SEC's Division of Enforcement Issues its FY 2018 Results

On November 2, the SEC's Division of Enforcement issued an annual report for fiscal year 2018.[1] This is the first such annual report to reflect a full fiscal year under the Trump administration and Chairman Clayton, and shows a Division of Enforcement that remains active.

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The report states that the SEC brought 821 total enforcement actions during the year, and obtained judgments and orders for approximately $3.9 billion in disgorgement and penalties. The number of cases brought and aggregate amount of penalties and disgorgement remains consistent with previous years, but the composition of enforcement cases has shifted; more than half of the $3.9 billion total is related to a single FCPA case brought by multiple agencies in addition to the SEC, and less money collected is attributable to registered investment advisers and investment companies.

The topline numbers show a 31.7% increase in the number of cases brought against investment advisers and investment companies from 82 in 2017 to 108 in 2018. As a percentage of all enforcement cases, this represents an all-time high of 22%, compared to the previous high of 20.7% in 2013. But, while the total number of of cases brought against investment advisers and investment companies increased, the average aggregated amount of penalties and disgorgement ordered in such cases plummeted. In 2015 through 2017, this average amount ranged from approximately $5.2 to $8.8 million per case; in 2018, the amount dropped to approximately $2.0 million per case, a decrease of nearly 62% from the prior year.[2] Additionally, despite the increase in the total number of actions brought against investment advisers and investment companies, the report discusses those actions only in passing — primarily as they relate to the SEC's share class selection disclosure initiative, which is not relevant to most private fund sponsors. Of note, a number of enforcement actions from the past fiscal year involved ongoing enforcement topics for private fund managers (e.g., expense allocation, accelerated monitoring fees and political contributions), although these themes were not highlighted in the report.

The report also highlights the impact of *Kokesh v. SEC* on actions of the Division of Enforcement. The report estimates that Kokesh, which generally limits the SEC's ability to obtain disgorgement more than five years after the underlying misconduct, resulted in the SEC foregoing approximately $900 million it would have sought otherwise.

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Finally, the report discusses the Division of Enforcement's five guiding principles, which it states drive the Division's assessment of its own performance:

- focus on "Main Street" investors, notably including an initiative focusing on disclosure of investment advisers' conflicts of interest;
- focus on individual accountability, including holding individuals "at the top of the corporate hierarchy" accountable for the actions of the firms they run;
- keeping pace with technological change, including bringing the first-ever action against a firm for violations of the Identity Theft Red Flags Rule;
- remedies tailored to further enforcement goals, rather than focusing solely on fines and financial remedies; and
- constant assessment of resource allocation, including shifting enforcement staff into market segments such as cybersecurity, initial coin offerings and the share class selection disclosure initiative.

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Regardless of the Division of Enforcement's announced priorities in the report, advisers to private funds should be aware that the Office of Compliance Inspections and Examinations continues to focus on areas of SEC interest across private fund advisers, such as investment and expense allocation, undisclosed conflicts of interest, advertising materials, Custody Rule compliance and other issues. Accordingly, advisers to private funds should continue to monitor their compliance with applicable rules on these issues.

1 The SEC's fiscal year ran from October 1, 2017 to September 30, 2018. All references to years in this *Kirkland AIM* are based on the SEC's fiscal year.

2 According to analysis conducted by Kirkland & Ellis lawyers of a dataset compiled by *The New York Times*.

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