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The SEC in 2019: The path forward draws strong opposition

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Introduction

In 2019 the SEC continued to pursue Chairman Jay Clayton's goals of improving capital raising for businesses and protecting Main Street investors, but in many instances the agency's actions exposed deep disagreements between the Commissioners and among industry stakeholders. Where in 2018 Clayton seemed to steer clear of the political divisiveness surrounding the current Administration, in 2019 the Commission got caught up in it entirely. Three-to-two votes with emphatic dissensions marked a year in which the SEC took action on controversial issues such as Regulation BI, proxy advisory firms, shareholder proposal ownership thresholds, and the regulation of exchange-traded funds. Two of the measures—Regulation BI and the proxy advisory firm guidance—were immediately hit with lawsuits challenging their validity. And while 3-2 votes are not new to the SEC, the depth of the disagreements in 2019 seemed to outdistance prior Commissions.

The contentious nature of the discourse seemed to escalate all year, culminating with the November rule proposals on proxy advisory groups and shareholder proposal thresholds. Commissioners Robert Jackson and Allison Herren Lee accused the Commission of being blatantly pro-business and shielding CEOs from accountability to investors. Clayton countered that the agency had received numerous comment letters from investors asking for the changes. Then at an early December hearing, Sen. Chris Van Hollen (D-Md) suggested that Clayton had been "duped" by those comment letters, which the Senator said were prepared by dark money groups to encourage the development of the proxy advisory firm proposals.

In addition to push-back from Congress and industry stakeholders on many fronts, the SEC faced other pressures in 2019 including a six-week government shutdown early in the year. The agency had to pass some emergency measures to help issuers meet their filing requirements during that time, and the Division of Corporation Finance, faced with a mounting backlog of no-action requests, began to respond orally to many shareholder proposal letters. The staff found the practice to be so effective that the Division adopted it as official policy for the 2020 proxy season. While it is too early to gauge the impact of the new process, the announcement initially drew concerns about the transparency of staff positions that would not be provided in writing.

The Commission's transparency also was called into question after the agency cancelled a number of open meetings and passed the agenda items seriatim, outside of the public view. The SEC called off a September 25 meeting and the next day adopted a rule to modernize the approval framework for

ETFs, a rule to extend test-the-waters rights to all issuers, and proposals affecting the regulation of the OTC markets. Similarly, in November the Commission voted behind closed doors to propose a rule to modernize the regulation of the use of derivatives by registered funds and business development companies, and in August proposed changes to Regulation S-K disclosures after it scrapped the open meeting at which they were to be considered. The seriatim approach has not been common practice at the SEC in the past, and bears watching in 2020.

Oversight of the PCAOB proved to be more challenging than usual for the SEC in 2019. Amid evidence that the PCAOB was in turmoil following the complete replacement of the five-member Board, including its inability to fill long-vacant senior positions, the SEC stepped in and appointed Commissioner Hester Peirce as coordinator of the SEC's efforts with the Board. The Commission also tapped former SEC Chairman Harvey Pitt to review the PCAOB's corporate governance procedures.

In the enforcement arena, the SEC had to overcome the 35-day shutdown, and Supreme Court decisions in *Kokesh* and *Lucia* that hindered its ability to recover ill-gotten gains. These setbacks did not deter the Enforcement Division from pursuing any cases, the division's co-directors said publicly. The agency touted the success of its share class disclosure initiative in 2019, in which 95 investment advisory firms self-reported misconduct that led to the return of $135 million to affected investors. During the year, the staff also continued to focus on digital assets, including token registration cases against Paragon Coin, AirFox and Gladius Network, and cybersecurity where it brought risk disclosure actions against Facebook and Mylan. In all, the Commission obtained judgments and orders totaling $4.3 billion in disgorgement and penalties, and returned $1.2 billion to harmed investors.

2019 was a turbulent year for the SEC as deep divisions on critical rulemaking issues surfaced. However, despite facing stiff headwinds, the Commission moved forward on initiatives to ease the disclosure burden for companies, to make it easier for small businesses to raise capital, and to make adjustments to the proxy system. With a June concept release, it also began the conversation about, among other things, whether it should relax restrictions on securities offerings to give retail investors greater access to private markets. Here is our comprehensive look back at the agency's efforts over the past year.

The Commission welcomes a new member

The Commission welcomed Allison Herren Lee in July. As a longtime SEC enforcement attorney, Lee arrived with substantial prior experience. Before becoming a Commissioner, she served in several roles at the SEC between 2005 and 2018, including in the Division of Enforcement and as counsel to former Commissioner Kara Stein. Lee was confirmed by the Senate in June and filled the Democrat seat vacated by Commissioner Stein in January.

While the Commission currently enjoys full strength, Commissioner Robert Jackson's term expired in June. A Commissioner may continue to serve approximately 18 months after his or her term expires if not replaced before then. Jackson has not made public his future plans, although *The Wall Street Journal* reported in April that he would be returning to the faculty of NYU School of Law. Should Jackson depart before being replaced, Commissioner Lee will be the only Democrat serving. In addition, Commissioner Hester Peirce's term expires on June 5, 2020, leaving open a Republican seat. While not always the case, Commissioners have traditionally been nominated in bipartisan pairs.

2019 rulemaking highlights

The SEC in 2019 issued 19 final rule releases and 19 proposals, representing a decrease from 28 final rules adopted in 2018. The Commission addressed 35 out of 39 items on an ambitious near-term agenda, despite rulemaking efforts being stalled during a lengthy government shutdown early in the year. Highlights, discussed in greater detail below, include changes to the rules governing proxy advisory firms and shareholder proposals, plus the adoption of Regulation BI, a new standard for broker-dealers when making a recommendation to a retail customer, and the modernization of the regulation of exchange-traded funds. More broadly, the year saw a sharpened focus on security-based swaps and the enhancement of disclosure and reporting.

Rulemaking in 2020. The current rulemaking agenda contains 48 items, some of which, such as proposals concerning proxy submissions and the definition of "accredited investor," have recently been acted on. The Commission has made significant strides towards improving the proxy process. Not all of these efforts have been well-received, however, and the effects of comments in opposition to aspects of the most recent proposals are sure to be seen when the final versions of the most recent proposals appear.

Speaking before the Senate Banking Committee in December, SEC Chairman Jay Clayton gave several hints concerning the Commission's direction in 2020. He indicated that the modernization and simplification of disclosure requirements will continue and said that he expects improvements to disclosures provided to investors, such as MD&A and Supplementary Financial Information. The Commission is also likely to consider a proposal modernizing the exemption permitting private companies to issue securities as compensation. Clayton also noted that the "gig economy" has changed the labor market and said that the regulatory framework should reflect new, alternative work arrangements. Finally, finalizing rulemaking mandated by the Dodd-Frank Act remains a priority, and the potential adoption of final rules regulating cross-border security-based swaps will be an important step in that direction.

Proxy rule proposals meet opposition

Guidance. The Commission addressed its proxy rules a number of times this year, culminating in a November rule proposal that has engendered much comment and criticism. First, guidance issued in August highlighted the issues investment advisers should consider when working with proxy advisory firms. The guidance is intended to clarify how an adviser's fiduciary duty under Advisers Act Rule 206(4)-6 relates to its proxy voting on behalf of clients, particularly when using a proxy advisory firm. Among other items, it discusses how an investment adviser and its client may come to an agreement on the scope of the adviser's authority to vote proxies on behalf of that client.

At the same time, the Commission issued an interpretation stating that advice provided by a proxy advisory firm generally constitutes a "solicitation" under the federal proxy rules. While exemptions from the proxy rules' information and filing requirements are available for solicitations, the firm must comply with all conditions of the applicable exemption. In addition, exempt solicitations are still subject to the prohibition on false or misleading statements in Exchange Act Rule 14a-9.

Opposition. The guidance was passed by a 3-2 vote, with Commissioners Jackson and Lee in opposition. Both commissioners pointed out that the guidance could alter the competitive landscape in the proxy advice arena without properly addressing the costs and benefits. Indeed, a few months later, Institutional Shareholder Services, Inc. filed suit against the SEC, asserting that the guidance is "unlawful." The complaint asks that the guidance be enjoined because it: exceeds the SEC's statutory authority; is procedurally improper due to a failure to follow APA notice and comment procedures; and is arbitrary and capricious in that the SEC made a significant change to the regulatory regime applicable to proxy advice while denying that it changed its position at all.

Proposed rule changes. In November, a divided Commission voted to propose changes to the rules governing proxy advisory firms and shareholder proposals. One proposal would target advisory firms by requiring them to furnish their voting advice to issuers to review for factual errors or methodological weaknesses before providing the report to the firm's clients. The proposed amendments would specify the circumstances under which a person who furnishes proxy voting advice will be deemed to be engaged in a solicitation and codify the SEC's view that voting advice provided in response to an unprompted request would not constitute a solicitation. Finally, the proposal would amend Rule 14a-9 to include examples of misleading proxy voting advice.

The second proposal would amend the thresholds for eligibility to submit shareholder proposals as well as shareholder proposal resubmissions. While retaining the long-standing $2,000 securities-holding threshold for eligibility to submit shareholder proposals, the proposal would create a tiered system where shareholders holding a greater value of securities in a company would be subjected to a shorter holding period than those with smaller holdings; this would encourage shareholder engagement by long-term investors. It would also provide for the exclusion of proposals that are resubmitted after repeatedly being overwhelmingly rejected by other shareholders.

Commissioners Jackson and Lee respectfully but energetically dissented from approving the proposals. Both objected to what they believed were pro-management changes in the rules.

Duped by comment letters? During the open meeting in which these proposals were adopted, Chairman Clayton noted that hundreds of comment letters had been received after a November 2018 roundtable on the proxy system. Clayton was struck, he said, by comments from long-term Main Street investors expressing concerns about the current proxy process. A common concern, he said, was that the investments of these investors were being steered by third parties to promote individual agendas to the detriment of the interests of other shareholders.

On December 10, Chairman Clayton was grilled by members of the Senate Banking Committee regarding the comment letters underpinning the proxy proposals. During his testimony at the hearing, Clayton emphasized the Commission's overarching goal of modernizing and improving the proxy voting process while serving the interests of Main Street investors. Following Clayton's remarks, however, members of the committee pressed Clayton as to the origin of the letters cited as support for the proposed changes. While not accusing Clayton of being intentionally deceptive, Sen. Chris Van Hollen (D-Md) suggested that Clayton had been "duped" by a series of comment letters that were either fraudulent or written at the behest of a "dark money" group backed by large corporations that do not want to be second-guessed by proxy advisors. Ranking Member Sherrod Brown (D-Ohio) similarly characterized the proposals as "a new tool to intimidate proxy advisors" and an example of the Trump Administration's taking the side of corporate interests. Comments on the proposals are due on February 3, 2020, but a number of the comments received to date have echoed the concerns of the committee members.

Harmonization of Securities Act registration exemptions

In June, the Commission sought public comment via a concept release on ways to simplify, harmonize, and improve the framework for exemptions from registration under the Securities Act. The impetus behind the release is that fact that since the enactment of the JOBS Act of 2012, a number of exemptions from registration have been introduced, expanded, or revised. Consequently, the exempt offering framework has become complex, and market participants have urged the Commission to undertake a comprehensive review of the available exemptions. In the concept release, the Commission undertook a review of the exemptions from registration in order to improve the framework and to identify any potential overlap or gaps.

Release highlights. The release sought comments on:

- *The Exempt Offering Framework*: Whether the Commission's exempt offering framework, as a whole, is consistent, accessible, and effective for both companies and investors or whether the Commission should consider changes to simplify, improve, or harmonize the exempt offering framework.
- *The Capital Raising Exemptions within the Framework*: Whether there should be any changes to improve, harmonize, or streamline any of the capital raising exemptions, specifically: the private placement exemption and Rule 506 of Regulation D, Regulation A, Rule 504 of Regulation D, the intrastate offering exemptions, and Regulation Crowdfunding.
- *Potential Gaps in the Framework*: Whether there may be gaps in the Commission's framework that may make it difficult, especially for smaller companies, to rely on an exemption from registration to raise capital at key stages of their business cycle.
- *Investor Limitations*: Whether the limitations on who can invest in certain exempt offerings, or the amount they can invest, provide an appropriate level of investor protection or pose an undue obstacle to capital formation or investor access to investment opportunities, including a discussion of the persons and companies that fall within the "accredited investor" definition.
- *Integration*: Whether the Commission can and should do more to allow companies to transition from one exempt offering to another and, ultimately, to a registered public offering, if desired,

without undue friction or delay.

- *Pooled Investment Funds*: Whether the Commission should take steps to facilitate capital formation in exempt offerings through pooled investment funds, including interval funds and other closed-end funds, and whether retail investors should be allowed greater exposure to growth-stage companies through pooled investment funds in light of the potential advantages and risks of investing through such funds.
- *Secondary Trading*: Whether the Commission should revise its rules governing exemptions for resales of securities to facilitate capital formation and to promote investor protection by improving secondary market liquidity.

Comments were due in late September, and the most popular topic in the letters received was the definition of "accredited investor." In December, the Commission proposed amending the definition of "accredited investor" in Regulation D to update the definition and add new categories of qualifying natural persons and entities. This proposal is discussed in detail elsewhere in this section.

Others have urged the Commissioners to be cautious before diving headlong into relaxing the exemption requirements. In a comment letter, Investor Advocate Rick Fleming questioned whether there is retail investor demand for exempt offerings and whether easing the regulatory safeguards associated with the exemptions would actually result in significant capital formation.

Regulation Best Interest: Really the best?

In June, with Commissioner Jackson dissenting, the SEC approved a new standard of conduct for broker-dealers when making recommendations to retail customers and a requirement for brokers and advisers to disclose relationship summaries to retail investors. Regulation Best Interest states that when making a recommendation of a securities transaction or an investment strategy involving securities, a broker-dealer must act in the retail customer's best interest and cannot place its own interests ahead of the customer's interests. Regulation BI includes specific obligations in the areas of disclosure, care, conflicts of interest, and compliance.

Obligations. The disclosure obligation holds that a broker-dealer must disclose material facts about the relationship and recommendations, including specific disclosures about the capacity in which the broker is acting, related fees, the type and scope of services provided, potential conflicts of interest, limitations on services and products, and availability of monitoring services. Under the care obligation, a broker-dealer must exercise reasonable diligence, care, and skill when making a recommendation to a retail customer and must understand potential risks, rewards, and costs associated with the recommendation and consider these issues with regard to the customer's investment profile.

With respect to conflicts of interest, a broker-dealer must establish, maintain, and enforce written policies and procedures reasonably designed to identify, and, at a minimum, disclose or eliminate, conflicts of interest. Regulation BI also requires policies and procedures to: (1) mitigate conflicts that create an incentive for the firm's financial professionals to place their interests or the interests of the firm ahead of the retail customer's interest; (2) prevent material limitations on offerings from causing the firm or the financial professionals to place their interests ahead of the retail customer's interests;

and (3) eliminate sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sale of specific securities within a limited period of time.

The compliance obligation requires broker-dealers to establish, maintain, and enforce policies and procedures reasonably designed to achieve compliance with Regulation BI as a whole.

Form CRS and interpretations. In connection with Regulation BI, the Commission voted to require investment advisers and broker-dealers to deliver relationship summaries to retail investors at the beginning of their relationships. In the Form CRS relationship summary, a firm will have to summarize information about services, fees, and costs; conflicts of interest; the legal standard of conduct; and disciplinary history.

The Commission also issued interpretations to clarify its views regarding the activities of investment advisers and broker-dealers. The SEC noted that an investment adviser owes a fiduciary duty to its clients that is principles-based and applies to the entire relationship between an investment adviser and its client. The Commission also clarified its interpretation of the "solely incidental" prong of the broker-dealer exclusion of the Advisers Act by stating that a broker-dealer's advice as to the value and characteristics of securities or as to the advisability of transacting in securities falls within the "solely incidental" prong of the exclusion if the advice is provided in connection with, and is reasonably related to, the broker-dealer's primary business of effecting securities transactions.

Push back. In September, the attorneys general of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, and the District of Columbia filed suit challenging Regulation BI. The attorneys general argued that Regulation BI does not harmonize the standards of conduct applicable to broker-dealers and investment advisers nor does it require that brokers act in their customers' best interests without regard to their own financial interests. According to the complaint, the SEC's rulemaking fails to meaningfully evaluate broker-dealer standards beyond existing suitability requirements and relies on a vague "best interest" standard while failing to actually require that brokers act in customers' best interests, which will leave investors even more confused about the duties of broker-dealers. By failing to adopt a uniform fiduciary standard in favor of an "amorphous" best interest standard, the rule will exacerbate investor confusion and perpetuate the mistaken belief that broker-dealers must put aside their own financial interests, they argued.

Just days later, two financial planning firms also filed suit challenging the validity of Regulation BI, largely on the same grounds as the state attorneys general. Regulation BI exceeded the SEC's statutory authority, its adoption failed to comply with the law, and the resulting final rule is arbitrary or capricious, they argued. They also suggested that the SEC's "solely incidental" interpretation exacerbates the "harmful consequences" of Regulation BI because the interpretive release seeks to revive an expansive view of the Advisers Act's catch-all exemption despite a 2007 D.C. Circuit decision invalidating the SEC's attempt to create an exemption for another set of broker-dealers beyond those mentioned in Advisers Act Section 202(a)(11)(C).

SEC response. SEC Chairman Jay Clayton has stated that much of the criticism of Regulation BI is "misleading, misguided, and unfortunately, in some cases, is simply policy preferences disguised as legal critiques." The rule changes and interpretations will enhance the quality and transparency of retail investors' relationships with broker-dealers and investment advisers and better align requirements and mandated disclosures with reasonable investor expectations, he said. Under the regulation, whether a broker-dealer has acted in the retail customer's best interest depends on specific facts and circumstances, the chairman explained, and a principles-based approach can be more effective in addressing issues of duty when relationships can vary and change over time.

Compliance with Regulation BI must be achieved by June 30, 2020.

Exchange-traded funds: New exemptions, new approaches

No more exemptive orders. The SEC adopted seriatim new rules to modernize the regulation of exchange-traded funds (ETFs). New Rule 6c-11 will allow ETFs to come to market more quickly without the time or expense of applying for individual exemptive relief. The new rule will exempt qualifying open-end ETFs from certain provisions of the Investment Company Act and its rules, subject to certain conditions. ETFs that are organized as unit investment trusts, structured as a share class of a multi-class fund, run as leveraged or inverse ETFs, or operated as non-transparent ETFs will not be able to rely on the rule.

Qualifications. The exemptions will permit a qualifying ETF to: (1) redeem shares only in creation unit aggregations; (2) permit ETF shares to be purchased and sold at market prices, rather than NAV; (3) engage in in-kind transactions with certain affiliates; and (4) in certain limited circumstances, pay authorized participants the proceeds from the redemption of shares in more than seven days.

To qualify, an ETF will be: 1) required to provide daily portfolio transparency on its website; 2) permitted to use "custom baskets" that do not reflect a pro-rata representation of the fund's portfolio or that differ from the initial basket used in transactions on the same business day if the ETF adopts written policies and procedures setting forth detailed parameters for the construction and acceptance of custom baskets that are in the best interests of the ETF and its shareholders, and 3) required to disclose certain information on its website, including historical information regarding premiums and discounts and bid-ask spread information.

One year after the effective date of Rule 6c-11, the SEC will rescind exemptive relief previously granted to ETFs that will be permitted to operate in reliance on the rule in order to create a consistent ETF regulatory framework. The Commission is also rescinding exemptive relief permitting ETFs to operate in a master-feeder structure but is grandfathering certain existing master-feeder arrangements and preventing the formation of new ones. In addition, the SEC issued an exemptive order that harmonizes certain related relief under the Exchange Act, including providing exemptive relief to broker-dealers from certain requirements under the Exchange Act with respect to ETFs relying on Rule 6c-11.

Compliance must be achieved by December 22, 2020.

Non-transparent ETFs. Early in 2019 the Commission authorized an actively managed ETF model commonly referred to as a "non-transparent ETF." On a daily basis, each fund would publish a basket of securities and cash designed to closely track daily performance while not specifically detailing the fund's portfolio. The "proxy" portfolio would serve as a tool for market participants to identify arbitrage opportunities and to estimate the value of the fund's holdings while providing enough information to keep share prices in line with asset values, and the funds will establish thresholds for tracking error and bid-ask spreads.

While ultimately supporting the actions, Commissioners Jackson and Lee wrote separately to express concern that, in times of stress, ordinary investors in non-transparent ETFs may not be able to get a fair price for their shares. Future applications that do not address the potentially serious liquidity problems associated with the structure of nontransparent ETFs should give the Commission pause, they said. Without protections, in the event of limited liquidity, non-transparent ETFs come with the risk that ordinary investors will face wider spreads and find prices that do not accurately reflect share value, according to the commissioners.

Sharp focus on securities-based swaps

In June, the SEC adopted a package of rules and rule amendments to establish capital and margin requirements for security-based swap dealers and major security-based swap participants, as well as segregation requirements and notification requirements. The Commission also amended the cross-border rule to provide a means to request substituted compliance with respect to the capital and margin requirements for foreign entities.

A package of rules approved in September established recordkeeping and reporting requirements for security-based swap dealers and major security-based swap participants, fulfilling another part of the regulatory mandate under Title VII of the Dodd-Frank Act. The release adopted a recordkeeping program modeled after the recordkeeping requirements for broker-dealers set forth in Exchange Act Rules 17a-3 and 17a-4. Other key areas addressed include securities-count requirements, an alternative compliance mechanism, and cross-border application.

In December, the SEC unanimously voted in favor of rules requiring the application of risk mitigation techniques to portfolios of uncleared security-based swaps. Specifically, new Rules 15Fi-3, 15Fi-4, and 15Fi-5 establish requirements for registered security-based swap dealers and major security-based swap participants to reconcile outstanding security-based swaps with counterparties on an ongoing basis and engage in certain forms of portfolio compression exercises. The entities must also execute trading relationship documentation with each of their counterparties in conjunction with executing a security-based swap transaction.

During the same meeting, by a 3-2 vote, the Commission also adopted a package of rule amendments, guidance, and a related order to expand and improve the framework for regulating cross-border security-based swaps, including single-name credit default swaps.

The Commission also adopted a process by which it may consider designating a jurisdiction as a “listed jurisdiction” and issued a separate order designating Australia, Canada, France, Germany, Japan, Singapore, Switzerland, and the United Kingdom as listed jurisdictions. The Commission also adopted revisions to Rule of Practice 194 to more closely harmonize its rules with the CFTC’s approach to the statutory disqualification of non-domestic associated persons of CFTC registered swap entities. Commissioners Lee dissented, and argued that the cross-border changes significantly undercut the framework put in place by the Dodd-Frank Act and that the large volume of cross-border activity in security-based swaps presents serious risks for the U.S. markets.

The year of enhancing disclosure and reporting

Disclosure improvements. In March, the SEC adopted amendments to simplify and modernize disclosure requirements, as mandated by the 2015 Fixing America’s Surface Transportation Act (FAST Act). The changes were designed to reduce costs and burdens, to improve readability and navigability, and to provide consistent rules for incorporation by reference and hyperlinking. Among other things, amendments to Regulation S-K allow registrants to exclude discussion of the earliest of three years in the MD&A in certain situations and to omit confidential information in material contracts and certain other exhibits without submitting a confidential treatment request, subject to certain conditions. Other amendments prohibit the incorporation by reference or cross-referencing into financial statements of financial information from other filings and revise various items of Regulation S-K to eliminate certain duplicative disclosures and to streamline narrative descriptions.

In the same meeting, the SEC voted to propose rule amendments to modify the offering, registration, and communication processes available to business development companies and registered closed-end funds. The proposal would allow eligible funds to engage in a more streamlined registration process in selling securities and to use communications and prospectus delivery rules currently available to operating companies. The proposal also would harmonize the disclosure and regulatory framework for BDCs and closed-end funds with that applicable to operating companies and would provide new reporting and structured data requirements.

In May, the SEC proposed amendments to rules and forms to improve disclosure requirements for financial statements relating to acquisitions and dispositions of businesses, including real estate operations and investment companies. The proposed amendments would, among other things, revise the investment test and the income test regarding significance, expand the use of pro forma financial information in measuring significance, and conform the significance threshold and tests for a disposed business.

In June, the Commission issued a rulemaking clarifying that broker-dealers that underwrite offerings by a single issuer do not need to have their annual reports certified by an independent public accountant. The amendment fixes an inadvertent error in Rule 17a-5(e) to provide that a broker-dealer would not be required to engage an independent public accountant to certify the broker-dealer’s annual reports if, among other things, the securities business of the broker-dealer has been limited to acting as broker (agent) for a single issuer in soliciting subscriptions for securities of that issuer.

Enhanced Regulation-S-K. In August, the Commission proposed updates to Regulation S-K that would improve and simplify disclosure requirements to reflect developments in the decades since its adoption. The amendments would revise Items 101(a) (general development of the business), 101(c) (narrative description of the business), and 105 (risk factors) to emphasize a more principles-based approach. The proposed amendments are an outgrowth of the JOBS Act-mandated review of Regulation S-K's disclosure requirements released in 2013, which were revisited in a 2016 concept release. In particular, revisions to Item 101 would include as a disclosure topic human capital resources with respect to a registrant's business taken as a whole. The proposal notes that there has been congressional interest in modernizing human capital disclosures and that, today, human capital is an important resource and driver of performance for certain companies.

Exchanges. A concept release was issued in September in tandem with a proposed rule amendment to govern the publication of quotations for over-the-counter securties. The proposed amendments aim to provide greater transparency to OTC securities investors, and, importantly, would limit the eligibility for an existing exception, commonly known as the "piggyback exception," which allows broker-dealers to publish quotations for a security in reliance on the quotations of another broker-dealer that initially performed the review of the issuer's information.

Other transparency requirements and financial penalties proposed in September would increase the pressure on SROs to implement the long-delayed national market system plan governing the Consolidated Audit Trail. The proposed amendments are intended to ensure that the plan participants fulfill their obligations to deliver a functional CAT in a reasonable time frame.

Resource extraction disclosure. Following court proceedings and congressional action, by a December 3-2 vote, the SEC again proposed a rule to implement Dodd-Frank Act Section 1504 that would require resource extraction issuers to disclose payments made to foreign governments or the federal government for the development of natural resources, including oil, natural gas, and minerals. Among other things, the proposed new rule would: (1) revise the definition of "project" to require disclosure at the national and major subnational political jurisdiction level instead of the contract level; (2) revise the definition of "not *de minimis*" to include both a project threshold and an individual payment threshold; and (3) add two new conditional exemptions for situations in which a foreign law or a pre-existing contract prohibits the disclosure. Dissenting from the proposal, Commissioners Jackson and Lee questioned whether the proposal would provide any increased transparency. The proposal's *de minimis* threshold will keep many payments in the dark, and its suggestion that the Commission could allow issuers to file confidential disclosures would make it harder to hold corporate insiders accountable for their choices, they said.

Volcker Rule

In 2013, the SEC, CFTC, Federal Reserve, OCC, and FDIC jointly issued rules to implement the "Volcker Rule" of the Dodd-Frank Act, with the aim of reducing systemic risk by preventing federally insured banks from engaging in proprietary trading or controlling hedge funds or private equity funds. In 2019, in response to feedback that the 2013 rule was unclear and required overly complicated compliance processes, the agencies jointly issued two sets of amendments to Volcker Rule restrictions.

In July 2019, the agencies adopted amendments to exclude small banks from the Volcker Rule under the Economic Growth, Regulatory Relief, and Consumer Protection Act. The amendments exclude from the prohibitions and restrictions certain firms with total consolidated assets of $10 billion or less and total trading assets and liabilities of five percent or less of total consolidated assets. The amendments also allow an investment adviser that is a banking entity to share a name with the fund under certain circumstances. The amendments became effective on July 22, 2019.

In October 2019, the agencies adopted amendments that create a three-tiered framework in which compliance requirements scale with a bank's trading assets and liabilities. The amendments also exclude certain financial instruments in which trading is permitted under Section 13; simplify methodologies for calculating compliance thresholds for foreign banking organizations; modify the short-term intent prong in the definition of "proprietary trading;" modify the liquidity management exclusion to permit banking entities to use a broader range of financial instruments to manage liquidity; add a number of new exclusions; and add exemptions for underwriting and market making-related activities, risk-mitigating hedging, and trading by foreign banking entities solely outside the U.S. Effective dates vary by provision beginning January 1, 2020, with a compliance date of January 1, 2021.

Fed Governor Lael Brainard voted against the final rule, expressing concern that it could substantially weaken Volcker Rule prohibitions by materially narrowing the scope of covered activities, relying excessively on firms' self-policing, not requiring firms to promptly report limit breaches and increases, and narrowing the scope of the CEO attestation requirement.

Other 2019 highlights

Rule releases. The SEC approved a proposal in May to amend the "accelerated filer" and "large accelerated filer" definitions to promote capital formation for smaller reporting issuers. The proposed amendments would exclude from the definitions an issuer that is eligible to be a smaller reporting company and had annual revenues of less than $100 million in the most recent fiscal year for which audited financial statements are available. In addition, the proposed amendments would increase the transition thresholds for accelerated and large accelerated filers becoming non-accelerated filers from $50 million to $60 million and for existing large accelerated filer status from $500 million to $560 million. As a result of the amendments, certain low-revenue issuers would not be required to have their assessments of the effectiveness of internal control over financial reporting attested to, and reported on, by an independent auditor.

The next month, the SEC adopted amendments to its auditor independence rules relating to auditors' lending relationships with their clients. The amendments to Rule 2-01 under Regulation S-X concern the analysis that must be conducted to determine whether an auditor is independent when the auditor has a lending relationship with certain shareholders of an audit client and are intended to identify debtor-creditor relationships that could impair an auditor's objectivity and impartiality. Among other changes, the amendments focus the analysis solely on beneficial ownership, the 10-percent bright-line shareholder ownership test was replaced with a "significant influence" test, and the definition of "audit client" for a fund under audit was amended to exclude funds that otherwise would be considered affiliates of the audit client. In December, the Commission proposed amendments to modernize certain other aspects of its auditor independence framework.

As fall came in, new Securities Act Rule 163B extended to all issuers the popular "test-the-waters" accommodation that was originally provided only to emerging growth companies with the passage of the JOBS Act in 2012. Under the new rule: there are no filing or legending requirements; the communications are deemed to be "offers;" and issuers subject to Regulation FD will need to consider whether any information in a test-the-waters communication would trigger any obligations under that regulation.

Proposed updates to the decades-old investment adviser advertising and solicitation rules appeared in November. The proposed amendments would replace current broad limitations with principles-based provisions and tailored requirements, and the changes to the solicitation rule would expand it to encompass all forms of compensation. If the proposals are adopted, some of the existing guidance on the topic of advertising and solicitations would be moot, superseded, or inconsistent with the amended rules, and the staff of the Division of Investment Management is reviewing certain no-action letters and other guidance to determine whether they should be withdrawn if the proposal is adopted.

In late November, the Commission proposed new rules and amendments governing the regulation of the use of derivatives by registered investment companies and business development companies. The proposal requires funds to adopt a derivatives risk management program and comply with limits on the amount of leverage-related risk that the fund may obtain. New sales practice rules (Exchange Act Rule 15*l*-2 and Advisers Act Rule 211(h)-1) were also proposed to address specific considerations raised by certain leveraged or inverse funds and exchange-listed commodity or currency pools.

Accredited investor definition. As previously noted, in December, the SEC proposed amendments to the "accredited investor" definition to add new categories of qualifying natural persons and entities that have the expertise necessary to engage in these markets but do not meet the current income and net worth requirements. Specifically, the proposed accredited investor amendments would add new categories of natural persons who may qualify as accredited investors based on expertise, professional certifications, and experience. The proposal would also expand the list of entities that may qualify as accredited investors by allowing entities meeting an investments test to qualify and add family offices with at least $5 million in assets under management and their family clients.

Commissioner Elad Roisman voiced his support for the proposal but urged the Commission to further deliberate before considering adoption of the staff's recommendations. Commissioner Jackson dissented from the proposal, noting that more data-driven analysis of how to best balance risks with potential investment rewards is necessary before expanding eligibility to participate in exempt offerings. Commissioner Lee noted that the proposal seeks to address the under-inclusiveness in the "accredited investor" definition but that there is also over-inclusiveness inherent in the current definition.

Staff bulletins. A new bulletin released by the Division of Corporation Finance in October provides information for companies and shareholders regarding Rule 14a-8. Staff Legal Bulletin No. 14K focuses on the "ordinary business" exception in Rule 14a8(i)(7). The staff discusses the importance of analysis when considering the significance of a policy issue under the exception and the scope and application of micromanagement as a basis to exclude a proposal. When a proposal raises a policy issue, a no-action request should center on the specific significance of the issue to that company, the bulletin says, adding that the issue of whether a proposal involves ordinary business matters is one that the board of directors is "well-situated to analyze."

In November, the Commission issued Staff Accounting Bulletin No. 119. The bulletin updates and aligns existing interpretive guidance with Financial Accounting Standards Board Accounting Standards Codification Topic 326, *Financial Instruments – Credit Losses*. Applicable upon a registrant's adoption of Topic 326, the bulletin discusses the documentation the staff would normally expect registrants engaged in lending transactions to prepare and maintain to support estimates of expected credit losses for loan transactions.

Enforcement in 2019

The SEC's enforcement team had to overcome a number of obstacles in 2019 as it addressed misconduct across the securities markets. Among them were the 35-day government shutdown, during which the division did not have adequate appropriations. In addition, the staff had to deal with adverse Supreme Court decisions in *Kokesh* and *Lucia* that hindered its ability to recover ill-gotten gains. Even so, the Enforcement Division managed to bring more than 850 cases in the year. It obtained judgments and orders totaling $4.3 billion in disgorgement and penalties, and returned $1.2 billion to harmed investors.

Share Class Selection Disclosure Initiative. A notable success from the year was the Share Class Selection Disclosure Initiative, in which 95 investment advisory firms self-reported misconduct that led to the return of $135 million to affected investors. Under the initiative, the staff recommended standardized settlement terms for investment advisory firms that self-reported failures to disclose conflicts of interest associated with the selection of fee-paying mutual fund share classes when a lower- or no-cost share class of the same mutual fund was available. The majority of the actions were brought in March, with the remainder brought in September. The Division's co-directors said that the self-reporting and self-remediation features enabled the staff to leverage its resources and address disclosure failures in a very short period of time.

In public appearances, the Division's co-directors said that digital assets and cybersecurity were areas of focus in 2019. The agency dealt with two main types of misconduct with initial coin offerings: straight-up frauds where issuers did not actually provide what they said they would, and regulatory violations such as touting. In token registration cases against Paragon Coin, AirFox and Gladius Network, the staff required the issuers to make a rescission offer for the issued tokens.

In an action against Block.one, the division did not require rescission. Co-Director Steve Peikin commented that Block.one involved very unusual circumstances because the underlying tokens were fixed and non-transferable, and did not lose value after the offering. In response to suggestions that the Block.one sanctions were a little light, Peikin reiterated the division's procedure for determining penalties, which is to consider duration of the offer, the amount raised, efforts to target U.S. investors, and the size of penalties in other recent cases.

Cybersecurity. The Division's cyber enforcement efforts involved risk disclosure cases, notably those against Facebook and Mylan. In the Facebook action, the Commission alleged that Facebook's risk factor disclosures presented the misuse of user data as hypothetical when Facebook knew that user data had in fact been misused. The company was ordered to pay a $100 million civil penalty. Avakian said that the Facebook case was a situation where one group within the company knew of the breach, but another group was responsible for the disclosure of it. The takeaway from this case, she said, is that companies should have a process in place to ensure that these two groups can come together and provide adequate disclosure.

In the Mylan action, the EpiPen manufacturer agreed to pay $30 million for misclassifying the EpiPen as a "generic" drug rather than a "branded" drug under a Medicaid rebate program. Mylan's conduct caused the Justice Department to investigate the company's practices, which it did not disclose and caused investor losses when the company eventually agreed to pay a $465 million settlement.

In a joint action with the CFTC, Options Clearing Corporation (OCC) agreed to pay $20 million in penalties for failing to establish and enforce policies and procedures involving financial risk management, operational requirements, and information-systems security. OCC, a systemically important financial market utility (SIFMU), is subject to the SEC's adopted Regulation Systems, Compliance, and Integrity (Reg SCI). OCC's conduct violated Reg SCI and in addition to the SEC and CFTC penalties, OCC agreed to a series of undertakings intended to resolve the deficiencies identified by the Commissions.

Financial statements and disclosure. In addition to the Facebook and Mylan actions, many 2019 cases illustrated the Division's ongoing focus on financial statement integrity, the accuracy of issuer disclosures, and the willingness to punish significant corporate wrongdoing. These included actions against Fiat Chrysler Automobiles, Nissan, Hertz Global Holdings, and PPG Industries.

In the Fiat Chrysler case, its U.S. subsidiary inflated monthly sales results by paying automobile dealers to report fake vehicle sales and maintaining a "cookie jar" of actual but unreported sales. It dipped into this reserve in months when sales would have fallen short of targets. Fiat Chrysler and its subsidiary were ordered to pay a $40 million penalty. Nissan paid a $15 million civil penalty for false financial disclosures that omitted more than $140 million to be paid to its CEO in retirement. Hertz's public filings materially misstated pre-tax income as a result of accounting errors made in a number of business units over multiple reporting periods, for which the company agreed to pay a $16 million penalty.

Pre-release ADRs. The SEC continued to pursue enforcement actions relating to the improper handling of pre-released American Depositary Receipts (ADRs). JP Morgan Chase Bank agreed to pay a $135 million penalty for improperly providing brokers thousands of pre-release transactions when neither the broker nor the customers had possession of the foreign shares required to support newly issued ADRs. Other entities settling with the SEC in 2019 for pre-released ADRs violations included Jefferies LLC, Cantor Fitzgerald, BMO Capital Markets, Wedbush Securities, and Merrill Lynch.

Individual accountability. Nissan and other 2019 cases highlighted the Enforcement Division's continued commitment to holding accountable individual wrongdoers. In an action against Brixmor Property Group, the Commission brought charges against the CEO, CFO, chief accounting officer, and the senior vice president of accounting. The individuals fraudulently manipulated a key non-GAAP metric relied on by analysts and investors to evaluate the company's financial performance.

Comscore's former CEO was barred from serving as an officer or director of a public company for 10 years after the staff determined that he directed the company to enter into enter into non-monetary transactions to improperly increase its reported revenue. The former CEO also was ordered to reimburse Comscore $2.1 million in profits from his sale of Comscore stock and incentive-based compensation. In a matter that is still being litigated, Volkswagen's former CEO was charged with defrauding investors when the company raised billions of dollars through corporate bond and fixed income offerings while making a series of deceptive claims about the environmental impact of the company's clean diesel fleet.

Gatekeepers. The SEC has focused the conduct of accountants, auditors, and attorneys who serve as gatekeepers in the market. The KPMG scandal, in which PCAOB employees provided nonpublic PCAOB inspections information to their former colleagues who had joined the accounting firm ahead of PCAOB inspections, ended up costing KPMG $50 million in a settlement with the SEC. The settlement also brought to light cheating on the firm's training exams. In an action involving auditor independence rules, the SEC settled with PricewaterhouseCoopers for failing to disclose the provision of non-audit services to the audit committees of the issuers it was auditing. PwC and the partner who oversaw the audits agreed to pay nearly $8 million to settle the charges.

Court decisions. The decision by the Supreme Court in *Kokesh v. SEC*, the High Court's grant of certiorari in *Liu v. SEC*, impacted the Enforcement Division in 2019, although the co-directors said publicly that the decisions did not deter the Commission from pursuing any cases. The 2017 *Kokesh* decision held that disgorgement is a penalty and therefore is subject to a five-year statute of limitations. In *Liu*, the High Court will address the question left open in *Kokesh* about whether the SEC can seek disgorgement as "equitable relief" for a violation of the securities laws.

In public appearances, Peikin said that disgorgement is a very important remedy for the Enforcement Division. Avakian noted that the staff has tried to keep a running tally of what *Kokesh* has cost the Commission in disgorgement. The current ballpark estimate is $1.1 billion, she said.

Supreme Court developments in 2019

The Court started the October 2019 term with a full complement of justices. While there were no securities-related decisions handed down in 2019, certiorari was granted in three cases concerning disgorgement, separation of powers, and fiduciary duties. Of these, oral argument has been heard in the fiduciary duty matter, *Jander*, and oral argument is set for March 3, 2020 in the remaining two cases. It is possible opinions will be handed down by the end of the term. And, while certiorari has already been denied for a number of petitions, two securities-related petitions remain pending, and more are sure to come.

Court to revisit disgorgement. One securities-related case will be heard in 2020. In *Liu v. SEC*, the Court will rule on a question left open in *Kokesh*: whether the Commission can seek disgorgement as "equitable relief" for a violation of the securities laws. In *Kokesh*, the Court held that the disgorgement often sought by the SEC in enforcement cases is a penalty for purposes of the statute of limitations contained in 28 U.S.C. §2462 (covering civil fines, penalties, or forfeitures). The holding in *Kokesh* was a narrow one, and the Court explicitly said in a footnote that it was not opining on the authority of federal courts to order disgorgement in SEC enforcement proceedings.

In *Liu*, two defendants in a civil enforcement action challenged a district court's order that they disgorge almost $27 million raised from investors. The Ninth Circuit, in an unpublished decision, upheld the order. The court explained that *Kokesh* left the question of federal courts' authority to award disgorgement for another day, so that case was not, as the defendants argued, irreconcilable with longstanding Ninth Circuit precedent.

The petition argues that Congress authorized the Commission to seek only injunctions, civil monetary penalties, and equitable relief. As a penalty, disgorgement falls outside the scope of equitable relief and thus lacks any statutory authority. Disgorgement as a remedy is further unsupported by any express or implied authority of the courts to grant equitable relief, the petitioners continued, because equity aims to restore the status quo rather than punish the wrongdoer. Indeed, in this case, the disgorgement left the petitioners nearly $16 million in debt relative to their position before the alleged fraud. There was also no indication that any disgorged funds would be returned to the victims.

The petition contends that this issue is significant because circuit courts need guidance after *Kokesh*. Prior to *Kokesh*, courts have consistently conceptualized disgorgement within an equitable framework. The notion that disgorgement is remedial is now untenable, the petition says, and courts need guidance in revising their approaches. The petition notes in closing that the SEC is only one of several agencies relying on disgorgement under the courts' general equitable jurisdiction to seek monetary awards. Merits briefs from both parties have been received, and oral argument is set for March 3, 2020.

Disgorgement viable in the circuits. As the *Liu* petition notes, ripples from the 2017 decision in *Kokesh* are being felt throughout the circuit courts. The issue is frequently litigated, and, post-*Kokesh*, circuit courts have so far rejected the argument that district courts no longer have authority to order disgorgement. While the Court concluded in *Kokesh* that disgorgement is a penalty, the sole issue in that case was whether disgorgement was subject to the limitations period. In a footnote, the Court explicitly stated that is was not opining on the authority of courts to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in that context. Circuit panels have accordingly held that *Kokesh* did not disturb circuit precedent on the authority to order disgorgement, and the issue awaits consideration by an en banc court or by the Supreme Court in *Liu*. For the Commission's part, the Division of Enforcement has indicated that it will continue to pursue disgorgement in appropriate cases.

Congress to limit disgorgement? It is likely that no matter which way the court rules in *Liu*, Congress will step in to delineate the availability of disgorgement in the district courts. On November 19 2019, the House of Representatives passed the Investor Protection and Capital Markets Fairness Act (H.R. 4344), which clarifies that the SEC may seek, and courts may award, disgorgement in enforcement cases. The bill would provide for a 14-year limitations period and allows disgorgement in the amount of any unjust enrichment obtained from the act or practice that triggered an SEC enforcement action. A rule of construction would provide that disgorgement is not a civil fine, penalty, or forfeiture under the U.S. Code provisions that were the basis for the Court's holding in *Kokesh* that disgorgement is a penalty. Similar legislation has been introduced in the Senate, but that version would retain the 5-year limitations period for disgorgement. There is a possibility that a disgorgement law could be enacted before a decision in *Liu*; if this occurs, the case could be dismissed as moot.

Pending petitions

SLUSA. There are also two securities-related petitions still pending before the Court. First, the petition in *Northern Trust Corporation v. Banks* argues that the Ninth Circuit misapplied Supreme Court precedent on the SLUSA in a way that invites abusive litigation. In a case where a trustee allegedly committed fraud when buying and selling securities for its own benefit, the Ninth Circuit said that the fraud could not be "in connection with" the purchase or sale of a security because the trustee's misconduct could only affect its own purchases. This petition was filed in October, and response is due on January 17, 2020.

In its petition for certiorari, Northern asks whether a trust beneficiary alleges misconduct "in connection with" the purchase or sale of a covered security when the beneficiary alleges that the trustee, for its own pecuniary gain, used trust assets to buy and sell the trustee's own proprietary securities rather than competitors' securities. The Ninth Circuit, Northern contends, took an "impossibly narrow" view of Supreme Court precedent (i.e., *SEC v. Zandford* and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*) in order to make a distinction between purchases and sales by a stockbroker, and purchases and sales by a trustee. The petition argues that the respondent here states a classic securities law claim—trades made despite a conflict of interest—and the fact that Northern is a trustee should not exempt this case from the federal securities laws.

The Ninth Circuit's decision also squarely conflicts with rulings in the Sixth and Eighth Circuits, having substantively identical facts. According to the petition, rather than distinguishing these cases, the Ninth Circuit simply concluded that *Chadbourne & Parke LLP v. Troice* implicitly abrogated them. This circuit split is an invitation to forum-shopping, and the petition maintains that litigants will flock to the Ninth Circuit, where a state-law claim is guaranteed to overcome a SLUSA preclusion defense.

First Amendment. The second pending petition, *New York Republican State Committee v. SEC*, asks the court to consider whether an SEC-approved FINRA rule banning certain political donations by placement agents violates the First Amendment. Here, the D.C. Circuit upheld Rule 2030, FINRA's pay-to-play rule, which bans most political contributions by FINRA members acting as placement agents. In essence, the rule prohibits placement agents from accepting compensation for soliciting business from a government entity to which the member has made a political contribution within the last two years.

The New York Republican State Committee argues that Rule 2030 imposes different contribution limits for candidates who are competing against each other, something that the Supreme Court has never allowed. For example, in the 2016 presidential election, the Clinton-Kaine campaign was not limited by a similar MSRB contribution rule, but the Trump-Pence campaign was limited because of now-Vice President Mike Pence's prior service as governor of Indiana. This same handicap will be imposed on candidates in the 2020 election if the Court does not intervene, the petition says.

The Supreme Court, the petition argues, has only recognized the prevention of corruption, or the appearance thereof, as the only legitimate interest in campaign finance limits. The petitioner says that the D.C. Circuit shortchanged the analysis under the Supreme Court's *McCutcheon* decision, which posits that quid-pro-quo corruption is the only basis for campaign finance limits.

The petition additionally challenges the D.C. Circuit's conclusion that the Exchange Act gives the SEC the authority to regulate against market distortions arising from pay-to-play activities. Congress has reserved for itself the authority to regulate elections, the petition says, and there is no mention of campaign finance in the Exchange Act. Finally, Rule 2030 is also arbitrary and capricious because the SEC failed to show how it is supported by any authority regarding "fraudulent and manipulative practices." Neither the SEC nor FINRA could identify what fraud could possibly result from the small, publicly-disclosed contributions precluded by the rule, the petition says.

Other cert grants. The Court also granted certiorari in other cases which, while not squarely securities-related, could impact the application of the securities laws. In November, the Court heard oral argument in *Retirement Plans Committee of IBM v. Jander*. In this case, ERISA plan fiduciaries have asked the Court to resolve a circuit split over the pleading requirements to state a claim for breach of the duty of prudence as set forth in *Fifth Third Bancorp v. Dudenhoeffer*. The petition asks whether *Fifth Third's* "more harm than good" pleading standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time.

Under a restrictive reading of *Fifth Third*, a plaintiff must plausibly allege an alternative action that a prudent fiduciary in the same circumstances could not have viewed as more likely to harm than to help the fund. The Second Circuit determined that the plaintiffs met this threshold. The court gave great weight to the allegation that disclosure of the alleged fraud was inevitable and that a prudent fiduciary would prefer to limit the effects through prompt disclosure. The petitioners argue that the Second Circuit's reliance on "generalized allegations" subverts *Fifth Third* and creates a circuit split that would make the Second Circuit the forum of choice for duty-of-prudence claims.

At oral argument on November 6, 2019, the differences between ERISA and the securities laws dominated. The parties sparred over whether the Second Circuit's understanding of securities fraud pleading requirements regarding an ERISA fiduciary's duty of prudence is consistent with Fifth *Third*, which established a complex set of pleading-stage hurdles for plaintiffs in cases at the intersection of ERISA and securities law.

In October, the Court agreed to hear *Seila Law, LLC v. CFPB*, in which the petitioner asserts that the Consumer Financial Protection Bureau's organizational structure violates Constitutional separation of powers principles. Seila Law, a firm whose consumer debt relief services are under investigation by the Bureau, argues that the CFPB's creation by the Dodd-Frank Act as an independent agency led by a single director who can only be removed for cause violates Constitutional separation-of-powers principles. The Ninth Circuit upheld a district court's order that the firm comply with the Bureau's investigation and also rejected the constitutionality challenge. In 2018, the U.S. Court of Appeals for the District of Columbia Circuit reached the same result in *PHH Corporation v. CFPB*; now-Justice Brett M. Kavanaugh dissented in that opinion. Oral argument is set for March 3.

Certiorari denied. This year, the court declined to address the following petitions:

- *Shkreli v. U.S.*: from the Second Circuit, asking whether a "no ultimate harm" instruction in a securities fraud prosecution causes prejudicial jury confusion by effectively holding the accused to a higher standard of conduct than the statute specifically requires, thereby unduly undermining a defense of good faith.
- *Scoville v. SEC*: from the Tenth Circuit, asking whether Dodd-Frank Act Section 929P(b)'s jurisdictional amendments conferred substantive extraterritorial reach upon Sections 10(b) and 17(a) in SEC enforcement actions and in federal criminal prosecutions.
- *Lampkin v. UBS Financial Services, Inc.*: from the Fifth Circuit, asking whether the grant of an employee stock option is a "sale" of a security under the Securities Act of 1933.
- *Isaacson/Weaver Family Trust v. Fresno County Employees' Retirement Association*: From the Second Circuit, asking whether the Court's decisions defining "a reasonable attorney's fee" in fee-shifting cases also constrain a district court's discretion in awarding "reasonable attorneys' fees" under FRCP 23(h) from a common-fund settlement.
- *Wallace v. Andeavor Corporation*: from the Fifth Circuit, asking whether the determination under Section 1514A(a) as to whether an employee's belief was objectively reasonable should be made by the trier of fact, so long as reasonable minds could disagree, or by the court as a matter of law.
- *Hall v. SEC*: from the Eleventh Circuit, asking whether purported misrepresentations, which do not involve or affect the value or underlying substance of the securities transacted, can support a finding of a violation of the anti-fraud provisions of the securities laws.

Looking ahead to 2020

Heading into 2020, the largest potential change to the Commission is the looming departure of Commissioner Robert Jackson. His term expired in June 2019, but he can continue to serve for up to 18 additional months. When he departs, the Commission will lose the most vocal and strident opponent of many of its current plans.

In addition, all eyes will be on the proxy rule changes proposed in November. Early commenters have expressed strong opposition to the proposals to require advisory firms to furnish their voting advice to issuers for review before providing it to the firm's clients, and to change the shareholder proposal submission ownership thresholds. In 2020, we will see how the Commission intends to move forward on these controversial measures and to what extent the comment letters dictate that path.

The Division of Corporation Finance will continue to work through its first full proxy season under the new approach to handling shareholder proposal omission requests. When it was announced, the staff said that in cases where it expresses no opinion, companies are free to litigate the matter if they want assurance. The coming year will reveal just how many companies feel compelled to pursue litigation where the staff declines to provide no-action advice. We will also see to what degree the oral-response approach causes any disruption to the no-action process.

Some new initiatives the SEC may pursue in 2020 include considering a proposal to modernize the exemption permitting private companies to issue securities as compensation in recognition that the "gig economy" has changed the labor market. The Commission took early steps in this direction in 2019 when it permitted Lyft, in connection with its IPO, to provide a cash bonus to some of its drivers to use to purchase IPO shares. Adopting rules to regulate cross-border security-based swaps is also on the Commission's 2020 agenda, according to December comments by Chairman Clayton, as is the continued simplification of disclosure requirements such as MD&A and Supplementary Financial Information.

Finally, the November 2020 election will determine whether there is a shift in power in Washington, and if the Commission will be able to push forward with its current agenda, or whether control over the agency's direction will shift to the Democrats for the following four years.