

A Midyear Review Of 2016 Securities Enforcement

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The U.S. Securities and Exchange Commission brought over 400 enforcement actions in the first half of fiscal 2016, and is on pace to surpass its record of 807 enforcement actions in a single fiscal year, set in fiscal 2015.

The SEC brought the vast majority of these enforcement actions as administrative proceedings (APs). On May 16, 2016, the NYU Pollack Center for Law & Business and Cornerstone Research issued a report that found that in the first half of fiscal 2016, the SEC brought 88 percent of actions against public company and related subsidiary defendants as APs. This was a substantial increase from fiscal 2010, when the SEC only brought 33 percent of its enforcement actions against public companies and their subsidiaries as APs.

The Cornerstone report also found that eight of the top 10 monetary settlements with public company and related subsidiary defendants from fiscal 2010 through the first half of fiscal 2016 were imposed in APs. The continued escalation of the SEC's enforcement activity is particularly noteworthy given that the SEC continues to function without its full slate of five commissioners.

In addition to providing a reminder that the SEC's enforcement focus is not likely to wane depending on the particular makeup of the commission, the first half of 2016 involved important developments concerning, among other things, the fairness and constitutionality of the SEC's use of APs, the availability of cooperation credit for defendants, the use of enforcement actions against compliance professionals, the SEC's ability to obtain disgorgement for long-past conduct, the whistleblower program, the SEC's requirement that certain defendants admit wrongdoing as a condition of settlement, and civil enforcement actions involving insider traders, the Foreign Corrupt Practices Act, investment advisers, cybersecurity, accounting and financial disclosures, municipal bonds, and broker-dealers. In this midyear review, we look at the SEC's enforcement program through June 2016.

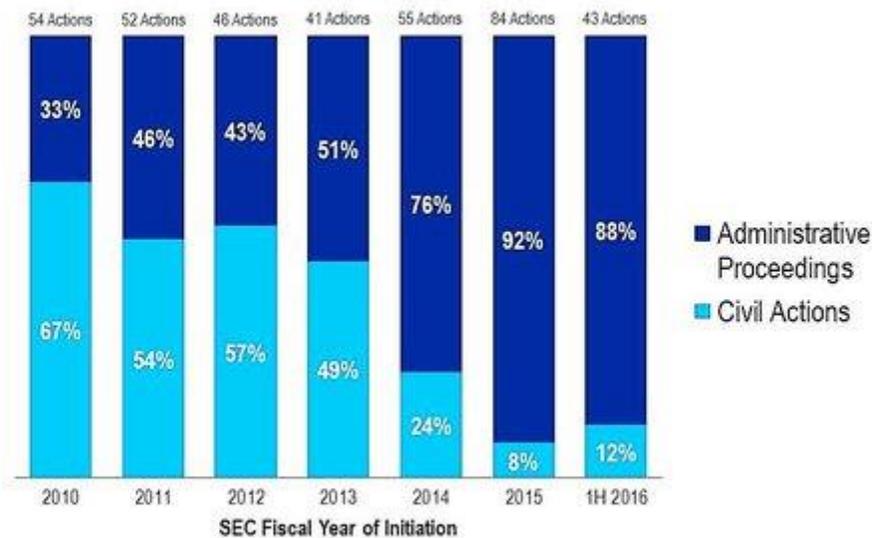


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**PUBLIC COMPANY AND RELATED SUBSIDIARY ACTIONS BY ENFORCEMENT VENUE
FY 2010-1H FY 2016**



Source: NYU Pollack Center for Law & Business and Cornerstone Research, *SEC Enforcement Activity against Public Companies and Their Subsidiaries* (May 16, 2016), at 4.
Note: Relief defendants are not considered. First half fiscal year 2016 includes data available through March 2016.

Use of APs. A Second Circuit panel held that district courts do not have jurisdiction to consider complaints filed in federal courts that seek to enjoin SEC APs on constitutional grounds, making it less likely that there will be any resolution to the merits of the constitutionality of APs in the near future. Meanwhile, the SEC sought to respond to claims that administrative law judges (ALJs) presiding over APs were biased in favor of the commission by releasing the results of an internal investigation that found no evidence of bias.

Cooperation Credit. In the face of skepticism of the value of self-reporting violations to government investigators, officials from the SEC and other government agencies made a number of public statements in the first half of 2016 defending the value and importance of cooperating with government investigators; at the same time, the SEC — for the first time — publicly accused a defendant of violating his cooperation agreement, resulting in the SEC seeking and obtaining a substantial penalty.

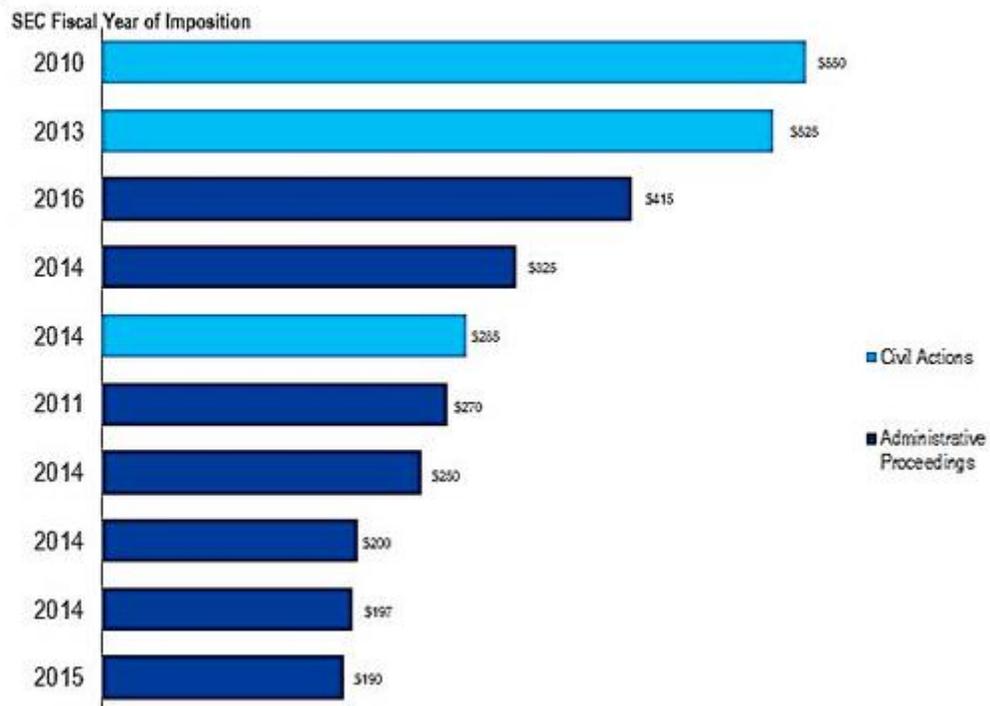
Compliance Professionals. The SEC has continued to bring enforcement actions against compliance professionals despite concerns that the actions would have a chilling effect on the profession. In an attempt to assuage these concerns, the commission held a two-day outreach seminar in April to provide guidance on developing compliance policies and perhaps to convince attendees that the SEC was not interested in bringing actions against professionals who do their jobs in good faith.

Statute of Limitations for Disgorgement. A three-judge panel in the Eleventh Circuit limited the ability of the SEC to obtain disgorgement of ill-gotten gains in civil injunctive actions filed more than five years after the allegedly violative conduct, which should prompt the SEC to pay increased attention to bringing investigations to a prompt close and negotiating tolling agreements as needed. The SEC had long contended that disgorgement was exempt from the five-year catch-all statute of limitations as an equitable remedy, but the court concluded it was akin to forfeiture, which is expressly covered.

Whistleblower Program. The SEC's whistleblower program has already made multiple significant whistleblower awards in 2016, including an award for \$17 million, the second-highest amount ever, and

its first-ever award to a whistleblower whose tip furthered an investigation, as opposed to leading to an investigation.

TOP 10 MONETARY SETTLEMENTS IMPOSED ON PUBLIC COMPANY AND RELATED SUBSIDIARY DEFENDANTS FY 2010 - JUNE 2016 (IN MILLIONS)



Source: Securities Enforcement Empirical Database.

Admissions. While it is still difficult to ascertain a principled pattern for when the SEC will require a settling defendant to admit wrongdoing, the commission did obtain admissions in certain cases in the first half of 2016, including three where the underlying investigation was brought in conjunction with other government enforcement entities and one from a large financial institution.

Financial Reporting and Accounting Fraud. The SEC launched a new Corporate Issuer Risk Assessment tool and brought several cases focused on revenue recognition and other traditional areas of accounting fraud, highlighting the SEC’s renewed focus on financial reporting and accounting fraud.

Investment Advisers and Private Equity Firms. The SEC continued its focus on investment advisers and private equity firms in the first half of 2016, with cases focused on the failure to disclose fees, misuse of investor funds, and the failure of a fund administrator to appropriately respond to red flags.

Broker-Dealers. In addition to enforcement actions concerning the misuse of investor funds and disclosure failures, the SEC brought several administrative actions against broker-dealers for allegedly failing to implement sufficient anti-money laundering procedures and announced a targeted sweep across all of its divisions to encourage other broker-dealers and investment firms to self-report any potential violations of the Customer Protection Rule.

Insider Trading. A jury found two traders liable for insider trading in a trial that was widely viewed as a test of the SEC's ability to bring enforcement actions against "remote tippees," or traders several steps removed from the source of inside information, following the Second Circuit panel's decision in *United States v. Newman*. In another remote-tippee case, however, the SEC elected not to pursue fraud charges, instead claiming that the remote tippee was a "relief defendant" who was nevertheless liable for disgorgement.

FCPA. While most FCPA enforcement activity in 2015 involved smaller-scale actions brought independently by the SEC, 2016 got off to a flying start with a sharp increase in the number of actions brought overall, which included the SEC's first-ever deferred prosecution agreement (DPA) in an FCPA action and a settlement for \$167.5 million with a Dutch telecommunications provider. As of June 30, 2016, the SEC has collected \$252.3 million in civil monetary penalties and disgorgement in corporate enforcement actions. Together, the SEC and the U.S. Department of Justice have collected \$523.2 million in civil monetary penalties, criminal fines and disgorgement, far exceeding the \$143.1 million both agencies collected last year.

Cybersecurity. After the SEC announced in early January that cybersecurity would remain a priority for the Office of Compliance Inspections and Examinations in 2016, the commission brought an action against a prominent investment adviser/broker-dealer with a robust compliance program after the adviser's policies allegedly failed to prevent an employee from inappropriately accessing sensitive customer information.

Municipal Bonds. The SEC notably brought actions against municipal bond advisers for the first time ever in the first half of 2016. In addition, it brought actions against bond servicers and issuers in connection with pay-to-play schemes, misrepresentations, conflicts of interest, and misuse of funds, and brought additional enforcement actions in connection with its Municipalities Continuing Disclosure Cooperation Initiative (MCDC).

These enforcement actions and the commission's broader enforcement program are explored more closely in our longer midyear review, in which we consider the broader implications of the cases instituted by the commission along with the public comments of commissioners and commission staff in the first six months of 2016. While judicial decisions on these and other issues could affect enforcement decisions going forward, it appears a safe bet that the SEC will break, or come close to breaking, the record for enforcement actions it set just last year.

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