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2020 YEAR-END SECURITIES ENFORCEMENT UPDATE

To Our Clients and Friends:

I. Introduction: Themes and Notable Developments

This year's update marks the end of the Trump administration and the beginning of the Biden administration. The change in leadership of the Securities and Exchange Commission has already begun. In December, Jay Clayton stepped down as Chairman, and this week the Biden administration nominated Gary Gensler to be the new Chairman. Mr. Gensler was Chairman of the Commodity Futures Trading Commission in the Obama administration and presided over a period of heightened financial regulation and aggressive enforcement against major financial institutions. The Wall Street Journal predicts that Mr. Gensler could give Wall Street its "most aggressive regulator in two decades."[1] In addition to a new Chairman, 2021 will also bring new senior leadership to the Division of Enforcement, as the Division's Co-Directors have also left the agency.

In this update, we look back at the significant enforcement actions and developments from the last six months of 2020, and consider what to expect from new leadership at the Commission and the Enforcement Division. In sum, it is safe to say that the next four years will see a return to increasing regulatory oversight and escalated enforcement of market participants.

A. Back to the Future: A Look Back and the View Ahead

During the last six months of 2020, the SEC's enforcement program continued to follow the priorities emphasized by Chairman Clayton over the last four years, while also navigating the challenges presented by the pandemic.

In the last few months, there has also been a nearly complete departure of the senior-most leadership of the Division of Enforcement. In August and December, respectively, Division Co-Directors Steven Peikin and Stephanie Avakian, departed the agency. And in January, Marc Berger, who had been appointed Deputy Director and then Acting Director also announced that he will be leaving at the end of January.

In one of his last speeches, Chairman Clayton reflected on his tenure and echoed the theme that has defined enforcement during the last administration, namely a focus on "Main Street" investors.[2] In practice, and as the Chairman noted, this has translated into a significant number of enforcement actions against fraudulent securities offerings – Ponzi schemes, affinity frauds and other offering frauds – that targeted individual investors.

Of course, one of the notable challenges for the Enforcement Division this year was created by the COVID-19 pandemic. After overcoming the initial hurdles of conducting investigations remotely, the Enforcement staff continued to pursue investigations and bring enforcement actions. Nevertheless, from a numerical standpoint, the number of enforcement actions was off from the prior year. For fiscal 2020, the SEC brought a total of 715 enforcement actions (of which 405 were stand-alone enforcement actions), a significant decline from 862 actions in fiscal 2019 (of which 526 were stand-alone enforcement actions) – a decline of 23% in stand-alone enforcement actions.[3]

There was also a change from last year in the types of cases the SEC brought. For fiscal 2020, the largest single category of cases involved securities offerings, typically offering frauds or unregistered securities offerings. This category accounted for nearly one-third, or 32%, of the stand-alone enforcement actions, compared to 21% of the actions brought in 2019 (and compared to only 16% of the cases in the last year of the Obama administration). Other major categories of cases in fiscal 2020 included cases against investment advisers, which comprised 21% of the total (compared to 36% of the total in fiscal 2019) and cases involving public company financial reporting and disclosure, which comprised 15% of the total in fiscal 2020 (compared to 17% of the total in fiscal 2019).

Despite the decline in the number of cases, there was an increase in the amount of financial remedies (disgorgement and penalties) ordered in enforcement actions. For fiscal 2020, financial remedies totaled $4.68 billion, representing an increase of approximately 8% over the amount ordered in 2019. However, it should be noted that a substantial portion of the 2020 financial remedies was attributable to one case – a settlement with Telegram Group Inc. – in which the company was ordered to pay $1.2 billion in disgorgement, but was credited in full for returning the same amount to investors that had purchased the company's unregistered digital tokens. Removing this settlement from the financial remedies for fiscal 2020 would reduce the total amount recover to an amount well below the amount ordered in 2019.

Notwithstanding the challenges of the pandemic, the SEC brought a number of significant enforcement actions in the last half of 2020 that we discuss in greater detail in other sections of this update. In particular, the SEC brought a number of cases against public companies for financial reporting and disclosure issues. Three of these cases were the result of the Enforcement Division's "EPS Initiative," in which the staff used risk-based data analytics to identify potential earnings management practices.

Other significant cases were the result of the Enforcement Division's focus on cases related to the pandemic. In particular, the SEC brought the first enforcement action based on disclosures concerning a company's ability to operate sustainably despite the pandemic.

This year also saw a number of enforcement actions in the area of crypto-currency and other digital assets. In particular, shortly before the end of the year, the SEC filed a complaint against Ripple Labs for alleged violation of the securities registration provisions. The outcome of this litigation will have a significant impact on enforcement and regulation of the digital asset market in the future.

Another highlight of the last year has been the continued growth of the SEC's whistleblower program. This year is the tenth anniversary of the program and was also a year of record awards both in number and size. Increased efficiency in the award process is also ensuring that the program has become, and will continue to be, an important source of investigations for the future.

Looking ahead, there is little doubt that the new administration will bring a heightened level of enforcement activity. But more important, we can expect a shift in focus and priorities away from retail investors and securities offering frauds and an increased emphasis on the conduct of institutional market participants – investment advisers and broker-dealers, as well as public company accounting, financial reporting and disclosure.

Assuming Mr. Gensler is confirmed by the Senate to be the next SEC Chairman, his experience, both at the helm of the CFTC and since, confirm expectations for increased regulation and enforcement. Mr. Gensler oversaw the implementation of an entirely new regime for the regulation of the markets for derivatives as well as the adoption of numerous regulations pursuant to the Dodd-Frank Act. The CFTC under his leadership also took aggressive enforcement actions against financial institutions in connection with the alleged manipulation of LIBOR. Mr. Gensler will also bring a strong interest in, and familiarity with, the market for crypto-currency and other digital tokens. This will ensure that the market for digital assets will receive particular attention in the coming years.

The last time there was a transition to a Democratic administration in 2008, the SEC confronted the financial crisis and the collapse of the mortgage-backed securities market. In the wake of the financial crisis, the SEC had a defined focus for investigation in distressed financial institutions and participants in the market for mortgage-backed securities. The SEC also adopted a number of initiatives to empower the enforcement program – some based in statute, such as the whistleblower program; others based in policy and practice, such as the encouragement of witness cooperation and the imposition of admissions on certain settling defendants.

The current transition in administrations follows a year of extreme market volatility caused by the pandemic, but also ending with the markets continuing to set records, benefiting from government stimulus and continued low interest rates. There is anticipation that as the COVID-19 crisis abates, the economy and markets will experience significant growth in the coming year. New Enforcement Division leadership will endeavor to identify areas of risk that they deem worthy of heightened scrutiny. In addition, oversight by a Democratic controlled House and Senate may further escalate pressure on the SEC to demonstrate its aggressiveness.

The takeaway from all of this is that the next four years will put a premium on legal and compliance departments and financial reporting functions of financial institutions, investment advisers, broker-dealers and public companies.

B. Commissioner and Senior Staffing Update

As the Trump administration wound down, there were a number of significant changes in the leadership of the Commission and the Enforcement Division. Looking ahead to the coming months, there will be further developments as a new Chairman is confirmed and new leadership of the Enforcement Division is appointed.

Simultaneous with Chairman Clayton's departure, the White House appointed Republican Commissioner Elad Roisman as Acting Chairman of the Commission. During the interim period following the inauguration of President-elect Biden, but before a new Chairman is nominated and confirmed, the White House could substitute the senior Democratic Commissioner, Allison Herren Lee, as Acting Chairman. Also during the second half of 2020, the other two Commissioners were sworn in: Democrat Commissioner Caroline Crenshaw filled the vacancy left by former Commissioner Robert Jackson, and Republican Commissioner Hester Peirce was sworn in for a second term, after her original term (for which she filled a vacancy in 2018) ended.

There were also significant changes in the leadership of the Enforcement Division. With the departure of the Co-Directors Peikin and Avakian, Marc Berger was appointed Acting Director of the Enforcement Division in December. This month, Mr. Berger also announced his departure. No Acting Director has been appointed as of this writing.

Other changes in the senior staffing of the Commission include:

- In August, Scott Thompson was appointed Associate Regional Director of Enforcement in the SEC's Philadelphia Regional Office. Mr. Thompson succeeds Kelly Gibson, who was appointed Director of the Philadelphia office in February 2020. Mr. Thompson has worked at the SEC since 2007, first as a trial attorney in the Enforcement Division and most recently as Assistant Regional Director from 2013 until his promotion in August 2020.

- Also in August, Richard Best was appointed Director of the SEC's New York Regional Office, succeeding Mr. Berger in the role. Mr. Best has worked at the SEC since 2015, serving in two other Regional Director roles—Salt Lake and Atlanta—before becoming the Director of the New York office. He also previously worked in FINRA's Department of Enforcement and as a prosecutor in the Bronx District Attorney's Office.

- In early December, Nekia Hackworth Jones was appointed Director of the SEC's Atlanta Regional Office. She joins the SEC from private practice where she specialized in government investigations and white collar criminal defense. Ms. Jones also previously served as an Assistant U.S. Attorney in the Northern District of Georgia and in DOJ's Office of the Deputy Attorney General.

C. Legislative Developments: Disgorgement

With little fanfare, the SEC achieved a significant legislative success at the end of 2020, cementing its ability to obtain disgorgement in civil enforcement actions. On January 1, 2021, Congress voted to override the President's veto of the National Defense Authorization Act ("NDAA"), a military spending bill passed each year since 1961.[4] Buried in the $740.5 billion bill was an amendment to the Securities Exchange Act of 1934, which gives the SEC explicit statutory authority to seek disgorgement in federal court.[5] Under Section 6501 of the NDAA, the SEC is authorized to seek "disgorgement . . . of any unjust enrichment by the person who received such unjust enrichment."[6] Perhaps more significant, the amendment establishes a *ten-year* statute of limitations for obtaining disgorgement for scienter-based violations of federal securities laws, doubling the 5-year standard previously established by the Supreme

Court. The amendment applies to any action or proceeding that is pending on, or commenced after its enactment (*i.e.*, January 1, 2020).

As discussed in a previous alert, the amendment is a response to two recent Supreme Court decisions which limited the SEC's authority to seek disgorgement, although the agency has a long history of seeking and receiving disgorgement: *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) (imposing a five-year statute of limitations on disgorgement), and *Liu v. SEC*, 140 S. Ct. 1936 (2020) (which imposed equitable limitations on disgorgement, such as the limitation to net profits). The extension of the statute of limitations to ten years is a significant enhancement to the SEC's remedies since many cases involve conduct that extends more than five years before an action is filed. However, notably, the amendment does not expressly reverse the equitable limitations that the Supreme Court imposed on the disgorgement remedy in *Liu*. Accordingly, the SEC will continue to confront defenses grounded in equitable principles, such as deduction for legitimate expenses and the elimination of joint and several liability for disgorgement.

D. Whistleblower Awards

2020 marked the 10-year anniversary of the SEC's whistleblower program. It also marked a record year for the number of whistleblower awards, the total amount of money awarded and the largest single whistleblower award.[7] During fiscal 2020, the Commission issued awards totaling approximately $175 million to 39 individual whistleblowers. As of the end of 2020, the SEC has awarded a total of approximately $736 million to 128 individual whistleblowers in the program's 10-year history.[8] Perhaps equally notable, enforcement actions attributed to whistleblower tips have resulted in more than $2.5 billion in ordered financial remedies.

The increase in the number of awards is the result of the SEC's efforts to increase the efficiency of the claim review and award process. In September, the SEC also adopted amendments to the Whistleblower Rule to promote efficiencies in the review and processing of whistleblower award claims. The amendments aim to provide the Commission with tools to appropriately reward individuals, and include a presumption of the statutory maximum award for certain whistleblowers with potential awards of less than $5 million.[9] For further discussion of the amendments to the Whistleblower Rule, see our prior alert on the subject.

The amendments also made one modification to the Whistleblower Rule that has proven to be controversial. As originally proposed in 2018, the amendment would have given the Commission authority to reduce the dollar amount of awards in cases with large monetary sanctions (in excess of $100 million). In the face of opposition from whistleblower advocates, the final rule dropped that amendment, and instead clarified that in determining the appropriate award, the Commission has discretion to consider both the percentage and the *dollar amount* of the award a discretion the Commission. In the adopting release, the Commission explained the modification as merely clarifying the discretion that the Commission always had in determining the appropriate award. One whistleblower advocate has already filed a suit against the SEC challenging the validity of the amendment under the Administrative Procedure Act.[10]

In October, the SEC also announced the largest award in the program's history—a payment of over $114 million to a whistleblower who provided information and assistance leading to successful enforcement actions.[11] The award, which consists of a $52 million award in connection with the SEC matter and a $62 million award arising out related actions by another agency, comes on the heels of the SEC's previous record-breaking $50 million whistleblower award in June.[12]

This year also saw a record level of tips received by the Office of the Whistleblower, as well as other complaints and referrals received by the Enforcement Division as a whole. The Office of the Whistleblower received over 6,900 tips in fiscal year 2020, a 31% increase over the second-highest tip year in fiscal year 2018.[13] More broadly, the Enforcement Division received over 23,650 tips, complaints and referrals in fiscal 2020, a more than 40% increase over the prior year. Inevitably, the increase in tips this past year is likely to lead to an increase in the number of investigations in the years to come.

The SEC's whistleblower awards also emphasize the assistance whistleblowers contribute to investigations through industry expertise or simply expediting an investigation. For example, in November, the SEC made a payment of over $28 million to an individual who provided information that prompted a company's internal investigation, and who provided testimony and identified a key witness.[14] Likewise, the SEC announced an award of over $10 million in October to a whistleblower, emphasizing the individual's substantial ongoing assistance, including help deciphering communications and distilling complex issues.[15] Also of importance to the Commission is a whistleblower's efforts to reduce ongoing harm to investors. In December, the SEC announced an award of over $1.8 million to a whistleblower who took immediate steps to mitigate harm to investors.[16] Additionally, the announcement noted the whistleblower's ongoing assistance, which saved time and resources of SEC staff.[17]

Other significant whistleblower awards granted during the second half of this year include:

- An award in July of $3.8 million to a whistleblower for information that allowed the SEC to disrupt an ongoing fraud scheme and led to a successful enforcement action.[18]

- An award in August of over $1.25 million for information leading to a successful enforcement action, resulting in the return of millions of dollars to investors.[19]

- Eleven awards in September, including a notable award of $22 million to an insider whistleblower whose tip led the SEC to open an investigation, and who provided ongoing assistance; and a $7 million award to another whistleblower who provided what the SEC deemed "valuable" information regarding the investigation.[20] Additional awards in September included an award of over $2.5 million to joint whistleblowers for a tip based on an independent analysis of a public company's filings, and for the whistleblowers' ongoing assistance in the SEC's investigation;[21] a $10 million payment to an individual who provided information and assistance that were described as of "crucial importance" to the SEC's successful enforcement action;[22] a $250,000 award to joint whistleblowers who raised concerns internally and whose tip to the SEC spurred the opening of an investigation and a successful enforcement action;[23]

payment of $2.4 million to a whistleblower who provided information and assistance that ultimately stopped ongoing misconduct;[24] awards to totaling over $2.5 million to two whistleblowers who reported misconduct overseas;[25] an award of $1.8 million for information regarding ongoing securities law violations;[26] and four awards totaling almost $5 million for "critical information" resulting in a successful enforcement action.[27]

- An award in October of $800,000 for information that caused the SEC to open an investigation leading to two successful enforcement actions.[28]

- Four awards in November, including a payment of $3.6 million to a whistleblower who provided information and ongoing assistance to enforcement staff regarding misconduct abroad;[29] a $750,000 payment to an individual who met with enforcement staff and provided information regarding an ongoing fraud;[30] an award of over $1.1 million to a whistleblower who provided what the SEC described a "exemplary assistance," and led the staff to look at new conduct during an ongoing investigation;[31] and a payment of over $900,000 to an individual who provided importantly information regarding securities law violations occurring overseas.[32]

- Six awards in December, including payments totaling of over $6 million to joint whistleblowers who provided information, submitted documents, participated in interviews, and identified key witnesses leading to a successful enforcement action;[33] a payment of nearly $1.8 million to a company insider who provided information that would have otherwise been difficult to detect;[34] an award of approximately $750,000 to two whistleblowers who provided tips and substantial assistance to the staff, including participating in interviews and providing subject matter expertise;[35] a payment of almost $400,000 to two individuals who provided information that prompted the opening of an investigation and ongoing assistance to SEC staff;[36] an award of more than $300,000 to a whistleblower with audit-related responsibilities who provided "high-quality" information after becoming aware of potential securities law violations;[37] a payment of more than $1.2 million for a whistleblower who provided information leading to a successful enforcement action, but whose "culpability and unreasonable delay" impacted the award amount; and a $500,000 payment to a whistleblower who provided significant information and ongoing assistance, which led to a successful enforcement action.[38]

II. Public Company Accounting, Financial Reporting and Disclosure Cases

Public company accounting and disclosure cases comprised a significant portion of the SEC's cases in the latter half of 2020, and included a range of actions concerning earnings management, revenue recognition, impairments, internal controls, and disclosures concerning financial performance.

A. Financial Reporting Cases

EPS Initiative

In September, the SEC announced the Enforcement Division's "Earnings Per Share (EPS) Initiative" and the settlement of its first two investigations arising from the Initiative. According to the press release announcing the settled actions, the SEC described the EPS Initiative as using "risk-based data analytics to uncover potential accounting and disclosure violations."[39] Based on the facts described in the two settled actions, the EPS Initiative is focused at least in part on detecting a practice known as "EPS smoothing," *i.e.*, questionable accounting to achieve EPS results consistent with consensus analyst estimates. According to the SEC, the first company, a carpet manufacturer, made unsupported and non-GAAP-compliant manual accounting adjustments to multiple quarters in order to avoid EPS results falling below consensus estimates. The second company, a financial services company, used a valuation method that was inconsistent with the valuation methodology described in its filings, in order to appear to have consistent earnings over time. Without admitting or denying wrongdoing, the carpet manufacturer agreed to pay a $5 million penalty to settle the charges; the financial services company agreed to pay a $1.5 million penalty.

Based on our experience representing clients in such matters, the SEC's attention can be drawn simply by consistent EPS performance, even in the absence of any basis to suspect misconduct. In such circumstances, it is important to demonstrate to the Staff the integrity of accounting and financial reporting controls that negate the potential for improper accounting.

Other Financial Reporting Actions

In August, the SEC instituted a settled action against a motor vehicle parts manufacturer for failing to estimate and report over $700 million in future asbestos liabilities.[40] The SEC alleged that, from 2012 to 2016, the company failed to perform quantitative analyses to estimate its future asbestos claim liabilities, despite having decades of raw historical claims data. Instead, the company incorrectly concluded that it could not estimate these liabilities and therefore did not properly account for them in its financial statements. The company agreed to pay a penalty of $950,000 to settle the action, without admitting or denying the SEC's allegations.

Also in August, the SEC announced a settled action against a computer server producer and its former CFO related to alleged violations of the antifraud, reporting, books and records, and internal accounting controls provisions of the federal securities laws.[41] According to the SEC's order, among other violations, the company incentivized employees to maximize revenue at the end of each quarter without implementing and maintaining sufficient internal accounting controls, resulting in a variety of accounting violations related to prematurely recognized revenue. Without admitting or denying wrongdoing, the company agreed to pay a $17.5 million penalty; the CFO agreed to pay more than $300,000 as disgorgement and prejudgment interest and $50,000 as a penalty. Additionally, the company's CEO, who was not charged with misconduct, consented to reimburse the company $2.1 million in stock profits he received during the period when the accounting errors occurred under the Sarbanes-Oxley Act's clawback provision.

In September, the SEC instituted a settled action against an engine manufacturer that allegedly inflated its revenue by nearly $25 million by recording its revenues in a manner inconsistent with GAAP.[42] The SEC alleged that the company overstated its revenue by improperly recognizing revenue from incomplete sales, from products that customers had not agreed to accept, and from products with falsely inflated prices, among other violations of GAAP. Without admitting or denying the allegations, the company agreed to pay a $1.7 million penalty, and to undertake measures aimed at remediating alleged deficiencies in its financial reporting internal controls.

Also in September, the SEC announced a settled action against a lighting manufacturer and four of its current and former executives for allegedly inflating the company's revenue from late 2014 to mid-2018, by prematurely recognizing revenue.[43] According to the complaint, using a variety of improper practices, the company recognized sales revenue earlier than allowed by GAAP and by the company's own internal accounting policies. The company also allegedly provided backdated sales documents to the company's auditor in order to cover up the improper practices related to premature revenue recognition. Without admitting or denying wrongdoing, the company agreed to pay a $1.25 million penalty, and the executives agreed to pay penalties as well.

The same month, the SEC also instituted a settled action against an automaker and two of its subsidiaries related to charges that the automaker disclosed false and misleading information related to overstated retail sales reports.[44] According to the SEC, the automaker inflated its reported retail sales using a reserve of previously unreported retail sales to meet internal monthly sales targets, regardless of the date of the actual sales. The company also allegedly paid dealers to falsely designate unsold vehicles as demonstrators or loaners so that the vehicles could be counted as having been sold, even though they had not been sold. The company and its subsidiaries agreed to pay a joint penalty of $18 million without admitting or denying the SEC's allegations.

Also in September, the SEC instituted settled actions against a heavy equipment manufacturer and three of its former executives for allegedly misleading the company's outside auditor about nonexistent inventory in order to overstate its income.[45] According to the SEC, the company improperly accounted for nonexistent inventory and created false inventory documents, which it later provided to its outside auditor. The company also allegedly deceived its outside auditor about approximately $12 million in revenue that it improperly recognized. Without admitting or denying the SEC's allegations, the company and its executives agreed to pay a total of $485,000 in penalties.

In October, the SEC filed a complaint against a seismic data company and four of its former executives for accounting fraud for concealing theft by the executives, and for falsely inflating the company's revenue.[46] According to the complaint, the company improperly recorded revenue from sales to a purportedly unrelated client (that was actually controlled by the executives), with the company recording roughly $100 million in revenue from sales that it knew the client would be unable to actually pay. The U.S. Attorney's Office for the Southern District of New York also brought a criminal action against the company's CEO.

In November, in a case related to previously settled charges against a large bank, the SEC filed a complaint against the bank's former Senior Executive Vice President of Community Banking alleging that disclosures concerning the bank's "cross-sell" metric were misleading and that the defendant knew or should have known was improperly inflated.[47] The SEC also instituted a settled action against the bank's former chairman and CEO for certifying statements that he should have known were misleading arising from the bank's inflated cross-sell metric. The SEC alleged that the executives knew or should have known that the cross-sell metric was "inflated by accounts and services that were unused, unneeded, or unauthorized." The litigation against the vice president remains pending; the CEO agreed to pay a $2.5 million penalty to settle the charges, without admitting or denying the SEC's allegations.

In December, the SEC instituted a settled action against a China-based coffee company, alleging that the company defrauded investors by misstating its revenue, expenses, and net operating losses.[48] According to the complaint, among other things, the company recorded approximately $311 million in false retail sales transactions, as well as roughly $196 million in inflated expenses to conceal the fraudulent sales. The company agreed to pay a $180 million penalty to settle the action, without admitting or denying the SEC's allegations.

B. Disclosure Cases

Disclosures Related to the COVID-19 Pandemic

In March 2020, the SEC's Division of Enforcement formed a Coronavirus Steering Committee to oversee the Division's efforts to actively look for COVID-19 related misconduct. Since the Steering Committee's formation, there have been at least five enforcement actions for alleged disclosure violations related to COVID-19. As discussed in our mid-year 2020 alert, there was an initial flurry of disclosure-related enforcement actions at the onset of the pandemic. These actions tended to involve microcap companies whose stock was suspended from trading after sky rocketing on the back of allegedly false statements about these companies' ability to distribute or access highly coveted protective equipment or technology that could detect or prevent the coronavirus.[49] In the second half of 2020, the SEC has continued to bring enforcement actions against companies for allegedly making false statements about their ability to detect COVID-19. For example, in September, the SEC filed an action against a President and Chief Science Officer ("CSO") alleging he issued false and misleading statements about the company's development of a COVID-19 blood test.[50] According to the complaint, the President and CSO incorrectly stated that (i) the company had purchased materials to make a test, (ii) the company had submitted the test for emergency approval, and (iii) there was a high demand for the test. The SEC's complaint also alleged that the defendant failed to provide necessary documents and financial information to the company's independent auditor to update the company's delinquent financial statements for 2014 and 2015.

More recently, the SEC announced charges against a biotech company and its CEO for making false and misleading claims in press releases that the company had developed a technology that could accurately detect COVID-19 through a blood test.[51] According to the complaint, the company and CEO made false and misleading statements about the existence of the physical testing device and the status of FDA emergency use authorization while advisors warned that the testing kit would not work as the company publicly described.

The SEC is also starting to bring enforcement actions against companies for alleged misstatements concerning how their financials were affected by the coronavirus. For example, in December, the SEC announced a settled order against a publicly traded restaurant company for allegedly incomplete disclosures in a Form 8-K about the financial effects of the pandemic on the company's business operations and financial condition.[52] In brief, according to the SEC's settled order, the company disclosed that it expected to be able to operate "sustainably, " but did not disclose that it was losing $6 million in cash per week, it only had 16 weeks of cash remaining, it was excluding expenses attributable to corporate operations from its claim of sustainability, and it was not going to pay rent in April 2020. Without admitting or denying the SEC's findings, the company agreed to pay a $125,000 penalty and to cease-and-desist from further violations of the reporting provisions in Section 13(a) of the Exchange Act and Rules 13a-11 and 12b-20. See our prior alert on this case for additional analysis and commentary on this case.

Other Disclosure Cases

In December, the SEC instituted a settled action against a U.S. based multinational company for allegedly failing to disclose material information about the company's power and insurance businesses in three separate situations.[53] First, according to the SEC, the company misled investors by disclosing its power business's increased profits without also disclosing that between one-quarter and one-half of those profits were a result of reductions in the company's prior cost estimates. Second, the company failed to disclose that its reported increase in cash collections came at the expense of future years' cash and was derived principally from internal sales between the company's own business units. Third, the company lowered projected costs for its future insurance liabilities without disclosing uncertainties about those projected costs due to a general trend of rising long-term health insurance claim costs. Without admitting or denying wrongdoing, the company agreed to settle the allegations and pay a $200 million penalty. The settlement also contained a relatively unique undertaking by which the company agreed to self-report to the SEC regarding certain accounting and disclosure controls for one year.

In September, the SEC announced a settled action against an automaker for allegedly misleading disclosures about its vehicles' emissions control systems.[54] According to the SEC, the automaker stated in a February press release and annual report that an internal audit had confirmed its vehicles complied with emissions regulations, without disclosing that the internal audit had a narrow scope and was not a comprehensive review, and also without disclosing that the Environmental Protection Agency and California Air Resource Board had expressed concerns to the automaker about some of its vehicles' emissions. The automaker agreed to pay a $9.5 million penalty without admitting or denying the SEC's allegations.

In September, the SEC instituted a settled action against a hospitality company for failing to fully disclose executive perks by omitting disclosure of approximately $1.7 million in executive travel benefits.[55] The benefits at issue related to company executives' stays at the company's hotels, and to the CEO's personal use of corporate aircraft from the period 2015 to 2018. The company agreed to pay a $600,000 penalty to settle the action, without admitting or denying the SEC's allegations.

C. Cases Involving Both Misleading Disclosures and Financial Reporting

In July, the SEC announced a settled action against a pharmaceutical company and three of its former executives for misleading disclosures and accounting violations.[56] According to the SEC, the company made misleading disclosures related to its sales to a pharmacy that the company helped establish and subsidize. For example, the company announced it was experiencing double-digit same store organic growth (a non-GAAP financial measure) without disclosing that much of that growth came from sales to the subsidized pharmacy and without disclosing risks related to that pharmacy. The SEC also alleged that the company improperly recognized revenue by incorrectly allocating $110 million in revenue attributable solely to one product to over 100 unrelated products. Without admitting or denying the allegations, the company agreed to pay a $45 million penalty; the former executives agreed to pay penalties ranging from $75,000 to $250,000 and to reimburse the company for previously paid incentive compensation in amounts ranging from $110,000 to $450,000. Additionally, the Controller agreed to a one-year accounting practice bar before the SEC.

In August, the SEC settled instituted a settled action against the former CEO and Chairman of a car rental company alleging that he aided and abetted the company in filing misleading disclosures and inaccurate financial reporting.[57] According to the SEC, the former CEO lowered the company's depreciation expenses by lengthening the period for which the company planned to hold rental cars in its fleet, from holding periods of twenty months to holding periods of twenty-four and thirty months; the CEO did not fully disclose the new, lengthened holding periods, and did not disclose the risks associated with an older fleet. The complaint also alleged that, when the company fell short of forecasts, the former CEO pressured employees to "find money," mainly by reanalyzing reserve accounts, resulting in his subordinates making accounting changes that left the company's financial reports inaccurate. Without admitting or denying the SEC's allegations, the former CEO agreed to pay a $200,000 penalty and reimburse the company $1.9 million. The car rental company had already agreed to pay a $16 million penalty to settle related charges, in December 2018.

In September, the SEC announced a settled action against a charter school operator engaged in a $7.6 million municipal bond offering, and its former president alleging that the defendants provided inaccurate financial projections and failed to disclose the school's financial troubles.[58] According to the complaint, the school's offering document included inaccurate profit and expense projections that indicated the school would become profitable in the next year when, according to the SEC, the school knew or should have known that these projections were inaccurate. The complaint also alleged that the school failed to disclose that it was operating at a sizable loss and had made repeated unauthorized withdrawals from its reserve accounts to pay its debts and routine expenses. Without admitting or denying wrongdoing, the school and its former president agreed to a settlement enjoining them from future violations; the former president also agreed to be enjoined from participating in future municipal securities offerings and to pay a $30,000 penalty.

Also in September, the SEC instituted a settled action against a technology company for inflating reported sales by prematurely recognizing sales expected to occur later and for failing to disclose these practices.[59] According to the SEC's order, the company allegedly failed to disclose a practice used to increase monthly sales in which some regional managers would accelerate, or "pull-in," to an earlier quarter's sales that they expected to occur in later quarters. The company also allegedly failed to disclose that some regional managers sold to resellers known to violate company policy by selling product outside their designated territories in order to increase monthly sales. Finally, the SEC's order alleged that the company made misleading disclosures by disclosing information related to its channel health that only included channel partners to which the company sold directly, without disclosing that this information did not include channel partners to which the company sold indirectly. The company agreed to pay a $6 million penalty, without admitting or denying wrongdoing.

In December, the SEC announced the settlement of an action filed in February against an energy company and its subsidiary for making misleading statements by claiming that the company would qualify for large tax credits for which the company knew it likely would not be eligible.[60] According to the SEC, the company represented that its project to build two new nuclear power units was on schedule, and therefore, would likely qualify for more than $1 billion in tax credits, when the company knew its project was substantially delayed and, resultingly, would likely fail to qualify for these tax credits. Without admitting or denying the allegations, the company agreed to pay a $25 million penalty; the company and its subsidiary also agreed to pay $112.5 million in disgorgement and prejudgment interest. The settlement remains subject to court approval. The litigation against two of the company's senior executives remains ongoing.

Also in December, the SEC filed a complaint against a brand-management company with violations of the federal securities laws' related to the company's alleged failure to account for and disclose evidence of goodwill impairment.[61] The complaint alleged that the company unreasonably concluded that its goodwill was not impaired based on a qualitative impairment analysis, without taking into account and also without disclosing two internal quantitative analyses showing that goodwill was likely impaired. The litigation against the company remains ongoing.

D. Internal Controls

Increasingly, the SEC has demonstrated a willingness to resolve investigations of public companies on the basis of violations of the internal controls provisions of the Exchange Act. One recent example of an internal controls settlement provided a rare window into a significant divergence of opinion among the Commissioners concerning the appropriateness of such settlements based on a broad application of the internal controls provision.

In October, the SEC instituted a settled action against an energy company related to charges that the company failed to maintain internal controls that would have provided reasonable assurance that the company's stock buyback plan would have complied with its own buyback policies.[62] According to the SEC's order, the company implemented a $250 million stock buyback while in possession of material nonpublic information (MNPI) about a potential acquisition, in spite of the company's policy prohibiting repurchasing stock while in possession of MNPI. In addition to detailing the litany of factors illustrating that the probability of the acquisition was sufficiently high as to have constituted MNPI, the SEC's order focused on the company's insufficient process for evaluating whether the acquisition discussions were material at the time it adopted a 10b5-1 plan for the buyback. Specifically, the process did not include speaking with the individuals at the company reasonably likely to have material information about significant corporate developments. As a result, the SEC's order alleged that the company's legal department did not consult with the CEO about the prospects of the company being acquired, even though the CEO was the primary negotiator. The company's legal department thus "failed to appreciate" that the transaction's probability was high enough to constitute MNPI.

Despite these findings, the SEC did not bring insider trading charges, but instead alleged that the company's internal controls were insufficient to provide reasonable assurance that the company's buyback transactions would comply with its buyback policy. Without admitting or denying the allegations, the company agreed to pay a $20 million penalty. Notably, Republican Commissioners Roisman and Peirce dissented from the Commission's decision to institute the enforcement action. In a public statement explaining their dissent, the Commissioners argued that the internal controls provision, Section 13(b)(2)(B) of the Exchange Act, applies to "internal *accounting* controls," and thus does not apply to internal controls to ensure a company does not repurchase stock in compliance with company policies.

III. Investment Advisers

In the second half of 2020, the SEC instituted a number of actions against investment advisers. We discuss notable cases below.

A. Payment for Order Flow

In August, the SEC instituted a settled action against two affiliated investment advisers in connection with their alleged misrepresentations to certain mutual fund and exchange-traded fund clients regarding "payment for order flow" arrangements, *i.e.*, payments the investment adviser received for sending client orders to other brokerage firms for execution.[63] According to the SEC, on multiple occasions, the investment advisers made misleading statements that the payment for order flow arrangements did not adversely affect the prices at which the clients' orders were executed, when in fact the executing brokers adjusted the execution prices to recoup those payments. Without admitting or denying the findings in the SEC's order, the firms agreed to a cease-and-desist order, and to pay a combined total of $1 million in penalties.

B. Mutual Fund Share Classes

In August, the SEC instituted a settled action against a California-based investment advisory firm based on allegations that it engaged in practices that violated its fiduciary duties to clients.[64] According to the SEC, the firm failed to disclose a conflict of interest in selecting mutual fund share classes that charged certain fees instead of available lower-cost share classes of the same funds. The firm's affiliated broker received the associated fees in connection with these investments. Additionally, the SEC alleged that the firm failed to disclose its receipt of revenue sharing payments from its clearing broker in exchange for purchasing or recommending certain money market funds to clients. The SEC further alleged that these practices resulted in a violation of the firm's duty to seek best execution for those transactions. Without admitting or denying the findings in the SEC's order, the firm agreed to a cease-and-desist order and to pay disgorgement of $544,446, plus prejudgment interest of $22,746, and a penalty of $200,000, all for distribution to investors.

C. Exchange-Traded Products

In November, the SEC announced the first enforcement actions resulting from the Division of Enforcement's "Exchange-Traded Products Initiative." The SEC instituted settled actions against five firms registered as investment advisers and/or broker dealers in connection with their alleged unsuitable sales of complex, volatility-linked exchange-traded products to retail investors.[65] According to the SEC, representatives of the firms recommended that their clients buy and hold exchange-traded products for long periods of time, contrary to the warnings in the products' offering documents, which made clear that they were intended to be short-term investments. The SEC further alleged that the firms failed to adopt or implement policies and procedures to address whether their registered representatives sufficiently understood the products to be able to form a reasonable basis to assess suitability or to recommend that their clients buy and hold the products. The firms agreed to pay a total of $3,000,000 in civil penalties among the five firms.

D. Puerto Rico Bonds

In December, the SEC filed a complaint in federal court in Puerto Rico against a Florida-based individual operating as an unregistered investment adviser.[66] According to the SEC's complaint, the individual promised municipal officials in Puerto Rico an annual return of 8-10% on their approximately $9 million investment in the municipality's funds, with no risk to principal. To convince officials to invest in the municipality's funds, the individual allegedly falsified bank correspondence and brokerage opening documents. The SEC further alleged that the individual failed to execute the promised investment strategy, instead misappropriating $7.1 million of taxpayer funds by transferring the funds to himself, entities he controlled, and his associates. The SEC's complaint seeks permanent injunctive relief, disgorgement of alleged ill-gotten gains plus prejudgment interest, and a civil penalty.

E. Disclosure Violations

In December, the SEC instituted a settled action against a UK-based investment adviser based on allegations that the company failed to make complete and accurate disclosures relating to the transfer of its highest-performing traders from its flagship client fund to a proprietary fund, and the replacement of those traders with a semi-systematic, algorithmic trading program.[67] The SEC alleged that the algorithmic trading program underperformed compared to the firm's live traders, generating less profit with greater volatility. Additionally, the investment adviser allegedly failed to adequately implement policies and procedures reasonably designed to prevent the violations of the Investment Advisers Act under the particular circumstances described above. Without admitting or denying the findings in the SEC's order, the firm agreed to a cease-and-desist order and to pay disgorgement and penalties totaling $170 million, all to be distributed to investors.

F. Single Broker Quotes

In December, the SEC instituted a settled action against a New York-based investment adviser and global securities pricing service based on allegations that the firm failed to adopt and implement policies and procedures reasonably designed to address the risk that the single broker quotes it delivered to clients did not reasonably reflect the value of the underlying securities.[68] The SEC further alleged that the firm failed to effectively or consistently implement quality controls for prices delivered to clients based on the single broker quotes. Without admitting or denying the findings in the SEC's order, the firm agreed to cease and desist from future violations, to a censure, and to pay an $8 million penalty.

G. Cherry Picking

In December, the SEC filed a complaint in federal court in Texas against a Dallas-based investment adviser and its principal, charging the defendants with violations of the antifraud provisions of the federal securities laws.[69] The SEC's complaint alleges that the principal placed options trades in the investment adviser's omnibus account early in the trading day, but waited until near or after market close to allocate the trades to either his personal account or to specific client accounts. As alleged in the complaint, the principal disproportionately allocated profitable trades to his personal accounts and unprofitable trades to advisory clients, while representing to clients that all trades would be equitably allocated. The SEC's complaint seeks permanent injunctions, disgorgement with prejudgment interest, and civil penalties.

IV. Broker-Dealers and Financial Institutions

Although not as numerous as prior years, there were nevertheless notable cases involving the conduct of broker-dealers in the latter half of 2020.

A. Financial Reporting and Recordkeeping

In August, the SEC instituted a settled action against a broker-dealer for neglecting to file over 150 suspicious activity reports (SARs) relating to microcap securities that the firm traded on behalf of its customers.[70] The purpose of SARs is to identify and investigate potentially suspicious activity, and the SEC's order alleged that the broker-dealer failed to do so, even when suspicious transactions were identified by compliance personnel. The allegedly suspicious activity included numerous instances where customers either deposited and sold large blocks of microcap securities before quickly withdrawing the resulting proceeds from the respective accounts, sold enough of a particular microcap security on given days to account for over 70% of the daily trading volume for that security, or deposited microcap securities that were subject to SEC trading suspensions. The broker-dealer agreed to pay an $11.5 million penalty to the SEC, without admitting or denying the findings, and additionally agreed to pay penalties of $15 million and $11.5 million to FINRA and the CFTC respectively.

In September, the SEC instituted a settled action against a broker-dealer subsidiary of a global financial services firm for alleged violations of Regulation SHO.[71] Regulation SHO governs short sales and, among other things, generally prohibits broker-dealers from separately marking their long and short positions in a given security, instead requiring order aggregation to determine and mark one net position for each security. The SEC's order alleged that the broker-dealer had a "Long Unit" that purchased equity securities to hedge short synthetic exposure, which should have been aggregated with a separate "Short Unit" that sold equity securities to similarly hedge long synthetic exposure for the purposes of order marking. The broker-dealer agreed to pay a $5 million penalty without admitting or denying the SEC's findings.

B. Trade Manipulation

In September, the SEC instituted a settled action against a broker-dealer subsidiary of a global financial services firm for allegedly using trading techniques that artificially depressed or boosted the price of securities that it intended to buy or sell.[72] Specifically, the SEC's order alleged that traders at the broker-dealer entered bona-fide buy-or-sell orders for particular securities, while simultaneously entering non bona-fide orders on the opposite side of the market to create a false appearance of buy or sell interest. In a settlement, the broker-dealer admitted to the SEC's findings and agreed to pay a $25 million penalty and $10 million in disgorgement.

C. Best Execution and Payment for Order Flow

In December, the SEC instituted a settled action against a retail broker-dealer for alleged misstatements concerning revenue streams and execution quality, and for alleged best execution violations.[73] Specifically, the SEC's order alleged that the broker-dealer did not disclose that it received revenue from order flow, *i.e*. routing its customers' orders to principal trading firms, and further alleged that its statements concerning execution quality were inaccurate, even after accounting for customer savings from not having to pay a commission. Without admitting or denying the Commission's findings, the broker-dealer agreed to pay a $65 million penalty and to obtain an independent consultant to review its relevant policies.

V. Cryptocurrency and Digital Assets

The Commission continued to bring enforcement actions in the area of digital assets during the second half of 2020. As in the first half of the year, these actions primarily were based on alleged failures to comply with the requirement to register an offering of assets deemed to be securities or allegations of fraud in the offer and sale of digital assets.

A. Significant Developments

Significantly, the SEC closed the year by bringing two enforcement actions involving digital assets. On December 22, the SEC charged Ripple Labs Inc. ("Ripple") and two of its executives—its co-founder and board chairman and its CEO—with raising $1.3 billion through the sale of unregistered digital asset securities.[74] In particular, the SEC alleged that the native digital currency of Ripple, XRP, which has been sold by Ripple and others and trading in secondary markets, including on cryptocurrency exchanges for seven years, is a security (not merely a currency) under the *Howey* test, which defines a security as an investment of money in a shared enterprise with an expectation of profits from others' work.[75] Additionally, the SEC alleged that the two executives personally made $600 million worth of unregistered sales of the digital asset. In the press release announcing the action, the SEC stressed that all public issuers "must comply with federal securities laws that require registration of offerings unless an exemption from registration applies." Six days later, on December 28, the SEC obtained an emergency asset freeze against Virgil Capital LLC and its affiliates due to an alleged fraud perpetrated by the company's owner.[76] The complaint alleged that the owner and his companies had been fraudulently misrepresenting to investors that their funds were to be used only for digital currency trading, when in reality those funds were used for personal expenses or other high-risk investments.

Another notable development demonstrates the increasing emphasis the SEC is placing on the protection of investors in the context of FinTech innovation. On December 3, 2020, the Commission announced that it was elevating the Strategic Hub for Innovation and Financial Technology ("FinHub"), to a stand-alone office. Previously, the FinHub, which was initially established in 2018, had been a unit within the Division of Corporation Finance.[77] Since its inception, FinHub has "spearheaded agency efforts to encourage responsible innovation in the financial sector, including in evolving areas such as distributed ledger technology and digital assets, automated investment advice, digital marketplace financing, and artificial intelligence and machine learning," and provided industry players and regulators with a forum to engage with SEC Staff. The establishment of FinHub as a stand-alone office—which will continue to be led by current director Valerie A. Szczepanik—signals that the Commission will continue to focus on digital assets in the years to come.

Although the end of the year arguably was a high-water mark concerning the SEC's enforcement of actions involving digital assets, the Commission consistently brought similar actions throughout the second half of the year, as discussed below.

B. Registration Cases

In July, the SEC instituted a settled action against a privately-owned California-based company and a related Philippine company for offering and selling U.S.-based securities without registration via an app and for trading in the related swap transactions outside of a registered national exchange.[78] The app allowed individuals to enter into a contract in which they would choose specific securities to "mirror," and the value of their contracts would fluctuate according to the price of the underlying security. The Commission determined that the contracts constituted security-based swaps, and therefore were subject to U.S. securities laws. Without admitting or denying to the findings in the order, the two companies agreed to pay a penalty of $150,000. Additionally, the companies entered into a separate settlement with the CFTC arising from similar conduct.

In September, the SEC instituted a settled action against an operator of an online gaming and gambling platform for conducting an unregistered initial coin offering ("ICO") of digital assets.[79] The order found that the company raised approximately $31 million through the offering of its digital token, and promised investors that it would develop a secondary market for trading in its tokens. The SEC determined that the tokens were sold as investment contracts, thereby constituting securities, the offering of which should have been registered. The company agreed to pay a $6.1 million penalty, without admitting or denying the Commission's findings, and further agreed to disable the token and remove it from all digital asset-trading platforms. The Washington State Department of Financial Institution separately entered into a settlement agreement in connection with this offering.

C. Fraud Cases

In August, the SEC instituted a settled action against a Virginia-based company and its CEO, in connection with the company's $5 million ICO to raise funding to develop an internet-based job-posting platform.[80] The SEC found that the offering of sale of the coin constituted the sale of unregistered securities, and that the company and its CEO made false and misleading statements to investors relating to the stability of its digital asset and its scalability compared to its competitors. Without admitting or denying the findings in the order, the company agreed to disgorge the $5 million raised and pay over $600,000 in prejudgment interest; the CEO was barred from serving as an officer or director of a public company and agreed to pay a $150,000 penalty; and the company and CEO both agreed to cease trading in (and destroy existing) coins and refrain from participating in any offerings of any digital asset securities.

In September, the SEC instituted a settled action against four individuals, and brought non-settled charges against another individual—an Atlanta-based film producer—and their two companies in connection with the misappropriation and theft of funds that were raised via ICOs.[81] The producer allegedly used the misappropriated funds and proceeds of manipulative trading to buy a Ferrari, a home, jewelry, and other luxury items. Three of the settling defendants agreed to pay a penalty of $25,000 and are prohibited from participating in the issuance of or otherwise transact in digital assets for five years. The fourth settling defendant agreed to pay a $75,000 penalty and is subject to a similar injunction. The U.S. Attorney's Office for the Northern District of Georgia has also brought a criminal action against the non-settling defendant.

In October, the SEC filed an action against a software magnate and computer programmer for fraudulently promoting investments in ICOs to his thousands of Twitter followers.[82] The Complaint alleges that the programmer failed to disclose that he was paid more than $23 million to promote the investments and made other false and misleading statements, such as that he was advising some of the issuers and personally invested in some of the ICOs. The SEC also brought charges against the programmer's bodyguard, alleging that he received over $300,000 to help with the scheme. The SEC also alleged that the programmer secretly amassed a large holding in another digital asset while promoting it on Twitter, with the intention of selling his holding at an inflated price. The DOJ's Tax Division has separately brought criminal charges against the computer programmer.

VI. Insider Trading

Insider trading is another area in which the number and size of cases was diminished from prior years. Nevertheless, insider trading enforcement remains a significant focus for the SEC. Below we note some of the more significant actions.

The SEC announced two insider trading cases in September, and brought a third in December. In the first case, the SEC filed charges against a senior manager at an index provider and his friend, for allegedly obtaining more than $900,000 by trading on inside information.[83] According to the SEC, the manager used information regarding which companies were to be added or removed from the market index to place call and put options using the friend's brokerage account. The SEC's complaint seeks injunctive relief and civil penalties; the U.S. Attorney's Office for the Eastern District of New York filed parallel criminal charges against the manager.

In the second case, the SEC settled insider trading charges against a former finance manager at an online retailer and two family members.[84] According to the SEC's complaint, the employee allegedly tipped her husband about the company's financial performance in advance of earnings announcements; the employee's husband and his father used the information to trade in the company's shares. The three individuals consented to the entry of a judgment enjoining future violation ordering payment of approximately $2.65 million in disgorgement and penalties. The U.S. Attorney's Office for the Western District of Washington filed parallel criminal charges against the employee's husband.

Most recently, the SEC filed insider trading charges against an individual in the Eastern District of New York.[85] According to the SEC's complaint, the individual obtained information regarding a private equity firm's interest in a publicly traded chemical manufacturing company in advance of a press release announcing the news. The individual traded on the information and additionally tipped others to trade for a collective profit of $1 million once the news broke. The SEC's complaint seeks injunctive relief and civil penalties.

VII. Actions Against Attorneys

It is rare for the SEC to bring enforcement actions against attorneys for conduct in their capacity as lawyers. Thus, when the SEC does bring such cases, it is notable.

In December, the SEC filed a partially settled action against two attorneys: one licensed attorney and one disbarred attorney with fraud related to the licensed attorney's reliance on the disbarred attorney for the preparation of attorney opinion letters for the sale of shares in microcap securities to retail investors.[86] The SEC alleged that the licensed attorney knew the disbarred attorney was disbarred during all relevant times. According to the complaint, the disbarred attorney prepared for the licensed attorney's signature at least thirty attorney opinion letters, on which the licensed attorney falsely stated that he had personal knowledge of the bases for the opinions in the letters. The complaint also alleged that the disbarred attorney submitted over 100 attorney opinion letters in which he falsely claimed to be an attorney. Without admitting or denying the allegations, the licensed attorney agreed to a partial settlement to an injunction and penny-stock bar, with the potential for other remedies, including penalties, reserved. The SEC's litigation against the disbarred attorney remains ongoing, as does a criminal action against both attorneys.

VIII. Offering Frauds

The SEC continued to bring offering fraud cases, which often contain charges against individuals and companies that target particular groups of investors.

A. Frauds Targeting Senior Citizens and Retirees

In July, the SEC filed a complaint against an aviation company and its owner, alleging that the company raised $14 million, largely from retired first responders, by representing that it would use the funds to purchase engines and other aircraft parts for leasing to major airlines.[87] The SEC's complaint alleges that, instead, the company and its owner diverted most of the money for unauthorized purposes, including Ponzi-scheme like payments to other investors.

In September, the SEC charged the former president of a real estate company with violating antifraud provisions of the securities laws in connection with a $330 million alleged Ponzi-like scheme that impacted seniors.[88] In a second September case, the SEC announced settled charges against two individuals charged in connection with the sale of unregistered stock, following up on a 2019 action by the SEC against the company's former CEO and two previously barred brokers.[89] According to the SEC, the three recently-charged individuals received undisclosed commissions totaling nearly $500,000 in connection with the sale of nearly $1.4 million in stocks to retail investors, most of whom were seniors.

In a recent case, the SEC filed civil charges against an individual in the Eastern District of New York for operating a Ponzi-like scheme that raised over $69 million from current and retired police officers and firefighters, among other investors.[90] The SEC's complaint alleges that the individual represented that the investments would be used to acquire jewelry for a business that he operated, but instead were diverted to perpetuate and conceal the fraudulent scheme. The individual has pleaded guilty to related criminal charges.

B. Frauds Targeting Affinity Groups

In August, the SEC charged three principals and their companies in connection with a Ponzi-like scheme targeting African immigrants.[91] According to the SEC, the investors believed that the funds would be used for foreign exchange and cryptocurrency trading. The CFTC also filed civil charges, and the DOJ filed criminal charges. In September, the SEC filed a complaint in the Eastern District of New York against a Swedish national in connection with a purportedly "pre-funded reversed pension plan" that was largely marketed online and attracted over 800 investors from the Deaf, Hard of Hearing and Hearing Loss communities.[92] Finally, in December, the SEC brought an emergency action against a real estate development company and its owner in connection with a $119 million round of fundraising that predominantly targeting South Asian investors.[93]

C. Fraud Related to Online Retailers and Technology Providers

The SEC has also focused on companies engaged in or making representations about emerging technologies and e-commerce. For example, the SEC charged an e-commerce startup and its CEO in Northern California with misrepresenting the extent of the company's contracts with more well-known retailers and brands in order to attract investment.[94] The SEC filed another complaint against the founder and CEO of a machine-learning analytics company in California, alleging that the founder misrepresented the company's prior financial performance and its client list.[95] In the Eastern District of Virginia, the SEC filed charges alleging that the founder and CEO of an online marketplace in connection with the offering and selling of over $18.5 million in securities, some of which were sold to corporate investors.[96] Both the U.S. Attorney's Office and the Fraud Section of the Department of Justice have also announced criminal charges based on similar allegations. Finally, a court in the Southern District of New York froze over $35 million in assets[97] in connection with allegations by the SEC that the former CEO of a fraud detection and prevention software company misled investors by providing investors with erroneous financial statements.[98] According to the SEC, the former CEO altered bank statements supplied to the company's finance department and incorporated into investor materials over the course of two years, during which the company raised approximately $123 million.

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[3] See 2020 Annual Report of U.S. SEC Division of Enforcement, available at https://www.sec.gov/files/enforcement-annual-report-2020.pdf.

[4] National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. (2020).

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[6] *Id.*

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[15] SEC Press Release, SEC Awards Over $10 Million to Whistleblower (Oct. 29, 2020), *available at* https://www.sec.gov/news/press-release/2020-270.

[16] SEC Press Release, SEC Issues Multiple Whistleblower Awards Totaling Over $3.6 Million (Dec. 18, 2020), *available at* https://www.sec.gov/news/press-release/2020-325.

[17] SEC Press Release, SEC Issues Multiple Whistleblower Awards Totaling Over $3.6 Million (Dec. 18, 2020), *available at* https://www.sec.gov/news/press-release/2020-325.

[18] SEC Press Release, SEC Issues $3.8 Million Whistleblower Award (July 14, 2020), *available at* https://www.sec.gov/news/press-release/2020-155.

[19] SEC Press Release, SEC Awards Over $1.25 Million to Whistleblower (Aug. 31, 2020), *available at* https://www.sec.gov/news/press-release/2020-199.

[20] SEC Press Release, SEC Awards Almost $30 Million to Two Insider Whistleblowers (Sept. 30, 2020), *available at* https://www.sec.gov/news/press-release/2020-239.

[21] SEC Press Release, SEC Awards Over $2.5 Million to Joint Whistleblowers for Detailed Analysis That Led to Multiple Successful Actions (Sept. 1, 2020), *available at* https://www.sec.gov/news/press-release/2020-201.

[22] SEC Press Release, SEC Awards More Than $10 Million to Whistleblowers (Sept. 14, 2020), *available at* https://www.sec.gov/news/press-release/2020-209.

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