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SEC's Division of Enforcement 2020 Annual Report Indicates Strong Enforcement Results Despite COVID-19 Challenges

SUMMARY

On November 2, 2020, the U.S. Securities and Exchange Commission's Division of Enforcement released its 2020 Annual Report, summarizing its priorities, activities, and results for its 2020 fiscal year, which ended September 30, 2020. The Division's Director, Stephanie Avakian, described the year as "the most challenging year in recent memory" due to the disruptions resulting from COVID-19. She also described 2020 as a "year of contrasts" that saw a slight decline in the total number of cases filed but also a record high amount of financial remedies and whistleblower awards. Key highlights of the 52-page Report are summarized below.

KEY ENFORCEMENT EFFORTS

The Report highlights a broad range of significant enforcement actions pursued in FY 2020. Notably, the SEC (i) brought a large number of financial statement and disclosure fraud cases against issuers and their senior executives; (ii) pursued instances of misconduct by investment advisors in their interactions with retail investors, particularly as it related to their disclosure of conflicts of interest and transparency about fee structures; (iii) alleged a broad array of violations at major financial institutions, including improper conduct related to the "pre-release" of American Depository Receipts, order routing practices, and credit rating processes; and (iv) continued to bring a wide array of insider trading and other abusive trading practices cases, often in parallel with criminal actions filed by U.S. Attorney's Offices.

The SEC brought a number of large, high-profile cases that resulted in substantial financial remedies, including the following:

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- A settlement, following successful litigation of a temporary restraining order, against Telegram Group Inc. relating to its unregistered offering of digital securities. Telegram agreed to return more than \$1.2 billion to investors and pay an \$18 million civil penalty.
- A settled action against Telefonaktiebolaget LM Ericsson involving a large-scale bribery scheme, in which Ericsson was ordered to pay more than \$1 billion to the SEC and DOJ.
- Settled actions against Bausch Health, formerly Valeant Pharmaceuticals, and its former CEO, CFO, and Controller alleging misleading disclosures in SEC filings and earnings presentations. Bausch agreed to pay a \$45 million civil penalty, and the former executives each agreed to additional financial and other relief.

LITIGATION RESULTS

The Report also notes that the Division committed significant resources to litigation in FY 2020, and achieved substantial success; the SEC prevailed in “every proceeding that the Division litigated to a verdict or decision.” Particularly significant were its successes in enjoining Telegram’s distribution of digital securities (described above) and its obtaining of summary judgment against Kik Interactive Inc., in which the court concluded that Kik’s sale of “Kin” tokens was an unregistered offering of securities that did not qualify for any exemption from registration requirements.

COVID-19 RESPONSE

The Report also describes the significant re-allocation of Division resources to responding to misconduct related to COVID-19. The Division established a Coronavirus Steering Committee to ensure a consistent approach to coronavirus-related matters, identify and monitor areas of potential misconduct associated with COVID-19, and detect and address potential misconduct. As a result of its efforts, the Division opened more than 150 COVID-19-related inquiries or investigations, some of which already have ripened into filed fraud actions against entities and individuals. The Report also recounts the Division’s internal efforts to adapt to mandatory telework, noting that, despite its challenges, since March, the Division has conducted numerous remote testimony sessions and Wells meetings, as well as court hearings and fully litigated bench trials.

STRATEGIC AND STRUCTURAL CHANGES

The Report notes four key areas in which the SEC made strategic or structural changes.

First, the Division worked to substantially accelerate its evaluation of claims for whistleblower awards in connection with its whistleblower program, which resulted in the SEC’s issuance of \$175 million in awards to 39 individuals, both greater than in any other year in the program’s history.

Second, the Division created the Office of Bankruptcy, Collections, Distributions, and Receiverships in order to further its commitment to returning money to harmed investors. This year, the SEC returned \$602 million

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to harmed investors, comprising over 800,000 payments to investors from 91 fair funds and court-appointed administrators.

Third, the Division focused on shortening the time it takes to complete investigations and recommend enforcement actions. This year, the median time to file was 21.6 months, reflecting a “five-year best.” With respect to financial fraud and disclosure cases, the Division was able to reduce the average amount of time it takes to complete investigations from 37 to 34 months by, among other things, increased staffing, more efficient triage, more targeted requests at the outset, and better leveraging of cooperation.

Finally, the Division focused on rewarding cooperation and providing increased transparency into how the SEC considers and weighs cooperation credit. By way of example, the Report notes that the SEC imposed a reduced civil penalty against BMW in light of its “extensive cooperation,” and imposed no penalty at all against Transamerica Asset Management, Inc. in light of its self-reporting, prompt steps to remediate its violations, and cooperation with the Division’s investigation.

KEY FY 2020 FIGURES

As the Report details, the Division obtained a record-breaking \$4.68 billion in monetary remedies in FY 2020, including \$3.59 billion in disgorgement and \$1.10 billion in penalties. Total monetary relief in FY 2020 exceeded that in FY 2019 by \$330 million, or 8%.

The Division filed 715 enforcement actions in FY 2020, which reflected a 17% decline from the previous year. Of the total actions brought, 405 were so-called “standalone” enforcement actions, 180 were follow-on administrative proceedings, and 130 were actions to de-register companies that were delinquent in their SEC filings. Of the total number of enforcement actions, 492 were brought after instituting mandatory telework in mid-March. The decline in the number of actions is attributable largely to the disruptions resulting from COVID-19, as well as the fact that the prior year included numerous actions filed as part of the SEC’s Share Class Selection Disclosure self-reporting initiative.

Three enforcement areas drove the majority of the SEC’s standalone cases: (i) securities offerings (32%); (ii) investment advisory and investment company issues (21%); and (iii) issuer reporting/accounting and auditing (15%). The SEC also brought actions relating to broker-dealers (10%), insider trading (8%), market manipulation (5%), Public Finance (3%), and FCPA (2%). The SEC continued to pursue charges against individuals; 72% of the SEC’s standalone cases involved charges against one or more individuals.

The Report highlights that 23,650 tips, complaints, and referrals (“TCRs”) were received in FY 2020—most during the pandemic—representing a substantial increase over last year. The Report notes that the Division’s work to triage these many TCRs led to an overall increase in the number of new inquiries and investigations since last year, and “has created a strong pipeline for future enforcement actions.”

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Finally, the Report details the non-monetary relief obtained in enforcement actions, including undertakings, bars and suspensions, trading suspensions, and court-ordered asset freezes. During FY 2020, enforcement actions resulted in 477 bars and suspensions, trading suspensions for 196 issuers, and 24 court-ordered asset freezes.

KEY TAKEAWAYS

The Report makes plain that the SEC's overall enforcement activity remained high despite the challenges and disruptions presented by the pandemic. Although there was a decline in the total number of enforcement actions brought, the majority of FY 2020 cases were brought after the Division instituted mandatory telework in mid-March. The overall mix of cases was largely consistent with that of prior years. Notable is the continued emphasis on financial statement and disclosure matters, as well as a continued focus on disclosures of conflicts of interest by investment advisors.

That the SEC's monetary remedies reached an all-time high in FY 2020 also indicates that recent developments in the Supreme Court—in particular, *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), which held that disgorgement counts as a “penalty” subject to 28 U.S.C. § 2462’s five-year statute of limitations, and *SEC v. Liu*, 140 S. Ct. 1936 (2020), which held that a disgorgement award is, subject to certain limitations, “equitable relief” under U.S.C. § 78u(d)(5)—at least so far are not impeding the SEC’s ability to obtain significant monetary relief in some cases. One explanation for this may be that the Division, where the statutory scheme permits it, is recommending higher civil penalties to counter the potential limits that the Supreme Court’s recent cases may place on the SEC’s ability to obtain disgorgement. The impact of *Kokesh* and *Liu* on future SEC cases will turn on how lower courts interpret those decisions in contested cases.

While the Report does not offer statistics from which to extrapolate future enforcement numbers, the substantial increase in the number of tips, complaints, and referrals in FY 2020 suggests that there is fuel for many new and continuing investigations. Although the long-term impact of the COVID-19 disruption, as well as any change in the SEC’s enforcement approach following the 2020 election, remain to be seen, the Report portends likely continuing aggressive enforcement efforts going forward.

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