

SEC Enforcement Staff Touts Year of Firsts and Big Data

Last week, at the [Securities Enforcement Forum](#) in Washington, DC, senior staff of the SEC's Division of Enforcement shed light on risks that asset managers and fund boards should be aware of. Their comments followed a record enforcement year resulting in more than \$4 billion in disgorgement and penalties. Fueled in part by data collection technology, the SEC brought 868 enforcement actions the [past fiscal year](#). Approximately 20% involved investment advisers or investment companies, the highest percentage in history, including one that found a private equity adviser to be acting as an unregistered broker/dealer, and others that involved alleged insufficient disclosure around accelerated monitoring fees. Highlights of the SEC's enforcement staff views include:

- Panelists noted that recent enforcement activity (e.g., the [Apollo](#) and [Blackrock](#) cases) shows the focus on **conflicts of interest** and **accelerated monitoring fees** is not abating. The Division is expected to continue to bring these cases, particularly where pre-commitment investor offering documents fail to disclose the fees.
- Panelists also noted that: the Division seems to have adopted a fairly aggressive surveillance stance, using data collection and analysis techniques to identify **trading patterns** that suggest violations; **anti-money laundering** is a continued focus; and **pay-to-play** continues to be an active exam topic in the private fund space.
- In his [keynote address](#), SEC Enforcement Director Andrew Ceresney focused on the SEC's enforcement in the area of public finance, driven by the SEC's Public Finance Abuse Unit. The SEC "has brought many first-of-their-kind actions and used a range of legal theories and remedies" involving the **\$3.7 trillion public finance market**. Since 2013, the SEC has brought charges of improper **pay-to-play activities** in connection with contracts for sub-custodian services for **public pension plans** and impermissible **broker/dealer markup practices** in the underwriting of municipal bonds. Ceresney also said the SEC will "continue to pursue investment frauds that use municipal securities or other public finance instruments as vehicles for the schemes" and to conduct enforcement sweeps targeted at areas of the municipal securities market. Other novel enforcement actions in the public finance space include a [temporary restraining order](#) to bar municipal bond offerings, the imposition of penalties on municipal bond issuers, and the extension of liability for federal securities law violations to municipal officials and municipal advisors.
- The SEC's brought its first **FCPA action involving a hedge fund** and the anti-fraud and self-dealing provisions of the Investment Advisers Act of 1940. Brockmeyer said the case against [Och-Ziff](#) is also the first in which the SEC charged a sitting CEO with causing the bribes, reflecting the SEC's effort to hold executives accountable. Brockmeyer also noted the SEC's imposed conditions for separating the firm's CCO from other officers and established an 18-month monitoring process.
- Former SEC Commissioner Daniel Gallagher criticized the SEC's actions against **chief compliance officers**, an issue that our Investment Management Group has explored in detail.
- The SEC continues to tout the role of whistleblowers. Jane A. Norberg, Chief of the SEC Office of the Whistleblower, has noted the importance of clarity in corporate whistleblower policies, and the SEC paid \$57 million in whistleblower awards during its last fiscal year, the highest annual amount to date. Asset managers should be aware, as we have [noted](#), that the SEC is focusing intently on employee confidentiality agreements, and has alleged in some cases that they "impede" employees from talking to

the SEC.

- **Cooperation and remediation** will be rewarded, according to Kara Novaco Brockmeyer, Chief of the FCPA Unit. Brockmeyer referred to cases where the penalty was a fraction of the disgorgement. The SEC's action against [Ernst & Young](#) this week may be another example. However, in many cases where the SEC noted cooperation and remediation, the SEC has imposed stiff sanctions, raising the question of whether such efforts are truly rewarded.
- The SEC is using tech tools such as CIRA, the Corporate Issuer Risk Assessment program, in its focus on **issuer reporting and disclosure**. Margaret McGuire, Chief of the SEC's Reporting & Audit Group, said the SEC is using this and other tools to identify anomalous performance, trading, and reporting, and activities pointing to deficient internal controls, non-GAAP metrics, or other red flag patterns. For more details, see our recent [update](#).
- Similarly, [SEC Chair Mary Jo White](#) praised the SEC's **technological advances**: "over the last three years, we have changed the way we do business on the enforcement front by using new data analytics to uncover fraud, enhancing our ability to litigate tough cases, and expanding the playbook bringing novel and significant actions to better protect investors and our markets."

Following a year of firsts and technological advances for the SEC Enforcement Division, asset managers and fund boards should continue to be aware of the risks articulated by the SEC. We will continue to monitor and report on developments in this space in the coming year.

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