



2016 Mid-Year Securities Litigation and Enforcement Highlights

JULY 2016

BakerHostetler

Table of Contents

Supreme Court Cases Review	5
Securities Law Cases	11
The SEC Cooperation and Whistleblower Programs	19
Insider Trading Cases	25
Settlements	29
Investment Adviser and Hedge Fund Cases	32
CFTC Cases and Developments.	35
Securities Policy and Regulatory Developments.	40

by

Marc D. Powers, Mark A. Kornfeld, Melissa L. Kosack, Torello Calvani, Jonathan A. Forman, Jonathan D. Blattmachr, Marco Molina, Margaret Hirce, Nexus Sea, Joshua B. Rog, Michelle Tanney, and Elias Trahanas.

Welcome to the 2016 Mid-Year Report From the BakerHostetler Securities Litigation and Regulatory Enforcement Practice Team.

The purpose is to provide a periodic survey, apart from our team Executive Alerts, on matters we believe to be of interest to sophisticated general counsel, chief compliance officers, compliance departments, legal departments, and members of the securities and commodities industries at financial institutions, private investment funds and public companies.

We issue this Securities Litigation and Enforcement Highlights Report at mid-year and shortly after year-end. We hope you find the information and commentary useful and welcome your comments and suggestions. We encourage you to contact any of the practice team members listed at the end of the Report.

This Report highlights recent, significant developments, including, but not limited to:

- **Supreme Court Cases**, including determining the extent to which Section 27 of the Securities Exchange Act of 1934 (“Exchange Act”) confers federal jurisdiction over state law claims; declining to review the constitutionality of the United States Securities and Exchange Commission’s (“SEC”) in-house courts; and the upcoming determination of the meaning of “personal gain” in the insider trading context;
- **Securities Law Cases**, including post-*Omnicare* standards on opinions and omissions; challenges to *Halliburton II*; the application of the business judgment rule in two-step and going-private mergers; application of Section 2462’s statute of limitations to declaratory relief and disgorgement; and the impact on the *American Pipe* tolling rule Circuit split;
- **SEC Cooperation and Whistleblower Programs**, including emphasizing timely self-reporting for cooperation credit in Foreign Corrupt Practices Act (“FCPA”) cases; individual deferred prosecution agreements; additional settlements pursuant to the Municipalities Continuing Disclosure Cooperation Initiative (“MCDC Initiative”); incentivizing broker-dealers to self-report potential violations of the Customer Protection Rule; sanctioning violations of the Whistleblower Protection Rule; and awarding significant amounts to whistleblowers;
- **Insider Trading Cases**, including the continued post-*Newman* impact and other recent, noteworthy insider trading cases;
- **Settlements**, including historic settlements with financial institutions stemming from the SEC’s strong enforcement trend with respect to the critical importance of corporate oversight;

- ***Investment Adviser and Hedge Fund Cases***, including enforcement actions by the SEC, as well as settlements, relating to misrepresentations about the calculation of fees and fund strategy and performance; misstatements in marketing materials; and the defrauding of investors by the misappropriation of funds collected for investment;
- ***Commodities and Futures Regulation and Cases***, including numerous actions focusing on spoofing, benchmark manipulation, anti-fraud enforcement and compliance with regulatory requirements; and
- ***Securities Policy and Regulatory Developments***, including adoption of rules by the SEC relating to amendments to Exchange Act requirements under the Jumpstart Our Business Startups Act (the “JOBS Act”); cross-border security-based swap rules related to activity in the U.S.; proposals of incentive-based compensation rules (along with other agencies); proposal of a plan for a consolidated audit trail; proposal of amendments to the definition of “smaller reporting company;” and proposal of a rule requiring investment advisers to adopt business continuity and transition plans.



Supreme Court Cases Review

In the first half of 2016, the only major securities-related decision issued by the Supreme Court was *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning* (“Manning”). The Supreme Court held in that litigation that the exclusive jurisdiction provision of Section 27 of the Exchange Act is governed by the same “arising under” test used to determine the existence of federal question jurisdiction. Other significant securities-related matters – such as the scope of the insider trading laws and the constitutionality of the SEC’s administrative proceedings – should be before the Supreme Court in the coming months.

The Supreme Court Determines the Extent to Which Section 27 of the Exchange Act Confers Federal Jurisdiction Over State Law Claims

On May 16, 2016, the Supreme Court affirmed the Third Circuit Court of Appeals’ ruling in *Manning* that there was no federal question jurisdiction under Section 27 to adjudicate New Jersey Racketeer Influenced and Corrupt Organizations Act (“New Jersey RICO”) and common law claims that relied, in part, on alleged conduct that is covered by the federal securities laws. The plaintiffs in *Manning* brought New Jersey RICO and common law claims in New Jersey state court to remedy alleged manipulative, “naked” short selling of stock shares by Manning and other financial institutions. The defendants moved to withdraw the claims to federal court on the ground that Section 27 of the

Exchange Act conferred exclusive jurisdiction on the federal courts for claims such as these that seek to remedy alleged violations of the federal securities laws.

The federal court for the District of New Jersey adopted the defendants’ position and removed the claims from state court.¹ The plaintiffs appealed that decision to the Third Circuit Court of Appeals, which ultimately reversed the lower court order and held that Section 27 of the Exchange Act did not confer subject matter jurisdiction to federal courts as to these claims.² On June 30, 2015, the Supreme Court granted certiorari on this issue, and the Supreme Court heard oral argument on December 1, 2015.³ See [our 2015 Year-End Report](#).

Section 27 provides in relevant part that federal courts “have exclusive jurisdiction of violations of [the Exchange Act or its regulations] ... and of all suits in equity and actions at law brought to enforce any liability or duty created by [the Exchange Act or its regulations].”⁴ The defendants argued to the Supreme Court that this plain language clearly and unambiguously confers federal courts with jurisdiction over state law claims that seek to remedy violations that are proscribed by the federal securities laws. They argued that the alleged conduct

in this action is already covered under the Exchange Act and, specifically, SEC’s Regulation SHO,⁵ which specifies the circumstances under which naked short sales are permissible. This overlap, they argued, triggers the exclusive jurisdiction provision under Section 27 of the Exchange Act and confers the federal courts with exclusive jurisdiction, meriting the removal of this action from state court.

The plaintiffs countered that Section 27 of the Exchange Act is not applicable in this case because the claims *only* seek to enforce liabilities and duties created under New Jersey state and common laws. They conceded that their complaint includes references to Regulation SHO, but argued that those references were not elemental to their claims and, without more, do not trigger the exclusive jurisdiction provision under Section 27 of the Exchange Act.

Moreover, in response to Congress’ consistent passing of legislation aimed at limiting perceived abuses in securities litigation and pressing for federal court jurisdiction, such as the Securities Litigation Uniform Standards Act (“SLUSA”) and the Private Securities Litigation Reform Act (“PSLRA”), the plaintiffs here, along with the securities plaintiffs’ bar as a whole, seek to fight back against these strict pleading standards by preferring state court. The following exchange between Justice Alito and Peter Stris (counsel for respondents) during the Supreme Court oral argument embodies this very trend:

1 *Manning v. Manning, Pierce, Fenner & Smith, Inc.*, No. 12-4466 (JLL), 2013 WL 2285955, at *4 (D.N.J. May 23, 2013).

2 *Manning v. Manning, Pierce, Fenner, & Smith, Inc.*, 772 F.3d 158, 166-68 (3d Cir. 2014).

3 *Manning, Pierce, Fenner & Smith, Inc. v. Manning*, 135 S.Ct. 2938 (2015).

4 15 U.S.C. §78aa.

5 See 17 C.F.R. §§ 242.200 – 242.204.

JUSTICE ALITO: So in light of SLUSA, the issue that's before us would apply only in individual actions and small class actions?

MR. STRIS: That's -- that's exactly right. And I think maybe I'll -- maybe I'll close with this. I think that's very important from the perspective of just sensibility and policy, which is the following. One of the things that -- that animated the Private Securities Litigation Reform Act was the concern that lawyers were driving litigation and not clients. And that's why, for example, one of the things that went into the PSLRA was a requirement of who the most appropriate plaintiff is. That doesn't happen when you have cases like this, when you have the CEO of a company who holds 2.1 million shares who's bringing a claim. And so not only was it not the point of Congress in 1933 and 1934 to invade the province of State courts, if we look at the entire history of purposes and -- and Congress trying to say, well, we have some concerns about what State courts are doing, there has never been an express concern about State courts enforcing State law in individual actions like this one. For the Court to hold otherwise would be unprecedented because you would be stripping State courts of the type of jurisdiction that they've had since the time of the Exchange Act. 10(b) of the Exchange Act itself was predicated on common law deceit and fraud and a whole history of what was occurring in State courts. And I just don't think there's any way to read Section 27

that's workable from the Court's jurisdictional precedents, but it's also sensible in terms of what the dual system of securities regulation is trying to do. And so if there are no further questions.

JUSTICE ALITO: Well, just out of curiosity, why is it so important for your client not to be in Federal district court?

MR. STRIS: So I think there's a few reasons. The first is his lawyer's practice in State court. They're familiar with the procedures; that's where they want to be. The second is the -- the procedures are better. I mean, it's not a surprise that a lot of securities plaintiffs want to be in State court. In some instances they want to be there because the law is more robust. There's no scienter requirement. You can bring a Holder claim. That's actually not the case here because New Jersey law happens to parallel so we don't have those benefits. But we want to be able to take a RICO claim where we're trying to take a new area. These naked short selling cases, they're new. You know, the Overstock case that's happened, we would prefer a State forum for our State law-created claims to convince a State court that this is actionable and, you know, it should warrant punitive damages. And I think we have every right to do that as -- as the master of our complaint.

Further at oral argument, several Supreme Court justices pressed defendants' legal counsel on his clients' interpretation of the scope of Section 27 of the Exchange Act. Justice Anthony Kennedy noted that

if defendants' interpretation were correct, then federal courts deciding removal motions would be "obligated to do a search of all federal laws and regulations to know if [a] complaint might have a federal cause of action[.]" The late Justice Antonin Scalia noted that such a result would be unduly "onerous" and a waste of judicial resources. And Justice Stephen Breyer noted that the SEC's decision not to submit an amicus brief in this matter cut against defendants' position that the federal securities laws control here.

In a unanimous decision authored by Justice Kagan, the Supreme Court adopted plaintiffs' arguments and affirmed the Third Circuit Court of Appeals' narrow interpretation of the jurisdictional test under Section 27 of the Exchange Act. The Supreme Court held that this test is akin to the "arising under" test used to determine federal question jurisdiction. In other words, a federal court will have exclusive jurisdiction under Section 27 of the Exchange Act only: (i) when the Exchange Act or its regulations "create[] the cause of action asserted" or (ii) when the state law claim "necessarily raise[s] an issue under the Exchange Act that is 'disputed and substantial'" and that "a federal forum may entertain without disturbing any congressionally approved balance of federal and state power."⁶ This test is far less expansive than the test proposed by the defendants in *Manning*, which called for exclusive federal court jurisdiction any time that there was any overlap between the state law claim and the Exchange Act.

⁶ 136 S.Ct. 1562, 1569-70 (May 16, 2016).

Applying the “arising under” test, the Supreme Court held that because the claims at issue in this litigation arise under state law – and not the Exchange Act – the exclusive jurisdiction provision under Section 27 of the Exchange Act is not triggered.⁷ Hence, there was no jurisdictional basis to remove this litigation from New Jersey state court to federal court, and the Supreme Court remanded this case back to New Jersey state court.

The *Manning* decision is a significant defeat for the securities defense bar, which traditionally has relied on Section 27 of the Exchange Act and similar jurisdictional statutes to remove state court cases dealing with securities-related matters to what is viewed as more defense-friendly federal courts. The Supreme Court appears reluctant to interpret the statute expansively and thereby effectively curb the states’ interests in having their courts adjudicate issues arising under their laws.

The Supreme Court Declined to Review the Constitutionality of SEC’s In-House Courts

On two separate occasions in 2016, the Supreme Court denied petitions for certiorari on whether the SEC’s enforcement actions before administrative law judges are unconstitutional. Traditionally, the SEC brought enforcement actions in federal court. But Section 929P(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”) recently allowed for the SEC to seek enforcement penalties in its own

⁷ *Id.* at 1575.

administrative proceedings. Targets of those investigations have since argued that this provision violates the Appointments Clause under Article II of the U.S. Constitution because the administrative law judges who preside over these proceedings are not appointed by the President, but are instead hired by the SEC. The Supreme Court has yet to rule on this issue.

The first petition for Supreme Court review came out of the litigation styled *Bebo v. SEC*, No. 15-997. The petitioner was the subject of an SEC matter before an administrative law judge, which ultimately resulted in an order requiring her to pay \$4.2 million in damages for alleged securities violations. While that matter was still pending, however, the petitioner challenged its constitutionality in federal court for the Northern District of Illinois, arguing that the entire process was unconstitutional under the Appointments Clause. The District Court dismissed the legal challenge for lack of subject matter jurisdiction, holding that the petitioner was first required to exhaust SEC administrative proceedings before appealing for judicial review from the federal courts. The Seventh Circuit Court of Appeals later affirmed this ruling. The petitioner then sought Supreme Court review, but this request was denied on March 28, 2016.⁸

The second petition arose from the litigation *Pierce v. SEC* (“Pierce”), No. 15-901. The petitioner in *Pierce* was the subject of an SEC enforcement action for alleged securities violations, and an administrative

⁸ 136 S.Ct. 1500 (March. 28, 2016).

law judge in that action ordered him to pay a civil penalty. On appeal, the petitioner argued to the D.C. Circuit Court of Appeals that the entire administrative hearing had been unconstitutional for the same arguments as those raised in the *Bebo* litigation. The D.C. Circuit rejected these arguments and the petitioner sought Supreme Court review. On April 25, 2016, the Supreme Court denied this petition.⁹

Supreme Court review of this issue is unlikely until such time as there becomes a split among the Circuits. So far there is none, as the Second Circuit recently joined both the Seventh and D.C. Circuit Courts of Appeals in ruling against the challenges under the Appointments Clause.¹⁰ However, these challenges have gained some traction at the District Court level in New York and Georgia, allowing for the possibility of a split in the near future that would open the door for Supreme Court review on this matter.

The Supreme Court Will Determine the Meaning of “Personal Gain” in the Insider Trading Context

On January 19, 2016, the Supreme Court granted certiorari on the petition filed by the defendant in *Salman v. United States* (“Salman”).¹¹ See our [2015 Year-End Report](#). The petitioner asked the Supreme Court to determine

⁹ 136 S.Ct. 1713 (April. 25, 2016).

¹⁰ *Tilton v. SEC*, --- F.3d ----, 2016 WL 3084795 (2d Cir. June 1, 2016).

¹¹ *United States v. Salman*, No. 15-628, 2016 WL 2077256 (Jan. 19, 2016).

whether an insider violates Section 10(b) of the Exchange Act and SEC Rule 10b-5 if it provides a family relative or friend with confidential information without any proof that he received any “personal gain” in return.¹² Furthermore, the issue on appeal is as follows: “Does the personal benefit to the insider that is necessary to establish insider trading under *Dirks v. SEC*, 463 U.S. 646 (1983) (“*Dirks*”), require proof of ‘an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature,’ as the Second Circuit held in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, No. 15-137 (U.S. Oct. 5, 2015), or is it enough that the insider and the tippee shared a close family relationship, as the Ninth Circuit held in this case?”¹³ *Dirks* held that “absent some personal gain,” an insider cannot be said to have violated the insider trading laws.¹⁴

Indeed, *Salman* provides an opportunity for the Court to define what a “personal benefit” is when tips are provided to close family relations. While *Newman* involved remote tippees who were three and four times removed from the tipper, *Salman* involves very close family

member tippees, making it a good vehicle to determine the reach of the “personal benefit” element.

In 2014, the Supreme Court considered a similar petition by the U.S. government in the *United States v. Newman* litigation.¹⁵ There, just as in *Salman*, the U.S. government brought insider trading charges against an individual who it accused of providing a family relative or friend with material, nonpublic information. Importantly, there was no proof in either case that the accused individual received a monetary reward or any other pecuniary benefit in return for his insider tip. In *Newman*, the Second Circuit interpreted the *Dirks* decision and held that, for “personal gain” to exist, there must be a quid pro quo agreement whereby the tipper receives some pecuniary benefit in exchange for the tip.¹⁶ In so doing, it rejected the U.S. government’s theory that mere friendship and association, alone, is enough to satisfy the “personal gain” requirement under *Dirks*.

15 See generally, Mark A. Kornfeld and Deborah H. Renner, *Inside the Minds: New Developments in Securities Litigation, Trends in Recent Developments in Securities Class Actions and Regulatory Enforcement Proceedings*, pp. 69-70 (2016 ed.).

16 *United States v. Newman*, 773 F.3d 438, 452-53 (2d Cir. 2014). See also Marc D. Powers and Jonathan A. Forman, *Applying Newman’s Personal Benefit Requirement to Insider Trading Compliance Programs*, NSCP (The National Society of Compliance Professionals) Currents (June 2015 Special Reprint), <https://www.bakerlaw.com/files/uploads/Documents/News/Articles/LITIGATION/2015/Powers-June-2015-BakerHostetler-Reprint.pdf>; and Marc D. Powers, Mark A. Kornfeld, Jonathan A. Forman, and Margaret E. Hirce, “The Boundaries for Insider Trading Prosecutions See a Resurgence: The 1980s Are Back!” (Dec. 17, 2014).

On October 5, 2015, the Supreme Court denied the U.S. government’s petition for a writ of certiorari and refused to revisit the *Newman* decision.¹⁷

In *Salman*, the tipper, an analyst for Citigroup, gave his brother (the tippee) confidential information about anticipated mergers and acquisitions involving Citigroup clients. The tippee then passed the information on to his brother-in-law (Salman, the remote tippee), who traded on the information. The issue hinged on whether gifting insider information to a family member is sufficient to satisfy the “personal benefit” requirement. In upholding Salman’s conviction, the Court held that “[p]roof that the insider disclosed material nonpublic information with the intent to benefit a trading relative or friend is sufficient to establish the breach of fiduciary element of insider trading.”¹⁸ The Court relied on the governing principle set forth in *Dirks*: “The elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend.”¹⁹ The Court found that initially, the tipper gave the confidential information to the tippee, his brother, in order

12 See Petition for a Writ of Certiorari, *Salman v. United States*, No. 15-628, (Nov. 10, 2015).

13 *Salman v. United States*, Petition for Writ of Certiorari, 15-628 (filed Nov. 10, 2015). The Court declined to certify the second question in Salman’s Petition: “Can failure to investigate suspicious circumstances, without more, constitute the ‘deliberate actions’ to avoid knowledge that this Court found necessary to establish willful blindness in *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S.Ct. 2060 (2011)?”

14 *Dirks v. SEC*, 463 U.S. 646, 659 (1983).

17 *United States v. Newman*, 136 S.Ct. 242 (2015).

18 2015 WL 4068903, at *6.

19 *Id.* at *4, citing *Dirks v. SEC*, 463 U.S. 646, 664 (1983).

to “benefit” him, which was the type of “gift” envisioned by *Dirks*. Furthermore, the remote tippee, Salman, knew that the tipper was the source of the information and that the tipper and tippee brothers had a “close fraternal relationship.”²⁰

In *Salman*, the Ninth Circuit Court of Appeals disagreed with the Second Circuit Court of Appeals and adopted the U.S. government’s broad interpretation of “personal gain.”²¹ Judge Jed S. Rakoff, who was visiting from the Southern District of New York, wrote on behalf of a unanimous Ninth Circuit Court of Appeals panel that limiting “personal gain” to a quid pro quo exchange – as the Second Circuit held in *Newman* – effectively provided a glitch whereby friends and family of insiders could trade and profit on confidential information without any legal consequences.

The parties have now fully briefed this matter and are awaiting oral argument. Six amici filed briefs, including Mark Cuban. Mr. Cuban, in describing his interest as amici, stated that he was “fortunate enough to have the financial resources to defend himself.”²² Moreover, Cuban argued that “[n]o one should be prosecuted for conduct that Congress is either unwilling or unable to define.” The outcome of this litigation will have a significant impact on how

prosecutors and regulators enforce insider trading laws. Practitioners and the industry will wait and see whether the high Court adds clarity to this area of law.

²⁰ *Id.* at *4.

²¹ *United States v. Salman*, 792 F.3d 1087, 1092-94 (9th Cir. 2015).

²² *Salman v. U.S.*, Brief of *Amicus Curiae* Mark Cuban in Support of Petitioner, 15-628 (filed May 13, 2016).



Securities Law Cases

According to recent analysis conducted by NERA Economic Consulting, 2016 is projected to see substantial growth in federal securities class action lawsuits with 298 cases expected to be filed in 2016, as opposed to the 230 cases filed in 2015. Notably, the Second and Ninth Circuits are expected to continue to receive the lion's share of these filings in 2016.

Opinions and Omissions: The Second Circuit Addresses the Standards in Practice Post-*Omnicare*

In *Tongue v. Sanofi* (“*Sanofi*”), the Second Circuit delivered its first published decision evaluating the impact and guidance of *Omnicare* and introduced the most significant appellate review to the current *Omnicare* landscape.²³ Previously, as a result of *Omnicare*, District Court decisions in 2015 were split with respect to the “ease” with which plaintiffs could pursue Section 11 claims under the Securities Act of 1933 (“Securities Act”).²⁴ As one such illustration, the Southern District in *Federal Housing Finance Agency v. Nomura Holding America, Inc.*,²⁵ opined on the actionability of an alleged omission due to the knowledge implications arising from

the defendant’s statement regarding its belief, even though there were facts in the record that the defendant “lacked the basis for making those statements that a reasonable investor would expect.”²⁶

Critically, the *Sanofi* court held that a statement of opinion is not misleading unless the omitted facts would “conflict with what a reasonable investor would take from the statement itself.”²⁷ Thus, the *Sanofi* decision examined whether statements of opinion, looked at through the lens of *Omnicare*, may be actionable under omissions, rather than misrepresentations. This is an important distinction because prior to the decision in *Omnicare*, there was no liability for a statement of opinion unless that opinion was “objectively false” and disbelieved at the time the opinion was expressed.²⁸

In *Sanofi*, the plaintiffs alleged that the defendants, a pharmaceutical company, its predecessor and three executives, violated federal securities laws by making statements regarding the drug Lemtrada, which was designed to treat multiple sclerosis.²⁹ Plaintiffs alleged that while Lemtrada was undergoing clinical trials, Sanofi misled investors by failing to disclose that the Food & Drug Administration (“FDA”) expressed concern with Sanofi’s use of certain blind studies in their trials.³⁰ Plaintiffs

alleged that these omissions misled investors and artificially inflated the value of their contingent value rights, a specialized financial instrument whose value is tied to the achievement of specific milestones.³¹

Focusing on the aforementioned “conflict” language in *Omnicare*, the Second Circuit held that defendants’ opinion did not materially mislead investors because there was “no plausible allegation that the FDA’s interim feedback conflicted with any reasonable interpretation of Defendants’ statements about FDA approval.”³² Furthermore, while the FDA expressed concerns over the defendants’ methodology for testing Lemtrada, it also said that any deficiency could be overcome if the results showed an “extremely large effect.” The record reflects, and the parties do not dispute, that Lemtrada’s treatment effect was, in fact, large. Accordingly, the court found that there was no conflict inferred “from a statement of optimism consistent with the FDA’s instructions as to the treatment results necessary for approval.”³³

Importantly, however, the court also held that investors are “not entitled to so much information as might have been desired to make their own determination” about the underlying subject matter of the opinion.³⁴ In other words, a stock issuer does not have to disclose every fact relating to their opinion.

²³ *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S.Ct. 1318, 1329 (2015) (“*Omnicare*”); *Tongue v. Sanofi*, 816 F.3d 199 (2d Cir. 2016).

²⁴ See generally, Mark A. Kornfeld and Deborah H. Renner, *Inside the Minds: New Developments in Securities Litigation, Trends in Recent Developments in Securities Class Actions and Regulatory Enforcement Proceedings*, pp. 56, 64-65 (2016 ed.).

²⁵ *Federal Housing Finance Agency v. Nomura Holding America, Inc.*, 104 F. Supp. 3d 441 (S.D.N.Y. 2015).

²⁶ *Id.* at 565-66.

²⁷ *Sanofi* at 210 (quoting *Omnicare*, 135 S.Ct. 1318, 1329 (2015)).

²⁸ *Omnicare*, 135 S.Ct. at 1324.

²⁹ *Tongue v. Sanofi*, 816 F.3d at 202.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 211.

³³ *Id.*

³⁴ *Id.* at 212.

Halliburton II Met With Challenges From Two Circuit Courts

The first half of 2016 saw the Circuit Courts again address the Supreme Court's ruling in *Halliburton Co. v. Erica P. John Fund*³⁵ – this time with a win for defendants' effort to rebut the fraud-on-the-market presumption of reliance.³⁶ In the two years since *Halliburton II*, defendants have had little success in defeating class action certification, so this victory is quite significant. The fraud-on-the-market theory has been the driving force behind class action certification under the Exchange Act.

In *Halliburton II*, the U.S. Supreme Court held that a defendant can rebut the fraud-on-the-market presumption in order to defeat class certification.³⁷ See our [2014 Mid-Year Report](#) and our [2015 Year-End Report](#).³⁸ Normally in such cases, when a plaintiff alleges that a misrepresentation artificially inflated a company's stock price, the defendant company may rebut the presumption by providing evidence that the stock price increase was not a result of the misrepresentation.

35 *Halliburton Co. v. Erica P. John Fund*, 134 S. Ct. 2398 (2014) ("*Halliburton II*").

36 Notably, the issues have been fully briefed in *Halliburton III*, which is currently before the Fifth Circuit. At the moment, the oral argument is set to take place the week of August 29. See also our 2015 Year-End Report.

37 *Id.*

38 See Mark A. Kornfeld and Deborah H. Renner, *Inside the Minds: New Developments in Securities Litigation, Trends in Recent Developments in Securities Class Actions and Regulatory Enforcement Proceedings*, pp. 55-63 (2016 ed.).

Since the Supreme Court's decision, however, two Circuit Courts have recognized an alternate theory of artificial inflation known as the "price maintenance theory," where a misrepresentation prevents the stock price from falling to its actual value.

Price Impact: Reversal of Class Certification

On April 12, 2016, the Eighth Circuit issued a 2-1 decision in *IBEW Local 98 Pension Fund v. Best Buy Co., Inc.*,³⁹ ("*Best Buy*") finding that the District Court of Minnesota improperly certified a class based on Best Buy's statements on an earnings conference call.⁴⁰ In that case, plaintiffs alleged that defendants made misleading statements regarding Best Buy's financial condition and projected revenue for fiscal year 2011.⁴¹ At 8:00 a.m. on September 14, 2010, before the stock market opened, Best Buy issued a press release reporting a decline in store sales growth and announcing an increase in its full-year earnings per share guidance for fiscal year 2011 to \$3.55-\$3.70.⁴² Two hours after the press release, Best Buy's CEO and CFO held a conference call with analysts, claiming that their earnings were "essentially in line" with their expectations for the year. Best Buy's stock, which opened at \$37.25 that day, closed at \$36.73.⁴³

39 *IBEW Local 98 Pension Fund v. Best Buy Co., Inc.*, No. 14-3178 (8th Cir. April 12, 2016), available at <http://media.ca8.uscourts.gov/opndir/16/04/143178P.pdf>.

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

On December 14, 2010, Best Buy issued a press release reporting a "lower than expected" decline in third-quarter sales.⁴⁴

On February 18, 2011, plaintiffs filed a class action against Best Buy alleging that its statements on September 14, 2010, were misleading.⁴⁵ In March 2012, the District Court dismissed plaintiffs' amended complaint with prejudice, finding that plaintiffs failed to allege facts that were sufficient to show the alleged misrepresentations were not protected by the PSLRA Safe Harbor provision.⁴⁶ The District Court, after further hearing, then granted plaintiffs leave to file a first amended class action complaint in October 2012.⁴⁷ Yet, the Court denied defendants' motion to dismiss based on the statements during the conference call because they were "not forward-looking and are, therefore, actionable as a statement of present condition."⁴⁸

After the District Court certified the class upon awaiting the decision in *Halliburton II*, defendants were granted permission to take an interlocutory appeal, where the Eighth Circuit reversed the class certification and held that defendants successfully rebutted the presumption in *Basic Inc. v. Levinson*.⁴⁹ The Circuit Court found that according to both plaintiffs' and

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

defendants' experts, the September 2010 conference call did not immediately increase the stock price because earnings projections "are statements of what a company is 'on track' to do," and therefore Best Buy's executives "added nothing to what was already public."⁵⁰ The substance of the conference call was found to be "virtually the same" as the statements made in the press release. Further, the plaintiffs' own expert found that the information from the press release and conference call "would have been expected to be interpreted similarly by investors."⁵¹ In other words, defendants successfully "severed any link" between the alleged misstatements on the conference call and the stock price.⁵²

Best Buy will have a reverberating impact on class certification in securities fraud litigation especially given the treatment of the "price maintenance" theory. Pursuant to this theory, the plaintiffs had argued the actionability of the misrepresentations pertaining to the confirmatory information on the conference call at issue in *Best Buy* since they could have manipulated the price of the stock by preventing a price decline.⁵³ Moreover, the Eighth Circuit highlighted that this theory "provided no evidence that refuted defendants' overwhelming evidence of no price impact."⁵⁴ In a dissent more in line with the District Court's holding in this case,

⁵⁰ *IBEW Local 98 Pension Fund*, No. 14-3178.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

Judge Murphy noted that "[n]either the Supreme Court nor any Circuit Court has, however, discussed the type of showing needed to rebut such a presumption of reliance in a price maintenance case."⁵⁵ We will be watching closely to see if any courts in the latter half of 2016 elaborate further on the evidentiary requirements and/or viability of the "price maintenance" theory.

Loss Causation: Improper Preclusion of Expert Testimony

On the very same day as the *Best Buy* ruling, the Second Circuit addressed the "price maintenance" or "inflation-maintenance" theory in *In re Pfizer Inc. Sec. Litig.* while determining that the District Court had improperly excluded the testimony of plaintiffs' loss causation and damages expert. Indeed, the Second Circuit held that the District Court had abused its discretion and misapprehended the role of plaintiffs' expert because his testimony "validates that the market reacted to information about the risks associated with Celebrex and Bextra and calculates the amount of artificial inflation in Pfizer's stock."⁵⁶ Plaintiffs' reliance on the "price maintenance" or "inflation maintenance" theory, therefore, made the role of their expert witness clear and necessary for his reports to be evaluated by a jury in the context of this theory.⁵⁷ The United States District Court for the Southern District of New York had ruled in favor of defendants on

⁵⁵ *Id.*

⁵⁶ *In re Pfizer Inc. Sec. Litig.*, 819 F.3d 642, 659 (2d Cir. 2016).

⁵⁷ *Id.*

summary judgment after excluding plaintiffs' expert.⁵⁸

Specifically, the plaintiffs had alleged that companies Pharmacia, Searle, and defendant Pfizer engaged in fraudulent misrepresentations by concealing that Celebrex and Bextra increase the risk of heart problems, which likely would have caused investors to change their assessment of the company's value.⁵⁹ Because the plaintiffs argued that Pfizer concealed the same risks that Pharmacia and Searle hid, they claimed that Pfizer "perpetuated the market's misconceptions" about the drugs, which, in turn, "caused the market to *maintain* the company's stock price at an artificially high level."⁶⁰ The plaintiffs contended that the market would have likely adjusted the value of Pfizer's stock to reflect the risks associated with Celebrex and Bextra if the risks were not concealed.⁶¹

Of note for further "price maintenance" securities fraud cases and the role of expert testimony, the Second Circuit emphasized that it did not weigh the merits of plaintiffs' theory and did not determine whether plaintiffs' theory is "either legally or factually sustainable."⁶² However, the court found that the reasons behind the adjudication of the legal or factual

⁵⁸ *In re Pfizer Inc. Sec. Litig.*, No. 4-CV-9866-LTS-HBP, 2014 WL 3291230, at *3 (S.D.N.Y. July 8, 2014), *vacated*, 819 F.3d 642 (2d Cir. 2016).

⁵⁹ *In re Pfizer*, 819 F.3d at 648.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 661.

deficiency of plaintiffs' theory were not justifications for the exclusion of the plaintiffs' expert testimony on the basis of being unreliable or unhelpful.⁶³ The court based this conclusion on Federal Rules of Evidence Rule 702 in that it was not a matter of whether the expert's testimony went to the ultimate issue at trial, but rather if it would assist the trier of fact.⁶⁴

Delaware Court Holds That the Business Judgment Rule Applies in Two-Step Mergers

On June 30, 2016, the Delaware Chancery Court extended the Delaware Supreme Court's holding in *Corwin v. KKR Financial Holdings LLC*,⁶⁵ finding that a tender offer by a majority of "fully informed, uncoerced, and disinterested" stockholders insulates a two-step merger from a challenge on any ground other than waste.⁶⁶ In such a case, the court determined that the business judgment rule "irrebuttably applies."⁶⁷

Here, in *In re Volcano*, the Volcano Corporation's ("Volcano") stockholders sought to challenge a merger between Volcano and Philips Holding USA on the basis that Volcano was allegedly uninformed and relied on the advice of a biased financial adviser that stood to profit from the merger due to the termination of two hedging

63 *Id.*

64 *Id.*

65 *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015).

66 *In re Volcano Corp. S'holder Litig.*, C.A. No. 10485-VCMR, available at <http://courts.delaware.gov/Opinions/Download.aspx?id=243120>.

67 *Id.*

transactions in which the financial adviser served as an underwriter.⁶⁸ The stockholders alleged that Volcano's directors breached their fiduciary duties and were solely motivated by their own financial gain.⁶⁹

Vice Chancellor Montgomery-Reeves dismissed the stockholders' claims on the basis that plaintiffs failed to allege that Volcano's stockholders who tendered 89.1 percent of the company's outstanding shares in the tender offer were interested or coerced.⁷⁰ He found that the stockholders were, in fact, fully informed and assented to the transaction by tendering their shares.⁷¹ In doing so, Vice Chancellor Montgomery-Reeves held that acceptance of a first-step tender offer of a fully informed, disinterested, and uncoerced majority of stockholders in a two-step merger under Section 251(h) of the Delaware General Corporation Law ("DGCL") has the same "cleansing effect" as a fully informed, uncoerced vote of a majority of disinterested stockholders of a target in a merger.⁷² As a result, cash-out mergers, such as *In re Volcano*, are governed by the business judgment rule's standard of review, which requires dismissal of challenges to the transaction except in the case of waste.

This decision essentially insulates a two-step merger under the DGCL from challenge because the

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

standard for establishing waste⁷³ is very difficult to meet. Even if the *In re Volcano* plaintiffs had attempted to allege waste, the court found that the challenge would have failed because "it [is] logically difficult to conceptualize how a plaintiff can ultimately prove a waste or gift claim in the face of a decision by fully informed, uncoerced, independent stockholders to ratify the transaction."⁷⁴

Business Judgment Rule Applies in Going-Private Mergers

The New York Court of Appeals, New York's highest court, also looked at the business judgment rule in the context of going-private mergers. On May 5, 2016, the court in deciding *In the Matter of Kenneth Cole Productions*,⁷⁵ adopted the Delaware Supreme Court's standard in *Kahn v. M&F Worldwide Corp.* ("Kahn"),⁷⁶ which held that the business judgment rule is the standard of review for going-private mergers if there are certain conditions in place to safeguard minority shareholders.⁷⁷

In *In the Matter of Kenneth Cole Productions*, Kenneth Cole ("Cole"), founder and controlling shareholder of Kenneth Cole Productions ("KCP"), proposed a going-private

73 Waste is defined as a transaction that "cannot be 'attributed to any rational business purpose.'" *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993).

74 *In re Volcano Corp.*, No. 10485-VCMR.

75 *In the Matter of Kenneth Cole Productions*, available at <https://www.nycourts.gov/ctapps/Decisions/2016/May16/54opn16-Decision.pdf>.

76 *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

77 *Id.*

merger by informing the board of KCP that he wished to submit an offer to purchase the remainder of outstanding Class A shares, which would effectively, take the publicly traded company private.⁷⁸ After Cole made the announcement, he left the meeting, and the KCP board established a special committee to consider his proposal to take KCP private.⁷⁹ The committee was comprised of two directors elected by Class A shares, and two directors elected by Class B shares.⁸⁰ Cole's initial offer was \$15.00 per share, contingent on the approval from the special committee, and a majority of the minority shares.⁸¹ He also stated that he had no desire to seek any other type of merger and that if the special committee did not recommend approval, or if the stockholders voted against the proposed transaction, Cole's relationship with KCP would not be affected.⁸² After lengthy negotiations over a period of months, the special committee recommended approval of Cole's offer at \$15.25 per share, with 99.8 percent of the minority shareholders in approval.⁸³

After Cole's announcement, certain minority shareholders sued for breach of fiduciary duty by Cole and KCP's directors for failing

to seek out other bids for KCP.⁸⁴ The case was dismissed at the trial court level, and the appellate division affirmed.⁸⁵ The Court of Appeals was confronted with which standard should apply in reviewing a going-private merger that is subject to approval by a special committee and a majority of minority shareholders.⁸⁶ The court looked at two competing standards: the entire-fairness standard, which places the burden on the independent directors to establish that there was a fair process and fair price in the transaction, and the business judgment rule, which essentially prevents courts from interfering with internal management of corporate decisions made in good faith.⁸⁷

The court adopted the Delaware Supreme Court's test in *Kahn*, which applied the business judgment rule if minority shareholders are protected.⁸⁸ In the context of going-private mergers, the *Kahn* standard enumerates six conditions to protect shareholders in order for the business judgment rule to apply: "(i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively;

(iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority."⁸⁹

The Court of Appeals reviewed each of these conditions and concluded that the plaintiffs failed to show that the defendants acted in bad faith, and furthermore found that Cole and the other KCP directors took the appropriate steps to protect minority shareholders.⁹⁰ In favoring this standard over the entire-fairness standard, the Court adopted a more defendant-friendly stance for the review of going-private mergers.

SEC v. Graham: Eleventh Circuit Application of Section 2462's Statute of Limitations to Declaratory Relief and Disgorgement

On May 26, 2016, the Eleventh Circuit issued its opinion in *SEC v. Graham*,⁹¹ which addressed the applicability of 28 U.S.C. § 2462, the five-year statute of limitations governing SEC enforcement actions seeking civil fines, penalties, and forfeiture.⁹² This case is significant because it is the first time a Circuit Court has applied Section 2462's statute of limitations to backward-looking relief, such as declaratory relief and disgorgement.

78 *In the Matter of Kenneth Cole Productions*, available at <https://www.nycourts.gov/ctapps/Decisions/2016/May16/54opn16-Decision.pdf>.

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.*

88 *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

89 *Id.* at 645.

90 *In the Matter of Kenneth Cole Productions*.

91 No. 14-13562, slip op. (11th Cir. May 26, 2016).

92 28 U.S.C. § 2462.

In January 2013, the SEC commenced a civil enforcement action in the Southern District of Florida, alleging that defendants violated federal securities laws between November 2004 and July 2008 by “selling condominiums that were functioning, in reality, as unregistered securities.”⁹³ The SEC alleged that defendants raised more than \$300 million from over 1,000 investors, but failed to pay any of the returns they guaranteed.⁹⁴ As relief, the SEC requested that the District Court: (1) declare that defendants violated federal securities laws; (2) permanently enjoin the defendants from violating federal securities laws in the future; (3) direct defendants to disgorge all profits; (4) order the defendants to repatriate any funds held outside the District Court’s jurisdiction; and (5) require three defendants to pay civil penalties.⁹⁵

The District Court found that the SEC’s claims were time-barred under Section 2462, and dismissed the case with prejudice. Its decision relied primarily on *Gabelli v. SEC* (“*Gabelli*”),⁹⁶ where the Supreme Court held that under Section 2462, the five-year statute of limitations for the SEC to bring a civil suit begins to accrue when the fraud occurs, not when it is discovered.

On appeal, the Eleventh Circuit reversed in part, holding that injunctions are forward-looking remedies and not penalties under

⁹³ Slip Op., at 3.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ 133 S.Ct. 1216 (2013).

the meaning of Section 2462.⁹⁷ The court then affirmed the remainder of the District Court’s ruling, in that Section 2462 applies to declaratory relief because it is backward-looking and “thus would operate as a penalty under § 2462.”⁹⁸ The SEC argued that declaratory relief should be exempt from Section 2462 because it may use findings of prior violations of securities laws to obtain other remedies.⁹⁹ The court reasoned that some of the remedies the SEC could seek were also time-barred under Section 2462 and that declaratory relief establishing past securities law violations is not necessary for the SEC to secure an injunction.¹⁰⁰ The Eleventh Circuit also concluded that Section 2462 also applies to disgorgement because it is synonymous with forfeiture.¹⁰¹

This decision is important because it expands on the *Gabelli* decision and limits the SEC’s ability to obtain monetary relief for conduct occurring more than five years in the past, and restricts the SEC’s ability to obtain declaratory relief. The decision has also created a Circuit split because the D.C. Circuit and Ninth Circuit previously held, pre-*Gabelli*, that disgorgement was not subject to the statute of limitations.¹⁰²

⁹⁷ *Graham*, Slip Op., at 5-9.

⁹⁸ *Id.* at 9.

⁹⁹ *Id.* at 10.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 12.

¹⁰² *Id.* at 13, 14.

Sixth Circuit Impact on the American Pipe Tolling Rule Circuit Split

Since the Supreme Court decided *American Pipe & Construction Co. v. Utah* (“*American Pipe*”) in 1974,¹⁰³ Circuit Courts have been split on whether the class action tolling doctrine applies to statutes of repose for claims under the Securities Act. For example, in 2013, the Second Circuit held that the filing of a class action did not toll the Exchange Act’s statute of repose (“*IndyMac*”),¹⁰⁴ whereas 13 years earlier, the Tenth Circuit found that *American Pipe* does apply to the Securities Act’s statute of repose (“*Wiles*”).¹⁰⁵

On May 19, 2016, the Sixth Circuit issued its opinion in *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.* (“*Stein*”), holding that plaintiffs’ claims were time-barred by the statutes of repose for claims arising under Sections 11 and 12 of the Securities Act and Section 10(b) of the Exchange Act.¹⁰⁶ In doing so, the Sixth Circuit sided with the Second Circuit’s holding in *IndyMac*, and amplified the split between Circuit Courts.

In *Stein*, the plaintiffs alleged that they invested and lost a significant amount of money across five investment funds due to defendants’ unlawful concealment of the funds’ risks, overvaluation, and lack

¹⁰³ 414 U.S. 538 (1974).

¹⁰⁴ *Police & Fire Ret. Sys. v. IndyMac MBS, Inc.*, 721 F.3d 95, 106-09 (2d Cir. 2013).

¹⁰⁵ *Joseph v. Wiles*, 223 F.3d 1155, 1166-68 (10th Cir. 2000).

¹⁰⁶ 821 F.3d 780 (6th Cir. May 19, 2016).

of diversification.¹⁰⁷ In doing so, plaintiffs alleged that defendants violated Sections 11, 12(a)(2), and 15 of the Securities Act, and Sections 10(b) and 20(a) of the Exchange Act.¹⁰⁸ The United States District Court for the Western District of Tennessee dismissed plaintiffs' claims as time-barred by the statute of limitations.¹⁰⁹

On appeal, the Sixth Circuit affirmed the District Court's ruling on the ground that plaintiffs' claims were time-barred by the Securities Act and Exchange Act's statutes of repose.¹¹⁰ The plaintiff investors maintained their suit was timely, relying on *American Pipe* to argue that the statute was tolled while their class certification was pending.¹¹¹ The Supreme Court found in *American Pipe* that the commencement of a class action suit generally tolls the running of the statute of limitations against members of the class.¹¹² Thus, the Stein court was confronted with whether *American Pipe* tolling should be extended to statutes of repose. In its analysis, the court recognized the decisions of the Second and Tenth Circuits on whether statutes of repose are subject to *American Pipe* tolling, and found that the Second Circuit's decision in *IndyMac* represented "the more cogent and persuasive

rule."¹¹³ The Sixth Circuit, like the Second Circuit, found that because statutes of repose confer a substantive right on defendant "to be free of liability after a certain absolute period of time,"¹¹⁴ it could not subscribe to the contrary view that a defendant's "potential liability should not be extinguished simply because the District Court left the class certification unresolved."¹¹⁵

In making this ruling, *Stein* extended the Second Circuit's holding of *IndyMac*, which addressed only the Securities Act, to the Exchange Act. *Stein* also drew from the Supreme Court's decision in *CTS Corporation v. Waldburger*, which held that "a statute of repose is a judgment that defendants should 'be free from liability after the legislatively determined period of time, beyond which the liability will no longer exist and will not be tolled for any reason.'"¹¹⁶ The Sixth Circuit rationalized that this view impacts the substantive rights under the Rules Enabling Act, and thus could not be abridged by any doctrine – such as tolling – founded on the Federal Rules of Civil Procedure.

107 *Id.* at 783.

108 *Id.* at 785.

109 *Id.*

110 *Id.* at 795.

111 *Id.* at 790-91.

112 *American Pipe*, 414 U.S. at 552-53.

113 *Stein*, 821 F.3d at 793.

114 *Id.* at 794.

115 *Id.* (quoting *Joseph v. Wiles*, 223 F.3d 1155, 1168 (10th Cir. 2000)).

116 134 S.Ct. 2175, 2183 (2014) (quoting C.J.S. Limitations of Action § 7, at 24 (2010)).



The SEC Cooperation and Whistleblower Programs

At the beginning of the year, SEC Director of Enforcement Andrew Ceresney signaled that the SEC's Cooperation and Whistleblower Programs would continue to play an important role in its enforcement efforts, stating, "[W]e are also focused on developing leads through our whistleblower and cooperation programs. ... Since the inception of our cooperation program, we have entered into 102 agreements with cooperating witnesses. ... I expect that both the whistleblower and cooperation programs will be significant components in our case generation efforts in the future."¹¹⁷

As expected, the first half of 2016 witnessed the following significant developments resulting from these two programs.

The SEC Emphasizes Timely Self-Reporting for Cooperation Credit in FCPA Cases

As we covered in our [2015 Year-End Report](#), the SEC has a new policy that requires companies to self-report a FCPA violation to be eligible for a deferred prosecution agreement ("DPA") or a non-prosecution agreement ("NPA") as a settlement option. FCPA settlements in the first half of this year reflect that the SEC is following this policy and appears to place a premium on timely self-reports.

For example, on February 16, 2016, the SEC announced a settled order with PTC Inc. ("PTC") for FCPA

violations in connection with \$1.5 million in improper payments made by two of its wholly-owned Chinese subsidiaries to Chinese government officials from 2006 through 2011.¹¹⁸ Although PTC self-reported the violations, it appears that the SEC did not extend a DPA or an NPA because, among other things, PTC did not disclose the "full scope and extent" of the misconduct for three years.¹¹⁹

In contrast, on June 7, 2016, the SEC announced NPAs with Akamai Technologies, Inc. ("Akamai"), and Nortek, Inc. ("Nortek") – two unrelated companies – for illegal payments to Chinese officials made by their foreign subsidiaries.¹²⁰ The SEC explained that the NPAs were warranted because "[b]oth companies self-reported the misconduct promptly" and "cooperated extensively with the ensuing SEC investigations." Among the cooperation steps and remedial measures taken by the companies, the SEC emphasized that the two companies:

- Self-reported during the early stages of their internal investigations (e.g., Akamai disclosed the violations to the SEC "[w]ithin weeks" of discovery)¹²¹ and provided timely updates to the SEC;
- Shared detailed findings of the internal investigations (including summaries of witness interviews and voluntary translations of documents from Chinese into English) and made witnesses available for interview (including those in China); and
- Terminated employees responsible for the misconduct and strengthened their anti-corruption compliance programs by enhancing their policies and training their employees.

Pursuant to the NPAs, Akamai and Nortek each paid disgorgement and prejudgment interest in the amounts of \$671,885 and \$322,058, respectively.¹²² The two companies were not subject to any other sanctions by the SEC.

The SEC Enters Into Two First-Ever Individual DPAs

The SEC also used DPAs with individuals to bolster enforcement actions during the first half of 2016.

¹¹⁷ Speech, SEC Director of Division of Enforcement Andrew Ceresney, Directors Forum 2016 Keynote Address (Jan. 25, 2016), <https://www.sec.gov/news/speech/directors-forum-keynote-ceresney.html>.

¹¹⁸ Press Release, United States Securities and Exchange Commission, "SEC: Tech Company Bribed Chinese Officials," Rel. No. 2016-29 (Feb. 16, 2016), <https://www.sec.gov/news/pressrelease/2016-29.html>.

¹¹⁹ *In the Matter of PTC Inc.*, 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, Securities Exchange Act of 1934 Rel. No. 77145 (Feb. 16, 2016), <https://www.sec.gov/litigation/admin/2016/34-77145.pdf>.

¹²⁰ Press Release, United States Securities and Exchange Commission, "SEC Announces Two Non-Prosecution Agreements in FCPA Cases," Rel. No. 2016-109 (June 7, 2016), <https://www.sec.gov/news/pressrelease/2016-109.html>.

¹²¹ Non-Prosecution Agreement between United States Securities and Exchange Commission and Akamai Technologies, Inc. (June 7, 2016), <https://www.sec.gov/news/press/2016/2016-109-npa-akamai.pdf>.

¹²² *Id.*; Non-Prosecution Agreement between United States Securities and Exchange Commission and Nortek, Inc. (June 7, 2016), <https://www.sec.gov/news/press/2016/2016-109-npa-nortek.pdf>.

On February 16, 2016, the SEC announced that it had entered into a three-year DPA with Yu Kai Yuan (“Yuan”), a Chinese national and former employee at one of PTC’s Chinese subsidiaries, who resides in Shanghai, to reward him for his “significant cooperation” in the SEC’s investigation of PTC’s FCPA violations.¹²³ Pursuant to the DPA, Yuan is not subject to any disgorgement or civil penalty.¹²⁴

On March 9, 2016, the SEC announced that it had entered into a five-year DPA with Bernard Thomas Marren (“Marren”), the former chairman of Uni-Pixel Inc., requiring him to cooperate in the enforcement action against Uni-Pixel’s former CEO and former CFO. This action alleged material misstatements and omissions regarding the company’s production capabilities between August 2012 and December 2013.¹²⁵ Pursuant to the DPA, Marren agreed to be barred from serving as an officer or director for five years.¹²⁶

123 Press Release, United States Securities and Exchange Commission, “SEC: Tech Company Bribed Chinese Officials,” Rel. No. 2016-29 (Feb. 16, 2016), <https://www.sec.gov/news/pressrelease/2016-29.html>.

124 Deferred Prosecution Agreement between United States Securities and Exchange Commission and Yu Kai Yuan (Dec. 10, 2015), <https://www.sec.gov/litigation/admin/2016/34-77145-dpa.pdf>.

125 Press Release, United States Securities and Exchange Commission, “SEC: Tech Company Mised Investors About Key Product,” Rel. No. 2016-45 (Mar. 9, 2016), <https://www.sec.gov/news/pressrelease/2016-45.html>.

126 Deferred Prosecution Agreement between United States Securities and Exchange Commission and Bernard Thomas Marren (Mar. 3, 2016), <https://www.sec.gov/litigation/complaints/2016/comp-pr2016-45-dpa.pdf>.

Prior to these DPA agreements, the SEC had not previously entered into a DPA with an individual in connection with an FCPA case or with a corporate director.¹²⁷

The SEC Completes Enforcement Sweep of Municipal Underwriters

On February 2, 2016, the SEC announced the third and final round of settlements with municipal underwriting firms in connection with its MCDC Initiative.¹²⁸

The MCDC Initiative began in March 2014 and offers favorable settlement terms to municipal bond underwriters and issuers that self-report alleged misstatements and omissions in municipal bond offerings. To date, 72 underwriters – constituting 96 percent of market share – have settled municipal bond offering violations under the MCDC Initiative with civil penalties totaling more than \$17 million. Each of the 14 underwriters participating in the third round of MCDC Initiative settlements paid civil penalties based on the number and size of the fraudulent offerings identified and agreed to retain an independent consultant to review its policies and procedures on due diligence for municipal securities underwriting. The MCDC Initiative continues with respect to municipal issuers.

127 Website, United States Securities and Exchange Commission, Enforcement Cooperation Program, <https://www.sec.gov/spotlight/enfcoopinitiative.shtml>.

128 Press Release, United States Securities and Exchange Commission, “SEC Completes Municipal Underwriter Enforcement Sweep,” Rel. No. 2016-18 (Feb. 2, 2016), <https://www.sec.gov/news/pressrelease/2016-18.html>.

The SEC Incentivizes Broker-Dealers to Self-Report Potential Violations of the Customer Protection Rule

Similar to the MCDC Initiative, the SEC began the Customer Protection Rule Initiative (“CPR Initiative”) on June 23, 2016, to encourage broker-dealers to self-report potential violations of the Customer Protection Rule by providing favorable settlement terms to those who participate in the initiative.¹²⁹ At bottom, this Rule requires that broker-dealers, among other things, maintain a reserve of funds or qualified securities in an account at a bank that is at least equal in value to the net cash owed to customers.¹³⁰ It also requires that broker-dealers maintain physical possession or control over their customers’ fully paid and excess margin securities.

To be eligible for the CPR Initiative, a broker-dealer must self-report the potential violation by November 1, 2016, (including the Customer Protection Rule provision implicated, time period and description of noncompliance, amount of cash and/or securities implicated, and remedial efforts undertaken). All reports will be reviewed by the Division of Trading and Markets and Division of Enforcement in coordination with the Office of Compliance Inspections and Examinations (“OCIE”) to determine whether a violation occurred.

129 Customer Protection Rule Initiative, United States Securities and Exchange Commission (June 23, 2016), <https://www.sec.gov/divisions/enforce/customer-protection-rule-initiative.shtml>.

130 17 CFR 240.15c3-3.

Where a violation is identified, the broker-dealer may be subject to guidance from the Division of Trading and Markets, an examination by OCIE, or an investigation by the Division of Enforcement.

To the extent an enforcement action is recommended for a reported violation, the Division of Enforcement will recommend a settled order finding violations of Rule 15c3-3 and any applicable books and records and reporting charges where the broker-dealer: (i) neither admits nor denies the findings; (ii) undertakes to enhance its compliance program, cooperate with any subsequent investigation regarding the violation (including against individuals), and retain an independent compliance consultant if necessary; and (iii) pays disgorgement and penalties, which may be reduced for cooperation. The SEC stated that the CPR Initiative covers only broker-dealers, and that enforcement actions against individuals will be assessed on a case-by-case basis taking into consideration, among other things, the evidence of intent and cooperation by the individual.

To further encourage participation in the CPR Initiative, on June 23, 2016, the SEC simultaneously announced a targeted sweep of broker-dealers to assess compliance with the rule and a settled order with Merrill Lynch, Pierce, Fenner & Smith Incorporated and Merrill Lynch Professional Clearing Corp. (“Merrill Lynch”) for violating, among other things, the Customer Protection Rule by using cash belonging to its customers to fund its own business

activities and allowing certain of its clearing banks to hold general liens over its customers’ securities from 2009 through 2015.¹³¹ The SEC found that Merrill Lynch’s actions exposed its customers to a “massive shortfall in the reserve account,” which may have had dire consequences for customers if the firm collapsed during the execution of those trades.

The settled order contained a rare admission by Merrill Lynch that it not only misused customer cash to generate profits, but also failed to safeguard customer securities from creditors. The order also required Merrill Lynch to pay disgorgement and prejudgment interest in the amount of \$57 million and a civil penalty in the amount of \$358 million for a total of \$415 million.¹³²

The SEC emphasized that the settled order was a message case for the industry, stating, “The significant relief imposed in the Merrill Lynch Order reflects the seriousness with which the Commission views failures

to comply with Rule 15c3-3.”¹³³ The press release confirmed the SEC’s commitment to identify additional firms that violate the Customer Protection Rule. The first part of the CPR Initiative “encourages broker-dealers to proactively report potential violations of the rule to the SEC and provides for cooperation credit and favorable settlement terms in any enforcement recommendations arising from self-reporting.” The second part involves the execution of “risk-based examinations of certain broker-dealers to assess their compliance with the Customer Protection Rule.”¹³⁴

Moreover, during a press conference publicizing the settlement, Director Ceresney indicated that Merrill Lynch faced a steeper civil penalty and was required to admit wrongdoing because it did not self-report, stating, “I want to be very clear that Merrill’s lack of transparency with the regulators on this critically important topic significantly increased the relief we sought and obtained in this case.”¹³⁵

¹³¹ Press Release, United States Securities and Exchange Commission, “Merrill Lynch to Pay \$415 Million for Misusing Customer Cash and Putting Customer Securities at Risk,” Rel. No. 2016-128 (June 23, 2016), <https://www.sec.gov/news/pressrelease/2016-128.html>.

¹³² *In the Matter of Merrill Lynch, Pierce, Fenner & Smith Incorporated and Merrill Lynch Professional Clearing Corp.*, Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 78141 (June 23, 2016), <https://www.sec.gov/litigation/admin/2016/34-78141.pdf>.

¹³³ Customer Protection Rule Initiative, United States Securities and Exchange Commission (June 23, 2016), <https://www.sec.gov/divisions/enforce/customer-protection-rule-initiative.shtml>.

¹³⁴ Press Release, United States Securities and Exchange Commission, “Merrill Lynch to Pay \$415 Million for Misusing Customer Cash and Putting Customer Securities at Risk,” Rel. No. 2016-128 (June 23, 2016), <https://www.sec.gov/news/pressrelease/2016-128.html>.

¹³⁵ Carmen Germaine, *Merrill Lynch Pays \$415M For Misusing Customer Cash*, Law360 (June 23, 2016), <http://www.law360.com/articles/810228/merrill-lynch-pays-415m-for-misusing-customer-cash>.

The SEC Sanctions Merrill Lynch for Violating Whistleblower Protection Rule

As part of the above-described settled order, Merrill Lynch also admitted to violating the Whistleblower Protection Rule by using language in certain of its policies, procedures and agreements with employees that tended to impede them from reporting information to the government.¹³⁶ The SEC credited Merrill Lynch for the measures it took to remedy this violation, including:

- Modifying the confidentiality provision in its policies, procedures and agreements to clarify that employees and former employees are not prohibited – outside of any applicable law or privilege – from communicating with the government regarding potential violations of law;
- Providing mandatory annual training to all employees; and
- Providing employees with a document, “Notice Concerning Your Rights to Report Possible Violations of the Law,” that sets forth the employees’ rights to: (i) report potential violations of law to the government or self-regulatory organizations without permission or notice to the employer; (ii) report potential violations of law anonymously; (iii) cooperate voluntarily with or respond to any inquiry from the government or

¹³⁶ The order, however, noted that the SEC was unaware of any instances in which an employee was in fact prevented from communicating directly with it regarding a potential violation of the securities laws or Merrill Lynch took action to enforce one of its agreements to prevent such communications.

self-regulatory organizations; and (iv) not be retaliated against for reporting potential securities law violations.

The order is the second time the SEC has brought an enforcement action against a company for provisions that violate the Whistleblower Protection Rule by impeding employees’ ability to communicate with the government.¹³⁷

The SEC Awards Significant Amounts to Whistleblowers

As covered in our [NSCP Currents article](#)¹³⁸ and [Executive Alert](#),¹³⁹ the SEC’s Office of the Whistleblower handed out over \$29 million in awards to 10 whistleblowers during the first half of 2016, including, among others:

- “[A] company outsider who conducted a detailed analysis that led to a successful SEC enforcement action;”¹⁴⁰

¹³⁷ Press Release, United States Securities and Exchange Commission, “SEC: Companies Cannot Stifle Whistleblowers in Confidentiality Agreements,” Rel. No. 2015-54 (Apr. 1, 2015), <https://www.sec.gov/news/pressrelease/2015-54.html>.

¹³⁸ See Tracy Cole, Jonathan A. Forman, and A. Mackenna Mosier, *It’s Not Over Until the Last Whistle Blows: Beware of the Mid-Investigation Tip*, NSCP Currents (June 2016), http://apps.americanbar.org/buslaw/committees/CL310000pub/newsletter/201510/fa_2.pdf.

¹³⁹ “SEC Confirms That Whistleblowers Will Continue to Carry a Baton in Its Race to Enforce SOX,” BakerHostetler Executive Alert, Tracy Cole, Mark A. Kornfeld, and Jacquelyn Rovine (June 17, 2016).

¹⁴⁰ Press Release, United States Securities and Exchange Commission, “SEC Awards Whistleblower More Than \$700,000 for Detailed Analysis,” Rel. No. 2016-10 (Jan. 15, 2016), <https://www.sec.gov/news/pressrelease/2016-10.html>.

- “[A] former executive whose tip substantially advanced the agency’s investigation and resulted in a successful enforcement action;”¹⁴¹
- “[A] company employee whose tip bolstered an ongoing investigation with additional evidence that strengthened the SEC’s case;”¹⁴² and
- “[A] former company insider whose detailed tip led the agency to uncover securities violations that would have been nearly impossible for it to detect but for the whistleblower’s information.”¹⁴³

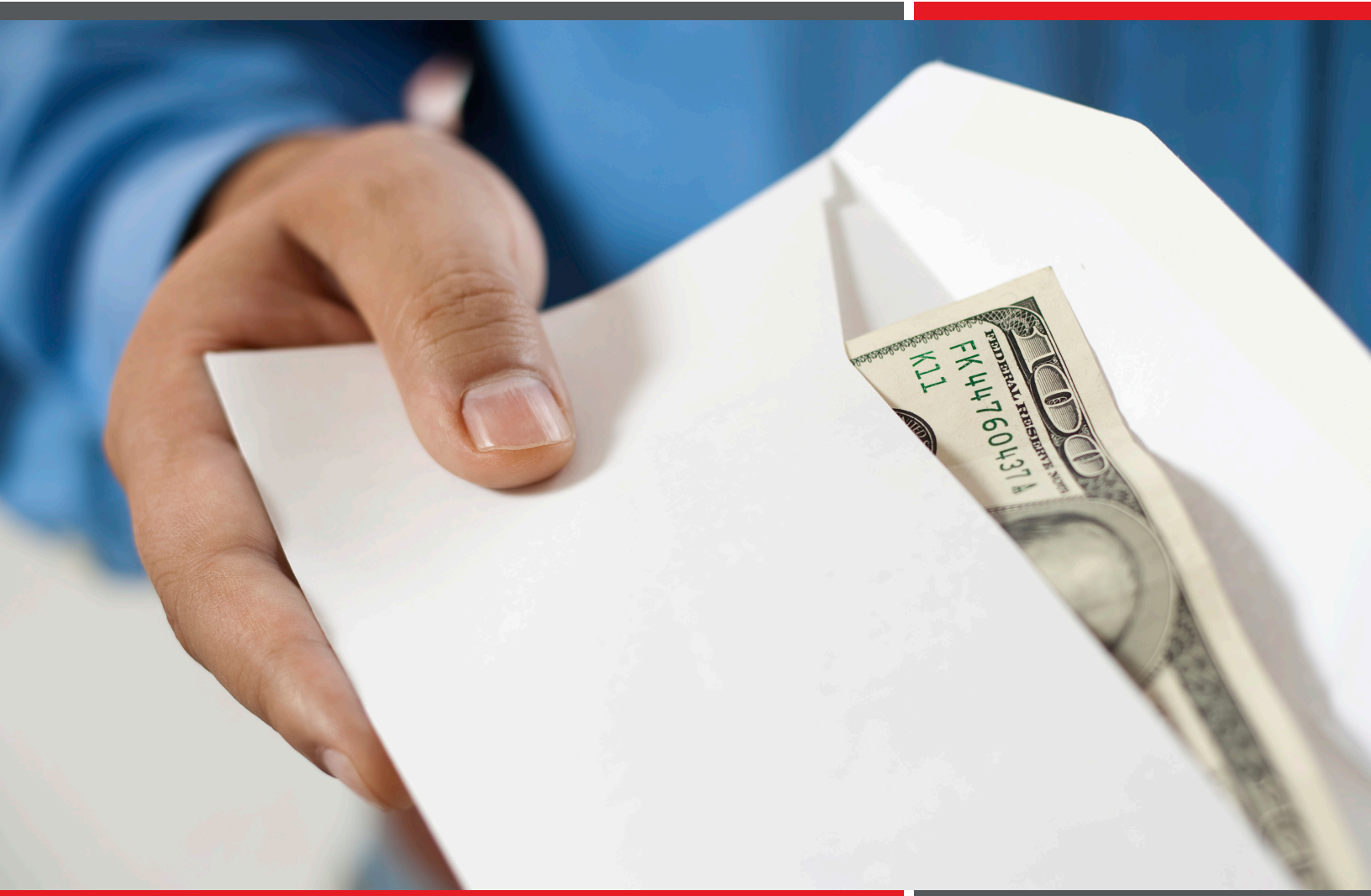
¹⁴¹ “SEC Confirms That Whistleblowers Will Continue to Carry a Baton in Its Race to Enforce SOX,” BakerHostetler Executive Alert, Tracy Cole, Mark A. Kornfeld, and Jacquelyn Rovine (June 17, 2016) (discussing whistleblower award of more than \$17 million).

¹⁴² Press Release, United States Securities and Exchange Commission, “Whistleblower Earns \$3.5 Million Award for Bolstering Ongoing Investigation,” Rel. No. 2016-88 (May 13, 2016), <https://www.sec.gov/news/pressrelease/2016-88.html>.

¹⁴³ Press Release, United States Securities and Exchange Commission, “SEC Awards More Than \$5 Million to Whistleblower,” Rel. No. 2016-91 (May 17, 2016), <https://www.sec.gov/news/pressrelease/2016-91.html>.

The flurry of awards over the past half year appears to be the result of the tips working their way through the investigation and enforcement process, suggesting a sign of things to come. Since inception of the Whistleblower Program, the SEC has awarded more than \$85 million to 32 whistleblowers.¹⁴⁴

¹⁴⁴ The CFTC has now joined the SEC in its use of whistleblower incentives. *See infra* Section VII. and CFTC's \$10 million whistleblower award. *See also* Tracy Cole, Mark A. Kornfeld, and Jacqlyn Rovine, "This Is Not a Test: The CFTC Joins the SEC and IRS in Awarding Substantial Whistleblower Bounties," BakerHostetler Client Alert (April 14, 2016), <https://www.bakerlaw.com/alerts/this-is-not-a-test-the-cftc-joins-the-sec-and-irs-in-awarding-substantial-whistleblower-bounties>. *See generally*, Mark A. Kornfeld and Deborah H. Renner, *Inside the Minds: New Developments in Securities Litigation, Trends in Recent Developments in Securities Class Actions and Regulatory Enforcement Proceedings*, pp. 73-77 (2016 ed.).



Insider Trading Cases

The first half of 2016 has seen the continued development of post-*Newman* fallout in insider trading cases. Perhaps the biggest and most highly anticipated development is the U.S. Supreme Court's grant of certiorari in *Salman*, which practitioners hope will resolve the purported conflict between the Second and Ninth Circuits following *Newman*. See our [2015 Year-End Report](#). Moreover, since *Salman* is the first insider trading case that the Court has heard in approximately three decades, there is an expectation that it will generally provide clarity on an area of law not defined by statute.

In the meantime, the post-*Newman* activity continues.¹⁴⁵ Defendants have had varying success bringing motions to overturn their convictions or to dismiss charges. In an interesting development, the government this year has returned forfeited funds due to the developments in insider trading law. In January 2016, Level Global Investors filed a motion to vacate the 2013 settlement with the SEC for insider trading. The Staff did not oppose, and returned the \$21.5 million in settlement money to the

hedge fund.¹⁴⁶ Similarly, U.S. District Judge Shira A. Scheindlin granted hedge fund Diamondback Capital Management, LLC's unopposed motion to vacate its 2012 judgment and ordered the government to return \$6 million in forfeited funds and a \$3 million fine.¹⁴⁷ In a related federal prosecution, the Amended Final Judgment in the action stated that, "based in part on legal developments," the money forfeited as part of the fund's January 20, 2012, non-prosecution agreement with the U.S. government would be returned.¹⁴⁸

In addition to these developments, the DOJ and the SEC continue to aggressively bring insider trading cases. The SEC increased its enforcement actions from 755 in fiscal year 2014 to 807 in fiscal year 2015, and the trend is expected to continue. In 2015, 87 parties were charged with insider trading, including venture capital firms, Fortune 500 company executives and CPAs.¹⁴⁹ Andrew Ceresney stated earlier this year that while the SEC often receives case referrals

from FINRA, it is increasingly relying on data analytics tools and has brought five cases as a result of these tools.¹⁵⁰ The trend is expected to continue.

Recent Insider Trading Actions

SEC v. Sanjay Valvani and Gordon Johnston, 16-cv-04512 (S.D.N.Y. June 15, 2016)

SEC v. Christopher Plaford, 16-cv-4511 (S.D.N.Y. June 15, 2016)

SEC v. Stefan Lumiere, 16-cv-4513 (S.D.N.Y. June 15, 2016)

U.S. v. Sanjay Valvani, 16-cr-412 (S.D.N.Y.)

U.S. v. Gordon Johnston, 16-crim-406 (S.D.N.Y.)

U.S. v. Christopher Plaford, 16-crim-400 (S.D.N.Y.)

U.S. v. Stefan Lumiere, 16-mag-3812 (S.D.N.Y.)

On June 15, 2016, the SEC and the DOJ brought parallel actions against Sanjay Valvani ("Valvani"), a portfolio manager at Visium Asset Management ("Visium"); Stefan Lumiere ("Lumiere") and Christopher Plaford ("Plaford"), former portfolio managers at Visium; and Gordon Johnston ("Johnston"), a former FDA employee and hedge fund consultant, with insider trading and

¹⁴⁵ See, e.g., Marc D. Powers and Jonathan A. Forman, *Applying Newman's Personal Benefit Requirement to Insider Trading Compliance Programs*, American Bar Association, Business Law Committees Newsletter (Oct. 2015), http://apps.americanbar.org/buslaw/committees/CL310000pub/newsletter/201510/fa_2.pdf.

¹⁴⁶ *Regulators to Return \$21.5 Million to Hedge Fund Shut After Raid*, NY Times (Jan. 26, 2016), <http://www.nytimes.com/2016/01/27/business/dealbook/regulators-to-return-21-5-million-to-hedge-fund-shut-after-raid.html?smprod=nytcore-ipad&smid=nytcore-ipad-share&r=1>.

¹⁴⁷ *SEC v. Adondakis, et al.*, 12-cv-00409 (Dkts. 144, 147).

¹⁴⁸ *U.S. v. \$6,000,000.00 in U.S. Currency*, 12-cv-6023, Amended Final Judgment (Dkt. No. 8 June 3, 2016).

¹⁴⁹ Press Release, United States Securities and Exchange Commission, "SEC Announces Enforcement Results for FY 2015," Rel. No. 2015-245 (Oct. 22, 2015), <https://www.sec.gov/news/pressrelease/2015-245.html>.

¹⁵⁰ *SEC Predicts Record Enforcement Levels Will Continue in 2016*, Law360 (Mar. 10, 2016), <http://www.law360.com/articles/769941/sec-predicts-record-enforcement-levels-will-continue-in-2016>.

falsely inflating profits.¹⁵¹ The SEC alleges that Johnston tipped Valvani with material nonpublic information relating to FDA approvals. Valvani traded in advance of the public announcements of the approvals, allegedly making nearly \$32 million. The SEC alleged that Plaford received confidential information from Valvani about Medicare reimbursement rates, and made nearly \$300,000 in illicit profits on the trading.

The SEC has also alleged Lumiere and Plaford engaged in a fraudulent scheme to inflate profits using sham broker quotes, and the “fund consequently reported artificially inflated returns and monthly net asset values, and paid out more than \$5.9 million in inflated management and performance fees to its investment adviser.”¹⁵² Plaford has cooperated with the SEC’s investigation.

The DOJ brought parallel criminal actions against the four defendants. Plaford and Johnston pleaded

guilty to seven and four counts, respectively, including securities fraud and wire fraud. Noting the continued focus on investigating insider trading, FBI Assistant Director-in-Charge Diego Rodriguez said, “As alleged, the defendants conspired and schemed over six years to obtain insider information from the FDA on the status of approvals for generic drugs in order to take that information and use it to make securities trades. Additionally, some of those same defendants schemed to defraud investors from an fixed-income fund by deceptively mismarking the value of certain securities. Sadly, these are schemes we see time and time again, where lies and use of nonpublic information profits those conducting the crimes and everyday investors lose out.”¹⁵³

SEC v. William T. Walters and Thomas C. Davis as Defendants and The Walters Group, Nature Development B.V., and Philip A. Mickelson as Relief Defendants, 16-cv-3722 (S.D.N.Y. May 19, 2016)

U.S. v. William T. Walters, 16-cr-338 (S.D.N.Y. May 19, 2016)

On May 19, 2016, the SEC and the DOJ announced charges against William T. Walters (“Walters”), a professional sports gambler, and Thomas C. Davis (“Davis”), the former chairman of the board of Dean Foods, in connection with

an insider trading scheme from 2008 through 2014.¹⁵⁴ The SEC also brought charges against relief defendants, including pro golfer Phil Mickelson (“Mickelson”). The SEC’s complaint alleges that Davis provided Walters with nonpublic confidential information about Dean Foods’ business plans. Walters then traded in advance of the company’s earnings announcements and allegedly made over \$40 million. Davis purportedly provided the information to Walters using secretive means, including prepaid cell phones, and made nearly \$1 million from Walters in exchange for providing the information. Mickelson is not charged with insider trading, but is a relief defendant alleged to have made almost \$1 million in illicit profits, which he used to pay back his gambling debt to Walters. Mickelson settled with the Staff, neither admitting nor denying the allegations, and agreed to pay full disgorgement and interest.

In the parallel criminal case, the DOJ charged Walters with conspiracy, securities fraud and wire fraud. Davis pleaded guilty to conspiracy, securities fraud, wire fraud, obstruction of justice and perjury. U.S. Attorney Preet Bharara stated, “[w]hen the board member of a Fortune 500 company feeds

151 Press Release, United States Securities and Exchange Commission, “Hedge Fund Managers and Former Government Official Charged in \$32 Million Insider Trading Scheme,” Rel. No. 2016-119 (June 15, 2016), <https://www.sec.gov/news/pressrelease/2016-119.html>; Press Release, United States Department of Justice, “Hedge Fund Portfolio Manager Sanjay Valvani and Former Portfolio Manager Stefan Lumiere Charged in Manhattan Federal Court,” (June 15, 2016), <https://www.justice.gov/usao-sdny/pr/hedge-fund-portfolio-manager-sanjay-valvani-and-former-portfolio-manager-stefan-lumiere>.

152 Press Release, United States Securities and Exchange Commission, “Hedge Fund Managers and Former Government Official Charged in \$32 Million Insider Trading Scheme,” Rel. No. 2016-119 (June 15, 2016), <https://www.sec.gov/news/pressrelease/2016-119.html>.

153 Press Release, United States Department of Justice, “Hedge Fund Portfolio Manager Sanjay Valvani and Former Portfolio Manager Stefan Lumiere Charged in Manhattan Federal Court,” U.S. Department of Justice (June 15, 2016), <https://www.justice.gov/usao-sdny/pr/hedge-fund-portfolio-manager-sanjay-valvani-and-former-portfolio-manager-stefan-lumiere>.

154 Press Release, United States Securities and Exchange Commission, “SEC Announces Insider Trading Charges in Case Involving Sports Gambler and Board Member,” Rel. No. 2016-92 (May 19, 2016), <https://www.sec.gov/news/pressrelease/2016-92.html>; Press Release, United States Department of Justice, “William T. “Billy” Walters Charged in Manhattan Federal Court With Insider Trading,” (May 19, 2016), <https://www.justice.gov/usao-sdny/pr/william-t-billy-walters-charged-manhattan-federal-court-insider-trading>.

inside information to a professional gambler who makes a fortune on well-timed trades in that company's stock, that is a form of corruption – the corruption of our markets. And we don't let corruption stand. We intend to prove every one of these allegations in a court of law."¹⁵⁵

Wining and Dining Considered Personal Benefits for Insider Trading

On May 26, 2016, the First Circuit issued its decision in *United States v. Parigian* ("Parigian"), finding that gifts in wine, steak and visits to masseurs are considered types of personal benefits needed to establish the requisite breach of duty in an insider trading action.¹⁵⁶ *Parigian* involved the defendant acting on allegedly nonpublic, material information that his golfing buddy received from an unidentified corporate insider.¹⁵⁷ Defendant Parigian was indicted for criminal securities fraud, under a theory that pressed that Parigian knew or should have known that his golfing buddy breached a duty of trust and confidence, and ultimately benefitted by doing so.¹⁵⁸ These benefits included steak dinners, wine and visits to a massage parlor, as well as golf outings.¹⁵⁹ Parigian's

motion to dismiss the indictment was ultimately denied.¹⁶⁰

The court held that Parigian waived any challenge to the indictment on the allegedly improper use of the "knew or should have known" standard because he did not raise the issue in the District Court or preserve it for appeal.¹⁶¹ The court noted that, in the criminal context, the "'knew or should have known' formulation runs up against a decades-long presumption that the government must prove that the defendant knew the facts that made his conduct illegal."¹⁶² While recognizing that the Sixth and Seventh Circuits previously applied the "knew or should have known" standard, the First Circuit found that "[t]he better view is that there is simply no reason why the *mens rea* requirement of scienter that routinely and presumptively applies in criminal cases would not apply in this criminal case where Congress has given no indication that it should not."¹⁶³

The court also examined whether the alleged insider and tipper shared a duty of trust and confidence, and if Parigian knew or should have known that the tips to him breached that duty.¹⁶⁴ Although Parigian claimed that he could not mount a defense at trial regarding the relationship between the executive and the tipper, the court

noted the government's allegations that Parigian was aware of the relationship between the tipper and the insider, and knew or should have known that the information was material and nonpublic because of his own actions following the tip: that Parigian deleted his emails.¹⁶⁵

Lastly, the court looked at the Circuit split on what constitutes a "personal benefit" that a tipper needs in order to constitute the tip as a breach of duty. The court noted that the indictment allegations that Parigian and the tipper were friends and that the tipper requested and promised "various tangible luxury items in return for the tips" was "enough under our precedent."¹⁶⁶ In doing so, the court seems to be closer to the Ninth Circuit's decision in *Salman*¹⁶⁷ than the Second Circuit's decision in *Newman*.¹⁶⁸

155 Press Release, United States Department of Justice, "William T. 'Billy' Walters Charged in Manhattan Federal Court With Insider Trading," (May 19, 2016), <https://www.justice.gov/usao-sdny/pr/william-t-billy-walters-charged-manhattan-federal-court-insider-trading>.

156 *United States v. Parigian*, No. 15-1994, 2016 WL 3027702 (1st Cir. May 26, 2016).

157 *Id.* at *1.

158 *Id.*

159 *Id.* at *2.

160 *Id.* at *1.

161 *Id.* at *3.

162 *Id.* at *4.

163 *Id.*

164 *Id.* at *5.

165 *Id.* at *7.

166 *Id.* at *8.

167 *United States v. Salman*, 792 F.3d 1087, 1094 (9th Cir. 2015).

168 *United States v. Newman*, 773 F.3d 438, 450 (2d Cir. 2014).



Settlements

According to recent analysis conducted by NERA Economic Consulting, the median settlement value has increased marginally from \$7.3 million in 2015 to \$7.8 million as of June 2016. Although the median settlement value has yet to reach the \$12.3 million value achieved in 2012, settlement values continue to increase year-over-year from 2014 to present.

In the first half of 2016, the SEC continued its strong enforcement trend, sending a clear message that not only is corporate oversight critically important, but the lack thereof would not be tolerated by the agency. The SEC's stance has led to continued settlements and/or penalties, particularly from financial sector defendants.

Indeed, at the start of the year, on January 14, 2016, the SEC announced that Goldman, Sachs & Co. ("Goldman") agreed to pay \$15 million to settle federal regulation violations.¹⁶⁹ The SEC found that Goldman was regularly asked by customers to locate stock for short selling, but that Goldman "violated Regulation SHO by improperly providing locates to customers where it had not performed an adequate review of the securities to be located."¹⁷⁰ These locates were "inaccurately recorded in the firm's locate log," which should have reflected "the basis upon which Goldman Sachs has given

169 Press Release, United States Securities and Exchange Commission, "SEC Charges Goldman Sachs With Improper Securities Lending Practices," Rel. No. 2016-9 (July 6, 2016), <https://www.sec.gov/news/pressrelease/2016-9.html>.

170 *Id.*

out locates."¹⁷¹ The SEC ultimately determined that Goldman not only provided "incomplete and unclear responses" in response to a 2013 SEC examination, which "questioned the firm's securities lending practices," but also "violated Rule 203(b)(1) of Regulation SHO and Section 17(a) of the Securities Exchange Act."¹⁷² Without admitting or denying the findings, Goldman consented to the SEC's order and agreed to pay the \$15 million penalty.

Just days later, on January 20, 2016, the SEC announced that Ocwen Financial Corp. ("Ocwen") agreed to settle charges that it misstated financial results by using a flawed methodology to value mortgage assets.¹⁷³ Ocwen agreed to a \$2 million penalty "after an SEC investigation found that the company inaccurately disclosed to investors that it independently valued these assets at fair value under U.S. Generally Accepted Accounting Principles (GAAP)."¹⁷⁴ The SEC found that Ocwen "failed to review the methodology with company management or its outside auditor, and the related party's valuation deviated from fair value measures."¹⁷⁵ The SEC ultimately determined that "Ocwen released inaccurate financial statements because its internal controls were

171 *Id.*

172 *Id.*

173 Press Release, United States Securities and Exchange Commission, "Paying Penalty for Misstated Financial Results," Rel. No. 2016-13 (July 6, 2016), <https://www.sec.gov/news/pressrelease/2016-13.html>.

174 *Id.*

175 *Id.*

inadequate and its audit committee failed to scrutinize whether the methodology was an appropriate way to measure fair value."¹⁷⁶ Ocwen was found to have violated Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11 and 13a-13.¹⁷⁷

On January 31, 2016, the SEC announced that Barclays Capital Inc. ("Barclays") and Credit Suisse Securities (USA) LLC ("Credit Suisse") agreed to settle separate cases alleging that they violated federal securities laws while operating alternative trading systems known as dark pools. Barclays admitted wrongdoing and agreed to settle the charges by paying \$35 million in penalties to the SEC and the New York Attorney General ("NYAG") for a total of \$70 million. Similarly, Credit Suisse agreed to settle the charges by paying a \$30 million penalty to the NYAG, \$30 million to the SEC and \$24.3 million in prejudgment interest and disgorgement to the SEC, for an \$84.3 million total. The SEC found that both firms failed to adequately police their dark pools.¹⁷⁸ These cases represent the most recent in a series of SEC enforcement actions involving dark pools and other alternative trading systems.¹⁷⁹

176 *Id.*

177 *Id.*

178 Press Release, United States Securities and Exchange Commission, "Barclays, Credit Suisse Charged With Dark Pool Violations," Rel. No. 2016-16 (July 6, 2016), <https://www.sec.gov/news/pressrelease/2016-16.html>.

179 *Id.*

The SEC's trend continued through June. On June 8, 2016, for example, the SEC announced that Morgan Stanley Smith Barney LLC ("Morgan Stanley") agreed to pay a \$1 million penalty, to settle charges associated with its failure to protect client data, some of which was ultimately offered for sale online.¹⁸⁰ The SEC "issued an order finding that Morgan Stanley failed to adopt written policies and procedures reasonably designed to protect customer data."¹⁸¹ Because of the alleged failures, a former employee accessed and transferred client data from approximately 730,000 Morgan Stanley accounts to his personal server, which was eventually hacked by third parties.¹⁸²

According to the SEC's settlement order, "federal securities laws require registered broker-dealers and investment advisers to adopt written policies and procedures reasonably designed to protect customer records and information."¹⁸³ The SEC determined, among other things, that Morgan Stanley: (1) "did not have effective authorization modules for more than 10 years to restrict employees' access to customer data based on each employee's legitimate business need"; (2) "did not audit or test the relevant authorization modules, nor did it monitor or analyze employees' access to and

use of the portals"; and (3) had "policies and procedures [that] were not reasonable."¹⁸⁴ Morgan Stanley ultimately agreed to settle the charges without admitting or denying the findings.

The SEC is increasingly looking behind firm doors to ensure that proper oversight, policies and procedures are being followed. As these enforcement actions continue, it behooves any financial firm to ensure that it implements best practices and industry standards in its operations, to avoid the risk of potential penalties.

¹⁸⁰ Press Release, United States Securities and Exchange Commission, "SEC: Morgan Stanley Failed to Safeguard Customer Data," Rel. No. 2016-112 (July 6, 2016), <https://www.sec.gov/news/pressrelease/2016-112.html>.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*



Investment Adviser and Hedge Fund Cases

In the first half of 2016, the SEC announced enforcement actions, as well as settlements, with registered investment advisers and hedge fund managers. These actions derived from misrepresentations about the calculation of fees and fund strategy and performance, misstatements in marketing materials, and the defrauding of investors by the misappropriation of funds collected for investment.

In the Matter of Equinox Fund Management, LLC (“Equinox”)

On January 19, 2016, the SEC announced a settlement with Equinox, an investment adviser specializing in managed futures, related to allegations that Equinox calculated and charged fees contrary to the method described in the registration statements of its managed futures fund – the Frontier Fund (“TFF”).¹⁸⁵

Equinox managed approximately \$268 million in assets as a commodity pool operator to TFF, which had 15,000-20,000 investors and between \$800 million and \$1 billion in net assets. TFF operated as a series of trusts consisting of numerous trading strategies across these series with each valued separately. Equinox charged each series fees, including management fees. Among other charges settled

¹⁸⁵ *In the Matter of Equinox Fund Management, LLC*, Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Section 21C of the Securities Exchange Act of 1934, and Section 203(e) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order, Sec. Act Rel. No. 10004 (Jan. 19, 2016), <https://www.sec.gov/litigation/admin/2016/33-10004.pdf>.

herein, TFF filed registration statements stating that those fees were based on each series’ NAV. Equinox, however, instead actually charged based on the notional value of the assets it managed in each series, a far higher number that included the leverage used. Through this arrangement, Equinox obtained an additional \$5.4 million in management fees over what it would have obtained had it been charging fees based on the NAV.

Pursuant to the settlement, the SEC sanctioned Equinox, and the firm agreed to pay \$5.4 million in disgorgement, \$600,000 in interest and a \$400,000 civil penalty.

In the Matter of Peter Kuperman (“Kuperman”) and QED Benchmark Management, L.L.C. (“QED”)

Furthering the trend of SEC actions in 2016 relating to misrepresentations, on January 28, 2016, the SEC announced a settlement with an investment advisory firm, QED, and Kuperman, a hedge fund manager, in connection with allegations that they misled investors about the strategy and performance of QED’s fund, QED Benchmark L.P. (the “Fund”).¹⁸⁶

¹⁸⁶ *In the Matter of Peter Kuperman and QED Benchmark Management, L.L.C.*, Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Section 8A of the Securities Act of 1933, Section 21C of the Securities Exchange Act of 1934, Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order, Sec. Act of 1933 Rel. No. 10009 (Jan. 28, 2016), <https://www.sec.gov/litigation/admin/2016/33-10009.pdf>.

Kuperman was QED’s sole owner and principal and was wholly responsible for soliciting and making communications with investors, and making the Fund’s investment decisions. The Fund’s offering memoranda and limited partnership agreement stated that the Fund could not invest more than 20 percent of its assets in one security and that no more than 5 percent could be invested in an illiquid security. To the contrary, however, the Fund invested nearly all its assets in a single penny stock that rarely traded. Kuperman provided to the Fund’s administrator unsupported share valuations, massively inflating the stock’s actual value.

In connection with the settlement, Kuperman agreed to pay compensation to the Fund’s investors in the amount of \$2.88 million and a \$75,000 civil penalty, and was barred from the industry.

SEC v. Joseph Andrew Paul (“Paul”), John D. Ellis (“Ellis”), Jr., James S. Quay (“Quay”), a/k/a “Stephen Jameson,” and Donald H. Ellison

On April 1, 2016, the SEC filed a complaint against four individuals (“Defendants”) in connection with a scheme aimed at senior citizens that included bogus performance data and other misstatements in marketing materials for investment advisory firm Paul-Ellis Investment Associates LLC (“PEIA”).¹⁸⁷

¹⁸⁷ *SEC v. Joseph Andrew Paul, John D. Ellis, Jr., James S. Quay, a/k/a “Stephen Jameson,” and Donald H. Ellison*, No. 16-cv-01326 (E.D.Pa. Filed Apr. 1, 2016), <https://www.sec.gov/litigation/complaints/2016/comp23510.pdf>.

Among other things, certain Defendants claimed PEIA managed \$150 to \$164 million and generated returns in the range of 8.5 percent to more than 56 percent. In actuality, however, the firm never managed more than \$4 million, and the returns were grossly overstated. Defendants Paul and Ellis copied most of the investment strategy information from another investment adviser's website and pasted it onto PEIA's site. The Defendants raised funds that they used for personal gain and never invested the money.

Defendant Quay falsely represented himself as an attorney under the name "Stephen Jameson." Quay had been an attorney but was disbarred in 2005 for tax fraud. The SEC previously sued Quay for securities fraud in 2012, and he served time in jail for failure to pay related disgorgement and other penalties.

The SEC brought claims for relief pursuant to various Exchange Act and Advisers Act sections and seeks to bar the Defendants, disgorgement and civil penalties. As of the date of this Report, the Defendants have not submitted an answer or other direct response to the complaint.

SEC v. Richard W. Davis, Jr. ("Davis") and Various Relief Defendants

On June 2, 2016, the SEC filed a complaint against Davis, an investment adviser, alleging he defrauded investors by secretly steering money into companies he owned or operated (the "Related Entities").¹⁸⁸

¹⁸⁸ *SEC v. Davis, et al.*, 16-cv-00285 (W.D.N.C. Filed June 2, 2016), <https://www.sec.gov/litigation/complaints/2016/comp-pr2016-104.pdf>.

It was alleged that from at least January 2008 through February 2015, Davis acted through two unregistered pooled investment vehicles to raise \$11.5 million from at least 85 investors through unregistered sales of securities. Instead of investing the investors' funds in real estate or mineral rights as promised, Davis caused the investment vehicles to enter business transactions with companies Davis owned or controlled and did so without disclosing the conflicts of interest. Since 2010, Davis reported to investors that their investments had not gone down in value, but the primary assets held by one of the investment vehicles were loans that had been in default for years. Davis also reported to investors that their investments were increasing in value, but had never undertaken a valuation of the underlying investments.

Davis entered into a consent judgment on June 2, 2016 (the "Consent").¹⁸⁹ Under the Consent, Davis must disgorge all gains plus a civil penalty, which are both undetermined amounts and will be decided by the court. In any disciplinary proceeding before the SEC, Davis may not contest the complaint's factual allegations. The court appointed a receiver to administer several of the Related Entities. Default judgment was found against them¹⁹⁰ and the receiver

¹⁸⁹ Plaintiff's Unopposed Motion for Entry of Partial Summary Judgment as to Defendant Richard W. Davis, Jr., *SEC v. Davis, et al.*, 16-cv-00285 (D.E. 2) (W.D.N.C. Filed June 2, 2016).

¹⁹⁰ Clerk's Default as to Certain Relief Defendants, *SEC v. Davis, et al.*, 16-cv-00285 (D.E. 37) (W.D.N.C. Filed July 5, 2016).

filed a motion to sell their assets.¹⁹¹ Attorneys for two of the Related Entities filed notices of appearance, and those companies must answer the complaint by August 15, 2016.¹⁹²

¹⁹¹ Receiver's Motion for Order Establishing Procedures for Miscellaneous Motions; Procedures for Sale of Assets; and Case Closing Procedures, *SEC v. Davis, et al.*, 16-cv-00285 (D.E. 40) (W.D.N.C. Filed July 8, 2016).

¹⁹² Order Granting Motion for Extension of Time to Answer, *SEC v. Davis, et al.*, 16-00285 (D.E. 34) (W.D.N.C. Filed June 28, 2016).



CFTC Cases and Developments

The U.S. Commodity Futures Trading Commission (“CFTC”) oversees the nation’s futures, options and swaps markets, seeking to protect market participants from fraud, manipulation and abusive practices, and to protect the public and the economy from systemic risk related to derivatives. With the passage of the Dodd-Frank Act, its budget and power have been increasing as a federal regulator.

Thus far in 2016, the CFTC has filed numerous actions focusing on spoofing, benchmark manipulation, anti-fraud enforcement and compliance with regulatory requirements. The CFTC has continued to bring actions to enforce new authorities granted by Congress in the Dodd-Frank Act, including enforcement of the Commodity Exchange Act’s (“CEA”) anti-spoofing clause. It has also continued its prosecution of benchmark rate manipulation cases, imposing \$425 million in penalties against Citibank, N.A., for attempted manipulation of the London Interbank Offered Rate (“LIBOR”) and the U.S. Dollar International Swaps and Derivatives Association Fix (“ISDAFIX”) benchmark rates. Notably, on April 4, 2016, the CFTC announced an award of more than \$10 million to a whistleblower who provided key information that led to a successful CFTC enforcement action. This award is the CFTC’s third whistleblower award, and it is exponentially larger than either the CFTC’s award of \$240,000 in May 2014 or its award of \$290,000 in September 2015.

Spoofing

As part of the Dodd-Frank Act, Congress provided the CFTC with new authorities to fight “spoofing,” the manipulation and market-disrupting tactic defined as entering an order with the intent to cancel it before it is consummated in a complete transaction. Specifically, Section 747 of the Dodd-Frank Act amended the CEA to prohibit disruptive trading practices in futures, options or swaps trading. Congress added Section 4c(a) (5) to the CEA, which makes it unlawful for any person to engage in any trading practice or conduct on any exchange that constitutes spoofing. Congress also amended Section 6(c) of the CEA to prohibit the employment or attempted employment of any manipulative device or contrivance with any swap or commodity trade.

In April 2016, a federal court issued a Consent Order imposing a permanent injunction against CFTC defendants Heet Khara and Nasim Salim, prohibiting them from engaging in spoofing in violation of the CEA. The Consent Order requires defendants to pay a civil penalty of approximately \$2.6 million to settle CFTC charges of spoofing in the gold and silver futures markets. According to the Consent Order, defendants regularly placed large aggregate orders for gold and silver contracts on the Commodity Exchange opposite smaller orders, and defendants then cancelled the large orders after the smaller orders were executed. According to the CFTC’s director of enforcement, Aitan Goelman, “Spoofing undermines public confidence in our markets, and the CFTC will

continue to aggressively pursue wrongdoers.”¹⁹³ We can expect additional spoofing investigations in the future.

Further, it is worth noting that the CFTC’s pursuit of spoofing actions continues to extend into the heart of corporate America, as demonstrated by its ongoing litigation against Kraft. Earlier this July, the Northern District of Illinois denied Kraft’s attempt to appeal the court’s refusal to dismiss the CFTC’s suit, alleging that Kraft manipulated the wheat market.¹⁹⁴ Critically, clients can no longer dismiss the CFTC as an underpowered agency, but must recognize the potential impact of its efforts to flex its litigation muscle and should implement corresponding corporate policies/initiatives as a result.

LIBOR and ISDAFIX Benchmark Rates

The CFTC has imposed over \$5 billion in penalties in 17 actions against banks and brokers for benchmark rate abuses. Of this amount, \$1.8 billion in penalties has been imposed on six banks for misconduct relating to foreign exchange benchmarks, and over \$3.2 billion has been imposed for misconduct relating to ISDAFIX, LIBOR, Eurobor and other interest benchmarks.

¹⁹³ Press Release, Commodity Futures Trading Commission, “Federal Court Orders UAE Residents Heet Khara and Nasim Salim to Pay Combined Civil Penalties of \$2.69 Million for Spoofing in the Gold and Silver Futures Markets,” Rel. No. PR7353-16 (Apr. 5, 2016).

¹⁹⁴ See *U.S. Commodity Futures Trading Commission v. Kraft Foods Group Inc. et al.*, No. 1:15-cv-02881 (N.D. Ill. 2016).

The CFTC has continued to prosecute and settle interest rate manipulation cases against large financial institutions. In May 2016, the CFTC filed and simultaneously settled two enforcement actions against Citibank, N.A. (“Citibank”).¹⁹⁵ In the first action, the CFTC ordered Citibank, to pay a \$250 million civil monetary penalty for its attempt to manipulate ISDAFIX, a global benchmark for interest rate products. Beginning in January 2007 and continuing through January 2012, Citibank’s traders attempted to manipulate and made false reports concerning ISDAFIX submissions in order to benefit the bank’s trading positions at the expense of its derivatives counterparties.

In the second action, the CFTC ordered Citibank and two of its Japanese affiliates to pay a penalty of \$175 million relating to abuses of LIBOR and the Euroyen Tokyo Interbank Offered Rate (“Euroyen TIBOR”).¹⁹⁶ Citibank and its affiliates attempted to manipulate the benchmarks by filing false reports that did not accurately reflect Citibank’s assessment of the costs of borrowing unsecured funds, with the intent to benefit its derivative trading positions and

¹⁹⁵ Press Release, Commodity Futures Trading Commission, “CFTC Orders Citibank to Pay \$250 Million for Attempted Manipulation and False Reporting of U.S. Dollar ISDAFIX Benchmark Rates,” Rel. No. PR7371-16 (May 25, 2016).

¹⁹⁶ Press Release, Commodity Futures Trading Commission, “CFTC Orders Citibank, N.A. and Japanese Affiliates to Pay \$175 Million Penalty for Attempted Manipulation of Yen LIBOR and Euroyen TIBOR, and False Reporting of Euroyen TIBOR and U.S. Dollar LIBOR,” Rel. No. PR7372-16 (May 25, 2016).

to protect Citibank’s reputation during the financial crisis in 2008. The order placed a high priority on cooperation with the CFTC, in that it recognized that Citibank self-reported the misconduct relating to Euroyen TIBOR, but also recognized that Citibank and its affiliates continued to attempt to manipulate LIBOR after the bank learned that the CFTC was investigating the bank’s LIBOR submission practices.

Anti-Fraud Enforcement

In 2016, the CFTC has filed numerous enforcement actions against persons who sought to defraud retail customers, commodity pool participants and others.¹⁹⁷ For example, in June 2016, the CFTC filed an enforcement action in the U.S. District Court for the Southern District of New York, charging Haena Park and companies she owned with fraudulently operating a commodity pool and misappropriating assets.¹⁹⁸ The complaint alleges that from January 2010 through the present, defendants fraudulently solicited more than \$23 million from the public to participate in a commodity pool that traded in futures contracts and then hid losses of more than \$18 million by falsely representing to pool participants that their funds were trading at a profit. The CFTC has filed a number of

¹⁹⁷ Press Release, Commodity Futures Trading Commission, “CFTC Releases Annual Enforcement Results for Final Year 2015,” Rel. No. PR7274-15 (Nov. 6, 2015).

¹⁹⁸ Press Release, Commodity Futures Trading Commission, “CFTC Charges Haena Park and Her Companies Phaetra Capital GP LLC, Phaetra Capital Management LP, and Argenta Group LLC with Misappropriation and Fraud,” Rel. No. PR7382-16 (June 3, 2016).

other enforcement actions around the country for similar violations concerning fraudulent solicitation and the misappropriation of assets.¹⁹⁹

The CFTC has also settled or received judgment against numerous other wrongdoers for commodity pool fraud and misappropriation. For example, in January 2016, the CFTC was awarded a \$500 million default judgment against Nikolai S. Battoo (“Battoo”) and his companies for making fraudulent misrepresentations and omissions that hid significant losses sustained by Battoo’s funds from exposure to the bankruptcy of MF Global, Inc., and Bernard L. Madoff Investment Securities LLC.²⁰⁰

Various District Courts around the country have ordered additional multimillion-dollar penalties for similar violations. For example, in June 2016, the U.S. District Court for the Middle District of Florida entered a final judgment requiring defendant Dorian Garcia (“Garcia”)

¹⁹⁹ See, e.g., Press Release, Commodity Futures Trading Commission, “CFTC Charges Canadian Resident Ryan S. Magee with Fraud and Acting as an Unregistered Commodity Pool Operator,” Rel. No. PR7330-16 (Feb. 19, 2016); and Press Release, Commodity Futures Trading Commission, “CFTC Charges Virginia Resident Tracy Lee Thomas and His Firm, Cayman Islands-Based Marbury Advisors Inc., with Fraudulently Soliciting over \$1.2 million in a Commodity Futures Scheme,” Rel. No. PR7348-16 (Mar. 25, 2016).

²⁰⁰ Press Release, Commodity Futures Trading Commission, “Federal Court in Illinois Orders Approximately \$500 Million in Sanctions against Defendant Nikolai S. Battoo and His Three Companies for Committing a Global Commodity Futures and Options Fraud,” Rel. No. PR7306-16 (Jan. 13, 2016).

and his related companies to pay approximately \$17 million to defrauded investors victimized in a Ponzi scheme that Garcia and the companies operated between 2010 and 2015.²⁰¹ Unfortunately, Ponzi schemes continue to victimize commodity pool participants.²⁰²

Whistleblowers

The CFTC's Whistleblower Program was created by Section 748 of the Dodd-Frank Act and provides monetary awards to persons who voluntarily report violations of the CEA, if the information leads to a successful CFTC enforcement action resulting in more than \$1 million in monetary sanctions. Whistleblowers are eligible to receive between 10 percent and 30 percent of the monetary sanctions collected, and all awards are paid from the CFTC's Customer Protection Fund that is financed entirely by monetary sanctions.

In January 2016, the CFTC launched a new website for its Whistleblower Program, www.whistleblower.gov.²⁰³ According to the CFTC's

Chairman, Timothy Massad, "We want to provide people, whether they are whistleblowers, attorneys or members of the public, the information they need to easily understand our Whistleblower Program and to make the process of filing a tip and applying for an award more intuitive and straightforward." Thus far, the new program appears to be working.

On April 4, 2016, the CFTC announced an award of more than \$10 million to a whistleblower who provided key information that led to a successful CFTC enforcement action.²⁰⁴ As noted above, this award is exponentially larger than the CFTC's two prior awards of \$240,000 in May 2014 and \$290,000 in September 2015. In fact, it is a game changer in that the CFTC, after a slow start, has now joined the SEC in awarding substantial whistleblower bounties.²⁰⁵ The law prohibits the CFTC from disclosing information that might reveal a whistleblower's identity, but the CFTC must have recovered between approximately \$33.5 million and \$100 million to result in a \$10 million award. And given the size of the award, the subject matter likely regarded price manipulation, trading ahead or front-running customer orders, wash sales, Ponzi schemes or foreign exchange fraud.

204 Press Release, Commodity Futures Trading Commission, "CFTC Announces Whistleblower Award of More Than \$10 Million," Rel. No. PR7351-16 (Apr. 4, 2016).

205 See Tracy Cole, Mark A. Kornfeld, and Jacquelyn Rovine, "This Is Not a Test: The CFTC Joins the SEC and IRS in Awarding Substantial Whistleblower Bounties," BakerHostetler Client Alert (April 14, 2016), <https://www.bakerlaw.com/alerts/this-is-not-a-test-the-cftc-joins-the-sec-and-irs-in-awarding-substantial-whistleblower-bounties>.

Conflict of Interest and Disclosure Violations

In March 2016, the CFTC ordered Equinox Fund Management, LLC ("Equinox"), a commodity pool operator, to pay over \$5.65 million to settle charges relating to material misstatements and omissions in its disclosure documents and annual and quarterly reports concerning its operations of a multi-adviser commodity pool, the Frontier Fund ("TFF"). The CFTC found that TFF's disclosure documents prepared by Equinox wrongly disclosed the basis on which management fees were charged. The disclosure documents stated that Equinox charged management fees based upon net asset values, when Equinox actually charged management fees based upon the value of the notional assets it was managing, which led to management fee overcharges totaling \$5.4 million.²⁰⁶

Reporting Violations

The CFTC has continued to bring actions charging reporting violations, under the Dodd-Frank Act's reporting requirements for physical commodity swap positions. For example, in March 2016, the CFTC ordered JPMorgan Ventures Energy Corp. and JPMorgan Chase Bank, N.A. (together, "JPMorgan"), to pay a penalty of \$225,000 to settle charges relating to JPMorgan's failure to comply with its obligations to submit accurate large trader

206 Press Release, Commodity Futures Trading Commission, "CFTC Orders Equinox Fund Management, LLC to Pay over \$5.65 Million for Material Misstatements and Omissions," Rel. No. PR7344-16 (Mar. 16, 2016).

201 Press Release, Commodity Futures Trading Commission, "Federal Court Orders Nearly \$17.5 Million in Sanctions against Naples, Florida Resident Dorian Garcia and his Companies for Solicitation Fraud, Misappropriation, and Registration Violations in Operating a Ponzi Scheme," Rel. No. PL7400-16 (July 5, 2016).

202 Press Release, Commodity Futures Trading Commission, "Federal Court Orders New York Firm 4X Solutions, Inc. and its Principal, Whileon Chay, to Pay More than \$10 Million in Disgorgement and a Civil Monetary Penalty for Forex Fraud Ponzi Scheme," Rel. No. PR7321-16 (Feb. 8, 2016).

203 Press Release, Commodity Futures Trading Commission, "CFTC Launches Whistleblower Program's Website," Rel. No. PR7312-16 (Jan. 21, 2016).

reports for physical commodity swap positions, in violation of Section 4s(f) of the CEA.²⁰⁷

CHS Hedging acted willfully, which likely led to an increased penalty for both parties.²⁰⁹

Additionally, in July 2016, the CFTC ordered Barclays Bank PLC (“Barclays”) to pay a \$560,000 penalty for similar violations under Section 4s(f) of the CEA. As stated in the respective orders, the CFTC believes large trader reporting for physical commodity swaps is essential to the CFTC’s ability to conduct effective surveillance of markets in U.S. physical commodity futures and economically equivalent swaps.²⁰⁸

In March 2016, the CFTC filed and simultaneously settled charges against CHS, Inc., and CHS Hedging, LLC (“CHS Hedging”), arising out of CHS, Inc.’s failure to comply with its legal obligation to submit accurate monthly CFTC Form 204 Reports, regarding the composition of its fixed-price cash corn and soybean purchases and sales. The CFTC found that CHS Hedging aided and abetted CHS, Inc.’s violations and ordered both entities to jointly pay a \$1 million penalty. The CFTC further found that

²⁰⁷ Press Release, Commodity Futures Trading Commission, “CFTC Orders JPMorgan Ventures Energy Corp. and JPMorgan Chase Bank, N.A. to Pay a \$225,000 Penalty for Inaccurate Large Trader Reports for Physical Commodity Swaps Positions,” Rel. No. PR7347-16 (Mar. 23, 2016).

²⁰⁸ Press Release, Commodity Futures Trading Commission, “CFTC Orders London-Based Barclays Bank PLC to Pay a \$560,000 Penalty for Inaccurate Large Trader Reports for Physical Commodity Swaps Positions,” Rel. No. PR7401-16 (July 6, 2016).

²⁰⁹ Press Release, Commodity Futures Trading Commission, “CFTC Orders CHS, Inc. and CHS Hedging, LLC to Pay \$1 Million for Inaccurately Reporting Positions in Corn and Soybeans,” Rel. No. PR7337-16 (Mar. 9, 2016).



Securities Policy and Regulatory Developments

In a June 2, 2016, speech before the SEC Historical Society, SEC Chairman Mary Jo White highlighted how “between the implementation of the Dodd-Frank and JOBS Acts, and advancing an important range of discretionary mission critical initiatives, the SEC has undertaken probably the most complex and daunting period of rulemaking in its history.”²¹⁰ As described below, in the first half of 2016, the SEC has furthered its rulemaking in all of these areas.

In May, the SEC finished its JOBS Act rulemaking when it adopted amendments to implement JOBS Act changes for Exchange Act registration requirements. Further, Chairman White described the SEC as having now reached “the final phase of implementing the Dodd-Frank Act,” which has entailed the SEC’s proposal of rules for the Act’s “two major remaining areas”: (i) security-based swaps, with the SEC recently enacting cross-border security-based swap rules related to activity in the U.S.; and (ii) executive compensation, with the SEC proposing rules to restrict incentive-based compensation at large financial institutions.

In addition to its required rulemaking, the SEC also furthered some of its “most significant

initiatives of the past three years.”²¹¹ These initiatives include the SEC’s proposal to reform the structure of equity markets in that the SEC proposed a plan for a consolidated audit trail; disclosure effectiveness by way of the SEC’s recent issuance of proposed amendments to the definition of “smaller reporting companies;” and the strengthening of the technological systems and operations of modern equity markets through the SEC’s proposal of rules requiring investment advisers to adopt business continuity and transition plans.

SEC Adopts Final Rule Amending Exchange Act Registration Requirements Under the JOBS Act

On May 3, 2016, the SEC adopted final rule amendments, as mandated by the JOBS Act, which revised the requirements for registration, termination of registration and suspension of reporting obligations under Sections 12(g) and 15(d) of the Exchange Act.²¹² When a private company is required to

register a class of equity securities under Section 12(g), it essentially “goes public” without the benefits associated with an IPO. When it was enacted, the JOBS Act:

- Amended Section 12(g)(1) of the Exchange Act to require an issuer to register a class of equity securities (other than exempted securities) within 120 days after its fiscal year-end if, on the last day of its fiscal year, the issuer has assets totaling \$10 million and the class of equity securities is “held of record” by either: (i) 2,000 persons or (ii) 500 persons who are not accredited investors. The previous threshold had been 500 record holders without regard to accredited investor status;
- Established a separate registration threshold for banks and bank holding companies and savings and loan holding companies pursuant to which an issuer must register a class of equity securities (other than exempted securities) within 120 days after the last day of its fiscal year end if, on the last day of its fiscal year, the issuer has total assets of more than \$10 million and the class of equity securities is “held of record” by 2,000 or more persons, without regard to accredited investor status;
- Amended the Exchange Act to enable an issuer that is a bank, a bank holding company or a savings and loan holding company to terminate the registration of a class of securities under Section 12(g) or suspend reporting under Section 15(d)(1) if that class is held of record by fewer than 1,200 persons. For other issuers,

211 Testimony, SEC Chairman Mary Jo White, “Testimony on Oversight of the U.S. Securities and Exchange Commission Before the United States Senate’s Committee on Banking, Housing and Urban Affairs,” (June 14, 2016), <https://www.sec.gov/news/testimony/testimony-white-oversight-sec-06-14-2016.html>.

212 *Final Rule, Changes to Exchange Act Registration Requirements to Implement Title V and Title VI of the JOBS Act*, Securities Act Release No. 33-10075; Exchange Act Release No. 34-77757; File No. S7-12-14 (May 3, 2016), <https://www.sec.gov/rules/final/2016/33-10075.pdf>; Press Release, United States Securities and Exchange Commission, “SEC Adopts Amendments to Implement JOBS Act and FAST Act Changes for Exchange Act Registration Requirements,” Rel. No. 2016-81 (May 3, 2016), <https://www.sec.gov/news/pressrelease/2016-81.html>.

210 Speech, SEC Chairman Mary Jo White, “Remarks Before the SEC Historical Society – The Continuous Process of Optimizing the Equity Markets,” (June 2, 2016), <https://www.sec.gov/news/speech/the-continuous-process-of-optimizing-the-equity-markets.html>.

the threshold for termination of registration and suspension of reporting remains at 300 persons; and

- Amended the Exchange Act to exclude from the definition of “held of record,” for purposes of determining whether an issuer is required to register a class of equity securities, securities that are held by persons who received them pursuant to an “employee compensation plan” in transactions exempted from the registration requirements of Section 5 of the Securities Act.

The SEC’s Final Rules reflect and implement the statutory changes made by the JOBS Act. With regard to registration by issuers, the SEC’s Final Rules do not propose a new definition of “accredited investor,” and will instead rely on the existing definition of “accredited investor” contained in Securities Act Rule 501(a). Further, the SEC’s Final Rules dictate that the “accredited investor” determination would be made as of the last day of the fiscal year, rather than at the time of the sale of securities.

Additionally, the Final Rules established a non-exclusive safe harbor that an issuer can rely on in determining whether securities fit within “held of record exclusions.” The safe harbor provides that: (i) an issuer may deem a person to have received the securities pursuant to an employee compensation plan if such plan and the person who received the securities pursuant to the plan met the plan and participant conditions of Rule 701(c) under the Securities Act; and (ii) an issuer may, solely for the

purposes of Section 12(g) of the Exchange Act, deem the securities to have been issued in a transaction exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act if the issuer had a reasonable belief at the time of the issuance that the securities were issued in such a transaction.

With the adoption of these amendments, the SEC has completed all of the mandated rulemaking under the JOBS Act.

SEC Adopts Cross-Border Security-Based Swap Rules Related to Activity in the U.S.

On February 10, 2016, the SEC, under Dodd-Frank, adopted rules regarding the application of Title VII of Dodd-Frank, which created the framework for regulation of swap transactions, to cross-border security-based swap transactions and persons engaging in those transactions.²¹³ The Rules address how the definition of a “security-based swap dealer” applies to security-based swap dealing transactions between non-U.S. persons that are “arranged, negotiated or executed” in the United States.

²¹³ Final Rule, *Security-Based Swap Transactions Connected With a Non-U.S. Person’s Dealing Activity That Are Arranged, Negotiated, or Executed by Personnel Located in a U.S. Branch of Office or in a U.S. Branch or Office of an Agent; Security Based Swap Dealer De Minimis Exception*, Exchange Act Rel. No. 34-77104; File No. S7-06-15 (Feb. 10, 2016), <https://www.sec.gov/rules/final/2016/34-77104.pdf>; Press Release, United States Securities and Exchange Commission, “SEC Adopts Cross-Border Security-Based Swap Rules Regarding Activity in the U.S.,” Rel. No. 2016-27 (Feb. 10, 2016), <https://www.sec.gov/news/press-release/2016-27.html>.

The Rules provide that a non-U.S. person will be required to include in its calculations of whether it qualifies for the non-U.S. person’s de minimis exception threshold from registration as a security-based swap dealer any security-based swaps that are “arranged, negotiated or executed” through personnel of the non-U.S. person located in a U.S. branch or office or personnel of such person’s agent located in a U.S. branch or office.

Under the Rules, the term “personnel” will be interpreted similarly to the definition of “associated person” in Sections 3(a)(70) and 3(a)(18) of the Exchange Act, so that it “encompass[es] a broad range of relationships that can be used by firms to engage in and effect securities transactions, and is not dependent solely on whether a natural person is technically an ‘employee’ of the entity in question.” The terms “arrange, negotiate or execute” refer to “market-facing activity” for a particular transaction, and not the “internal functions” performed by personnel located in a U.S. branch or office.

SEC and Other Agencies Propose Incentive-Based Compensation Rules

On May 16, 2016, the SEC and five other federal agencies invited public comment on a proposed rule to prohibit incentive-based compensation arrangements that encourage inappropriate risk at covered financial institutions.²¹⁴ The deadline for comments was July 22, 2016.

The Proposed Rule was prescribed under Section 956 of Dodd-Frank, which requires the SEC and other agencies to jointly prescribe regulations or guidance with respect to incentive-based compensation practices at covered financial institutions. The Rule would apply to covered financial institutions with total assets of \$1 billion or more. The requirements are tailored based on assets with covered institutions, which include broker-dealers and investment advisers, and are divided into three categories: (i) Level 1: institutions with assets of \$250 billion or more; (ii) Level 2: institutions with assets between \$50 billion and \$250 billion; and (iii) Level 3: institutions with assets of \$1 billion to \$50 billion. The Proposed Rule applies to “covered persons,” such as any executive officer,

employee, director or principal shareholder who receives incentive-based compensation, or a “senior executive” or “significant risk-taker” who is not a “senior executive officer,” but may still expose a Level 1 or Level 2 institution to material financial loss.

All covered institutions would be subject to general prohibitions on incentive-based compensation arrangements that could encourage inappropriate risk-taking by providing excessive compensation or that could lead to a material financial loss. For instance, the Proposed Rule would require that the incentive-based compensation arrangements for certain covered persons of Level 1- and Level 2-covered institutions include deferral of payments, risk of downward adjustment and forfeiture, and clawback to appropriately balance risk and reward.

Additionally, any institution that would be covered by the Proposed Rule would be required to annually document the structure of incentive-based compensation arrangements and retain those records for seven years. Further, such an institution would be required to disclose information concerning incentive-based compensation arrangements to its appropriate federal regulator. Moreover, boards of directors of covered institutions would be required to conduct oversight of the incentive-compensation arrangements.

SEC Proposed a Plan for a Consolidated Audit Trail

On April 27, 2016, the SEC voted to publish for public comment a proposed national market system plan to create a single, comprehensive database, known as the consolidated audit trail, that would enable regulators to efficiently track all trading activity in the U.S. equity and options markets.²¹⁵ The plan came about because the SEC believes that the regulatory data infrastructure on which SROs and the SEC currently rely is “outdated and inadequate to effectively oversee a complex, dispersed and highly automated national market system.”

National securities exchanges and FINRA prepared the plan, which is required by the SEC’s July 2012 rule establishing the consolidated audit trail. Under the plan, a central repository would receive, consolidate, and retain trade and order data on equities orders, including both national market system securities and over-the-counter equity securities, from exchanges and broker-dealers. The plan also details methods by which SROs and broker-dealers would record and report information, along with processes to ensure accuracy, integrity and security for those reporting order data.

²¹⁴ Proposed Joint Rulemaking, *Incentive-based Compensation Arrangements*, Exchange Act Rel. No. 34-77776; File No. S7-07-16 (May 16, 2016), <https://www.sec.gov/rules/proposed/2016/34-77776.pdf>; Press Release, United States Securities and Exchange Commission, “Agencies Invite Comment on Proposed Rule to Prohibit Incentive-Based Pay that Encourages Inappropriate Risk-Taking in Financial Institutions,” Rel. No. 2016-89 (May 16, 2016), <https://www.sec.gov/news/press-release/2016-89.html>.

²¹⁵ Joint Industry Plan, Notice of Filing of the National Market System Plan Governing the Consolidated Audit Trail, Exchange Act Rel. No. 34-77724, File No. 4-698, <https://www.sec.gov/rules/sro/nms/2016/34-77724.pdf>; Press Release, United States Securities and Exchange Commission, “SEC Seeks Public Comment on Plan to Create A Consolidated Audit Trail,” Rel. No. 2016-77 (Apr. 27, 2016), <https://www.sec.gov/news/press-release/2016-77.html>.

SEC Proposes Amendments to Definition of “Smaller Reporting Company”

On June 27, 2016, the SEC voted to propose amendments to the definition of “smaller reporting company” that is used in the SEC’s rules and regulations.²¹⁶ The Proposed Amendments would expand the number of registrants that qualify as smaller reporting companies, and are intended to promote capital formation and reduce compliance costs for smaller registrants, as these smaller reporting companies would qualify for certain existing scaled disclosures provided in Regulation S-K and Regulation S-X.

The Proposed Amendments would enable a company with less than \$250 million of public float to provide scaled disclosures as a smaller reporting company, as compared with the \$75 million threshold under the current definition. Moreover, if a company does not have a public float, it would be permitted to provide scaled disclosures if its annual revenues are less than \$100 million, as compared with the current threshold of less than \$50 million in annual revenues.

²¹⁶ Proposed Rule, *Amendments to Smaller Reporting Company Definition*, Securities Act Rel. No. 33-10107; Exchange Act Rel. No. 34-78168; File No. S7-12-16 (June 27, 2016), <https://www.sec.gov/rules/proposed/2016/33-10107.pdf>; Press Release, United States Securities and Exchange Commission, “SEC Proposes Amendments to Smaller Reporting Company Definition,” Rel. No. 2016-131 (June 27, 2016), <https://www.sec.gov/news/pressrelease/2016-131.html>.

Furthermore, the Proposed Amendments would raise the thresholds under which a company that loses its “smaller reporting company” status may requalify as one. Under the Proposed Amendments, once a company exceeds the applicable \$250 million public float or \$100 million revenue threshold, it cannot again qualify as an SRC until its public float decreases below \$200 million or annual revenue decreases below \$80 million.

SEC Proposes Rule Requiring Investment Advisers to Adopt Business Continuity and Transition Plans

On June 28, 2016, the SEC proposed a new rule that would require SEC-registered investment advisers to adopt and implement written business continuity and transition plans.²¹⁷ The purpose of the Proposed Rule is to address operational risks that all investment advisers share, including technological failures with regard to systems and processes, and the loss of adviser or client data, personnel, or access to the adviser’s physical location(s) and facilities.

²¹⁷ Proposed Rule, *Adviser Business Continuity and Transition Plans*, Investment Act Rel. No. IA-4439; File No. S7-13-16 (June 28, 2016), <https://www.sec.gov/news/pressrelease/2016-133.html>; Press Release, United States Securities and Exchange Commission, “SEC Proposes Rule Requiring Investment Advisers to Adopt Business Continuity and Transition Plans,” Rel. No. 2016-133 (June 28, 2016), <https://www.sec.gov/news/pressrelease/2016-133.html>; Guidance Update, United States Securities and Exchange Commission, Division of Investment Management, “Business Continuity Plan for Registered Investment Companies,” No. 2016-04 (June 2016), <https://www.sec.gov/investment/im-guidance-2016-04.pdf>.

Business continuity and transition plans aid advisers in preserving the continuity of advisory services in the event of business disruptions, whether temporary or permanent, such as a natural disaster, cyberattack, technology failure, terrorist attack, the departure of key personnel, and similar events.

FINRA already requires business continuity plans of broker-dealers under its purview, and the CFTC has adopted similar regulations with respect to its swap dealers and major swap participants. With 12,000 registered investment advisers counseling 30 million clients and managing \$67 trillion in assets (up 140 percent in the past 10 years), the SEC proposes this Rule in an effort to minimize client and investor harm.

Under the Proposed Rule, the written business continuity and transition plans must be reasonably designed to address operational and other risks related to a significant disruption in the investment adviser’s operations. The plans would be required to address the following specified components: maintenance of systems and protection of data; pre-arranged alternative physical locations; communication plans; review of third-party service providers; and plan of transition in the event the adviser is winding down or is unable to continue providing advisory services. More specifically, for plans dealing with transitioning an adviser’s business to another, the Proposed Rule requires a transition plan to include: (i) policies to safeguard, transfer and/or distribute client assets; (ii) procedures to disseminate client-specific information about the

transition; (iii) information about the adviser's governance structure; (iv) identification of any available material resources; and (v) an assessment of any applicable law or contracts impacted by such a transition.

While the above elements would have to be addressed, the Proposed Rule would permit advisers to tailor the details of their plans based upon the complexity of their business operations and the risks attendant to their particular business models and activities. Further, the Proposed Rule would require SEC-registered investment advisers to make and keep all business continuity and transition plans that are currently in effect or have been in effect any time within the past five years, and to review the adequacy and effectiveness of their plans at least annually.

Any comments to the Proposed Rule are due on or before September 6, 2016.

BakerHostetler Securities Litigation and Regulatory Enforcement Contacts

National Contact

Marc D. Powers
212.589.4216
mpowers@bakerlaw.com

Chicago

William K. Kane
312.416.6211
wkane@bakerlaw.com

Cincinnati

Ted T. Martin
513.929.3416
tmartin@bakerlaw.com

Cleveland

Edmund W. Searby
216.861.7689
esearby@bakerlaw.com

Columbus

Thomas L. Long
614.462.2626
tlong@bakerlaw.com

Costa Mesa

George Mooradian
714.966.8800
gmooradian@bakerlaw.com

Denver

Lyle A. Wallace
303.764.4012
lwallace@bakerlaw.com

Houston

Paul S. Francis
713.646.1334
pfrancis@bakerlaw.com

Los Angeles

Michael R. Matthias
310.442.8802
mmatthias@bakerlaw.com

New York

Torello Calvani
212.589.4657
tcalvani@bakerlaw.com

Geoffrey H. Coll
212.589.4627
gcoll@bakerlaw.com

Jessie M. Gabriel
212.271.1508
jgabriel@bakerlaw.com

Mark A. Kornfeld
212.589.4652
mkornfeld@bakerlaw.com

Melissa L. Kosack
212.589.4274
mkosack@bakerlaw.com

Andrew W. Reich
212.589.4222
areich@bakerlaw.com

Brian W. Song
212.271.1505
bsong@bakerlaw.com

Orlando

Jerry R. Linscott
407.649.4024
jlinscott@bakerlaw.com

Seattle

Curt Roy Hine
206.332.1101
chineline@bakerlaw.com

Washington, D.C.

Jonathan R. Barr
202.861.1534
jbarr@bakerlaw.com

bakerlaw.com

Celebrating the 100th anniversary of its founding this year, BakerHostetler is a leading national law firm that helps clients around the world to address their most complex and critical business and regulatory issues. With five core national practice groups – Business, Employment, Intellectual Property, Litigation, and Tax – the firm has more than 940 lawyers located in 14 offices coast to coast. For more information, visit bakerlaw.com.

Baker & Hostetler LLP publications inform our clients and friends of the firm about recent legal developments. This publication is for informational purposes only and does not constitute an opinion of Baker & Hostetler LLP. Do not rely on this publication without seeking legal counsel.

© 2016 BakerHostetler®