

# SEC and CFTC Enforcement Update

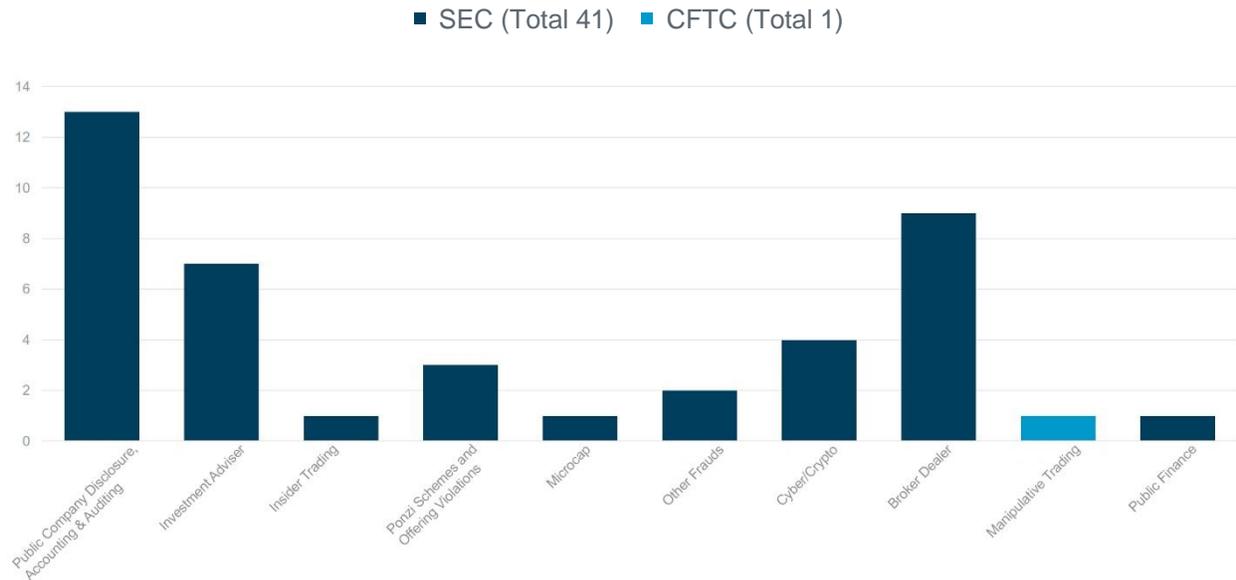
December 2020

In this edition of the newsletter, we discuss enforcement developments at the agencies during December 2020. December was an active month for the SEC, likely driven by the impending departure of SEC Chairman Jay Clayton. The SEC filed 41 actions and the CFTC filed 1 (excluding follow-on actions, bars and suspensions) against a combined total of 65 defendants and respondents.

The SEC’s 41 actions spanned numerous case types, including public company disclosures, broker-dealer, and investment adviser cases. The CFTC’s 1 action concerned manipulative trading.

## Actions Initiated by the SEC and CFTC in December 2020<sup>1</sup>

### Actions Categorized by Matter Type



### Types of Defendants/Respondents



<sup>1</sup> Follow-on administrative proceedings, suspensions, bars, and delinquent filings excluded.

## Key Cases and Developments

### **SEC Settles With Public Company Concerning COVID-19 Disclosures**

**In re Cheesecake Factory Incorporated (A.P. Dec. 4, 2020, Settled)**

The SEC settled a case with a restaurant company in which the SEC alleged that the company made misleading disclosures in SEC filings concerning the impact of COVID-19 on its business. According to the SEC, the company stated that its restaurants were “operating sustainably,” even though internal documents showed that the company was losing approximately \$6 million in cash per week, had only 16 weeks of cash remaining, and had told its landlords that it would not pay the next month’s rent. This is the SEC’s first case charging a public company concerning disclosures about the impact of COVID-19. The company agreed to pay a civil penalty of \$125,000.

[SEC Press Release](#) | [SEC Order](#)

### **SEC Settles With Conglomerate Regarding Disclosures**

**In re General Electric Co. (A.P. Dec. 9, 2020, Settled)**

The SEC settled a case with an industrial conglomerate concerning disclosures about the company’s power and insurance businesses. According to the SEC, the company failed to disclose that one-quarter to nearly half of the profits in the company’s power business for several quarters resulted from reductions in prior cost estimates. The SEC also alleged that the company did not disclose that a reported increase in cash collections was primarily from receivable sales and came at the expense of future cash. The SEC further alleged that the company lowered projected costs for claims against its long-term care insurance portfolio without disclosing related uncertainties. The company agreed to pay a civil penalty of \$200 million.

[SEC Press Release](#) | [SEC Order](#)

### **SEC Settles With Coffee Company for Accounting Fraud**

**In re Luckin Coffee, Inc. (A.P. Dec. 16, 2020, Settled)**

The SEC settled a case with a coffee company for accounting fraud. According to the SEC, the company—which self-reported the fraud, fired the responsible individuals, and cooperated with the investigation—inflated its retail sales and overstated its revenue, profit, and operating expenses. The company agreed to pay a civil penalty of \$180 million, which may be offset by payments made to investors in a related Cayman proceeding.

[SEC Press Release](#) | [SEC Order](#)

### **SEC Settles With Broker-Dealer Regarding Order Handling**

**In re Robinhood, LLC (A.P. Dec. 17, 2020, Settled)**

The SEC settled a case with a broker-dealer regarding statements about how the broker-dealer routed customer orders. The SEC alleged that the broker-dealer advertised that it provided execution quality that met or exceeded that of its competitors. However, the SEC alleged that some of the customers’ orders were executed at inferior prices because the firm received higher levels of payment for order flow. The SEC also alleged best execution violations. The broker-dealer agreed to pay a civil penalty of \$65 million.

[SEC Press Release](#) | [SEC Order](#)

## **SEC Settles With UK-based Hedge Fund and Investment Adviser**

**In re BlueCrest Capital Management Ltd. (A.P. Dec. 8, 2020, Settled)**

The SEC settled a case with an UK-based hedge fund and investment adviser that transferred its top traders from a flagship client fund to a proprietary fund, and replaced those traders with an underperforming algorithm. The SEC alleged that the adviser made inadequate and misleading disclosures about the existence of the proprietary fund and the transfer of traders. The company agreed to pay disgorgement of \$107,560,200, prejudgment interest of \$25,154,306, and a civil penalty of \$37,285,494. The SEC has said it will distribute the approximately \$170 million to harmed investors.

[SEC Press Release](#) | [SEC Order](#)

## **SEC Charges a Clothing Company for Failing to Impair Goodwill Properly**

**SEC v. Sequential Brands Group Inc. (S.D.N.Y. Dec. 11, 2020, Contested)**

The SEC charged a clothing company for misleading financial statements due to its failure to impair goodwill properly. According to the SEC, the company should have assessed its goodwill after several months of declining stock prices and that internal calculations showed that the company would have failed the first step of its disclosed two-step impairment test. The SEC alleges that the company's failure to impair resulted in an overstatement of the company's income and financial position. The SEC filed a contested complaint, which is unusual because cases involving accounting issues usually are filed as settlements and do not litigate.

[SEC Press Release](#) | [SEC Order](#)

## **SEC Charges Biotech Company and its CEO with Fraud Related to COVID-19**

**SEC v. Berman (S.D.N.Y. Dec. 17, 2020, Contested)**

The SEC brought a case against a biotechnology company and its CEO for alleged fraud. The SEC alleges that the company claimed it had developed a device that could test for Covid-19 in under one minute using a finger prick when it did not actually have such a test.

[SEC Press Release](#) | [SEC Complaint](#)

## **CFTC Settles With Energy and Commodities Firm for Corruption-Based Fraud**

**In re Vitol Inc. (A.P. Dec. 3, 2020, Settled)**

In its first case involving foreign corruption, the CFTC settled charges against an energy and commodities trading firm for allegedly paying bribes and kickbacks to employees of state-owned entities in South America for preferential treatment and access to trades with those entities. The firm agreed to pay more than \$95 million in civil monetary penalties and disgorgement. The U.S. Attorney's Office for the Eastern District of New York entered a deferred prosecution agreement with the firm in a parallel criminal matter.

[CFTC Press Release](#) | [CFTC Order](#)

## **SEC Files Insider Trading Case Against an Individual Who Received Material Nonpublic Information through a Corporation's Board Member**

**SEC v. Peltz (E.D.N.Y. Dec. 22, 2020, Contested)**

The SEC filed an insider trading case against an individual who received a tip about an unannounced acquisition offer from a member of the target company's board of directors. The SEC alleged that the individual received the tip and then executed trades based on that information while tipping others to

trade ahead of the announcement of the acquisition offer. The U.S. Attorney for the Eastern District of New York filed parallel criminal charges against the individual.

[SEC Press Release](#) | [SEC Complaint](#)

## Two Notable Developments Related to the SEC's Disgorgement Authority

Congress passed the National Defense Authorization Act over the President's veto. The act included a provision to extend to 10 years the time for the SEC to file disgorgement claims for scienter-based violations. The law also tolls the limitations period while a party is located outside of the United States. For further analysis, see our client memorandum [here](#) and update [here](#).

In a first-of-its-kind decision following the Supreme Court's decision in *Liu v. SEC*, the U.S. District Court for the District of Nevada denied the SEC's request for disgorgement because the SEC "fail[ed] to identify whether disgorgement award [was] for the benefit of investors." See *SEC v. Bevil*, 2020 WL 7048263, at \*2 (D. Nev. Nov. 30, 2020). The court granted the SEC leave to refile a motion for judgment to address the issue. *Id.* As we have previously [noted](#), the Supreme Court's decision in *Liu* preserved the SEC's disgorgement authority, but with limitations.

## Whistleblower Awards

The SEC announced five sets of whistleblower awards during the month, including a \$6 million award to joint whistleblowers and two sets of awards to multiple whistleblowers around \$3 million each.

[SEC Whistleblower Page](#)

## Personnel and Organizational Changes

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

- Chairman Jay Clayton departed the SEC on December 23, 2020, and President Trump designated Commissioner Elad Roisman as Acting Chairman.

[Statement of SEC Chairman Jay Clayton](#) | [SEC Press Release](#)

- Division of Enforcement Director Stephanie Avakian concluded her tenure at the SEC after four years at the helm of the division as Co-Director and then Director.

[SEC Press Release](#)

- The SEC announced its General Counsel, Robert Stebbins, would conclude his tenure in early January following three and a half years as the SEC's General Counsel.

[SEC Press Release](#)

- Brett W. Redfearn concluded his service as Director of the Division of Trading and Markets, a position he held for over three years.

[SEC Press Release](#)

- The SEC named Nekia Hackworth Jones as Director of its Atlanta Regional Office. Ms. Jones is a former federal prosecutor and most recently worked as a litigation partner at a firm in Atlanta.

[SEC Press Release](#)

- The SEC renamed the Office of Compliance Inspections and Examinations as the Division of Examinations. The division is the second largest component of the SEC with over 1,000 employees. The division conducts risk-based examinations of entities registered with the SEC.

[Statement of SEC Commissioners](#)

- The SEC announced the creation of the Security-Based Swaps Joint Venture, which is a venture among various SEC divisions and offices responsible for coordinating the regulation of security-based swaps and related entities. The co-leads of the venture will be Vivi Mazarakis, Acting Assistant Director in the Division of Examinations, and Carol McGee, Assistant Director for the Office of Derivatives Policy in the Division of Trading and Markets.

## [SEC Press Release](#)

- The SEC created an office focused on innovation and financial technology out of its Strategic Hub for Innovation and Financial Technology, referred to as FinHub. Valerie A. Szczepanik will be the first director of FinHub and report to the SEC Chairman.

## [SEC Press Release](#)

- The CFTC announced Market Participants Division Director Joshua B. Sterling would depart in January after leading the division since August 2019.

## [CFTC 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.

### *New York*

<b>Greg D. Andres</b>	+1 212 450 4724	<a href="mailto:greg.andres@davispolk.com">greg.andres@davispolk.com</a>
<b>Martine M. Beamon</b>	+1 212 450 4262	<a href="mailto:martine.beamon@davispolk.com">martine.beamon@davispolk.com</a>
<b>Angela T. Burgess</b>	+1 212 450 4885	<a href="mailto:angela.burgess@davispolk.com">angela.burgess@davispolk.com</a>
<b>Tatiana R. Martins</b>	+1 212 450 4085	<a href="mailto:tatiana.martins@davispolk.com">tatiana.martins@davispolk.com</a>

### *Washington, DC*

<b>Robert A. Cohen</b>	+1 202 962 7047	<a href="mailto:robert.cohen@davispolk.com">robert.cohen@davispolk.com</a>
<b>Neil H. MacBride</b>	+1 202 962 7030	<a href="mailto:neil.macbride@davispolk.com">neil.macbride@davispolk.com</a>
<b>Fiona Moran</b>	+1 202 962 7137	<a href="mailto:fiona.moran@davispolk.com">fiona.moran@davispolk.com</a>
<b>Stefani Johnson Myrick</b>	+1 202 962 7165	<a href="mailto:stefani.myrick@davispolk.com">stefani.myrick@davispolk.com</a>
<b>Paul J. Nathanson</b>	+1 202 962 7055	<a href="mailto:paul.nathanson@davispolk.com">paul.nathanson@davispolk.com</a>
<b>Linda Chatman Thomsen</b>	+1 202 962 7125	<a href="mailto:linda.thomsen@davispolk.com">linda.thomsen@davispolk.com</a>

---

© 2021 Davis Polk & Wardwell LLP | 450 Lexington Avenue | New York, NY 10017

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's [privacy notice](#) for further details.