

SEC and CFTC Enforcement Update

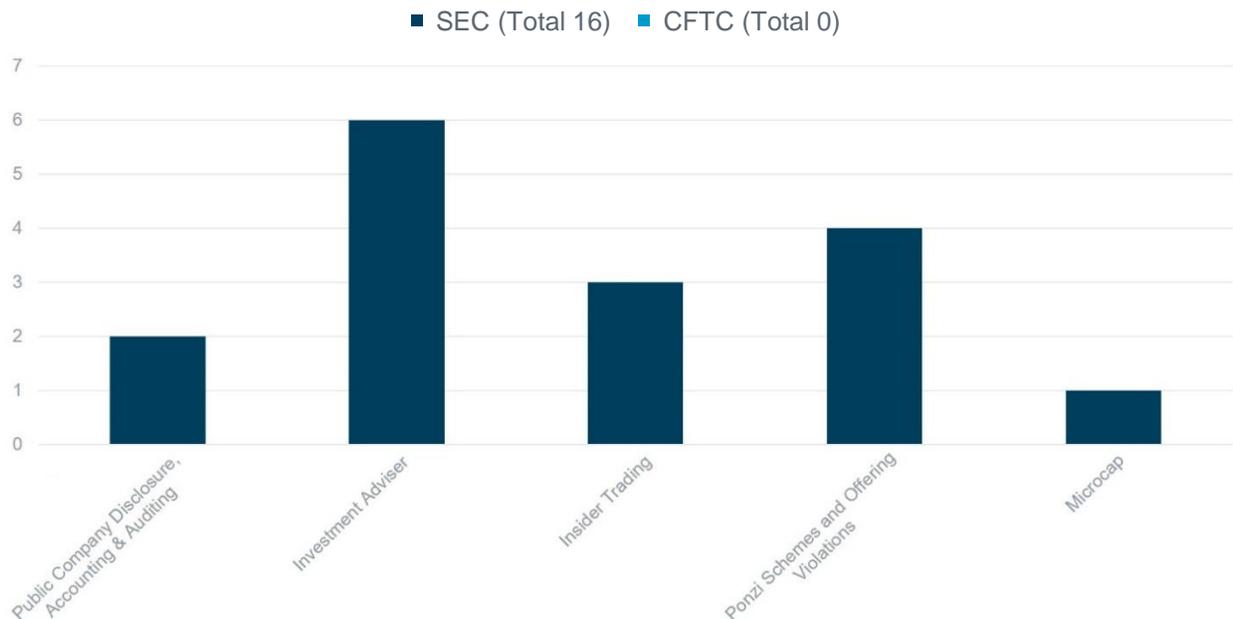
November 2020

In this edition of the newsletter, we discuss enforcement developments at the agencies during November 2020. November was a relatively slow month—the CFTC did not announce any enforcement actions, and the SEC filed 16 actions (excluding follow-on actions, bars and suspensions) against a combined total of 29 defendants and respondents.

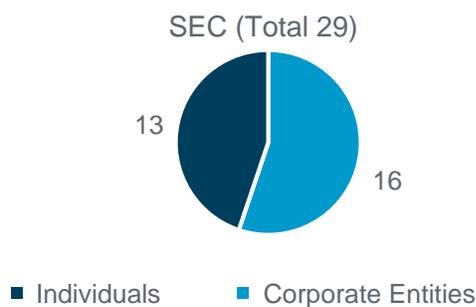
The SEC’s 16 actions spanned numerous case types, including public company accounting and controls, investment advisers, insider trading, and offering violations.

Actions Initiated by the SEC and CFTC in November 2020¹

Actions Categorized by Matter Type



Types of Defendants/Respondents



¹ Follow-on administrative proceedings, suspensions, bars, and delinquent filings excluded.

Key Cases and Developments

CFTC Issues Annual Enforcement Report

The CFTC Division of Enforcement released its Annual Report for fiscal year 2020. The CFTC noted that it brought a record number of enforcement actions, 113, compared to the prior high of 102 actions. The CFTC also noted that fiscal year 2020 included the agency's fourth-highest amount of total monetary awards (more than \$1.3 billion) and the most retail fraud actions brought in a fiscal year.

[CFTC Enforcement Division Annual Report](#)

SEC Settles with Five Advisory Firms for Unsuitable Sales of Complex Products

In re American Portfolios Financial Services, Inc. (A.P. Nov. 13, 2020, Settled); In re Benjamin F. Edwards & Company, Inc. (A.P. Nov. 13, 2020, Settled); In re Summit Financial Group, Inc. (A.P. Nov. 13, 2020, Settled); In re Securities America Advisors, Inc. (A.P. Nov. 13, 2020, Settled); In re Royal Alliance Associates, Inc. (A.P. Nov. 13, 2020, Settled)

The SEC settled five actions against investment advisory firms for violations involving the sale of VIX-related exchange-traded products to retail investors. The actions are the first from the SEC's Exchange-Traded Products Initiative, which uses data analytics to identify potentially unsuitable sales. According to the SEC, representatives from the advisory firms did not understand the volatility-related exchange-traded products, and recommended that clients hold the products for long periods even though the offering documents made clear that the products were likely to experience a decline in value when held for long periods. The SEC further alleged that the firms failed to adopt or implement procedures regarding suitability and volatility-linked exchange-traded products. Each firm agreed to pay disgorgement, prejudgment interest, and penalties ranging from \$500,000 to \$650,000.

[SEC Press Release](#) | [SEC Order \(American Portfolios Financial Services\)](#) | [SEC Order \(Benjamin F. Edwards & Company\)](#) | [SEC Order \(Summit Financial Group\)](#) | [SEC Order \(Securities America Advisors\)](#) | [SEC Order \(Royal Alliance Associates\)](#)

SEC Office of Compliance Inspections and Examinations Issues Statement on VIX-Related and Complex Exchange Traded Products

In reference to the above cases, the SEC's Office of Compliance Inspections and Examinations (OCIE) issued a statement highlighting failures of firms to maintain robust policies and procedures. OCIE noted that the above matters reflect advisers failing to use products as designed. OCIE recommended that compliance programs be dynamic rather than based on specific product features, and that firms offering their professionals access to a full scope of products on a platform should design procedures to avoid having each professional conduct their own product analysis. The statement said that OCIE would continue to review these issues in its examinations.

[OCIE Statement](#)

Two SEC Commissioners Issue Statement on Stock Buybacks Case

The two Republican SEC Commissioners issued a statement to explain their dissents in a recent stock buybacks case, *In re Andeavor LLC*, which we discussed in [this client memorandum](#) (the Commissioners cited our memorandum in their statement). The Commissioners stated their belief that the enforcement case applied Section 13(b)(2)(B) of the Exchange Act beyond its appropriate scope. The Commissioners said that the provision requires reasonable *accounting* controls, and that the buyback decision at issue in the case was not an accounting issue.

[Statement of Commissioners Peirce and Roisman](#)

SEC Office of Compliance and Inspections and Examinations Issues a Risk Alert Regarding Investment Adviser Compliance Programs

OCIE issued a Risk Alert regarding its view of common and notable compliance issues concerning investment advisers' policies and procedures. The alert noted:

- **Inadequate Compliance Resources:** including lack of staff, training, and information technology. This can occur when an investment adviser grows in size but does not dedicate additional resources.
- **Insufficient Authority of Chief Compliance Officers:** including insufficient authority to enforce compliance policies and limited interaction with senior management.
- **Annual Review Deficits:** investment advisers could not demonstrate that they performed annual reviews, or that annual reviews did not review key risk areas.
- **Implementing Actions Required by Written Policies and Procedures:** including failing to perform actions required by compliance procedures.
- **Maintaining Accurate and Complete Information in Policies and Procedures:** including policies that were outdated, incomplete, or not specific to the investment adviser.
- **Maintaining or Establishing Reasonably Designed Written Policies and Procedures:** including policies insufficiently tailored to prohibiting violations of the Investment Advisers Act.

SEC Risk Alert

Whistleblower Awards

The SEC announced five whistleblower awards during the month, including a \$28 million award to an internal whistleblower and a \$1.1 million award for an independent analysis based on publicly available information.

SEC Whistleblower Page

Personnel Changes

The SEC announced a number of notable personnel changes this month:

- Chairman Jay Clayton announced he will leave the SEC at the end of 2020.

SEC Press Release

- The SEC named Mike Willis as an Associate Director in the Division of Economic and Risk Analysis (DERA). Mr. Willis will lead DERA's newly created Office of Data Science and Innovation, which provides the SEC with expertise on data analytics, risk assessment, and structured disclosure.

SEC Press Release

- The SEC named Lourdes Caballes and Michael Rufino Associate Directors of the Office of Compliance Inspections and Examinations (OCIE) Broker-Dealer Examination Program in the New York Regional Office. Ms. Caballes and Mr. Rufino succeed Robert Sollazzo, who retired in July after 38 years of SEC service.

SEC Press Release

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your usual Davis Polk contact.

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