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Securities Enforcement & Litigation Alert

SEC Speaks 2012:

An "Entrepreneurial" and Restructured SEC Pledges Proactive Enforcement

*By Christian Bartholomew and Sarah Nilson**

- For more information on the issues discussed in this article, see our Enforcement Issues Outline
- For a discussion of the SEC's recent scrutiny of private equity sponsors, see our Private Equity Alert
- For a comprehensive analysis of the SEC's new whistleblower program, see our Whistleblower PowerPoint

At the recent "SEC Speaks" conference in Washington, DC this year, Chairman Mary Schapiro[1] and senior Enforcement officials vowed to increase investor protection through use of the SEC's expanded authority under the Dodd-Frank Act and initiatives designed to help the SEC enforcement staff proactively detect and prevent securities law violations. In her speech, Schapiro pointed to numerous modernization initiatives as central to this effort, including better hiring, more training, more sophisticated IT systems, and better management structures. Schapiro noted that the Commission now has Wall Street traders, asset managers, and quantitative analysts on staff alongside attorneys, economists and accountants and has more than doubled its training budget since 2009. She also touted the SEC's new TCR system (tips, complaints, and referrals) as allowing the SEC to better "triage" the information it receives and use that information more effectively in terms of opening new investigations, directing information to existing investigations, and uncovering and tracking emerging trends.

Schapiro pointed to the SEC's record 735 enforcement actions,[2] which returned more than $2 billion to investors, as evidence that these efforts to modernize the agency and bolster its knowledge base are already bearing fruit. Division of Enforcement Director Robert Khuzami echoed these remarks, saying that the agency's risk-based initiatives are paying off and that the SEC is being more proactive, which has, in his view, resulted in more deterrence. Declaring a new "entrepreneurial" spirit and ethos, Schapiro and Khuzami made clear that the SEC intends to redouble its enforcement efforts across the board.

Broker-Dealers, IAs and Hedge/PE Funds Beware

OCIE-Enforcement Coordination on the Rise

Interestingly, despite recent assurances from senior officials that the examination program is not being used to generate enforcement cases,[3] Schapiro noted that referrals from the Office of Compliance Inspections and Examinations (OCIE) to the enforcement staff increased from 10 to 15% over the past two years, resulting from continued close cooperation between Enforcement and OCIE staff. Over the same period, 42% of examinations identified significant findings, a roughly 33% increase over 2009 levels. Schapiro observed that the use of risk-based targeting in examinations has also expanded, and examination staff is working to develop models to identify anomalous patterns among registrants and to build risk assessment tools and evaluate risks across markets and registrants. Going forward, the Commission expects to expand its use of risk-based analytics to further strengthen and streamline the examination process, particularly in the area of hedge fund and private equity oversight.

*This alert was prepared with the assistance of Weil associates Erin Yates and Brianna Benfield

Enforcement Very Focused on PE and Hedge Funds

Later in the program, Bruce Karpati, Co-Chief of the Commission's Asset Management Unit, reported that the Commission brought a record number of investment adviser and hedge fund adviser cases in 2011 and expects 2012 to be an active year as well, particularly in the private equity area. As we have reported separately,[4] the unit has launched a private equity initiative, and is looking hard at so-called "zombie funds" with stale portfolio valuations, among other things. The unit plans to expand its use of Aberrational Performance risk analytics to detect and identify suspicious conduct earlier,[5] and will focus on valuation issues and oversight of portfolio managers in this regard, private equity sponsors, mutual fund fees and fee arrangements, and compliance programs and oversight of such programs.

Karpati stressed that a key tool for the unit has been the knowledge and insights gained from a panel of some 15 former Wall Street professionals, including execution traders, private equity analysts, a mutual fund operations persons, portfolio managers and others with significant industry experience. These experts provide insight for examination and enforcement staff, lead training efforts, and act as advocates for policy making.

More Financial Crisis Cases to Come

Still later in the program, Khuzami highlighted the importance that financial crisis cases have played over the last year, and remarked that there would be more such cases to come. To date the SEC has charged 95 entities and individuals for conduct arising out of the financial crisis; notably, over half of the individuals charged were senior officers. Jason Anthony, Special Counsel for the Structured and New Products Unit, reported that the unit has led the pursuit of financial crisis cases in the RMBS and CDO areas, and indicated that his unit is also looking hard at structured products sold to retail investors, with a focus on suitability and disclosures.

Whistleblower Program Up and Running[6]

230 Cases Eligible for Awards

Perhaps reflecting how much attention the new SEC whistleblower program has received, Sean McKessy, Chief of the new Office of the Whistleblower, led off the day's Enforcement panel discussion. After repeating the publicly-available statistics of the program to date,[7] McKessy described the Office's role as being a "liaison" between the whistleblower community and the enforcement staff, and said that, since the inception of the whistleblower hotline, the Office has returned more than 2,000 calls.[8] McKessy said that he and his staff are engaged in internal and external outreach to ensure that the program is widely known and understood, and noted that the Office is thinking about how to manage communications with whistleblowers while protecting the confidentiality of enforcement actions. Although there has been no publicly-announced award to date, McKessy explained that, so far, the Office has identified and listed 230 cases as being eligible for awards and is in the early stages of processing awards.

Most Tips Indicate Internal Reporting

Most notably, responding to a question about the SEC's controversial decision not to require whistleblowers to report wrongdoing internally before going to the SEC, McKessy noted that the rules create significant incentives to report internally, and suggested that these incentives are working.[9] McKessy commented that of the TCR forms he has seen, the "significant majority" of whistleblowers say they have already reported internally, and said that he was "hard pressed" to think of an example in which the whistleblower did not first report internally.[10]

Cooperation Initiative Continuing and Expanding

37 Agreements with Individuals Signed to Date

A central part of the SEC's enforcement program has been its recent emphasis on the value of cooperation and its use of cooperation, deferred prosecution agreements (DPA) and non-prosecution agreements (NPA).[11] The designated speaker on this subject, David Bergers, Director of the Boston Regional Office, explained that the initiative is designed to encourage insiders to "come forward early" in the

investigation, and highlighted the fact that the SEC has entered into 37 cooperation agreements with individuals since the initiative was launched.[12] Bergers also highlighted that in FY11 the Commission entered into two NPAs with Fannie Mae and Freddie Mac and entered into its first-ever DPA with Tenaris S.A. for violations of the FCPA.[13]

"Genuine Cooperation Pays"

Andrew Calamari, Associate Director of the New York Regional Office, separately noted that the *Seaboard*[14] factors for charging corporations are "still alive and well," and pointed to the Commission's recent decision not to charge Credit Suisse as evidence that "genuine cooperation does indeed pay." In that matter, the SEC no-charged Credit Suisse while charging four of its bankers and traders for overstating the prices of subprime bonds during the height of the subprime credit crisis.[15] Calamari stressed that the SEC did not charge Credit Suisse because, among other things, it self-reported the violation, offered significant cooperation to the staff, and terminated the four employees.

Enforcement Policy and Process

Dodd-Frank 180-Day Charge-or-Decline Deadline Shortens Wells Process

A little-known provision of Dodd-Frank requires that the SEC either bring or decline an enforcement matter within 180 days of the Wells notice; in "complex actions," the Enforcement Director can extend this deadline once upon notice to the Chairman of the Commission, and can seek additional extensions but only with the approval of the Commission.[16] Bergers stressed that the enforcement staff is taking this deadline "very seriously" and has "streamlined" the Wells process. Bergers said that the staff now will "generally" only grant counsel one post-Wells meeting and "generally" will not continue negotiations if that will delay the staff's recommendation to the Commission.

"Neither Admit nor Deny" Policy Alive and Well

Matthew Martens, Chief Litigation Counsel, obliquely addressed the recent uproar created by Judge Rakoff's refusal to approve the SEC's settlement with Citigroup.[17] Martens declared that it is "general policy to accept [and recommend] a settlement if [the staff] gets what it could reasonably expect to obtain at trial," and argued that it would be "a mistake" to decline settlements because they did not include an admission of liability by the settling party. He went on to say that the SEC's policy in this regard is "not an outlier" and that it is consistent with and "tougher than" the policies of other federal agencies. Although he did not identify the matter, Martens responded to Judge Rakoff's criticism that the *Citigroup* settlement left the public guessing about the underlying facts of the case by saying that "the public is not left wondering what occurred" because the SEC files "detailed complaints and orders" that are frequently accompanied by a statement from the defendant that it will endeavor "to do better." Martens also pointed out that out of approximately 2,000 cases, judges have challenged settlements in less than 10 cases and, again obliquely referring to the *Citigroup* matter, only one judge has rejected a settlement. Martens stressed that the SEC is always willing to answer questions from the courts regarding proposed settlements and concluded by making clear that the staff is "not doing anything differently" and has not (as, we observe, some have suggested) seen more intransigence from defendants in light of these developments.

SEC Scoring "Impressive Record" in Litigation

Martens also touted the SEC's "impressive" litigation record, saying that, for FY11 and to date in FY12, the SEC has prevailed 86% of the time if measured by defendant and 83% of the time if measured by case. He noted that the New York Regional Office won all nine of its trials during that time period.

Easier Secondary Liability; Gatekeepers at Risk

Merri Jo Gillette, Director of the Chicago Regional Office, discussed the SEC's new enforcement powers under Dodd-Frank and how they have affected the program. Specifically, Gillette noted that Dodd-Frank lowers the liability standard for aiding-and-abetting to recklessness and clarified that the SEC may bring cases against individuals who act as control persons.[18] Gillette went on to say that, given this expansion of aiding-and-abetting and control person liability, the SEC is now bringing more secondary liability cases.

Separately, in discussing financial statement and accounting matters, Calamari made a point of noting that the SEC continues to pursue auditors and other "gatekeepers."

Janus Decision Affecting Charging Decisions

Joseph Brenner, the Enforcement Division's Chief Counsel, discussed the affect of the Supreme Court's recent decision in *Janus Capital Group v. First Derivative Traders* on the enforcement program. *Janus* was a private securities litigation matter in which the Supreme Court narrowed primary liability for false statements to those to whom the statement is directly attributable and who have ultimate control over its content.[19] According to Brenner, *Janus* is not making a difference in *who* the SEC charges, but is affecting *how* parties are being charged. Specifically, Brenner said that the SEC is bringing aiding-and-abetting and control person liability charges "much more," sometimes instead of and sometimes in addition to, primary liability charges.[20] Brenner stressed that, in the Commission's view, *Janus* only applies to claims under Rule 10b-5 of the Exchange Act, and not other provisions such as Section 17(a) of the Securities Act and the scheme liability provisions of Rule 10b-5, and indicated that, of the enforcement decisions interpreting *Janus* to date, four out of five have found that *Janus* does not apply to these other provisions.[21] Finally, Brenner noted that the courts are taking *Janus*'s attribution requirement seriously, but are finding that more than one person can be the maker of the same statement, such as in a 10-K filing.

Supervisory Liability for Legal and Compliance Personnel "Remains Disturbingly Murky"

In the wake of the Commission's split decision affirming and dismissing failure to supervise charges against Ted Urban,[22] former GC at Ferris Baker Watts, Commissioner Daniel Gallagher waded into the issue, proclaiming that the Commission should act to clarify the circumstances in which legal and compliance personnel can properly be considered supervisors.[23] Noting that the Commission's 1992 *Gutfreund* 21A report provides some guidance as to when legal and compliance personnel may be deemed to be "supervisors" for purposes of liability, Gallagher observed that once such personnel become involved in "formulating management's response to a problem, [they are] obligated to take affirmative steps to ensure that appropriate action is taken."[24] But, Gallagher noted, because legal or compliance personnel face supervisory liability where they fail to properly discharge that duty, this can have "the perverse effect of increasing the risk of supervisory liability in direct proportion to the intensity of their engagement in legal and compliance activities." Gallagher argued that, although the *Urban* case and *Gutfreund* 21A report provide some guidance, this issue "remains disturbingly murky," and called on the Commission and SROs to rectify this "dangerous dilemma" and to provide a framework that encourages legal and compliance personnel to become involved in and provide the necessary guidance without fear of being deemed to be supervisors.

Financial Statement and Accounting Cases Remain A "Core Focus"

Although the number of financial statement and accounting fraud cases decreased markedly in FY11, Calamari and Howard Scheck, Chief Accountant in the Enforcement Division, emphasized that such cases are still "a core focus" for the Commission.[25] Calamari emphasized that cases against audit firms, which the SEC views as "gatekeepers," remain a very central focus, and highlighted the Commission's actions against affiliates of three of the big four accounting firms over the last year.[26]

"Delay and Pray" and "Extend and Pretend" Practices

Scheck noted that restatements have been down due, in his view, to the requirements of Sarbanes-Oxley, which provides for increased Audit Committee oversight, better internal controls, and certifications by C-suite officials. Scheck then said that the enforcement staff is focusing on loan impairment issues, so-called "extend and pretend" and "delay and pray" situations, as well as accounting for long-term contracts. Scheck noted that two other interrelated areas of concern are the lack (in the staff's view) of sufficient analysis of qualitative materiality issues under SAB No. 99,[27] and independence issues under Section 10A, which requires auditors to report certain wrongful acts to the SEC in certain situations. He emphasized that the SEC will be looking for situations where

auditors do not follow-up on red flags, as was the case in the recent PwC India and Livingston & Haynes actions.[28]

FCPA Cases Remain A High Priority

Kara Brockmeyer, Chief of the FCPA Unit, informed the audience that the unit now has a team of 30 staff members in the Main Office and six staff members in regional offices. Brockmeyer reported that the SEC brought 20 FCPA actions in FY11, yielding a total of $255 million in sanctions. The Commission's largest FCPA settlement in FY11 was with Johnson & Johnson, in which the company agreed to pay $48.6 million to settle allegations that its subsidiaries bribed government doctors in several European countries and paid kickbacks to Iraqi officials to obtain contracts under the United Nations Oil for Food Program.[29] Brockmeyer remarked that the *Johnson & Johnson* settlement and the recent $22 million settlement with *Smith & Nephew* were the first cases arising out of a FCPA sweep of the pharmaceutical and medical device industry, and indicated that we can expect more such cases in 2012.

Cooperation with Foreign Governments Increasing

Brockmeyer also noted that FCPA investigations are expanding as the SEC is receiving more and better cooperation from foreign governments and stressed that this makes FCPA compliance ever-more critical. She made clear that the unit has and will continue to emphasize the need for compliance programs in which FCPA compliance is a part of a company's broader system of internal controls and procedures for ensuring accurate books and records.

SEC "Very Focused" on Insider Trading

More Cases in Pipeline

Sanjay Wadhwa, Associate Director of the New York Regional Office and Deputy Chief of the Market Abuse Unit, made the not-surprising remark that the Commission is "very focused" on insider trading and indicated that staff in four different SEC offices are currently engaged in "sprawling" insider trading investigations. Wadhwa summarized the Galleon and expert network cases,[30] and said that there are more such cases in the pipeline. Wadhwa recognized that there is significant discussion over whether wiretapping will become a routine tool in insider-trading cases, but made clear that the SEC does not wiretap and will continue to use traditional techniques to uncover insider trading, and that we can expect to see a number of insider trading actions in the next six to nine months that do not involve wiretapping.

Consolidated Audit Trail to Help in Identifying Cases

In her speech, Schapiro had earlier noted that the Commission's initiative to standardize reporting across trading platforms will assist in uncovering insider trading cases. According to Schapiro, the consolidated audit trail will expand the Commission's capacity to regulate and investigate trading practices by aiding the Commission in identifying suspicious trading activities, as well as allowing the Commission to rapidly reconstruct unusual trading activity. The Commission plans to implement the consolidated audit trail with equities and, eventually, standardize reporting for fixed income and other asset classes. This is a high priority for the Commission, which expects to adopt a final rule this year.

Municipal Securities and Public Pensions Unit to Focus on Five Areas

Elaine Greenberg, Chief of the Municipal Securities and Public Pensions Unit, outlined five areas that the unit will focus on in 2012: (1) offering and disclosure fraud, (2) tax or arbitrage-driven fraud, (3) pay-to-play and public corruption cases, (4) public pension accounting and disclosure fraud, and (5) valuation and pricing fraud. Greenberg noted that these areas of inquiry are designed to protect municipalities and investors and to deter broker-dealers, but added that the SEC is also looking at the conduct of municipalities, and pointed to the action against New Jersey for misleading investors in connection with a bond offering.[31]

Conclusion

We think the SEC's enforcement efforts in 2012 will be smarter, more efficient, and more aggressive as a result of its efforts to improve its investigative tools and training, to increase its knowledge base, and to better its coordination across programs and offices. We see an increased and increasingly sophisticated focus on market participants and complex financial transactions and

products, and believe the size and significance of cases in this area will rise. We also fully expect the SEC to continue its vigorous efforts in other areas as well, particularly in the FCPA and insider-trading areas, and note that, given the SEC's much-expanded secondary liability powers, public companies and "gatekeepers" can expect significant scrutiny when it comes to financial statement and accounting issues. Finally, given the SEC's focus on corporate compliance programs and the new whistleblower program, companies must be vigilant in detecting and preventing misconduct, and in responding appropriately when it occurs.

1 The full text of Chairman Schapiro and other Commissioners' speeches can be found at sec.gov/news/speech.shtml; none of the staff's comments were published. All of the speakers prefaced their remarks with the standard disclaimer that they were expressing their own views and not necessarily the views of the Commission.

2 There has been some criticism and suggestion that this number inflates the SEC's enforcement efforts, since it includes so-called "follow-on" cases (*e.g.*, where the SEC seeks, in an administrative action, an industry bar after an individual has been enjoined in a federal court action; such cases are frequently relatively pro forma) and delisting cases. *See* SEC Enforcement Story Doesn't Add Up for 2011 (Mar. 2, 2012) (noting that follow-on and delisting matters accounted for 49% of enforcement actions in 2011), *available at* bloomberg.com/news/print/2012-03-02/sec-accounting-of-record-enforcement-year-in-2011-doesn-t-add-up.html.

3 *See* "SEC Not Using Exams as Stalking Horse For Enforcement Probes, OCIE Official Says," Stephen Joyce, BNA Securities Law Daily (Feb. 10, 2010).

4 See our Private Equity Alert, "SEC Enforcement Staff Focusing on PE Sponsors," *available at* weil.com/files/upload/Private_Equity_Alert_February_2012.pdf.

5 The SEC enforcement staff announced this initiative in December 2011. *See* SEC Release 2011-252, *available at* sec.gov/news/press/2011/2011-252.htm.

6 A comprehensive discussion and analysis of the new SEC whistleblower program can be found in our February 2012 PowerPoint, "The SEC's Whistleblower Program" ("Whistleblower Powerpoint"), *available at* weil.com/files/upload/The_SECs_Whistleblower_Program.pdf.

7 The SEC received 334 tips from August 11, 2011, the date the SEC rules became effective, through fiscal year-end September 30, 2011. *See* SEC's Annual Report on the Dodd-Frank Whistleblower Program for the Fiscal Year 2011, *available at* sec.gov/about/offices/owb/whistleblower-annual-report-2011.pdf; *see also* our Whistleblower PowerPoint. The Office now has a staff of eight: McKessy, Deputy Chief Jane Norberg, 5 additional attorneys, and a paralegal.

8 McKessy did not indicate how many of these calls were tips or merely inquiries regarding how the program works, but it bears noting that the SEC has devoted considerable resources to publicizing the program. Among other things, the program is prominently featured on the SEC website home page.

9 These include that the SEC can increase a whistleblower's award if he or she first reported internally. How the staff and the Commission will interpret and apply this provision and deal with numerous other nuances of the rules remains to be seen. For a more detailed discussion of these issues, see our Whistleblower PowerPoint.

10 Potential whistleblowers can submit tips to the Office of the Whistleblower through Form TCR, *available at* sec.gov/about/forms/formtcr.pdf. Question 5b of Form TCR asks whether the whistleblower has "reported this violation to his or her supervisor, compliance officer, whistleblower hotline, ombudsman, or any other available mechanism at the entity for reporting violations."

11 For a more detailed discussion of the SEC's efforts in this area, see our February 2012 Outline "Top SEC Enforcement Issues for Public Companies" ("Enforcement Issues Outline"), *available at* weil.com/files/upload/Top_Enforcement_Issues.pdf.

12 Unfortunately, but not surprisingly, these individual agreements are not public, so it is difficult to discern what issues they cover, and how they are structured in terms of what the *quid* for the *quo* may be in any particular agreement.

13 *See* SEC Release 2011-267 (Dec. 16, 2011); SEC Release 2011-112 (May 17, 2011). For a more detailed discussion of these agreements, see our Enforcement Issues Outline.

14 *See* SEC's Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Sec. Exch. Act Rel. No. 44969 (Oct. 23, 2001), *available at* sec.gov/litigation/investreport/34-44969.htm.

15 *See SEC v. Serageldin*, 12-civ-0796 (S.D.N.Y. filed Feb. 1, 2012); *see also* SEC Release 2012-23 (Feb. 1 2012), sec.gov/news/press/2012/2012-23.htm.

16 *See* Section 929U of the Dodd-Frank Act (Section 4E of the Securities Exchange Act of 1934). Although there was no discussion as to whether

such an extension has been sought, we have identified at least one matter wherein the SEC has granted an extension of time in which to bring an action. *See In re Gualario & Co., LLC*, Admin. Proc. No. 3-14340 (Aug. 11, 1011) (90-day extension granted), *available at* sec.gov/alj/aljorders/2011/ap680cff.pdf.

17 *See, e.g., SEC v. Citigroup v. Global Markets*, No. 11-civ-7387 (S.D.N.Y.), wherein Judge Rakoff rejected the SEC and Citigroup's proposed $285 million settlement and criticized the policy as "depriv[ing] the Court of even the most minimal assurance that the substantial injunctive relief it is being asked to impose has any basis in fact." For a more detailed discussion of recent judicial scrutiny of SEC settlements, see our Enforcement Issues Outline.

18 Gillette also discussed expanded remedies given under the Dodd-Frank Act, including that the SEC can now seek penalties in administrative proceedings against unregulated entities and individuals and has authority to seek penalties from secondary actors who were "causes" of direct violations.

19 113 S. Ct. 2296 (2011) (finding that "[e]ven when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. It is the speaker who takes credit—or blame—for what is ultimately said").

20 This is clearly reflected in recent cases. *See*, *e.g., SEC v. Sells*, cv-11-4941-HLR (N.D. Cal. Oct. 6, 2011) (alleging defendants "orchestrated a scheme to defraud the investors of Hansen Medical by using undisclosed trickery to make it appear that the company had successfully sold its most expensive product when it had not actually completed the sales").

21 We believe Brenner is referring to *SEC v. Mercury Interactive LLC*, 2011 U.S. Dist. LEXIS 134580 (N.D. Ca. Nov. 22, 2011), *SEC v. Daifotis*, 2011 U.S. Dist. LEXIS 83872 (N.D. Cal. Oct. 7, 2011), *SEC v. Book*, 2011 U.S. Dist. LEXIS129673 (S.D.N.Y. Nov. 9, 2011), and *SEC v. Landberg*, 2011 U.S. Dist LEXIS 127827 (S.D.N.Y. Oct 26, 2011). For a more detailed discussion of these cases and other post-*Janus* issues, see our Enforcement Issues Outline.

22 In the *Urban* matter, the enforcement staff brought charges against Urban for allegedly failing to supervise a rogue broker; although Chief Administrative Law Judge Brenda Murray exonerated Urban, finding that he acted reasonably under the circumstances, she declined to find that he was ***not*** a supervisor because his "opinions on legal and compliance issues were viewed as authoritative and his recommendations were genereally followed" and he dealt with the rogue broker as a member of the firm's Credit Committee. The decision sent shockwaves through the legal and compliance community and, on appeal to the Commission, numerous groups filed amicus curiae briefs urging the Commission to reject the finding that Urban had acted as a supervisor. Unfortunately, a split Commission recently dismissed the proceeding without addressing this issue. *See In re Urban*, Exch. Act Rel. No. 66259 (Jan. 26, 2012) (dismissing proceeding), *available at* sec.gov/litigation/admin/2012/34-66259.pdf; *In re Urban*, Admin. Proc. No. 3-13655 (Sept. 8, 2010), *available at* sec.gov/litigation/aljdec/2010/id402bpm.pdf.

23 The full text of this important speech can be found at sec.gov/news/speech/2012/spch022412dmg.htm.

24 *See In re Gutfreund,* Exch. Act Rel. No. 31554 (Dec. 3, 1992).

25 It bears noting that, while the Enforcement Division has established five specialized units to focus on particular enforcement areas (FCPA, Asset Management, New and Structured Products, Market Abuse and Municipal Securities), four of the five are focused on activity by market participants, *i.e.*, broker-dealers, investment advisers, etc., and there is no specialized unit for financial statement and accounting cases.

26 *See In re Lovelock & Lewes* (and other PricewaterhouseCoopers affiliates), Admin. Proc. No. 3-14321 (Apr. 5, 2011); *In re KPMG Australia*, Admin Proc. No. 3-14276 (Feb. 28, 2011); *SEC v. Deloitte Touche Tohmatsu CPA Ltd.*, No. 1:11-MC-00512 (D.D.C., filed Sept. 8. 2011) (subpoena enforcement action).

27 *See* SEC Staff Accounting Bulletin: No. 99 – Materiality (Aug. 12, 1999) (expressing the view that it is inappropriate to rely solely on quantitative benchmarks to assess materiality in preparing financial statements and performing audits), *available at* sec.gov/interps/account/sab99.htm.

28 *See In re Lovelock & Lewes*, Admin. Proc. No. 3-14321 (Apr. 5, 2011); *In re Livingston & Haynes, P.C.*, Admin. Proc. No. 3-14410 (June 6, 2011).

29 *See SEC v. Johnson & Johnson*, No. 1:11-CV-00686 (D.D.C., filed Apr. 8, 2011).

30 Specifically, Wadwha indicated that the Galleon cases involve over $93 million in illicit gains, and to date the SEC has charged 31 individuals and settled with 28 in connection with these investigations. The expert network cases involve over $110 million in illicit gains, and the SEC has charged 22 defendants, of which ten have settled, two are near settlement, three have cooperated, and seven are actively litigating.

31 *See In re State of New Jersey*, Admin. Proc. No. 3-14009 (Aug. 18, 2010); Press Release 2010-152 (Aug. 18, 2010), *available at* sec.gov/news/press/2010/2010-152.htm.

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