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Securities Litigation and Enforcement Trends

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SEC Speaks 2012

The US Securities and Exchange Commission (SEC or the Commission) held its annual SEC Speaks conference in Washington, DC from February 24–25, 2012. This past year was devoted to modernization initiatives and calls for renewed efforts to increase the unprecedented 735 enforcement actions filed in the fiscal year that ended September 30, 2011.

Chairman Mary L. Schapiro began the conference by noting the strides the SEC has made in improved modernization initiatives, including better hiring and training and more sophisticated technology, research capabilities and operational management. Schapiro specifically emphasized broadened hiring efforts to bring nonlawyer industry experts on staff, including traders and academics, as well as doubling the staff's training budget and enhancement of the new agencywide electronic discovery program. Schapiro also lauded the staff's increased ability to recognize threats and move rapidly to address them.

Robert Khuzami, director of the SEC's Division of Enforcement, echoed chairman Schapiro's remarks and emphasized the ongoing efforts to bring cases arising from the financial crisis, in addition to the nearly 100 actions brought to date against individuals and/or entities—more than half of which include CFOs, CEOs or other senior officers. Jason Anthony in the Structured and New Products Unit also addressed the SEC's "very large focus" on financial crisis cases, reporting that the SEC has brought 95 actions against entities and individuals arising out of the financial crisis and has obtained almost $2 billion in monetary relief.

Matthew Martens, chief litigation counsel, discussed the SEC's litigation record and settlement practices, in light of the uproar stemming from Judge Rakoff's refusal last year to approve the SEC's settlement with Citigroup. According to Martens, it is the SEC's policy to accept settlements with recoveries that the SEC could reasonably expect to receive at trial, and he argued that it would be a mistake to reject settlements simply because they lack admissions of liability. Martens also noted that the use of detailed public complaints ensures that the public is adequately put on notice regarding any wrongful conduct that allegedly has occurred, and he stressed that out of approximately 2,000 cases settled in the past three years, judges have challenged settlements in fewer than ten instances.

Kara Brockmeyer, chief of the SEC's specialized FCPA Unit, announced the December 2011 launch of the "FCPA Spotlight" page on the Commission's website, which includes links to every FCPA action ever brought by the SEC and also provides FCPA case statistics going back five years. Brockmeyer noted that the SEC brought 20 FCPA actions in 2011 (19 companies, one individual) and collected $255 million in sanctions. Brockmeyer promised that "more will be coming," including cases targeting the pharmaceutical industry. Indeed, in 2012, the SEC has already charged 14 individuals and five companies with FCPA violations. She also touched on various international developments in anticorruption enforcement, including recent antibribery laws passed in Russia and China, and noted that Switzerland recently brought its first foreign corruption case. Brockmeyer indicated that the SEC is seeing more and improved cooperation in connection with foreign corruption cases between regulators and across borders.

David Bergers, the SEC's regional director in Boston, discussed Enforcement's enhanced ability to pursue potential wrongful conduct based upon the delegation of formal order authority to senior officers in the Division, which permits the SEC to escalate an investigation more quickly and to compel testimony and document production. Bergers also noted that, under the streamlined Wells notice process, the SEC will allow only one post-Wells meeting so that settlement negotiations do not delay recommending an action to the Commission, which is consistent with Dodd-Frank's requirement that an action be filed within 180 days of a Wells notice, with any extension requiring the Commission's approval. Bergers stressed that the Enforcement staff is taking this deadline "very seriously."

Commissioner Daniel Gallagher focused his comments on "failure to supervise" liability for a broker-dealer's legal and compliance personnel. Although legal and compliance officers are not

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automatically considered "supervisors," they can fall under this category when the facts and circumstances of a particular case reveal that they held the requisite degree of responsibility, ability or authority to affect the conduct of other employees such that they have become a part of the management team's collective response to a problem. Gallagher acknowledged that "robust engagement on the part of legal and compliance personnel raises the specter that such personnel could be deemed to be 'supervisors' subject to liability for violations of law by the employees they are held to be supervising," which then leads to "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 did conclude that the issue "remains disturbingly murky" and called upon the Commission to provide a framework that encourages such personnel to provide the necessary guidance without fear of being deemed "supervisors."

Sean McKessy, chief of the SEC's Office of the Whistleblower, reported that the new Whistleblower Program stemming from Dodd-Frank has resulted in hundreds of high-quality tips. McKessy stressed that his office has engaged in significant internal outreach to educate staff across the divisions to ensure they understand the type of information that should be captured from whistleblowers as well as how to process award payments, which Dodd-Frank directs the SEC to pay in amounts between 10 and 30 percent of monetary sanctions to individuals who voluntarily provide original information that leads to successful enforcement actions resulting in sanctions over $1 million. According to McKessy, the current priority is to improve and maintain communication with whistleblowers and their counsel, and he noted that the office has successfully returned more than 2,000 calls within 24 business hours of receiving the tip on the hotline.

In response to criticism that Dodd-Frank's Whistleblower Program will stifle internal reporting, McKessy defended the approach as "balanced" because it includes "built-in incentives" that enable whistleblowers to report internally first yet still remain eligible for the award. McKessy also volunteered that his experience has been that a significant majority of the tips received were—according to the whistleblowers themselves—reported first internally within their respective companies, and said that he was "hard pressed" to think of an example in which the whistleblower did not first report internally.

Merri Jo Gillette, regional director in Chicago, commented on the expansion of aiding and abetting liability under Dodd-Frank, noting that the SEC now has more flexibility to assert aiding and abetting claims under the Securities Act and the Investment Advisers Act, as well as to seek civil monetary penalties. Prior to Dodd-Frank, the SEC was required to show that an aider and abettor knowingly provided substantial assistance, but now the SEC may prove the charge under a "knowing or reckless state of mind" standard. Gillette remarked that the SEC will continue to look at the application of aiding and abetting liability to so-called corporate gatekeepers, such as accountants and lawyers.

In terms of changes to civil penalties under Dodd-Frank, Gillette explained that the most significant development is the SEC's authority to seek penalties in administrative proceedings as well as expanded authority to penalize secondary actors, as the SEC may now explicitly seek penalties against persons who commit direct violations and who were "causes" of direct violations.

Speakers at the conference continued to emphasize the importance of auditor independence. Because the SEC's auditor independence standards are broader than those of the American Institute of CPAs (AICPA), the Accounting Enforcement panel cautioned that companies considering an initial public offering should carefully review the scope of their auditor's services for compliance with the SEC's more stringent requirements. Fraud enforcement in the context of financial reporting also continues to be a high priority for the SEC. The SEC warned that additional areas of focus will be cross-border transactions, disclosures, revenue recognition, loan losses, valuation, impairment, expense recognition and related-party transactions.

The revamped SEC now appears ready to expand upon its enforcement efforts in 2012, which is reflected within President Obama's proposed

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budget for 2013, reflecting an 18.5 percent increase over the SEC's 2012 appropriation, and which would permit the agency to increase its staff by 15 percent. This budget increase would support the Commission's touted technology initiatives and continued expansion of the agency's system to identify suspicious patterns and behaviors quickly and more effectively. The SEC appears engaged to exceed last year's record number of enforcement actions, especially via the capabilities afforded by Dodd-Frank. ■

Second Circuit Interprets *Morrison*: Domestic Transactions in Securities on a Foreign Exchange

Absolute Activist Value Master Fund Ltd. v. Ficeto, Case No. 11-0221-cv (2d Cir. Mar. 1, 2012)

On March 1, 2012, the Second Circuit issued a ruling concerning the second prong of the US Supreme Court's decision in *Morrison v. Nat'l Australia Bank Ltd.*, in which the Court held that US securities laws apply only to (1) transactions in securities listed on domestic exchanges and (2) domestic transactions in other securities. Answering the question of when a transaction involving securities not listed on a US exchange can still be a "domestic" transaction, the Second Circuit concluded that, in order to establish a domestic transaction in other securities, a plaintiff "must allege facts suggesting that either irrevocable liability was incurred or title transferred within the United States."

The plaintiffs in *Absolute Activist* include nine Cayman Islands hedge funds that invested in various asset classes on behalf of hundreds of US and other investors worldwide. The complaint alleges that various officers and employees of the funds' investment manager, Absolute Capital Management Holdings Limited, engaged in a "pump-and-dump" scheme, causing the funds to purchase billions of shares of thinly capitalized US-based companies, falsely inflating the value of those companies and then unloading their personal holdings in the companies at a significant profit. While the defendants reaped enormous profits, the hedge funds allegedly suffered losses in the amount of $195,916,216.

The issue before the Second Circuit was whether the securities the Cayman Islands hedge funds had purchased satisfied *Morrison's* second prong, thus addressing "under what circumstances the purchase or sale of a security that is not listed on a domestic exchange should be considered 'domestic' within the meaning of *Morrison*." The Second Circuit noted that *Morrison* provided very little guidance on what constitutes a domestic purchase or sale, but it examined the definition of those terms in the securities laws and under prior decisions concerning the timing of purchases and sales of securities. The court translated the standard for determining such timing—which is the point in time at which the parties become irrevocably bound—into the standard to be applied when determining the locus of a securities purchase or sale. Thus, a plaintiff has alleged the existence of a domestic transaction if there are sufficient facts to create an inference that "the purchaser incurred irrevocable liability within the United States to take and pay for a security, or that the seller incurred irrevocable liability within the United States to deliver a security."

Noting that the irrevocable-liability test is not the only way to identify a securities transaction, the Second Circuit also added the location at which title to the shares at issue was transferred.

In issuing its ruling, the Second Circuit expressly rejected certain tests for determining the domesticity of a securities transaction that the parties had proposed, including (1) the location of the broker-dealer, (2) the identity of the securities and whether they are issued by US companies, (3) the respective identity of the buyer and seller and (4) the level of conduct that took place in the United States by the alleged wrongdoer.

As written, the *Absolute Activist* complaint failed to adequately allege that the parties had incurred irrevocable liability to carry out the transaction within the United States or that title to the shares had passed within the United States. Despite the fact that the offerings were direct sales by US companies to the hedge funds and the stocks were

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SEC-registered, the complaint asserted only a few allegations that even hinted at the location of the securities transactions at issue. Thus, the Second Circuit remanded the case to the district court, granting plaintiffs leave to amend their complaint in order to plead additional facts to support their claim that the transactions took place in the United States.

While the Second Circuit's ruling appears at first blush to take a fairly narrow approach to what transactions may be considered domestic, *Absolute Activist* could potentially expand the number of cases that may be brought in the United States under US securities laws. Despite the Second Circuit's express restrictions on the domesticity of transactions on non-US exchanges by specifically enumerating certain allegations that would not suffice, the court, in remanding the case, provided much guidance on the types of factual allegations that *should* be asserted to allow plaintiffs to survive a motion to dismiss. Armed with the express guidance to allege facts concerning where money was exchanged, where contracts were formed, where purchase orders were executed and where title passed, more plaintiffs may opt to prosecute their cases under the second prong of *Morrison* and thereby be able to sufficiently allege facts allowing their cases to survive dismissal. ■

Continued Uncertainty Surrounding the Future of the SEC's "Neither Admit Nor Deny" Settlement Practice

Since US District Court Judge Jed S. Rakoff of the Southern District of New York rejected a $285 million settlement between the Securities and Exchange Commission (SEC) and Citigroup Global Markets Inc. (Citigroup) last fall, both the SEC and federal courts have grappled with the future of what had been the SEC's long-standing practice of permitting companies to settle cases without admitting any liability. However, the Second Circuit's recent decision to stay the proceedings before the Southern District of New York, pending the resolution of the SEC and Citigroup's appeals of Judge Rakoff's settlement rejection, suggests that the appellate court may eventually set aside Judge Rakoff's rejection of the parties' settlement.

In *SEC v. Citigroup*, Judge Rakoff held that the proposed consent judgment between the SEC and Citigroup was "neither fair, nor reasonable, nor adequate, nor in the public interest" because Citigroup had not admitted or denied the allegations set forth by the SEC.[1] Per Judge Rakoff, the proposed settlement did "not serve the public interest, because it ask[ed] the Court to employ its power and assert its authority when it does not know the facts."[2]

In the immediate aftermath of Judge Rakoff's ruling, Robert Khuzami, the Director of Enforcement at the SEC, issued a statement, noting that Judge Rakoff's decision "ignore[d] decades of established practice throughout federal agencies and decisions of the federal courts."[3] Further, Khuzami stated that "[r]efusing an otherwise advantageous settlement solely because of the absence of an admission also would divert resources away from the investigation of other frauds and the recovery of losses suffered by other investors not before the court."[4]

Notwithstanding Khuzami's criticism of Judge Rakoff's decision, in early January 2012, the SEC announced a policy change involving cases in which parallel criminal proceedings result in convictions or admissions of securities law violations. In such situations, per the new SEC policy, the "neither admit nor deny" language is no longer available, and the conviction or admission would be incorporated into the civil disposition. This policy change will likely have little impact on most defendants, since the bulk of cases brought by the SEC do not involve criminal proceedings.

In recent months, other US district courts have mimicked the reasoning employed by Judge Rakoff in rejecting no-admit, no-deny settlements. For example, in December 2011, US District Court Judge Rudolph T. Randa of the Eastern District of Wisconsin took issue with a proposed settlement

1 *SEC v. Citigroup Global Markets, Inc.*, __ F. Supp. 2d __, 2011 WL 5903733, at *6 (S.D.N.Y. Nov. 28, 2011).
2 *Id.*
3 Robert Khuzami, *Public Statement by SEC Staff: Court's Refusal to Approve Settlement in Citigroup Case* (Nov. 28, 2011), available at: http://www.sec.gov/news/speech/2011/spch112811rk.htm.
4 *Id.*

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between the SEC and Kass Corp. CEO, Michael Koss, and requested that the SEC provide additional information showing why the settlement was in the public interest. In response, the SEC redrafted the proposed settlement agreement. More recently, US District Court Judge Richard A. Jones of the Western District of Washington rejected a proposed no-admit, no-deny settlement between the SEC and three individual defendants. Judge Jones criticized the SEC for seeking judgments against the defendants while reserving the right to request disgorgement remedies and civil penalties in the future.[5]

On March 15, 2012, in a *per curiam* opinion, a three-judge panel of the Second Circuit granted the motions of the SEC and Citigroup to stay district court proceedings, pending the resolution of their interlocutory appeals that seek to set aside Judge Rakoff's decision rejecting the parties' proposed settlement.[6] Although the panel did not hold that Judge Rakoff's settlement rejection was improper, the Second Circuit concluded that the SEC and Citigroup had shown a likelihood of success on the merits of their appeals, which justified staying the lower court proceedings. Notably, the panel wrote that Judge Rakoff was likely incorrect in rejecting the proposed settlement on public policy grounds, stating that it is not "the proper function of federal courts to dictate policy to executive administrative agencies."[7]

While the lower court proceedings remain stayed, on March 31, 2012, the Second Circuit scheduled oral arguments on the pending appeals for late September 2012. Until then, the future of the SEC's long-standing "neither admit nor deny" settlement practice will continue to remain unsettled. ■

5 *SEC v. Merendon Mining (Nevada), Inc. et al.*, No. 10 CV 00955 (Mar. 5, 2012).
6 *SEC v. Citigroup Global Markets, Inc.*, __ F. 3d __, 2012 WL 851807 (2d Cir. Mar. 15, 2012).
7 *Id.* at *4.

Recent SEC Enforcement Action Raises Questions About Implications of Foreign Law in Responding to Subpoena

On September 8, 2011, the US Securities and Exchange Commission (SEC) filed a subpoena enforcement action against Shanghai-based Deloitte Touche Tohmatsu CPA Ltd. (Deloitte Shanghai) in the US District Court for the District of Columbia. The enforcement action was the result of Deloitte Shanghai's failure to produce documents related to the SEC's investigation into potential fraudulent conduct by Longtop Financial Technologies, Limited, one of Deloitte Shanghai's longtime clients.

Deloitte Shanghai advised the SEC that it could not produce documents responsive to the subpoena because removing these documents from China, without authorization from the appropriate government authorities, could be deemed illegal and lead to extremely harsh consequences, including prison time.

Specifically, Deloitte Shanghai was concerned that producing documents to the SEC would violate the People's Republic of China (PRC) Law on the Protection of State Secrets, the PRC Certified Public Accountants Law, the PRC Archives Law and the PRC General Principles of Civil Law and Criminal Law. Collectively, these laws place stringent controls on the disclosure and production of documents to foreign countries.

Under the PRC Law on the Protection of State Secrets, a "state secret" is broadly defined and includes matters concerning state affairs, national defense, diplomatic activities, national and social development, science and technology, state security and any other matters classified by the State Secrets Bureau as state secrets.[1] Chinese law also strictly controls the disclosure of "Archives"—historical records of public entities and individuals the preservation of which is "of value" to the state and to society.[2] Such records can relate to political, military, economic, scientific, technological,

1 PRC Law on the Protection of State Secrets, Art. 8.
2 Archives Law of the People's Republic of China, Art. 2.

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cultural, religious and other activities.[3] Under the Archives Law, every public organization, enterprise, institution and citizen has a duty to protect Archives.[4] In addition, under the PRC Certified Public Accountants Law, a CPA has a duty to maintain the confidentiality of all business information he or she acquires in the performance of his or her service.[5]

On September 8, 2011, the SEC filed an *ex parte* Application for Order to Show Cause, contending that Chinese law did not justify Deloitte Shanghai's failure to comply with the subpoena.[6] The district court granted the SEC's Application and ordered Deloitte Shanghai to show cause as to why it should not be held in contempt for failure to respond to the subpoena.[7] The district court, however, made no findings with regard to whether the various Chinese laws would prohibit Deloitte Shanghai from producing documents.[8] Deloitte Shanghai filed a Motion to Clarify the Order to Show Cause, which was denied by the court on February 1, 2012.[9] Currently, a hearing on whether Deloitte Shanghai will be required to comply with the subpoena is set for May 4, 2012.[10]

Other courts have held that the simple assertion of foreign law as a justification for noncompliance does not suffice. *See, e.g., Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 US 197, 204–05 (1958) (foreign secrecy laws did not preclude US court from ordering a foreign party to disclose information in judicial proceeding); *Société Nationale Industrielle Aérospatiale v. US District Court for the Southern District of Iowa*, 482 US 522, 544 n.29 (1987) (blocking statutes do not "deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate [those] statute[s]"); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477 (9th Cir. 1992) (contempt sanctions against corporation that refused to produce discovery because of Chinese law prohibitions upheld where neither the corporation nor the People's Republic of China had "identified any way in which disclosure of the information requested . . . [would] significantly affect the PRC's interests in confidentiality").

In determining whether to compel compliance with a subpoena or other discovery request, the courts in these cases consider the factors enumerated in the Restatement on Foreign Relations Law, including but not limited to: (1) the importance of the documents or other information requested; (2) the specificity of the requests; (3) where the information originated; (4) the availability of alternative means of procuring the information; and (5) "the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located."[11] The most important factor appears to be the balance of national interests.[12] Courts will, however, also consider the good faith of the party objecting to discovery.[13]

While the Deloitte Shanghai case deals with an accounting firm located in China, US-based firms may also have to contend with these issues in situations where the client for which the audit or other accounting services are being performed is located in China or where the firms have branch offices located in China. In such instances, there are several questions that must be considered, including who created the documents, where the documents are located, who has possession and

3 *Id.*

4 *Id.*, Art. 3. Under the Archives Law, unauthorized disclosure of Archives may result in criminal liability. *Id.*, Arts. 24, 25.

5 PRC Law on Certified Public Accountants, Art. 19. Also, the Regulations on Strengthening the Protection of Secrets and Archive Management relating to Issuance and Listing of Securities Overseas, promulgated on October 20, 2009, provide that audit work papers must be stored in China and strictly prohibit their production to people or entities outside of China without express approval from the necessary Chinese authorities.

6 *See SEC v. Deloitte Touche Tohmatsu CPA, Ltd.*, 1:11-mc-00512-GK-DAR, Document No. 1.

7 *Id.*, Document No. 10.

8 *Id.*

9 *Id.*, Document No. 14.

10 *Id.*, Document No. 22.

11 Restatement (Third) of Foreign Relations Law § 442(1)(c).

12 *See Richmark Corp. v. Timber Falling Consultants*, 952 F.2d 1468, 1476 (9th Cir. 1992) (The balance of the national interests is "the most important factor. We must assess the interests of each nation in requiring or prohibiting disclosure, and determine whether disclosure would 'affect important substantive policies or interests' of either the United States or the PRC") (citing Restatement (Third) of Foreign Relations Law § 442, comment c).

13 *Gucci America, Inc. v. Weixing Li*, No. 10 Civ. 4974 (RJS), 2011 WL 6156936, at *5 (S.D.N.Y. Aug. 23, 2011); *see also Tiffany LLC v. Andrew*, 276 F.R.D. 143, 160 (S.D.N.Y. 2011) ("There is no evidence in the record that the Banks are acting in bad faith . . . . [Indeed,] [t]he fact that the Banks chose to object to the subpoenas . . . does not indicate bad faith").

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control of the documents, and whether the documents contain information that could be deemed state secrets, Archives, trade secrets or financial or other sensitive information subject to Chinese law.

There is still much uncertainty in this area of law with respect to how US courts will analyze the relevant factors in determining whether disclosure is warranted. A question also remains as to how federal agencies such as the SEC will work with countries such as the PRC to address these concerns. In addition, companies faced with a subpoena or other document request that is directed toward records located in a foreign jurisdiction may find themselves in the proverbial catch-22—deciding whether to produce the requested documents and information, while facing potential civil and criminal penalties under Chinese or other foreign law, or to withhold the requested documents and information, while facing possible contempt liability and other civil sanctions levied by US courts. Nonetheless, for companies with branch offices or clients abroad, it is important, to protect their interests and those of their clients, to recognize when foreign law might need to be taken into consideration. ■

Recent SEC Enforcement Actions Signal Shift to More Proactive Approach to Hedge Fund Regulation

Several enforcement actions announced by the SEC in recent months appear to be products of a specific Division of Enforcement initiative—dubbed the "Aberrational Performance Inquiry"—designed to identify abnormally high-performing hedge funds and target them for increased scrutiny. Under this new initiative, the Division of Enforcement's newly established Asset Management Unit has begun using proprietary risk analytics to evaluate hedge fund returns, focusing primarily on performance that appears inconsistent with a fund's investment strategy or other benchmarks. While details regarding the exact analytics being used have not been made available, SEC Director of Enforcement Robert Khuzami has stated that the Asset Management Unit is focusing on hedge funds that are outperforming market indexes by 3 percent on a steady basis.

On December 1, 2011, the SEC announced several recent enforcement actions that appear to have arisen from this new initiative. The complaints in all three of the newly initiated actions allege a variety of securities violations and other illegal practices, including, among others, inflating the value of fund holdings, concealing fund performance and intentionally misrepresenting key fund characteristics, including assets, liquidity, investment strategy, manager credentials and conflicts of interest.

In *SEC v. Balboa*, No. 11-CV-08731 (S.D.N.Y. 2011), the SEC alleged that Balboa, a former portfolio manager, conspired with two European brokers in a fraudulent scheme to inflate the hedge fund's reported monthly returns and net asset value by manipulating the valuation process. According to the complaint, Balboa provided fictional prices for two of the fund's illiquid holdings, which in turn allowed the fund to drastically overvalue certain of its securities holdings and report inflated and falsely positive monthly returns.

In *SEC v. Rooney*, No. 11-CV-08264 (N.D. Ill. 2011), the SEC alleged that Rooney, an investment advisor to the Solaris Opportunity Fund LP, made a drastic change in the fund's investment strategy that was inconsistent with the fund's offering documents and marketing materials by becoming wholly invested in a financially troubled company with which he had a relationship. The investments allegedly benefitted Rooney, while providing the fund with a "concentrated, undiversified and illiquid position in a cash poor company with a lengthy track record of losses."

Finally, in *SEC v. Kapur*, No. 11-CV-08094 (S.D.N.Y. 2011), the SEC charged Kapur, a hedge fund manager and managing director, with fraud in connection with repeated misrepresentations regarding the fund's record, size and credentials. Specifically, the SEC alleged that Kapur overstated performance, inflated assets and exaggerated the performance history and experience of the fund's management team, which allowed the firm to

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appear as if it had been outperforming the market.

There is no reason to believe that the SEC's Division of Enforcement and, specifically, the Asset Management Unit plan to limit this new analytics-based approach to the world of hedge funds. Indeed, the SEC's Asset Management Unit has expressly stated that the new approach is being applied "across the investment adviser space." Given the resources committed to the Asset Management Unit, both hedge funds and investment advisers should expect to see an increase in the number of investigations and enforcement actions. ■

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