FACULTY OF FEDERAL ADVOCATES

Covid-19 in the Boardroom: Navigating Board Governance and Regulatory Issues Presented by Covid-19

March 19, 2021

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COVID-19 UPDATE: FINANCIAL REPORTING AND AUDITING CONSIDERATIONS FOR CORPORATE MANAGEMENT, AUDIT COMMITTEES, AND AUDIT FIRMS

To Our Clients and Friends:

As the disruption caused by COVID-19 continues unabated, companies and their outside auditors are grappling with the financial reporting implications of the crisis. There are numerous, immediate regulatory responses to the crisis that issuers should consider, including, for example, the reporting relief recently announced by the Securities and Exchange Commission (principally a 45-day delay in certain filing requirements) or under the CARES Act (in the form of relief from certain accounting standards).[1] Similarly, auditors should remain aware of the steps that the Public Company Accounting Oversight Board is taking to address the disruption in normal business activity, primarily permitting firms to request a 45-day delay in certain aspects of their PCAOB inspections.[2]

Beyond those process developments, there are also areas of substantive financial reporting that issuers and their auditors should consider as they prepare for annual or quarterly periodic reporting. As management and audit committees undertake to see that their financial statements are fairly presented in this fast-paced and ever-changing environment, and as auditors audit or conduct review procedures on these financials, they should not lose sight of the potential reaction that regulators may have in the future to accounting judgments and disclosure decisions, or to the prospect that those decisions may be scrutinized through the lens of twenty-twenty hindsight in future private shareholder litigation. Simply put, this is not business as usual for anyone. It is more important than ever that corporate management and audit committees focus on certain key financial reporting and accounting issues in these unsettling times. Similarly, auditors should consider these issues and evaluate how those and other considerations will affect their audits and reviews of upcoming financial statements.

Issuer Considerations: Potential Legal Exposure Related to Select Accounting and Financial Reporting Areas

The impact of COVID-19 on companies across all facets of the economy cannot be underestimated, and many companies will likely be confronted by significant employee layoffs and financial losses in the months to come. Although this environment remains wildly unpredictable even for the most sophisticated analysts, there are certain areas of financial reporting for which there is heightened potential for second-guessing by regulators and private plaintiffs. Those areas include (i) management estimates, including goodwill and asset impairment, (ii) lease accounting, (iii) going concern evaluations, (iv) internal controls over financial reporting, and (v) the use and disclosure of non-GAAP measures and performance metrics.

Estimates and Impairment

In recent decades, financial reporting has relied more and more on management estimates concerning the fair values of assets and the potential impairment of those assets, including goodwill and intangible asset impairment. Even in the most stable of times, fair value estimates and impairment assessments can present a minefield of difficult questions, as evidenced by the fact that goodwill and intangible asset valuation is the most frequent subject of critical audit matters identified in external auditors' reports, according to the PCAOB.[3]

The recent turmoil wrought by the pandemic has added exponentially to the difficulty of reaching reasonable and supportable accounting judgments in this area. Both the SEC and PCAOB have acknowledged in their recent public statements that estimate and impairment accounting will be one of the areas most affected by the interruption of normal business activity during the crisis.[4] Although these statements highlight that regulators are well aware of these challenges and sound a note that the regulatory community will exercise caution before second-guessing well-reasoned judgments,[5] management and audit committees should not let their guard down and should appreciate that after-the-fact scrutiny of estimation and impairment processes and determinations likely will be intense. This holds true across numerous circumstances, from the estimation of insurance loss reserves to the analysis of goodwill from recent acquisitions for potential impairment.

As issuers prepare their upcoming periodic reports—whether they include disclosures concerning annual impairment testing or potential disclosure of a triggering event requiring an interim impairment—management and audit committees should keep in mind that potential legal exposure accompanies both the decision to write down or impair assets and the decision not to do so.

- For example, an issuer that takes a conservative view regarding the impact that the crisis will have on its operations and the value of its assets going forward might announce a significant write-down or impairment. However, if the company or its industry recovers quickly following the crisis, a regulator or private plaintiff may claim the company used the COVID-19 crisis as a cover to write down the value of assets to mask earlier mismanagement of the enterprise.

- On the other hand, an issuer that predicts the current crisis will be short-lived or that business will soon recover to pre-crisis levels may elect to reflect no or minimal asset write-downs and impairments. That decision could be subject to second-guessing should the company's forecast prove optimistic and a long economic slump ensue. Even a subsequent write-down or impairment charge could expose the company to claims that it intentionally delayed the inevitable.

In light of this dilemma, issuers should consider what steps to take to help ensure that their valuation estimates and impairment decisions are reasonable in light of all facts that are presently known. For material estimates and impairments, companies should strongly consider obtaining objective and independent assessments and updating those analyses on a quarterly basis going forward. And the entire process should be well documented, including written assessments that explain the process, the critical assumptions, the timing of any write-down or change in estimate, and an explanation of why the estimate is well supported and reasonable in the circumstances in the period recorded.

Lease Accounting

In 2019, issuers began to implement the revised accounting standard ASC 842 to bring operational leases onto their financial statements, which for many represented a significant change to their accounting.[6] Barely a year into that change, companies will now have to grapple with the accounting implications of a worldwide economic interruption which is reportedly leaving large numbers of companies unable to meet the financial obligations under lease agreements.[7] As with impairment and valuation considerations, issuers will need to determine whether and how to restructure their lease relationships in a period of significant uncertainty, knowing that regulators and private plaintiffs will scrutinize those decisions with the benefit of hindsight.

On April 8, 2020, the Financial Accounting Standards Board provided some relief for companies applying ASC 842 when it voted to relax the requirement that leases be individually reviewed as potential modifications. Recognizing that many changes to normal leasing relationships are being implemented through existing provisions in the leases, such as force majeure clauses, rather than by modifying the lease contract, FASB determined that it would be unduly burdensome for issuers to conduct an individualized analysis concerning whether each change in lease payments constituted a modification.[8] As a result, FASB will now allow companies to temporarily account for lease concessions related to the impacts of COVID-19 consistent with how those concessions would have been accounted for had enforceable rights and obligations for those concessions existed (regardless of whether those enforceable rights and obligations explicitly exist in the contract). Consequently, for concessions related to the impacts of the ongoing crisis, an entity will not have to analyze each individual contract.[9] FASB's recent action will provide short-term relief to issuers in preparing financial statements in accordance with GAAP. However, Companies will need to take steps to see that their categorization decisions and modification analysis are reasonable, and that those determinations are well documented.

Other potential areas of lease accounting for which issuers can expect scrutiny include:

- *The content of any risk factors they include in upcoming filings related to the COVID-19 crisis*. Companies for which modifications to leases could materially affect their accounting and financial results should consider explicitly noting leases as an aspect of their risk factor disclosures about the impact of the pandemic on business operations.

- *Right of Use (ROU) accounting*. A ROU asset is a lessee's right to hold, operate, or occupy the leased property over the lease term. Lessees that have recognized an ROU asset on the balance sheets will have to consider whether changes to their leasing relationships as a result of the crisis affect the recognition of ROU assets, including the amortization of those assets.

Going Concern

With so many companies experiencing unprecedented financial turmoil due to the pandemic, an aspect of that issuers should not overlook is the GAAP requirement that "an entity's management at the date the financial statements are issued should evaluate whether there are conditions and events, considered in the aggregate, that raise substantial doubt about an entity's ability to continue as a going concern

within one year after the date that the financial statements are issued."[10] In light of both the significant economic trauma that the COVID-19 crisis has caused and the uncertainty regarding how long it will last, issuers may find that their going concern analysis now requires different considerations than it would in normal times.

Of course, as with other issues discussed in this update such as goodwill and asset impairment, regulators and private plaintiffs will have the benefit of hindsight in making allegations against companies that do not survive the current crisis, and might assert that substantial doubt about the company's continuation clearly existed, or should have been recognized by the company, at the time that the financial statements were issued. Issuers can protect themselves in part against such claims by considering whether the documentation of their going-concern analysis is sufficiently robust.

Internal Controls

Management, audit committees, and auditors also need to recognize that perceived violations of GAAP or disclosure requirements could lead to subsequent regulatory scrutiny or allegations by private plaintiffs that an issuer's internal control over financial reporting was not effective. For example, regulators or plaintiffs may later allege that the furlough or termination of certain employees or the challenges created by a newly remote work force degraded a company's internal controls, leading directly to improper accounting or disclosure in one of the above areas.

It is therefore important that issuers focus on risks to the design and operation of internal control during this period of disruption. Among the circumstances that could arise during the crisis and that could interfere with the normal operation of the internal-control system are:

- The closure of business facilities and off-site work arrangements may prevent certain controls, including periodic and compensating controls, from operating;
- Staff furloughs, illnesses, and remote work may cause managers to modify workstreams to the detriment of the segregation of duties; and
- The uncertainty, business disruptions, and market turmoil caused by the crisis may interrupt the normal flow of information, including information from third-party sources, on which certain controls rely.

Management and audit committees should therefore consider what steps they can take to buttress their internal controls during this time, to protect themselves internally and externally.

Non-GAAP Financial Measures

The use of non-GAAP financial measures has been the subject of recent regulatory scrutiny as the SEC has examined whether companies use non-GAAP financial measures to present an overly optimistic picture of their business performance. At this point, most companies are well aware of the SEC's extensive guidance in the past few years designed to promote robust and careful use of non-GAAP financial measures in issuer disclosures.[11]

The SEC's enforcement of this guidance has included not only policing the formulation and consistency of the metrics themselves but also, in late 2018, an enforcement order alleging that an issuer inappropriately gave a non-GAAP financial measure equal prominence with the analogous GAAP measure.[12]

Scrutiny on the use of non-GAAP financial measures also has been subject of recent criminal prosecution. For example, on August 1, 2019, the same day that the SEC charged a real estate investment trust with improperly adjusting a non-GAAP measure allegedly to mislead investors about the company's growth,[13] the U.S. Attorney's Office for the Southern District of New York announced criminal securities fraud charges against the company's former chief executive officer and chief financial officer.[14]

Given the level of scrutiny currently being applied to non-GAAP financial measures by regulators and prosecutors, issuers should consider whether additional attention to their processes to calculate and present any non-GAAP financial measures is warranted in this environment.

Auditor Considerations: Potential Legal Exposure Related to Current Audit Work

It should come as no surprise to external auditors that the accounting and disclosure challenges faced by their clients also have potential implications for the auditors' own regulatory or litigation exposure. The PCAOB's statements during the crisis and its enforcement actions arising out of the 2008 financial crisis provide a guide to some of the points of potential scrutiny that PCAOB-registered firms can anticipate.

On April 2, 2020, the PCAOB released a Spotlight document entitled, "COVID-19: Reminders for Audits Nearing Completion."[15] Consistent with the PCAOB's focus on risk assessment and response as a foundation of the audit, the document discusses at length the effect that the current crisis may have on an auditor's risk-assessment process:

> As part of the evaluation of whether sufficient appropriate audit evidence has been obtained, auditors are required to evaluate the appropriateness of their initial risk assessments. **In light of the economic effects of the COVID-19 crisis, new risks may emerge, or the assessments of previously identified risks may need to be revisited because the expected magnitude and likelihood of misstatement has changed.** Changing incentives or increased pressures on management, especially when taken together with changes in internal controls or increased ability for management override of controls, may result in new risks of material misstatement due to fraud or changes to the auditor's previous assessment of risks of material misstatement due to fraud. Similarly, increased pressure on, and changes in, management processes, systems, and controls may give rise to increased risk of error. **Initial responses to assessed risks may not be adequate given the revised risk assessments, or planned procedures may not be practical or possible to perform under current circumstances**.[16]

As the PCAOB notes, the response to a modified risk assessment may itself be affected by the interruption of normal business activity, including that the nature and form of audit evidence may need to change as certain evidence relied upon in the past may no longer be available.[17]

The PCAOB's Spotlight document also addresses other potential effects of the present crisis on the planning and performance of the audit, including:

- Financial statement areas that may be affected by the current economic turmoil, including several of those noted above;
- Changes that may need to occur in audit committee communications or in the auditor's report, including the identification of any new critical audit matters; and
- The potential need to modify the operation of certain quality-control processes, including the engagement quality review, in light of current business restrictions.[18]

The PCAOB notes in the Spotlight that certain of its publications issued during the most recent financial crisis and recession may provide a guide to relevant audit considerations in the present.[19] The PCAOB's enforcement actions related to that financial crisis also provide a useful guidepost to the areas of scrutiny that auditors can expect as they emerge from this present crisis.

Perhaps the most high-profile PCAOB enforcement action related to the previous financial crisis was its proceeding against an engagement partner related to a mortgage lender's restatement of its financial statements based on revised loan asset valuations. The matter concerned two of the financial statement areas that we discuss above as being potentially relevant to the current crisis—management estimates concerning asset valuation, and evaluation of an entity's ability to continue as a going concern. In that matter, the PCAOB charged the engagement partner with a failure to exercise due professional care, including professional skepticism; a failure to obtain sufficient audit evidence; and an inappropriate reliance on management representations, all related to both her procedures related to the value of the lender's mortgage assets and her consideration of the lender's ability to continue as a going concern.[20]

Although the SEC later overturned the PCAOB's sanction of the engagement partner,[21] we expect that the case remains a reliable guide to the types of allegations the PCAOB may bring in the future concerning auditing decisions made today. That matter, therefore, along with the April 3 Spotlight document, highlights areas to which auditors should remain attentive as they perform audit and review procedures in this difficult environment, including: (i) exercising adequate professional care, including professional skepticism; (ii) obtaining sufficient appropriate audit evidence and not becoming overly reliant on management representations; and (iii) properly identifying and assessing the risks of material misstatement, as well as fashioning an appropriate response to those risks in light of the current difficulty in carrying out business operations. As always, the likelihood of an enforcement action by the SEC or PCAOB may depend in part on whether an auditor's judgments on these and other relevant issues is adequately documented in the written work papers.

* * * *

Issuers and external auditors have already recognized that the accounting and auditing judgments that they make today during the COVID-19 crisis could be the target of litigation and regulatory investigations down the road. It is important that companies and auditors assess which aspects of their financial reporting, disclosure, and audit processes are most likely to be subject to scrutiny during and

after the present crisis, and to take steps now to help ensure that decisions on those points are reasonable and defensible.

In its April 3, 2020 statement, the SEC Office of Chief Accountant emphasized the availability of its consultation process for issuers facing especially challenging financial reporting questions during this time.[22] When confronted with particularly complex financial reporting issues, management should consider using this invitation for consultation. Gibson Dunn's lawyers also stand ready to assist with any questions you may have regarding these or other financial reporting developments related to the COVID-19 crisis, or assisting in the consultation process. For further information, please contact the Gibson Dunn lawyer with whom you usually work, or the following authors in Washington, New York, Denver, and Palo Alto.

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[1] The SEC's filing relief is discussed in more detail in Gibson Dunn's Securities Regulation Monitor blog, *available at* https://www.securitiesregulationmonitor.com/Lists/Posts/Post.aspx?ID=402, and our April 9, 2020 Client Update, Perspectives from One Month into the COVID-19 U.S. Outbreak: Public Company Disclosure Considerations, *available at* https://www.gibsondunn.com/perspectives-from-one-month-into-the-covid-19-u-s-outbreak-public-company-disclosure-considerations/. A Gibson Dunn summary of the CARES Act is located at https://www.gibsondunn.com/senate-advances-the-cares-act-to-stabilize-economic-sector-during-coronavirus-pandemic/. On April 3, 2020, SEC Chief Accountant Sagar Teotia clarified that the SEC Office of the Chief Accountant will consider a company's decision to structure its financial reporting consistent with the CARES Act accounting provisions to be compliant with GAAP. *See* Statement on the Importance of High-Quality Financial Reporting in Light of the Significant Impacts of COVID-19 (Apr. 3, 2020) (Teotia Statement"), *available at* https://www.sec.gov/news/public-statement/statement-teotia-financial-reporting-covid-19-2020-04-03.

[2] *See* "In Light of COVID-19, PCAOB Provides Audit Firms with Opportunity for Relief from Inspections" (Mar. 23, 2020), *available at* https://pcaobus.org/News/Releases/Pages/In-Light-of-COVID-19-PCAOB-Provides-Audit-Firms-with-Opportunity-for-Relief-from-Inspections.aspx.

[3] *See* "Spotlight – Critical Audit Matters" (Dec 10, 2019), *available at* https://pcaobus.org/Documents/CAMs-Spotlight.pdf.

[4] *See* Division of Corporation Finance, CF Disclosure Guidance: Topic No. 9 (Mar. 25, 2020), available at https://www.sec.gov/corpfin/coronavirus-covid-19; "Spotlight – COVID-19: Reminders for Audits Nearing Completion" (Apr. 2, 2020) ("PCAOB Spotlight"), *available at* https://pcaobus.org/Documents/COVID-19-Spotlight.pdf.

[5] *See* Teotia Statement ("OCA has consistently not objected to well-reasoned judgments that entities have made [concerning judgments and estimates], and we will continue to apply this perspective").

[6] *See* FASB Accounting Standards Update 2016-02, Leases (Topic 842) (Feb. 25, 2016).

[7] *See* "Businesses Can't Pay Rent. That's a Threat to the $3 Trillion Commercial Mortgage Market," wsj.com (Mar. 24, 2020).

[8] *See* Gibson Dunn's Client Update concerning force majeure clauses, *available at* https://www.gibsondunn.com/force-majeure-clauses-a-4-step-checklist-and-flowchart/.

[9] *See* FASB Staff Q&A—Topic 842 and Topic 840: Accounting for Lease Concessions Related to the Effects of the COVID-19 Pandemic.

[10] ASC 205-40-50-1.

[11] *See* "Non-GAAP Financial Measures," *available at* https://www.sec.gov/divisions/corpfin/guidance/ nongaapinterp.htm.

[12] *See, e.g.*, ADT, Inc., Rel. No. 34-84956 (SEC Dec. 26. 2018).

[13] Brixmor Property Group Inc., Rel. No. 34-86538 (SEC Aug. 1, 2019).

[14] "Former Chief Executive Officer And Chief Financial Officer Of Publicly Traded Company Charged With Accounting Fraud" (Aug, 1, 2019), *available at* https://www.justice.gov/usao-sdny/pr/former-chief-executive-officer-and-chief-financial-officer-publicly-traded-company.

[15] *See* PCAOB Spotlight.

[16] *Id.* at 2 (emphasis added).

[17] *Id.* at 2-3.

[18] *Id.* at 3-5.

[19] *Id.* at 6 (citing PCAOB Staff Audit Practice Alert No. 9, "Assessing and Responding to Risk in the Current Economic Environment" (Dec. 6, 2011); PCAOB Staff Audit Practice Alert No. 3, "Audit Considerations in the Current Economic Environment" (Dec. 5, 2008)).

[20] Cynthia C. Reinhart, CPA, Rel. No. 34-85964, at 15 (SEC May 29, 2019).

[21] *See generally id.* The SEC disagreed in part with the PCAOB's factual findings and also overturned the PCAOB's analysis concerning what constituted "repeated instances of negligent conduct" sufficient to support the imposition of heightened sanctions pursuant to section 105(c)(5)(B) of the Sarbanes-Oxley Act of 2002, as amended. *See* 15 U.S.C. § 7215(c)(5)(B).

[22] Teotia Statement ("We remain available for consultation and encourage stakeholders to contact our office with questions they encounter as a result of COVID-19").

Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact any member of the firm's ***Coronavirus (COVID-19) Response Team****.*

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RISK ALERT
OFFICE OF COMPLIANCE INSPECTIONS AND EXAMINATIONS

August 12, 2020

Select COVID-19 Compliance Risks and Considerations for Broker-Dealers and Investment Advisers*

I. Introduction

In response to the broad and varied effects of, and the public and private sector responses to, COVID-19, SEC registrants have been faced with new operational, technological, commercial, and other challenges and issues. In many cases, these challenges and issues have created important regulatory and compliance questions and considerations for SEC registrants.

Through this period, OCIE has remained operational nationwide and continues to execute on its mission. As described in more detail in our March 23, 2020 statement, OCIE has worked with SEC registrants to address the timing of its requests, availability of registrant personnel, and other matters to minimize disruptions.[1] Specifically, OCIE has worked with SEC registrants to ensure that its work can be conducted in a manner consistent with maintaining normal operations and appropriate health and safety measures. OCIE has also actively engaged in on-going outreach and other efforts with many SEC registrants to assess the impacts of COVID-19 and to discuss, among many other things, operational resiliency challenges.

Through these and other efforts, as well as consultation and coordination with our SEC colleagues and other regulators, OCIE has identified a number of COVID-19-related issues, risks, and practices relevant to SEC-registered investment advisers and broker-dealers (collectively, "Firms"). Additionally, market volatility related to COVID-19 may have heightened the risks of misconduct in various areas that the staff believe merit additional attention.

The purpose of this Risk Alert is to share some of these observations with Firms, investors, and the public generally. OCIE's observations and recommendations fall broadly into the following six categories: (1) protection of investors' assets; (2) supervision of personnel; (3) practices relating to fees, expenses, and financial transactions; (4) investment fraud; (5) business continuity; and (6) the protection of investor and other sensitive information.

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* The views expressed herein are those of the staff of OCIE. This Risk Alert is not a rule, regulation, or statement of the Securities and Exchange Commission (the "SEC" or the "Commission"). The Commission has neither approved nor disapproved the content of this Risk Alert. This Risk Alert has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person. This document was prepared by OCIE staff and is not legal advice.

1 OCIE, Statement on Operations and Exams – Health, Safety, Investor Protection and Continued Operations are our Priorities (March 23, 2020).

II. Staff Observations on Areas of Risk and Focus

A. Protection of Investor Assets

Each Firm has a responsibility to ensure the safety of its investors' assets and to guard against theft, loss, and misappropriation.[2] In light of the current environment, the staff has observed that some Firms have modified their normal operating practices regarding collecting and processing investor checks and transfer requests. OCIE encourages Firms to review their practices, and make adjustments, where appropriate, including in situations where investors mail checks to Firms and Firms are not picking up their mail daily. Firms may want to update their supervisory and compliance policies and procedures to reflect any adjustments made and to consider disclosing to investors that checks or assets mailed to the Firm's office location may experience delays in processing until personnel are able to access the mail or deliveries at that office location.[3]

OCIE also encourages Firms to review and make any necessary changes to their policies and procedures around disbursements to investors, including where investors are taking unusual or unscheduled withdrawals from their accounts, particularly COVID-19 related distributions from their retirement accounts.[4] Firms may want to consider:

- Implementing additional steps to validate the identity of the investor and the authenticity of disbursement instructions, including whether the person is authorized to make the request and bank account names and numbers are accurate; and

- Recommending that each investor has a trusted contact person in place, particularly for seniors and other vulnerable investors.[5]

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[2] Investment Advisers Act of 1940 ("Advisers Act") Rule 206(4)-2 ("Custody Rule") requires investment advisers that are registered or required to be registered with the SEC and that have custody of their clients' funds or securities to safeguard those funds against theft, loss, misappropriation, or financial reverses of an adviser. Securities Exchange Act of 1934 ("Exchange Act") Rule 15c3-3 requires SEC-registered broker-dealers to obtain and maintain possession and control of all fully paid securities and excess margin securities.

[3] Investment advisers and certain broker-dealers have an obligation to promptly transmit investor checks. S*ee* Custody Rule and Exchange Act 15c3-3-(k)(2), respectively. Commission staff have addressed certain provisions of the broker-dealer financial responsibility rules and investment adviser Custody Rule, among other things. This Risk Alert provides a list of SEC resources for references to COVID-19-related temporary relief and other topics discussed herein.

[4] *See*, *e.g.*, Congressional Research Services, In Focus: Withdrawals and Loans from Retirement Accounts for COVID-19 Expenses (updated March 27, 2020) and SEC Public Statement, Chairman Clayton, "Confirmation of June 30 Compliance Date for Regulation Best Interest and Form CRS" (June 15, 2020) ("The Coronavirus Aid, Relief and Economic Security (CARES) Act allows eligible participants in certain tax-advantaged retirement plans to take early distributions of up to $100,000 during this calendar year without being subject to early withdrawal penalties and with an expanded window for paying the income tax they owe on the amounts they withdraw.").

[5] *See*, *e.g.*, FINRA Rules 2165 (FINRA exploitation rule) and 4512(a)(1)(F) (FINRA rule on trusted contact person) and SEC Office of the Investor Advocate, "How the SEC Works to Protect Senior Investors" (May 2019).

B. Supervision of Personnel

Firms have an obligation to supervise their personnel, including providing oversight of supervised persons' investment and trading activities.[6] A Firm's supervisory and compliance program should include policies and procedures that are tailored to its specific business activities and operations and should be amended as necessary to reflect the Firm's current business activities and operations.[7]

As Firms need to make significant changes to respond to the health and economic effects of COVID-19 – such as shifting to Firm-wide telework conducted from dispersed remote locations, dealing with significant market volatility and related issues, and responding to operational, technological, and other challenges – OCIE encourages Firms to closely review and, where appropriate, modify their supervisory and compliance policies and procedures.

For example, Firms may wish to modify their practices to address:

- Supervisors not having the same level of oversight and interaction with supervised persons when they are working remotely.

- Supervised persons making securities recommendations in market sectors that have experienced greater volatility or may have heightened risks for fraud.[8]

- The impact of limited on-site due diligence reviews and other resource constraints associated with reviewing of third-party managers, investments, and portfolio holding companies.

- Communications or transactions occurring outside of the Firms' systems due to personnel working from remote locations and using personal devices.

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[6] Advisers Act Rule 206(4)-7 (the "Compliance Rule") requires SEC-registered investment advisers to adopt and implement written policies and procedures that are reasonably designed to prevent violations of the Advisers Act. Advisers Act Section 203(e)(6) also authorizes the Commission to institute proceedings to determine whether it is in the public interest to sanction an investment adviser if it has failed reasonably to supervise a person subject to its supervision, with a view to preventing violations of the provisions of such statutes, rules, and regulations by that person. FINRA Rule 3110 requires FINRA member broker-dealers to establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules. Strong compliance programs incorporate legal requirements and essential controls that are periodically reviewed and updated.

[7] Advisers Act Rule 206(4)-7(b) requires investment advisers to review, at least annually, the adequacy of their established policies and procedures. FINRA Rule 3110(b)(1) states that "each member shall establish, maintain, and enforce written procedures to supervise the types of business in which they engage." *See also* FINRA Regulatory Notice 20-16: Transition to Remote Work and Remote Supervision (May 28, 2020) (sharing practices implemented by FINRA member firms to, for example, supervise in a remote work environment during the pandemic). Significant compliance events, changes in business arrangements, and regulatory developments, among other things, may lead to the need for a review.

[8] *See*, *e.g.*, SEC Press Release 2020-11, SEC Charges Companies and CEO for Misleading COVID-19 Claims (May 14, 2020) (The SEC alleges that two firms "sought to take advantage of the COVID-19 crisis by misleading investors about their ability to provide medical solutions."). *See also* FINRA Notice to Members 20-14: Sales Practice Obligations with Respect to Oil-Linked Exchange-Traded Products (May 15, 2020).

- Remote oversight of trading, including reviews of affiliated, cross, and aberrational trading, particularly in high volume investments.

- The inability to perform the same level of diligence during background checks when onboarding personnel – such as obtaining fingerprint information and completing required Form U4 verifications – or to have personnel take requisite examinations.[9]

C. Fees, Expenses, and Financial Transactions

Firms have obligations relating to considering and informing investors about the costs of services and investment products, and the related compensation received by the Firms or their supervised persons.[10] The recent market volatility and the resulting impact on investor assets and the related fees collected by Firms may have increased financial pressures on Firms and their personnel to compensate for lost revenue. While these incentives and related risks always exist, the current situation may have increased the potential for misconduct regarding:

- Financial conflicts of interest, such as: (1) recommending retirement plan rollovers to individual retirement accounts, workplace plan distributions, and retirement account transfers into advised accounts or investments in products that the Firms or their personnel are soliciting; (2) borrowing or taking loans from investors and clients; and (3) making recommendations that result in higher costs to investors and that generate greater compensation for supervised persons, such as investments with termination fees that are switched for new investments with high up-front charges or mutual funds with higher cost share classes when lower cost share classes are available.

- Fees and expenses charged to investors, such as: (1) advisory fee calculation errors, including valuation issues that result in over-billing of advisory fees;[11] (2) inaccurate calculations of tiered fees, including failure to provide breakpoints and aggregate household accounts; and (3) failures to refund prepaid fees for terminated accounts.

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[9] *See*, *e.g.*, Order Under Section 17A and Section 36 of the Securities Exchange Act of 1934 Extending Temporary Exemption from Specified Provisions of the Exchange Act and Certain Rules Thereunder, Exchange Act Release No. 89170 (June 26, 2020) and related FINRA FAQs.

[10] Advisers Act Section 206 imposes a fiduciary duty on investment advisers. S*ee*, *e.g.*, Commission Interpretation Regarding Standard of Conduct for Investment Advisers ("Fiduciary Interp."), Advisers Act Release No. 5248 (June 5, 2019) ("The cost (including fees and compensation)… associated with investment advice would generally be one of many important factors… to consider when determining whether a security or investment strategy involving a security or securities is in the best interest of the client."). Regulation Best Interest requires a broker-dealer, when making a recommendation of any securities transaction or investment strategy involving securities to a retail customer, to act in the best interest of the retail customer and not place its interests ahead of the retail customer. Among other obligations, a broker-dealer must understand and consider the potential costs associated with a recommendation, make relevant disclosures and address its conflicts of interest associated with the cost of investing. S*ee* Exchange Act Rule 15l-1(a)(2)(ii) and Regulation Best Interest: The Broker-Dealer Standard of Conduct, Exchange Act Release No. 86031 (June 5, 2019) ("Reg BI Adopting Release") (A broker-dealer's general obligation under Regulation Best Interest is satisfied only if the broker-dealer complies with four specified component obligations, relating to disclosure, care, conflicts of interest, and compliance.).

[11] The Commission has brought enforcement actions against advisers for causing the overvaluation of certain holdings maintained in clients' accounts, which also may result in clients paying higher asset-based advisory fees and inflated portfolio performance returns (*see*, *e.g.*, In re Semper Capital Management, Advisers Act Release No. 5489 (April 28, 2020) (settled)).

Firms may wish to review their fees and expenses policies and procedures and consider enhancing their compliance monitoring, particularly by:

- Validating the accuracy of their disclosures, fee and expense calculations, and the investment valuations used.

- Identifying transactions that resulted in high fees and expenses to investors, monitoring for such trends, and evaluating whether these transactions were in the best interest of investors.

- Evaluating the risks associated with borrowing or taking loans from investors, clients, and other parties that create conflicts of interest, as this may impair the impartiality of Firms' recommendations.[12] Also, if advisers seek financial assistance, this may result in an obligation to update disclosures on Form ADV Part 2.[13]

D. Investment Fraud

The staff has observed that times of crisis or uncertainty can create a heightened risk of investment fraud through fraudulent offerings. Firms should be cognizant of these risks when conducting due diligence on investments and in determining that the investments are in the best interest of investors.[14] Firms and investors who suspect fraud should contact the SEC and report the potential fraud.

E. Business Continuity

Certain firms are required to adopt and implement compliance policies and procedures that are reasonably designed to prevent violation of the federal securities laws.[15] As part of this process, Firms should consider their ability to operate critical business functions during emergency events.[16] Due to the pandemic, many Firms have shifted to predominantly operating from

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12 *See*, *e.g.*, SEC Staff Speech, Peter Driscoll, "How We Protect Retail Investors" (April 29, 2019). The Commission has brought enforcement actions against advisers for fraudulently inducing clients to invest in their businesses and for recommending investments with undisclosed financial incentives for the firms, their supervised persons, or both (*see*, *e.g.*, In re Fieldstone Financial Management Group, LLC, Advisers Act Release No. 5263 (July 1, 2019) (settled)).

13 *See* Division of Investment Management Coronavirus (COVID-19) Response FAQs, Question II.4. (Posted April 27, 2020).

14 The SEC has suspended trading for many issuers due to false and misleading claims (e.g., purporting to have cures, vaccines, or curative drugs for COVID-19 infections, or access to personal protective equipment, testing, or other preventatives such as hand sanitizers). Firms have an obligation to provide advice that is in the best interest of each investor, which requires a reasonable understanding of both the investor and the proposed investment. *See* Fiduciary Interp; Reg BI Adopting Release; FINRA Notice to Members 20-08: Business Continuity Planning (March 9, 2020); and Exchange Act Rule 15l-1 (provides a new best interest standard for broker-dealer recommendations to retail investors).

15 *See supra* notes 6 and 7.

16 *Id.* In adopting the Compliance Rule, the Commission stated that an investment adviser's compliance policies and procedures should generally address business continuity plans. FINRA Rule 4370 requires broker-dealers that are members of FINRA to create and maintain a written business continuity plan identifying procedures relating to an emergency or significant business disruption.

remote sites, and these transitions may raise compliance issues and other risks that could impact protracted remote operations, including:[17]

- Firms' supervisory and compliance policies and procedures utilized under "normal operating conditions" may need to be modified or enhanced to address some of the unique risks and conflicts of interest present in remote operations. For example, supervised persons may need to take on new or expanded roles in order to maintain business operations. These and other changes in operations may create new risks that are not typically present.

- Firms' security and support for facilities and remote sites may need to be modified or enhanced. Relevant issues that Firms should consider include, for example, whether: (1) additional resources and/or measures for securing servers and systems are needed, (2) the integrity of vacated facilities is maintained, (3) relocation infrastructure and support for personnel operating from remote sites is provided, and (4) remote location data is protected. If relevant practices and approaches are not addressed in business continuity plans and/or Firms do not have built-in redundancies for key operations and key person succession plans, mission critical services to investors may be at risk.

OCIE encourages Firms to review their continuity plans to address these matters, make changes to compliance policies and procedures, and provide disclosures to investors if their operations are materially impacted, as appropriate.

F. Protection of Sensitive Information

Firms have an obligation to protect investors' personally identifiable information ("PII").[18] The staff has observed that many Firms require their personnel to use videoconferencing and other electronic means to communicate while working remotely. While these communication methods have allowed Firms to continue their operations, these practices create:

- Vulnerabilities around the potential loss of sensitive information, including PII.[19] These risks are attributed to, among other things: (1) remote access to networks and the use of web-based applications; (2) increased use of personally-owned devices; and (3) changes in controls over physical records, such as sensitive documents printed at remote locations and the absence of personnel at Firms' offices.

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[17] *See, e.g.,* Chairman Clayton testimony, "Capital Markets and Emergency Lending in the COVID-19 Era" (June 25, 2020) ("OCIE has continued its efforts in examining registered entities for compliance with the federal securities laws, with a focus on the resiliency of critical market systems and verification of investor assets with financial professionals. Since mid-March, OCIE has supplemented its examinations with hundreds of outreach calls to registrants nationwide to assess the impact of COVID-19 on operational resiliency and business continuity planning.").

[18] The Safeguards Rule of Regulation S-P requires every SEC-registered broker-dealer and investment adviser to adopt written policies and procedures to address administrative, technical, and physical safeguards for the protection of investor records and information. The Identity Theft Red Flags Rule of Regulation S-ID requires certain firms to develop and implement a written identity theft prevention program that is designed to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account.

[19] National Institute of Standards Technology, ITL Bulletin: Security for Enterprise Telework, Remote Access, and Bring Your Own Device (BYOD) Solution (March 2020).

- More opportunities for fraudsters to use phishing and other means to improperly access systems and accounts by impersonating Firms' personnel, websites, and/or investors.[20]

OCIE recommends that Firms pay particular attention to the risks regarding access to systems, investor data protection, and cybersecurity. In particular, Firms should assess their policies and procedures and consider:

- Enhancements to their identity protection practices, such as by reminding investors to contact the Firms directly by telephone for any concerns about suspicious communications and for Firms to have personnel available to answer these investor inquiries.

- Providing Firm personnel with additional trainings and reminders, and otherwise spotlighting issues, related to: (1) phishing and other targeted cyberattacks; (2) sharing information while using certain remote systems (e.g., unsecure web-based video chat); (3) encrypting documents and using password-protected systems; and (4) destroying physical records at remote locations.

- Conducting heightened reviews of personnel access rights and controls as individuals take on new or expanded roles in order to maintain business operations.

- Using validated encryption technologies to protect communications and data stored on all devices, including personally-owned devices.

- Ensuring that remote access servers are secured effectively and kept fully patched.

- Enhancing system access security, such as requiring the use of multifactor authentication.

- Addressing new or additional cyber-related issues related to third parties, which may also be operating remotely when accessing Firms' systems.[21]

III. Conclusion

OCIE encourages Firms to remain informed regarding fraudulent activities that may affect investors' assets and, when fraud is observed, to report such activities. Below are some SEC resources that may be helpful.

Reporting Fraudulent Activities. Submit a tip or ask a question using the SEC's tips, complaints and referral system or by phone at (202) 551-4790.

Reaching out to the SEC's Office of Investor Education and Advocacy. Ask questions by phone at 1-800-732-0330 or using this online form, or email at Help@SEC.gov.

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[20] *Id*. *See also* OCIE, Risk Alert: Cybersecurity: Ransomware Alert (July 10, 2020) and Department of Homeland Security, Cybersecurity and Infrastructure Security Agency Alert: Enterprise VPN Security (updated April 15, 2020) (When personnel access non-public electronic resources from external locations, the data security protections may be compromised by, among other things, the remote access methods used.).

[21] *See*, *e.g.*, OCIE, Cybersecurity and Resilience Operations (January 2020).

Staying Informed Regarding the SEC's Response to COVID-19 and Related Activities:

- SEC's Coronavirus (COVID-19) Response.
- COVID-19 Quick Reference Guide for Investors and Market Participants.
- Information regarding fighting COVID-19-related financial fraud.
- Investor Alert: Frauds Targeting Main Street Investors.
- Frequently Asked Questions Concerning the COVID-19 Pandemic and the Broker-Dealer Financial Responsibility Rules.
- Division of Investment Management Coronavirus (COVID-19) Response FAQs.
- List of recent trading suspensions.

This Risk Alert is intended to highlight for firms risks and issues that OCIE staff has identified. In addition, this Risk Alert describes risks that firms may consider to (i) assess their supervisory, compliance, and/or other risk management systems related to these risks, and (ii) make any changes, as may be appropriate, to address or strengthen such systems. Other risks besides those described in this Risk Alert may be appropriate to consider, and some issues discussed in this Risk Alert may not be relevant to a particular firm's business. The adequacy of supervisory, compliance and other risk management systems can be determined only with reference to the profile of each specific firm and other facts and circumstances.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 90565 / December 4, 2020

ADMINISTRATIVE PROCEEDING
File No. 3-20158

In the Matter of **THE CHEESECAKE FACTORY INCORPORATED,** **Respondent.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against The Cheesecake Factory Incorporated ("Cheesecake Factory" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

[1] The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

SUMMARY

1. This matter concerns material misstatements by Cheesecake Factory regarding the impact of the Novel Coronavirus Disease 2019 ("COVID-19") on its business operations and financial condition. The disclosures were included in press releases attached to Forms 8-K furnished to the Commission on March 23 and April 3, 2020, respectively.

RESPONDENT

2. **The Cheesecake Factory Incorporated**, a Delaware corporation based in Calabasas Hills, California, operates restaurants across the United States and internationally through licensees. Cheesecake Factory has stock registered under Section 12(b) of the Exchange Act and traded on the Nasdaq Global Select Market under the ticker symbol CAKE.

FACTS

3. In mid-March 2020, Cheesecake Factory faced an unprecedented challenge to its business arising from the impact of the COVID-19 pandemic. In that context, the company issued several disclosures regarding the effect of, and its response to, the pandemic. As described below, certain of those disclosures failed to adequately inform investors of the extent of COVID-19's impact on the company's operations and financial condition in the period of late-March through mid-April 2020, when the company obtained additional financing.

4. During this time period, the company began taking steps to conserve cash and increase liquidity in the near-term. Among other things, on March 18, 2020, the company sent a letter to its landlords saying that it would not be paying April rent due to the "severe decrease in restaurant traffic [due to COVID-19 that] has severely decreased our cash flow and inflicted a tremendous financial blow to our business," noting that it "hope[d] to resume our rent payments as soon as reasonably possible."

5. In addition, on March 23, 2020, the company drew down the last $90 million on a revolving line of credit. As of the start of the second quarter on April 1, 2020, the company had approximately $65 million of cash and cash equivalents.

6. By at least March 23, 2020, the company was actively seeking additional liquidity through either the incurrence of debt through lenders or the issuance of equity to private equity investors with the goal of raising at least $100 million. In presentations shared with lenders and potential private equity investors, Cheesecake Factory disclosed its cash position and projected that the company had cash to support approximately 16 weeks of operations under the prevailing circumstances. During this time period, internal Cheesecake Factory documents noted that the company was experiencing a negative cash flow rate of $6 million per week.

7. On March 23, 2020, Cheesecake Factory furnished a Form 8-K to the Commission disclosing, among other things, that it was withdrawing previously-issued financial guidance due to economic conditions caused by COVID-19. Cheesecake Factory furnished, as an exhibit to the

Form 8-K, a copy of its public press release dated March 23, 2020 that provided a business update regarding the impact of COVID-19. According to the press release, Cheesecake Factory announced that it was transitioning to an "off-premise model" (i.e., to-go and delivery) that was "enabling the Company's restaurants to operate sustainably at present under this current model."

8. The press release further disclosed the $90 million draw down on its revolving credit facility, that it had curtailed planned unit growth, and that it was "evaluating additional measures to further preserve financial flexibility." Cheesecake Factory's March 23 Form 8-K and the attached press release did not disclose the landlord letters or the company's negative cash flow rate.

9. Two days later, on March 25, 2020, press articles reported that Cheesecake Factory had sent a letter to each of its restaurants' landlords on March 18 stating that it was not going to pay its rent for April 2020, and included a copy of one of the landlord letters.

10. On March 27, 2020, following media reports of the landlord letter, Cheesecake Factory furnished information in another Form 8-K disclosing that it was not planning to pay rent in April and that "it was in various stages of discussions with its landlords regarding ongoing rent obligations, including the potential deferral, abatement and/or restructuring of rent otherwise payable during the period of COVID-19 related closure." The company also disclosed that, effective as of April 1, 2020, it had reduced compensation for executive officers, its Board of Directors, and certain employees. The company also announced that it had furloughed approximately 41,000 employees, but allowed them to retain their benefits and insurance until June and provided them with a daily complimentary meal from their restaurant.

11. On April 3, 2020, Cheesecake Factory furnished a Form 8-K to the Commission that attached a copy of an April 2, 2020 public press release as an exhibit. The April 2 press release provided a preliminary Q1 2020 sales update given the impact of COVID-19. Among other things, Cheesecake Factory again disclosed in the press release that "the restaurants are operating sustainably at present under this [off-premise] model."

12. Cheesecake Factory's disclosures on March 23 and April 3 regarding the sustainability of its restaurant operations did not disclose that Cheesecake Factory was excluding expenses attributable to corporate operations from its claim of sustainability; that the company was, in fact, losing approximately $6 million in cash per week; and that it had only approximately 16 weeks of cash remaining, even after the $90 million revolving credit facility borrowing.

13. In addition, Cheesecake Factory's March 23, 2020 disclosure that it was "evaluating additional measures to further preserve financial flexibility" did not disclose the March 18, 2020 landlord letters stating that the company would not pay April rent.

14. Based on the foregoing, Cheesecake Factory's March 23 and April 3, 2020 Forms 8-K were materially false and misleading.

15. On April 20, 2020, Cheesecake Factory announced a $200 million subscription agreement for the sale of convertible preferred stock to a private equity investor, enhancing the company's liquidity position.

VIOLATIONS

16. As a result of the conduct described above, Cheesecake Factory violated Section 13(a) of the Exchange Act and Rules 13a-11 and 12b-20 thereunder, which collectively require every issuer of a security registered pursuant to Section 12 of the Exchange Act to file with the Commission accurate current reports on Form 8-K that contain material information necessary to make the required statements made in the reports not misleading.

CHEESECAKE FACTORY'S COOPERATION

17. In determining to accept the Offer, the Commission considered the cooperation afforded the Commission staff.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent Cheesecake Factory's Offer.

Accordingly, it is hereby ORDERED that**:**

A. Pursuant to Section 21C of the Exchange Act, Respondent Cheesecake Factory cease and desist from committing or causing any violations and any future violations of Section 13(a) of the Exchange Act and Rules 12b-20 and 13a-11 thereunder.

B. Respondent Cheesecake Factory shall, within 15 days of the entry of this Order, pay a civil money penalty in the amount of $125,000.00 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717.

Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Cheesecake Factory as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Melissa R. Hodgman, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549.

Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Vanessa A. Countryman
Secretary

January 19, 2021

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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[98] SEC Press Release, SEC Charges Former CEO of Technology Company With Raising $123 Million in Fraudulent Offerings (Sept. 17, 2020), *available at* https://www.sec.gov/news/press-release/2020-213.

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Gibson Dunn is one of the nation's leading law firms in representing companies and individuals who face enforcement investigations by the Securities and Exchange Commission, the Department of Justice, the Commodities Futures Trading Commission, the New York and other state attorneys general and regulators, the Public Company Accounting Oversight Board (PCAOB), the Financial Industry Regulatory Authority (FINRA), the New York Stock Exchange, and federal and state banking regulators.

Our Securities Enforcement Group offers broad and deep experience. Our partners include the former Director of the SEC's New York Regional Office, the former head of FINRA's Department of Enforcement, the former United States Attorneys for the Central and Eastern Districts of California, and former Assistant United States Attorneys from federal prosecutors' offices in New York, Los Angeles, San Francisco and Washington, D.C., including the Securities and Commodities Fraud Task Force.

Securities enforcement investigations are often one aspect of a problem facing our clients. Our securities enforcement lawyers work closely with lawyers from our Securities Regulation and Corporate Governance Group to provide expertise regarding parallel corporate governance, securities regulation, and securities trading issues, our Securities Litigation Group, and our White Collar Defense Group.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work or any of the following:

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SEC Coronavirus (COVID-19) Response

The U.S. Securities and Exchange Commission's efforts are centered, first and foremost, on the health and safety of our employees and all Americans. We also are focused on, among other things:

- maintaining the continuity of Commission operations;
- monitoring market functions and system risks;
- providing prompt, targeted regulatory relief and guidance to issuers, investment advisers and other registrants impacted by COVID-19 to facilitate continuing operations, including in connection with the execution of their business continuity plans (BCPs); and
- maintaining our enforcement and investor protection efforts, particularly with regard to the protection of our critical market systems and our most vulnerable investors.

We continue to work in close coordination with other financial regulators and governmental authorities in the United States and globally.

Below is a summary of operational initiatives, market-focused actions, guidance and targeted assistance and relief, investor protection efforts and other work of the agency in response to the effects of COVID-19. It is not an exhaustive list. Rather, it provides background and more specific context as to how the SEC is continuing to work with investors and other market participants as it executes its mission during this period of collective, national challenge.

[-] Agency Operations: Transition to Telework and Continuity of Operations

The agency has now transitioned to a full telework posture with limited exceptions. A majority of SEC staff began teleworking on Tuesday, March 10, and the agency has remained fully operational during this transition, which is expected to last at least through March 28, 2021.

In the weeks prior to March 9, staff prepared for telework readiness, including conducting network capacity tests, and encouraging all employees to test their remote connectivity. We have also made preparations for remote open and closed Commission meetings if needed. Our experience since the week of March 9 provides us confidence that the agency will continue to be able to maintain operations in a full telework posture. As with any large-scale operational shift, we expect adjustments in certain functions, including with respect to information technology, may be necessary or advisable. We encourage market participants to continue to engage with us, and we will provide operational updates as necessary.

Several Divisions and Offices have released statements to inform market participants and others about their operating status and how best to engage with staff during this time. These include:

- Division of Corporation Finance
- Division of Investment Management
- Division of Trading and Markets
- Office of Compliance Inspections and Examinations

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- Office of the Chief Accountant
- Office of the Secretary

[-] Market Monitoring and Engagement with Market Participants

In early February, we began assembling a cross-divisional working group to prepare for the possible adverse effects of COVID-19. An initial focus of these efforts was on monitoring the real and potential effects of COVID-19 on public companies, including with respect to potential reporting challenges and the importance of prompt, public disclosures by issuers concerning the effects and risks of COVID-19 on their businesses. Staff across divisions and offices have also expanded their ongoing outreach efforts with clearing agencies, exchanges, issuers, broker-dealers, investment companies, public accounting firms, investor representatives, credit rating agencies, fund sponsors, investment advisers and other market participants, as well as other domestic and foreign authorities. Key areas of ongoing focus and monitoring include:

- *Trading, Markets and Securities Infrastructure:* Monitoring the functioning, integrity and resiliency of securities markets with a focus on operations, systems integrity and BCPs of U.S. securities clearinghouses, exchanges, other market utilities and key market participants. This involves monitoring and direct communications with these organizations (and other regulators) regarding market conditions, operational challenges, and other issues.
- *Large Financial Firm Monitoring:* Monitoring and communicating with the largest U.S. broker-dealers to keep abreast of their activities and operations, including BCP matters and capital and liquidity. This includes gathering insights from these firms concerning industry trends and dynamics relating to the impact of COVID-19 on operations (at both a firm and a system level) and continued coordination with FINRA and the MSRB on observations and identification of material risks.
- *Retail Investors and Asset Management:* Monitoring and outreach to the asset management industry (including mutual funds, money market funds, exchange traded funds (ETFs), private funds and investment advisers), particularly funds and advisers with material exposures in markets and asset classes that have been most affected by recent events. On April 2, the Investment Advisory Committee held a special meeting to focus on market and investment-related issues facing our retail investors.
- *Issuers, Corporate Disclosures and Accounting Issues:* Monitoring and providing guidance with respect to corporate filings and disclosures (e.g., reporting earnings and financial results, changes in trends and outlook, the addition or modification of risk factors and discussion of supply chain and distribution matters) of U.S. issuers, as well as foreign companies that are listed in the United States, including engaging with issuers and other market participants that may need assistance or conditional relief in complying with their reporting obligations. Providing guidance to municipal market participants on the continuing disclosure obligations of municipal issuers and other obligated persons. We also have ongoing contact with several public accounting firms and their affiliates concerning their global operations, as well as industry and general trends and dynamics.
- *Securities Market Macro Trends, Dynamics and Potential Impacts:* Monitoring and analyzing real and potential effects of COVID-19 on the functioning of U.S. and global securities markets. Recognizing that global markets are interconnected, this includes assessing potential impacts and spillover effects on industry and company operations and actions taken by governmental authorities and private market participants. This also includes communicating with the largest nationally recognized statistical rating organizations (NRSROs) to keep abreast of how they are considering the impacts of COVID-19 on their credit ratings and operations. As examples, in addition to market price movements and credit ratings, we are monitoring capital flows, funding requirements and the availability of credit and

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- *Ongoing Coordination with U.S. and Foreign Financial Regulatory Community:* Engaging in regular communication, coordination and information sharing concerning risks, trends and impacts with the Department of the Treasury, National Economic Council, Federal Reserve Board, Federal Reserve Bank of New York, FDIC, OCC and CFTC, as well as authorities in Asia and Europe, including through participation in the Financial Stability Board (FSB) and the International Organization of Securities Commissions (IOSCO). Remaining in close contact with SROs such as exchanges, FINRA, and the MSRB. Coordinating with Congress on operations, market conditions and Commission actions and authorities, among other things.
- *Small Businesses and Investors in Small Business:* Engaging in outreach with the small business community to address capital needs in light of business closures, workforce challenges, and declining revenue resulting from the effects of COVID-19. This includes the Office of the Advocate for Small Business Capital Formation hosting a series of virtual events with thought leaders across the small business ecosystem and proactively soliciting feedback on potential solutions. On April 2, the Small Business Capital Formation Advisory Committee held a special meeting to identify the most critical challenges small businesses face accessing capital.

On October 5, 2020, the SEC published a staff report titled U.S. Credit Markets: Interconnectedness and the Effects of the COVID-19 Economic Shock, which focuses on the origination, distribution and secondary market flow of credit across U.S. credit markets. The staff report also addresses how the related interconnections in our credit markets operated as the effects of the COVID-19 pandemic took hold.

[-] Guidance and Targeted Regulatory Assistance and Relief

The Commission and staff are working to promptly provide guidance to market participants and targeted regulatory assistance and relief where necessary or appropriate. Below is a chronological list of certain of the more significant actions we have taken to date:

December 2020

- Commission and staff relief and guidance includes (in reverse chronological order):
  - Public Statement: An Update on the Commission's Targeted Regulatory Relief to Assist Market Participants Affected by COVID-19 and Ensure the Orderly Function of Our Markets (updated 12/7/2020)

August 2020

- Commission and staff relief and guidance includes (in reverse chronological order):
  - Temporary Amendments to Regulation Crowdfunding; Extension (8/28/2020)
  - Conditional Exemptive Order: Granting Exemptions from Certain Rules Related to the Sale and Delivery of Physical Securities under Regulation SHO Related to COVID-19 (8/25/2020)

June 2020

- Commission and staff relief and guidance includes (in reverse chronological order):
  - Public Statement: An Update on the Commission's Targeted Regulatory Relief to Assist Market Participants Affected by COVID-19 and Ensure the Orderly Function of Our Markets (6/26/2020)
  - Staff Statement: Regarding Temporary International Mail Service Suspensions to Certain Jurisdictions Related to the COVID-19 Pandemic (6/24/2020)

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- Updated Staff Statement: Regarding Requirements for Certain Paper Submissions in Light of COVID-19 Concerns (replaces the April 2, 2020 Staff Statement) (6/18/2020)
- Temporary Conditional Exemption: Certain Activities of Registered Municipal Advisors (6/16/2020)

May 2020

- On May 4, Chairman Jay Clayton published a statement together with Rebecca Olsen, Director, Office of Municipal Securities: The Importance of Disclosure for our Municipal Markets
- Commission and staff relief and guidance includes (in reverse chronological order):
  - Extension of Conditional Exemptive Order: Relief for Registered Transfer Agents and Certain Other Persons Affected by COVID-19 (5/27/2020)
  - Division of Investment Management Frequently Asked Questions Regarding COVID-19 Response (5/8/2020)
  - Temporary, Conditional Relief to Allow Small Businesses to Pursue Expedited Crowdfunding Offerings (5/4/2020)

April 2020

- April 2, 2020, Chairman Jay Clayton published a statement: Investors Remain Front of Mind at the SEC: Approach to Allocation of Resources, Oversight and Rulemaking; Implementation of Regulation Best Interest and Form CRS. The statement discusses:
  - (1) the Commission's approach to allocation of resources, oversight, and rulemaking in the face of various challenges caused by COVID-19, and
  - (2) the June 30, 2020 compliance date for Reg BI, Form CRS, and other requirements which remains in place based on the staff's extensive engagement with market participants and the significant benefit for Main Street investors these conduct and transparency initiatives provide.
- Commission and staff relief and guidance includes (in reverse chronological order):
  - Staff Guidance: New Frequently Asked Questions Concerning the COVID-19 Pandemic and the Broker-Dealer Financial Responsibility Rules (4/22/2020)
  - Division of Investment Management Frequently Asked Questions Regarding COVID-19 Response (4/14/2020)
  - Division of Investment Management Staff Statement on Importance of Delivering Timely and Material Information to Investment Company Investors (4/14/2020)
  - Division of Corporation Finance Statement Regarding Requirements for Form 144 Paper Filings in Light of COVID-19 Concerns (4/10/2020)
  - Division of Investment Management Staff Statement on Hearing Requests on Applications Filed Under the Investment Company Act of 1940 and Investment Advisers Act of 1940 (4/8/2020)
  - Conditional Exemptive Order: Providing Temporary Relief for Business Development Companies Making Investments in Small and Medium-sized Businesses (4/8/2020)
  - Staff Guidance: Conducting Annual Meetings in Light of COVID-19 Concerns (4/7/2020)
  - Staff Guidance: Exchange Act Forms, Section 112. Form 40-F (Question 112.02) (4/6/2020)
  - Staff Guidance: Exchange Act Forms, Section 104. Form 10-K (Question 104.18) (4/6/2020)

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- Statement from the Chief Accountant: The Importance of High-Quality Financial Reporting in Light of the Significant Impacts of COVID-19 (4/3/2020)
- Staff Guidance: New Frequently Asked Questions for Investment Advisers on: Qualified Custodian Service Disruptions Due to COVID-19 (Question VII.4) (4/2/2020)
- Staff Statement: Regarding Requirements for Certain Paper Submissions in Light of COVID-19 Concerns (4/2/2020)

March 2020

- March 24, 2020, Chairman Jay Clayton published a statement: The Deep and Essential Connections Among Markets, Businesses, and Workers and the Importance of Maintaining those Connections in our Fight Against COVID-19. The statement provides Chairman Clayton's personal views on addressing the effects of COVID-19 and, among other things, recognizes that
  - (1) our health care, pharmaceutical, manufacturing, transportation, telecommunications and many other private-sector industries are critical to our collective response to COVID-19, and
  - (2) the thousands of firms and entrepreneurs in these industries — and the millions of employees and contractors — that are working around the clock to fight COVID-19 depend on continued access to payments and credit. In addition, many companies and individuals will depend on our markets to bridge the funding gap until we fully recover from COVID-19. In short, preserving the flows of credit and capital in our economy – to businesses and individuals alike — will help us better fight COVID-19, as well as speed and strengthen our recovery.
- Additional Statements from Chairman Jay Clayton
  - Public Statement of SEC Chairman Jay Clayton for FSOC Open Meeting (3/26/2020)
  - Statement on the SEC's Coronavirus Response Efforts – Facilitating the Continued Orderly Operation of Our Capital Markets Consistent with Health and Safety Directives and Other Measures (3/20/2020)
  - Update on Consolidated Audit Trail; Temporary COVID-19 Staff No-Action Letter; Reducing Cybersecurity Risks (3/17/2020)
- The Commission and staff have provided assistance and relief to various classes of market participants and certain specific entities. In many cases, the relief is conditioned upon public disclosure of the reasons the issuer, registrant or other entity is availing itself of the relief. Commission and staff relief and guidance includes (in reverse chronological order):
  - Staff Guidance: New Frequently Asked Questions for Investment Advisers on: Timely Completion of a Surprise Exam When Faced with Logistical Disruptions Due to COVID-19 (Question IV.7) (3/30/2020)
  - Staff No Action Letter: Affiliated Purchases of Debt Securities under Section 17(a) of the Investment Company Act (3/26/2020)
  - Conditional Exemptive Order: Providing Conditional Regulatory Relief for Registered Municipal Advisors Affected by the Coronavirus Disease 2019 (3/26/2020)
  - Temporary Final Rule: Providing Temporary Relief for the Form ID Notarization Process and for Issuers Subject to Reporting Obligations Pursuant to Regulation A and Regulation Crowdfunding (3/25/2020)
  - Exemptive Relief: Granting Application by The Financial Information Forum and Security Traders Association for a Temporary Exemption Pursuant to rule 606(c) of Regulation NI

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- Staff Guidance: Providing Guidance Regarding Disclosure and Other Securities Law Obligations That Companies Should Consider With Respect to COVID-19 and Related Business and Market Disruptions (3/25/2020)
- Conditional Exemptive Orders: SEC Extends Conditional Exemptions From Reporting and Proxy Delivery Requirements for Public Companies, Funds, and Investment Advisers Affected By Coronavirus Disease 2019 (COVID-19) (3/25/2020),
    - Order Under Section 36 of the Securities Exchange Act Modifying Exemptions from the Reporting and Proxy Delivery Requirements for Public Companies, which extended and superseded the exemptions provided in Conditional Exemptive Order: Providing Conditional Regulatory Relief and Assistance for Companies Affected by COVID-19 (3/4/2020)
    - Order Under Section 206A of the Investment Advisers Act Granting Exemptions from Specified Provisions and Order Under Section 6(c) and Section 38(a) of the Investment Company Act Granting Exemptions from Specified Provisions and Commission Statement Regarding Prospectus Delivery, which extended and superseded the exemptions provided in Targeted Action to Assist Funds and Advisers, Permit Virtual Board Meetings and Provide Conditional Relief From Certain Filing Procedures for Funds and Investment Advisers Affected by COVID-19 (3/13/2020)
- Staff Statement: Regarding Rule 302(b) of Regulation S-T in Light of COVID-19 Concerns (3/24/2020)
- Conditional Exemptive Order: SEC Provides Temporary Additional Flexibility to Registered Investment Companies Affected by Coronavirus (3/23/2020)
- Conditional Exemptive Order: Relief for Registered Transfer Agents and Certain Other Persons Affected by COVID-19 (3/20/2020)
- Immediate Effectiveness of Proposed Rule Change: Facilitating NYSE Electronic Auctions in Light of Temporary Closure of Physical Trading Floor (3/20/2020)
- Staff No Action Letter: Affiliated Purchases under Rule 17a-9 of the Investment Company Act (3/19/2020)
- Staff Guidance: New and Updated Frequently Asked Questions for Investment Advisers on: Conducting Investment Advisory Business from a Temporary Location (Form ADV Item 1.F) (3/16/2020)
- Staff Guidance: New and Updated Frequently Asked Questions for Investment Advisers on: Inadvertent Adviser Custody During a Temporary Office Closure (Question II.1) (3/16/2020)
- Staff No Action Letter: Consolidated Audit Trail Reporting (3/16/2020)
- Immediate Effectiveness of Proposed Rule Change: Facilitating Continued Operations of the Cboe Options Exchange In Light Of Temporary Suspension of Cboe Physical Trading Floor (3/14/2020)
- Staff Guidance: Conducting Annual Meetings in Light of COVID-19 Concerns (3/13/2020)
- Conditional Exemptive Order: Targeted Action to Assist Funds and Advisers, Permit Virtual Board Meetings and Provide Conditional Relief From Certain Filing Procedures for Funds and Investment Advisers Affected by COVID-19 (3/13/2020)
- Order Granting Exemptions From Specified Provisions of the Investment Compa
  Certain Rules Thereunder; Commission Statement Regarding Prospectus Deliv

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- Order Granting Exemptions from Specified Provisions of the Investment Advisers Act and Certain Rules Thereunder (3/13/2020)
- Staff Statement: Fund Board Meetings and Unforeseen or Emergency Circumstances Related to COVID-19 (3/4/2020)
- Conditional Exemptive Order: Providing Conditional Regulatory Relief and Assistance for Companies Affected by COVID-19 (3/4/2020)

February 2020

- In February, it became apparent that the effects of COVID-19 could impact the ability of certain companies (particularly those with operations in China) to meet their reporting obligations. In connection with the PCAOB, we issued a Joint Statement: Effects of the Coronavirus on Financial Reporting (2/19/2020) that
  - Urged issuers to work with their audit committees and auditors to ensure that their financial reporting, auditing and review processes meet the applicable requirements in light of their obligations and the unforeseen circumstances.
  - Emphasized the need to consider potential disclosure of subsequent events in the notes to the financial statements in accordance with guidance included in Accounting Standards Codification 855, Subsequent Events.
  - Articulated the Commission's general policy to grant appropriate relief from filing deadlines in situations where, in light of circumstances beyond the control of the issuer, filings cannot be completed on time with the appropriate level of review and attention.

January 2020

- Statement from Chairman Clayton: Impact of the Coronavirus (1/30/2020)
  - Reminded issuers that the effects of COVID-19 and their response could, depending on a number of factors, be material to an investment decision; and directed staff to monitor issuer disclosures and provide guidance and assistance to issuers and other market participants.

The Commission and staff stand ready to continue to assist and, where necessary or appropriate, provide relief to market participants who are facing operational or reporting hardships relating to the effects of COVID-19.

[-] Enforcement, Examinations and Investor Education

Like the rest of the agency, the Division of Enforcement and the Office of Compliance Inspections and Examinations (OCIE) continue to execute on their mission of protecting investors and remain fully operational. The agency is actively monitoring our markets for frauds, illicit schemes and other misconduct affecting U.S. investors relating to COVID-19—and as circumstances warrant, will issue trading suspensions and use enforcement tools as appropriate.

Enforcement has dedicated significant resources to quickly responding to COVID-related matters. The Commission has suspended trading in issuers where there are issues regarding the adequacy and accuracy of the information in the marketplace in connection with COVID-19. Over the last few months, the SEC has suspended trading in the securities of dozens of issuers. The Commission has also brought a number of enforcement actions against issuers and individuals alleging fraud based on COVID-19 related claims.

Recent enforcement actions in connection with COVID-19 include:

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- **NEW!** SEC v. Arrayit Corporation and Rene Schena (2/11/2021) - Biotechnology company and its CEO charged in connection with alleged false and misleading statements to investors about the company's development of a COVID-19 test.
- SEC v. Berman, et al. (12/17/2020) - Biotechnology company and its CEO charged with making false and misleading claims in numerous press releases that the company had developed a working, break-through technology that could accurately detect Covid-19 through a quick blood test.
- In the Matter of The Cheesecake Factory Inc. (12/4/2020) - Charges settled against a restaurant company for making misleading disclosures about the impact of the COVID-19 pandemic on its business operations and financial condition.
- SEC v. Schena (9/25/20) - President and Chief Science Officer of biotechnology company charged with making allegedly false and misleading statements concerning development of a COVID-19 blood test.
- SEC v. Gomes, et al. (6/9/2020) – Emergency action against five individuals and six offshore entities for an alleged fraudulent scheme that generated more than $25 million from illegal sales of multiple microcap companies' stock, including four companies that were the subject of recent SEC trading suspension orders.
- SEC v. Nielson (6/9/2020) – Penny stock trader charged with conducting an alleged fraudulent pump-and-dump scheme in the stock of biotechnology company Arrayit Corporation by making hundreds of misleading statements in an online investment forum, including an alleged false assertion that the company had developed an "approved" COVID-19 blood test.
- SEC v. Applied Bioscience (5/14/220) – Company charged with alleged false claims that it had begun offering and shipping supposed finger-prick COVID-19 tests.
- SEC v. Turbo Global et al. (5/14/2020) – Company and its CEO charged with alleged false and misleading press releases about a purported "multi-national public-private-partnership" to sell thermal scanning equipment to detect individuals with fevers.
- SEC v. Praxsyn Corporation et al. (4/28/2020) – Company and its CEO charged with alleged false claims the company was able to acquire and supply large quantities of N95 or similar masks to protect wearers from the COVID-19 virus.

Recent trading suspensions issued in connection with COVID-19 are listed below. For more information on trading suspensions, click here.

- **NEW!** Corporate Universe, Inc. (2/9/2021)
- **NEW!** View Systems, Inc. (1/19/2021)
- BoxVn Inc. f/k/a Vaccex Inc. (12/16/2020)
- Rising Biosciences, Inc. (8/25/2020)
- Lord Global Corp. (8/20/2020)
- EastWest Bioscience Inc. (7/8/2020)
- Blackhawk Growth Corp. (6/22/2020)
- Micron Waste Technologies Inc. (5/26/2020)
- WOD Retail Solutions Inc. (5/20/2020)
- Custom Protection Services, Inc. (5/5/2020)
- CNS Pharmaceuticals Inc. (5/1/2020)

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- Moleculin Biotech, Inc. (5/1/2020)
- WPD Pharmaceuticals, Inc. (5/1/2020)
- Nano Magic Inc. (4/30/2020)
- Kleangas Energy Technologies, Inc. (4/27/2020)
- Decision Diagnostics Corp. (4/23/2020)
- Predictive Technology Group, Inc. (4/21/2020)
- SpectrumDNA, Inc. (4/21/2020)
- SCWorx Corp. (4/21/2020)
- PreCheck Health Services, Inc. (4/16/2020)
- Bravatek Solutions, Inc. (4/15/2020)
- BioXyTran, Inc. (4/15/2020)
- Signpath Pharma, Inc. (4/15/2020)
- Applied BioSciences Corp. (4/13/2020)
- Arrayit Corporation (4/13/2020)
- Solei Systems, Inc. (4/10/2020)
- Roadman Investments Corp. (4/10/2020)
- Parallax Health Sciences, Inc. (4/10/2020)
- Turbo Global Partners, Inc. (4/9/2020)
- BioELife Corp. f/k/a/ U.S. Lithium Corp. (4/9/2020)
- Key Capital Corporation (4/7/2020)
- Prestige Capital Corp. (4/7/2020)
- Wellness Matrix Group, Inc. (4/7/2020)
- Sandy Steele Unlimited Inc. (4/3/2020)
- No Borders, Inc. (4/3/2020)
- Praxsyn Corporation (3/25/2020)
- Zoom Technologies, Inc. (3/25/2020)
- Eastgate Biotech (2/24/2020)
- Aethlon Medical, Inc. (2/7/2020)

Those interested can keep track of enforcement actions here at SEC.gov.

On March 23, the Co-Directors of Enforcement released a statement highlighting market participants' obligations with respect to material non-public information, including importance of maintaining controls and procedures to keep material nonpublic information confidential unless and until it is appropriately disclosed. The statement emphasizes the need for market participants to be mindful of the prohibitions on illegal securities trading, and to follow related controls and procedures, during times such as these where material nonpublic information may be more prevalent and arise in less common contexts. The statem

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discusses our commitment to Main Street investors and our focus on those who would seek to prey on them in uncertain times.

On March 19 the Commission issued an order in pending Administrative Proceedings to encourage parties to file and serve documents electronically.

OCIE remains fully operational nationwide and, with adjustments to take into account health and safety measures, business continuity plans, firm-specific operational matters and other factors, continues to execute on its investor protection mission. More specifically, in light of health and safety concerns and other circumstances, OCIE has moved to conducting examinations off-site through correspondence, unless it is absolutely necessary to be on-site. OCIE is working with registrants to address the timing of its requests, availability of registrant personnel, and other matters to minimize disruption. OCIE will work with registrants to ensure that its work can be conducted in a manner consistent with maintaining normal operations, and importantly, necessary or appropriate health and safety measures.

OCIE's statement on its operations and examinations can be found here.

The Office of Investor Education and Advocacy continues its work to educate investors while the staff adheres to guidance from our nation's public health officials. In April, the Office issued an investor alert outlining the types of frauds Main Street investors should be especially wary of during this time. The Office also issued an alert in February to educate investors, "Look Out for Coronavirus-Related Investment Scams."

Through this period of collective, national challenge, we have remained fully operational and committed to our tripartite mission to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation. While the agency is engaging on numerous COVID-19 initiatives as noted above, we also continue our regular agency operations. For example, we have continued to advance rulemaking initiatives, conduct risk-based inspections, bring enforcement actions, and review and comment on issuer and fund filings.

Our staff has been intently focused on continuing to display the level of professionalism and dedication on which our investors and markets have come to rely. We recognize the importance of our mission to America's investors and our markets and believe it is a privilege to serve.

What's New

Enforcement action in connection with COVID-19: SEC v. Arrayit Corporation and Rene Schena (2/11/2021)

Trading suspensions in connection with COVID-19: Corporate Universe, Inc. (2/9/2021) and View Systems, Inc. (1/19/2021)

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