

The SEC Enforcement Report: Working Through Adversity

The Division of Enforcement published its 2020 Annual Report on November 2, 2020 ([here](#)). The Report contains the now familiar sections: A Message from the Director keyed to highlights; a review and discussion of key areas of interest; a series of data charts; and lists of enforcement actions brought during the fiscal year.

Yet the overall Report differs from earlier years. While it is the usual blend of case cites, discussion of initiatives and scattered statistics, the true story is one of perseverance through adversity.

A year of success despite COVID: The Report begins by noting that once the Division moved past “that initial period of uncertainty [the Division] . . . ultimately achieved a remarkable level of success, including bringing more than 700 enforcement cases during the fiscal year . . . an extraordinary accomplishment.” This point is illustrated by the citation to a sampling of cases which include:

Telegram Group, Inc., a case that centered on an unregistered offering of digital tokens or Grams that ultimately was part of a larger scheme to unlawfully distribute the Grams to the secondary public market;

Bausch Health, formerly Valeant Pharmaceuticals, an action keyed to improper revenue recognition;

BMW AG, a settled action in which two subsidiaries made inaccurate disclosures about the firm’s retail sales volume in the U.S while raising \$18 billion from investors through bond offerings;

SCANA Corp., a litigated case in which the company was charged along with two senior executives for making false statements about a nuclear power plant expansion that was abandoned; and

Telefonaktiebolaget LM Ericsson, an FCPA action based on a large-scale bribery

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scheme involving the use of sham consultants to channel cash to government officials in multiple countries.

Cases in select areas: Cases filed in four areas, along with the Division's litigation results, further illustrate the success of the program, according to the Report. The cases include actions centered on financial fraud, investment professionals and main street investors along with the litigation results.

Financial fraud and issuer disclosure has long been a focus of the Commission's enforcement efforts. Yet recent efforts to duplicate historic results in this area have been less than successful. That continues to be true.

The Report cites a series of cases to illustrate the Division's work. Those include: *Revolution Lighting Technologies*, an action in which the firm and its executives falsely inflated revenue for years; *Iconix Brand Group*, a case in which the CEO and COO beat Wall Street analysts' consensus estimates by creating fictitious revenue; and *Hill International*, an action where two former executives employed fraudulent accounting practices.

To be sure, the Division seems to be emphasizing financial fraud by, for example, announcing a new initiative toward the end of the fiscal year focusing on EPS, evidenced by two cases. Similarly, in the final quarter of the year perhaps a larger number of financial fraud actions were brought than in any period during the fiscal year. Those cases are apparently the product of focusing on data and metrics, according to the Report. What they do suggest is a new beginning in this area.

The Division also continued to focus on actions involving investment professionals while seeking to protect main street investors. As the Report notes, a series of cases tied largely to conflicts of interest centered on matters such as the failure to disclose the payment of 12b-1 fees were filed. This trend has been evident over the last several years, continued through 2020, and is fully consistent with protecting main street investors as the Commission has repeatedly noted.

Litigation success is another key point. The Report notes that over 40% of the standalone matters were not fully resolved at the time of filing. Whether this is atypical, resulted from difficulties tied to the pandemic or for other reasons is not discussed. More significant, however, is the statement that the Commission prevailed in each litigated action, an important point.

Other initiatives: Initiatives undertaken by the Division supplemented its case filing efforts. A key point involves the effort to hold individuals accountable. Over the course of the year the Commission charged "individuals in 72% of the standalone enforcement actions brought." That percentage appears to be based on the fact that about 400 "standalone" cases were filed – it is not based on the 700 plus number touted in the report.

A second is whistleblowers, an increasingly important initiative for enforcement. Since

inception, about \$562 million has been awarded. In fiscal 2020 the agency sought to accelerate the speed at which claims are evaluated. Last year about \$175 million was awarded to 39 individuals – a 200% increase in the number of awards made in a single year over the next-highest year.

The Division also created the Office of Bankruptcy, Collections, Distributions and Receiverships to improve on the distribution of cash to harmed investors. About \$600 million was returned to those investors in fiscal 2020. Whether this resulted from the new Office, the Supreme Court's decision in *Liu* that was handed down in June 2020, or some combination thereof is not clear.

The Division continued to try to speed the pace of investigations last year – a point also covered in last year's report. The median investigation was completed in 21.6 months, a five year best. Similarly, complex investigations were completed in 34 months rather than 37 as in earlier years.

The Report also touts the Division's efforts to accelerate investigations through meaningful cooperation. As an example of those efforts, the Report cited the case involving BMW where a reduced penalty was imposed for what is called "extensive cooperation, especially in light of COVID-19 challenges." Just how this approach differs from that used in other years is not explained.

Conclusion: Perhaps the best statement about fiscal 2020 is not the case cites, the tables of statistics or the discussion of various initiatives, but the one offered by the Director in her opening letter: "the greatest of our achievements this year was the everyday work of the women and men of the Enforcement Division. The fact that they kept going. That they did their jobs. That they kept protecting investors. Through the darkness of late March and early April, through school closures, through work-from-home, through illness and worse. . ." they kept going. Those efforts are a testament to the Division, its leadership, the Commission and the public. Those efforts are the real results of 2020.