The Evolution and 2020 Status of Cooperation in SEC Enforcement Investigations

*By Dixie L. Johnson, Carmen J. Lawrence, and Jamie Stinson**

When facing potential enforcement action from the Securities and Exchange Commission ("SEC"), companies often seek to mitigate the consequences by cooperating with the SEC in one or more of the following ways: self-policing, self-reporting, remediation, and cooperation. While a 2001 SEC report of investigation known as the Seaboard Report provides a roadmap for what steps to take in order to earn cooperation credit and describes generally the potential benefits to be received, no such report or guidance exists that details exactly what tangible benefits a company will receive in return for the earned credit and how it will be determined. In addition, outside of narrow exceptions where the SEC engages in self-reporting initiatives, companies looking for publicly available guidance on how best to cooperate face a lack of consistency in the SEC's settlement documentation describing cooperation factors and what benefits may be earned.

In this article, we analyze the SEC's use of cooperation credit from its inception and examine the results of a survey we conducted, which looks at three years of enforcement resolutions where the SEC acknowledges a company's cooperative efforts. In addition, we compare instances where the SEC determined not to pursue enforcement charges with certain matters from our survey where the SEC acknowledged extensive cooperation. This article recommends that the SEC provide more consistency in its treatment of all four cooperation factors, including noting for which specific factors a company earned credit, and providing details on how it earned such credit and what specific benefits it received in return. We also encourage the SEC to consider providing credit to companies attempting to self-report and to consider implementing more self-reporting programs or initiatives, including those that would contemplate true amnesty.

Introduction and Scope

As we pass the seventy-fifth anniversary of *The Business Lawyer*, we also approach the ninetieth anniversary of the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act"), so this is a good time to pause and reflect. The United States Securities and Exchange Commission ("SEC") is one of only a limited number of federal agencies that handles its own civil enforcement actions, with the ability to bring those actions both in the federal courts and through its own administrative proceedings. Through the years, the SEC has leveraged its enforcement program by encouraging companies, firms,

* Johnson and Lawrence are partners, and Stinson is an associate, in the Special Matters and Investigations practice at King & Spalding LLP. They acknowledge and greatly appreciate the assistance of Christina Kung and Kimberly Wade in conducting the survey and helping to finalize this article.

and individuals to report possible violations of the law or the SEC's rules and regulations, whether committed by themselves or others, and to help resolve those violations through extensive cooperation with the SEC.[1] This article provides a current view of cooperation "credit" afforded to entities by the SEC.

We present this view in three parts. First, we describe how the SEC's cooperation program has evolved through the years. Second, we provide a brief overview of enforcement remedies and collateral consequences that can be relevant in SEC enforcement actions against entities and, therefore, may become relevant in negotiations relating to cooperation "credit" during settlement. Third, we describe the methodology of our survey, which focused on SEC descriptions of cooperation credit awarded to entities in enforcement settlements from 2017 through 2019, and we provide our findings and observations in light of the survey results and our experience in SEC enforcement matters over the past several decades.

It remains difficult to demonstrate whether or how an entity's cooperation with the SEC translated directly into tangible savings that could justify the cost to the entity. No SEC report quantifies the benefits entities received as a result of their cooperation or attempts to quantify the cost to entities associated with that cooperation or compares the two. Consequently, discerning the potential impact of cooperation requires a review of each SEC settlement involving an entity and its related publicly available documentation. Our review of SEC fiscal years 2017 through 2019, however, indicates that the SEC's descriptions in publicly available documents are uneven and inconsistent. Some settlement orders state nothing more than that the Commission "considered cooperation afforded the Commission staff" in determining to accept the offer of settlement, while others include a list of steps taken by the entity, creating a clearer picture of why cooperation credit was appropriate. Even when cooperation steps are listed in detail, lining up settlements that appear from publicly available information to reflect roughly identical conduct and cooperation steps can demonstrate inexplicably different enforcement outcomes. We urge the SEC, in its settlement documents reflecting an award of cooperation credit, to increase the consistency with which it identifies the details of entity cooperation and the specifics of the credit received for that cooperation.

In particular, we encourage the SEC to be more explicit regarding the self-policing factors forming part of its cooperation framework. Even though self-policing is important to the SEC, its settlement orders rarely call out self-policing. Meanwhile, the SEC often urges "self-reporting" while not giving credit for situations when a company believes it is self-reporting, but unbeknownst to the company, someone else (a whistleblower or the SEC staff itself) identified the issue before the company's report. More consistency in describing what

1. This article focuses on cooperation by entities and therefore does not include a discussion of the SEC's whistleblower program, which primarily involves incentivizing individuals to provide information to the SEC by offering significant financial awards, in qualifying situations, to assist the SEC's enforcement investigations and proceedings.

companies have done in these categories would both help companies and further the goals of the SEC's cooperation program.

Finally, the SEC has offered enforcement amnesty to entities only once, to root out anti-corruption in the 1970s prior to adoption of the Foreign Corrupt Practices Act of 1977 ("FCPA"). Since then, the SEC has occasionally announced self-reporting cooperation programs for certain eligible regulated entities, encouraging them to report and remediate their own violations in specific categories, thereby earning a standardized set of settlement terms. Self-reporting programs inspire cooperation and enable the Division of Enforcement to leverage its resources more effectively, to increase efficiency while accomplishing its remediation, to communicate effectively with the public, and other regulatory goals. Despite these advantages, the SEC rarely launches self-reporting programs and has never offered them to non-regulated public companies. We encourage the SEC to offer self-reporting programs more broadly, including to public companies, and even to incorporate true amnesty programs into its enforcement agenda, both for regulated entities and for others.

I. Evolution of SEC Cooperation Program

A. 1934 Through 2000

The SEC has operated an active enforcement program since shortly after the agency was established in 1934. But "cooperation" prior to the 1970s typically referred to how the SEC cooperated with the financial markets, self-regulatory organizations, and other governmental authorities,[2] or with industries and the public,[3] not how entity cooperation in SEC enforcement investigations affected remedies.

In the 1970s, the SEC launched the Division of Enforcement, led by Director Irving Pollack and Deputy Director Stanley Sporkin.[4] After Pollack became a commissioner, the SEC, inspired by Sporkin as Enforcement Director, Alan Levenson as Director of the Division of Corporation Finance, Harvey Pitt as General Counsel, and their teams, implemented a "voluntary disclosure" program.[5]

2. *See, e.g.*, Letter from Irving M. Pollack, Dir. of Mkt. Regulation, U.S. Sec. & Exch. Comm'n, to John R. Birmingham, Vice President, NYSE Elecs. Sys. Ctr. (June 30, 1966), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1960/1966_0530_Birmingham_NYSE_Pollack.pdf.

3. *See, e.g.*, Manuel F. Cohen, Chairman, U.S. Sec. & Exch. Comm'n, Address on the Occasion of the University of Connecticut's G.M. Loeb Awards Luncheon—Disclosure: The SEC and The Press (May 21, 1968), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1960/1968_0521_Cohen_speech.pdf (noting the notable achievement by the SEC of receiving cooperation "from industry and the public" in connection with the "no action" letter process); Manuel F. Cohen, Chairman, U.S. Sec. & Exch. Comm'n, Remarks at the 1964 Convention of the American Accounting Association at Indiana University: Current Developments at the SEC (Sept. 1, 1964), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1960/1964_0901_CohenCurrentT.pdf (encouraging the accounting profession's "cooperative regulation" or self-regulation).

4. Thirty-Eighth Annual Report of the Securities and Exchange Commission 133 (1972), https://www.sec.gov/about/annual_report/1972.pdf.

5. H.R. Rep. No. 95-640, at 4 (1977) ("More than 400 corporations have admitted making questionable or illegal payments. . . . These corporations have included some of the largest and most

Under this amnesty program, the SEC pledged that it would not bring an enforcement action against companies that conducted their own independent internal investigations into corruption activities and publicly disclosed any material findings in an SEC filing. Ultimately, more than 450 companies admitted to having, or were found to have, paid political or commercial bribes within or outside the United States.[6] This very successful voluntary disclosure program ultimately led to the adoption of the FCPA and the related books and records and accounting control requirements in section 13 of the Exchange Act,[7] but this voluntary disclosure program lasted only a few years.[8]

We are aware, based on our knowledge and experience, that practitioners in subsequent decades often evaluated whether and how to encourage their clients to cooperate with the SEC, exploring various methods with varying degrees of success. Practitioners who more frequently represented clients before the Division of Enforcement arguably had an advantage because they knew the panoply of available options and were more comfortable offering creative solutions to the SEC staff. Faced with *ad hoc* overtures like these, the SEC staff often responded in an *ad hoc* way. Because there was no policy in place, formal or otherwise, to provide guidance, inconsistencies developed over time between similar matters and between regions.

In some situations, counsel brought information to the SEC staff's attention, going above and beyond what was required in enforcement investigations, and leaving to the staff's discretion the extent to which that cooperation would be credited. Other times an individual or entity offered to cooperate, but they wanted certainty beforehand at the staff or Commission level as to the charges and sanctions to be imposed. In those circumstances, counsel may have provided an attorney proffer to the SEC staff. This enabled the staff to get a sense

widely held public companies in the United States; over 117 of them rank in the top Fortune 500 industries."); Alan L. Beller, Dir., Div. of Corp. Fin., U.S. Sec. & Exch. Comm'n, Speech by SEC Staff: Alan B. Levenson Memorial Lecture (May 18, 2004), https://www.sec.gov/news/speech/spchalb051804.htm (explaining that the "questionable payments" enforcement program, implemented between 1974 and 1976, yielded the voluntary disclosure program, which culminated in the enactment of the FCPA in 1977 and noting that, "[u]ltimately, more than 450 companies admitted to having, or were found to have, paid political or commercial bribes in the U.S. or abroad").

6. Alan L. Beller, Dir., Div. of Corp. Fin., U.S. Sec. & Exch. Comm'n, Speech by SEC Staff: Alan B. Levenson Memorial Lecture (May 18, 2004), https://www.sec.gov/news/speech/spchalb051804.htm; Roberta S. Karmel, Comm'r, U.S. Sec. & Exch. Comm'n, Remarks to Financial Executives Institute International Conference and Annual State-Federal Cooperative Enforcement Conference: Qualitative and Differential Disclosure (Oct. 17, 1979), https://www.sec.gov/news/speech/1979/101779karmel.pdf (discussing significance of disclosure of books and records violations, stating that "hundreds of companies entered the SEC's voluntary disclosure program and Congress then passed the Foreign Corrupt Practices Act").

7. *See* Beller, *supra* note 5; Forty-First Annual Report of The Securities and Exchange Commission 29 (1975), https://www.sec.gov/about/annual_report/1975.pdf.

8. Interview by Richard Rowe with Alan B. Levenson for the SEC Historical Society 16 (Jan. 14, 2003), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/oral-histories/levenson011404Transcript.pdf; *Timeline: 1970s*, SEC Hist. Soc'y, http://www.sechistorical.org/museum/timeline/1970-timeline.php (last visited July 15, 2020) (reflecting that the first voluntary disclosure under the program took place in 1975, and the FCPA was enacted shortly thereafter in 1977).

of the value and import of the information they might receive and, in return, provided the basis for determining the potential terms of a settlement the staff could recommend to the Commission. On these occasions, where the cooperator demanded Commission approval of the settlement terms, or where the settlement demand was for a "full pass" (i.e., no enforcement action would be brought at all), the SEC staff needed to seek advance approval from the Commission for the resolution of the matter. The SEC occasionally mentioned having awarded cooperation credit in enforcement settlements, but not in a programmatic way.[9]

B. 2001 Through 2009

During the turmoil that followed the tragedies of September 11, 2001, the SEC's enforcement program continued to operate. SEC Chairman Harvey Pitt's term had begun in August 2001, after he had spent more than two decades in private practice handling representations involving extensive cooperation with the SEC.[10] Shortly after his arrival, the Commission began to offer more transparency into what the SEC considered cooperation to be, and when credit would be afforded in return. For example, as the SEC was dealing with the aftermath of the prior day's events, the Commission also announced, on September 12, 2001, a significant case in the history of corporate cooperation with the agency. And a few weeks later, on October 23, 2001, the SEC announced its policy for providing cooperation credit in a Section 21(a) Report of Investigation that continues to serve as the seminal guidance today. We describe each in turn below.

1. Baker Hughes FCPA Case

The September 2001 settlement involved Baker Hughes Incorporated, which the SEC found had cooperated extensively with the agency after self-reporting that the company had inaccurately recorded payments to Indonesian officials in violation of the FCPA. Baker Hughes neither admitted nor denied the SEC's findings while agreeing to cease and desist from committing or causing violations of Exchange Act section 13(b)(2)(A), which relates to maintaining accurate books and records, and section 13(b)(2)(B), which relates to devising and maintaining an adequate system of internal accounting controls.[11] The SEC assessed no civil monetary penalty, noting that, "[i]n determining to accept the offer, the

9. *See, e.g.*, Stephen M. Cutler, Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Speech by SEC Staff: Remarks Before the Investment Company Institute at the Securities Law Developments Conference (Dec. 6, 2001), https://www.sec.gov/news/speech/spch527.htm (discussing Order Instituting Proceedings, *In re* Smirlock, Admin. Proceeding File No. 3-8243, 1993 SEC LEXIS 3313 (Nov. 29, 1993), in which adviser was not charged for violations based on its CIO's conduct because of its cooperation, and noting that cooperation credit was not a new concept).

10. *See generally* James B. Stewart, Den of Thieves (1992) (generally referencing Pitt's involvement in guiding clients to cooperate in support of the SEC's enforcement efforts and in the hope of mitigating the consequences against themselves).

11. Order Instituting Public Proceedings, *In re* Baker Hughes Inc., Exchange Act Release No. 44784, §§ I, VI (Sept. 12, 2001), https://www.sec.gov/litigation/admin/34-44784.htm [hereinafter *In re* Baker Hughes Order].

Commission considered remedial acts promptly undertaken by Respondent and cooperation afforded to the Commission staff."[12] In coordination, the SEC also sued the company's former chief financial officer and controller in federal court "for authorizing the payment of a bribe."[13] Finally, for the first time, the SEC also joined with the Department of Justice ("DOJ") in jointly filing a civil injunctive action against the company's accounting firm in Indonesia and a partner of that firm.[14]

Among other things, the company promptly disclosed the conduct to its auditors and government authorities, separated itself from the employee and outside entity that had been involved in the payment, conducted a full independent investigation, and implemented enhanced FCPA policies and procedures, in addition to cooperating fully with the government's investigation.[15] By not assessing a civil monetary penalty or other sanctions against the company, the SEC sent a strong message that cooperation would be rewarded. But even so, practitioners wondered why an enforcement action was necessary at all, given the extensive cooperation and remediation, and questioned what more, if anything, Baker Hughes could have done to earn a "full pass."

2. The SEC's Seaboard Report

Shortly thereafter, on October 23, 2001, the SEC issued a Section 21(a) Report of Investigation, which became known as the "Seaboard Report."[16] The Seaboard Report noted that, while the SEC brought an enforcement action against the former controller of Seaboard, it was not charging the company due to its swift response to the misconduct and its significant cooperation.[17]

The considerations laid out in the Seaboard Report became a new playbook for entities considering the steps to be taken when faced with actual or potential securities law violations. Among other things:

- The company's internal auditors conducted a preliminary review within a week of learning about the potential misconduct.

12. *Id.* § VI.

13. Litig. Release No. 17126, SEC Sues Baker Hughes Inc.'s Former Chief Financial Officer and Controller for Authorizing the Payment of a Bribe (Sept. 12, 2001), https://www.sec.gov/litigation/litreleases/lr17126.htm.

14. *Id.*; *see generally* Matt T. Morley et al., *FCPA Anti-Bribery Case Suggests Effective Strategies for Addressing Discovery of Illegal Corporate Activity*, Fried Frank (Sept. 26, 2001), https://www.friedfrank.com/index.cfm?pageID=25&itemID=792.

15. *In re* Baker Hughes Order, *supra* note 11, § IV(B)(6).

16. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,969 (Oct. 23, 2001), https://www.sec.gov/litigation/investreport/34-44969.htm [hereinafter Seaboard Report]. Even though the company's name did not appear in the report, the SEC identified the company in a separate action it filed the same day against the company's former controller alleging that she was a cause of approximately $7 million in discrepancies in the company's financial statements. Order Instituting Proceedings, *In re* Leon-Meredith, Exchange Act Release No. 44970 (Oct. 23, 2001), https://www.sec.gov/litigation/admin/34-44970.htm.

17. Seaboard Report, *supra* note 16.

- Internal auditors advised company management, who informed the Audit Committee of the Board of Directors of the inaccurate books and records and misstated financial reports caused by the controller.
- After the full Board was advised, it authorized the company to hire an outside law firm to conduct a thorough inquiry.
- The company dismissed the controller and two of her supervisors within four days of hiring the outside law firm.
- A day after dismissing the employees, the company made public disclosures and self-reported to the SEC.[18]
- The company provided the SEC staff with "all information relevant to the underlying violations," including providing notes and transcripts of interviews with the controller and other employees without invoking "the attorney-client privilege, work product protection or other privileges or protections with respect to any facts uncovered in the investigation."[19]
- After discovering the misconduct, the company engaged in remedial acts aimed to strengthen its financial reporting processes and address the violative conduct, including:
  - developing a detailed closing process for relevant accounting personnel;
  - consolidating subsidiary accounting functions under the parent company certified public accountant ("CPA") and hiring three additional CPAs in the accounting department responsible for preparing the subsidiary's financial statements;
  - redesigning the subsidiary's minimum annual audit requirements; and
  - requiring the parent company's controller to vet and approve all senior accounting personnel for the subsidiary.

The report then outlined four categories of questions the SEC would consider when evaluating a company's cooperation and determining how to address the company's conduct: self-policing (including the strength of the company's compliance program); self-reporting (including whether the SEC learned about the issue from the company itself); remediation (what the company has done to address the conduct); and cooperation (including how much the company helped the SEC gain access to information and witnesses to assist in the investigation).[20]

Comparing the Baker Hughes settlement order, which resulted in an enforcement action, with the Seaboard Report, which resulted in a "full pass" for the entity, demonstrates that both companies took thorough and prompt steps following

18. *Id.* The Seaboard Report noted that the price of the company's shares did not decline following the initial announcement or after publishing a restatement.

19. *Id.*

20. *See id.*

discovery of the violative conduct, and both cooperated extensively with the SEC staff. The difference in treatment may have resulted, at least in part, from the comparative severity of the underlying conduct and from the difference in self-policing activities before the violations, as demonstrated by no mention of a robust compliance program at Baker Hughes, compared to the description of Seaboard's program, which demonstrated diligent self-policing that enabled the company to uncover the misconduct. The factors articulated in the Seaboard Report have stood the test of time and remain in effect today.[21]

In subsequent years, the Division of Enforcement reinforced this message in its cases and speeches, although typically without offering much transparency into how the various Seaboard factors contributed to "credit" at the time of resolution. In February 2004, then Division of Enforcement Director Steven Cutler stated that he believed "the Commission is placing a greater emphasis than ever before on assessing and weighing cooperation when making charging and sanctions decisions."[22] Cutler noted that, in order to accomplish this goal, he "directed the staff to keep an ongoing log recording parties' cooperation, or lack thereof, throughout each investigation."[23] Cutler also explained that the Commission began implementing "a more graduated scale" in its consideration of a company's cooperation, which might take into account the frequency and amount of cooperation over the course of an investigation.[24] Then, in April 2004, Cutler cited to the Seaboard Report and noted that "extraordinary cooperation . . . including self-reporting a violation, being forthcoming during the investigation, and implementing appropriate remedial measures (including, in the case of an entity, appropriate disciplinary action against culpable individuals), can contribute significantly to a conclusion by the staff that a penalty recommendation should be more moderate in size or reduced to zero."[25] Interestingly, Cutler stated that extraordinary cooperation could impact the penalty, but he made no mention of extraordinary cooperation potentially leading to a "full pass," as it had for Seaboard.

3. Whether Waiver of Applicable Privileges Affected Cooperation Credit

Meanwhile, although the SEC's cooperation program typically functioned independently from cooperation programs adopted by other government departments

21. *See, e.g.*, Steven Peikin, Co-Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, PLI White Collar Crime 2018: Prosecutors and Regulators Speak—Remedies and Relief in SEC Enforcement Actions § III (Oct. 3, 2018), https://www.sec.gov/news/speech/speech-peikin-100318 (stating that in describing myriad factors considered when evaluating whether to impose corporate penalties, "[w]e also consider whether application of the *Seaboard* factors is appropriate").

22. Stephen M. Cutler, Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Speech by SEC Staff: Remarks Before the District of Columbia Bar Association (Feb. 11, 2004), https://www.sec.gov/news/speech/spch021104smc.htm.

23. *Id.*

24. *Id.*

25. Stephen M. Cutler, Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Speech by SEC Staff: 24th Annual Ray Garrett Jr. Corporate & Securities Law Institute (Apr. 29, 2004), https://www.sec.gov/news/speech/spch042904smc.htm.

and agencies, that situation changed in an important way during the early 2000s. In the wake of the Enron and WorldCom crises, and the emergence of the Sarbanes-Oxley Act of 2002,[26] a focus emerged on the corporate attorney-client privilege and the attorney work product protection: whether the government would condition cooperation credit on an entity's waiver of its privileges and protections in communications with the government.

The 2001 Seaboard Report had set the groundwork for this, noting that the SEC had considered, in determining not to bring an enforcement action against the company, that Seaboard "did not invoke the attorney-client privilege, work product protection or other privileges or protections with respect to any facts uncovered in the investigation."[27] Although the Seaboard Report did not include questions about waivers among those it listed as relevant to cooperation credit, it did note in a footnote that,

> [i]n some cases, the desire to provide information to the Commission staff may cause companies to consider choosing not to assert the attorney-client privilege, the work product protection and other privileges, protections and exemptions with respect to the Commission. The Commission recognizes that these privileges, protections and exemptions serve important social interests. In this regard, the Commission does not view a company's waiver of a privilege as an end in itself, but only as a means (where necessary) to provide relevant and sometimes critical information to the Commission staff . . . .[28]

As part of its response to the Enron and WorldCom situations, through a series of memoranda by its Deputy Attorneys General, the DOJ guided prosecutors regarding their charging decisions. At first the DOJ instructed prosecutors to consider whether a corporation waived attorney-client and work product protections, but after considerable backlash, the DOJ instructed that cooperation credit would not depend on privilege waivers, and the guidance prohibited prosecutors from requesting waivers under most circumstances.[29]

The SEC never said during this period that a waiver of applicable privileges and protections was required to receive full cooperation credit. However, we are aware that, based on our knowledge and experience, the Seaboard Report footnote, when combined with the DOJ pronouncements, prompted some in the Division of Enforcement to begin asking for privilege and protection waivers. Throughout this period, the SEC's official position remained the same, however: the SEC sought factual information, but it did not programmatically seek waivers

26. Cynthia A. Glassman, Speech by SEC Commissioner: SEC Initiatives Under the Sarbanes-Oxley Act of 2002 (Jan. 28, 2003), https://www.sec.gov/news/speech/spch012803cag.htm ("The third reason—and the focus of my remarks—is that the Commission has just adopted a number of important new rules pursuant to the Sarbanes-Oxley Act of 2002. The law was enacted in July in response to financial frauds at Enron, WorldCom and other corporations and the realization that many of the 'gatekeepers' responsible for preventing fraud had fallen down on the job.").

27. Seaboard Report, *supra* note 16.

28. *Id.* at n.3.

29. Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Justice, to United States Attorneys re: Principles of Federal Prosecution of Business Organizations 9 (Aug. 28, 2008), https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf.

of the attorney-client privilege or attorney work product protections in order to obtain cooperation credit. To clarify this directive, in 2010, the SEC modified its enforcement manual to include language that remains there today: "The staff should not ask a party to waive the attorney-client privilege or work product protection without prior approval of the Director or Deputy Director [of the Division of Enforcement],"[30] and "a party's decision to assert a legitimate claim of privilege will not negatively affect their claim to credit for cooperation."[31]

C. 2010 Through 2019

In January 2010, under the leadership of SEC Chair Mary Schapiro and Director of Enforcement Robert Khuzami, the SEC launched its "Cooperation Initiative,"[32] adding formal Cooperation Agreements, and Deferred- and Non-Prosecution Agreements, to the tools the Division of Enforcement could use to encourage cooperation with its investigations.[33] As part of this announcement, the Commission for the first time also articulated a framework for evaluating cooperation by individuals.[34] That framework, which continues today, includes four factors: assistance provided by the individual, importance of the underlying matter, interest in holding the individual accountable, and profile of the individual.[35] Thus, although the cooperation program also included entities, most of the focus involved cooperation by individuals.

30. SEC Div. of Enforcement, Enforcement Manual § 4.3, at 76 (Nov. 28, 2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf [hereinafter 2017 Enforcement Manual]; SEC Div. of Enforcement, Enforcement Manual § 4.3, at 95 (Jan. 13, 2010), https://web.archive.org/web/20100222175244/https://www.sec.gov/divisions/enforce/enforcementmanual.pdf [hereinafter 2010 Enforcement Manual].

31. 2017 Enforcement Manual, *supra* note 30, § 4.3, at 76; 2010 Enforcement Manual, *supra* note 30, § 4.3, at 95. Of course, the extent to which providing "just the facts" preserves a company's privileges and protections remains subject to judicial review and is not clear at the time the cooperation happens. As a result, providing "just the facts" increases a company's risk, even if the Commission does not acknowledge that. *See, e.g.*, SEC v. Vitesse Semiconductor Corp., No. 10-cv-9239, 2017 WL 2899082, at *3 (S.D.N.Y. July 14, 2011) (finding that oral briefings given to the SEC describing witness interviews waived privilege as to attorney's witness interview notes).

32. Policy Statement Concerning Cooperation by Individuals in Its Investigations and Related Enforcement Actions, SEC Policy Statement Release No. 34-61340 (Jan. 19, 2010), https://www.sec.gov/rules/policy/2010/34-61340.pdf [hereinafter Cooperation Initiative Policy Release]; SEC Press Release No. 2010-6, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010), https://www.sec.gov/news/press/2010/2010-6.htm [hereinafter SEC Announces Initiative 2010].

33. *See* Cooperation Initiative Policy Release, *supra* note 32; SEC Announces Initiative 2010, *supra* note 32.

34. SEC Announces Initiative 2010, *supra* note 32.

35. Over the next three years, the lead authors of this article published three articles addressing developments in the SEC's treatment of cooperation. *See* Dixie L. Johnson & Carmen J. Lawrence, *Recent Developments in the SEC Cooperation Initiative*, Fried Frank (Nov. 9, 2012), https://www.friedfrank.com/siteFiles/Publications/Fried_Frank_Institute%20Sec%20Reg%202012_Ch%2056.pdf; Dixie L. Johnson & Carmen J. Lawrence, *Cooperating and Getting a "Full Pass" from the SEC: Is "Seaboard" Still Alive?*, Bloomberg L.: Sec. L. News (Aug. 7, 2011, 11:00 PM), https://news.bloomberglaw.com/securities-law/cooperating-getting-full-pass-from-the-sec-is-seaboard-report-still-alive; Dixie L. Johnson & Carmen J. Lawrence, *United States: The First SEC Non-Prosecution Agreement: Another Arrow in the Quiver*, Mondaq (Jan. 4, 2011), http://www.mondaq.com/unitedstates/charges-mortgages-indemnities/119240/the-first-sec-non-prosecution-agreement-another-arrow-in-the-quiver.

By mid-January 2015, the SEC had signed over eighty cooperation agreements but had announced only five DPAs and five NPAs, numbers that then-Director of Enforcement Andrew Ceresney deemed "appropriate[.]"[36] As he reflected on the cooperation program, Ceresney noted that the Commission's cooperation program was "a bit more developed in the context of FCPA cases than in others types of cases."[37] He also noted that "the bar has been raised for what counts as good corporate citizenship in the past 15 years or so," listing corporate internal investigations as "common, a clear best practice for any company that discovers significant potential misconduct," and noting that "sharing the results of those internal investigations with the government has become commonplace."[38] Then-Director Ceresney attempted to make the case in his speech that "the benefits are real in terms of charging decisions, monetary relief, and bars" by citing specific cases in which he stated that the sanctions would have been worse if cooperation had not occurred.[39] Later that year, Ceresney announced a policy that a company must self-report and cooperate to be eligible for an NPA or DPA in the FCPA context.[40] While some agreements remain confidential, it is notable that no examples of cooperation agreements listed on the SEC's website involved entities, while approximately half of DPAs involved entities and almost all NPAs involved entities.[41] For the years 2017 through 2019, however, the SEC reported no DPA or NPA agreements at all.

Through the years, the SEC launched various initiatives to encourage regulated entities to self-report violations in specific categories.[42] But these initiatives and other SEC programs focused only on certain regulated entities or on limited populations of issuers.[43] Without similar programs or much guidance, other

36. Andrew Ceresney, Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Remarks at University of Texas School of Law's Government Enforcement Institute in Dallas, Texas: The SEC's Cooperation Program: Reflections on Five Years of Experience (May 13, 2015), https://www.sec.gov/news/speech/sec-cooperation-program.html.

37. *Id.*

38. *Id.*

39. *Id.*

40. Andrew Ceresney, Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, ACI's 32nd FCPA Conference Keynote Address (Nov. 17, 2015), https://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html.

41. *See Spotlight on Enforcement Cooperation Program*, U.S. Sec. & Exchange Commission (Sept. 20, 2016), https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml [hereinafter *Spotlight on Enforcement*].

42. *See, e.g.*, *Municipalities Continuing Disclosure Cooperation Initiative*, U.S. Sec. & Exchange Commission, https://www.sec.gov/divisions/enforce/municipalities-continuing-disclosure-cooperation-initiative.shtml (modified Nov. 13, 2014) [hereinafter *Municipalities Initiative*] (municipal securities issuers needing to update their continuing disclosures); Carmen Lawrence et al., *Client Alert: The SEC's Customer Protection Rule Initiative and Whistleblower Protection Efforts—What Broker-Dealers Need to Know*, King & Spalding LLP (July 12, 2016), https://s3.amazonaws.com/kslaw-staging/attachments/000/003/910/original/ca071216.pdf?1494907251; *Share Class Selection Disclosure Initiative*, U.S. Sec. & Exchange Commission (May 1, 2018), https://www.sec.gov/enforce/announcement/scsd-initiative.

43. *See Municipalities Initiative*, *supra* note 42, § I (limited to "issuers and obligated persons involved in the offer or sale of municipal securities . . . as well as underwriters of such offerings"); *see Customer Protection Rule Initiative*, U.S. Sec. & Exchange Commission, https://www.sec.

entities, including public companies, continued to face the question of whether, when, and how much to cooperate with the SEC.

D. 2020 and Beyond

As we enter the 2020s, the SEC continues to highlight its Enforcement Cooperation Program in a Spotlight web page,[44] and the Enforcement Manual includes over twenty pages on the topic.[45] The Spotlight page is stale, however, reflecting as of this writing a last modified date of September 20, 2016. The Enforcement Manual, dated November 28, 2017, as of this writing, has reflected no substantive changes to the Division's cooperation policy since the manual was first revised to include the Division's Cooperation Program in January 2010.[46] As a result, even with these resources, publicly available information regarding the SEC's cooperation initiative remains relatively sparse. We also have not seen an assessment more recent than then-Director Ceresney's May 2015 assessment regarding the first five years of the formal program.[47]

So, to augment current resources available to companies considering cooperating with the SEC, we endeavored to take a macro-level look at how the SEC describes cooperation in its resolutions with companies and how those descriptions may correlate to the resolutions' terms and penalties. What must a company do to earn cooperation credit? Will that credit ultimately be worth the time and resources necessary for a company to implement its cooperation or remedial plan? In addition to providing useful information regarding those questions, these recent developments provide invaluable guidance on (i) what facts and circumstances the SEC considers when determining whether an entity or individual qualifies for cooperation credit, as well as (ii) the type of cooperation credit the SEC ultimately provides under particular facts and circumstances. After we outline the current remedies available to the SEC in enforcement actions, we set forth below the methodology and findings from our research.

II. Current Remedies Available to the SEC

The SEC's Division of Enforcement conducts fact-finding investigations and, if the Division determines that a violation exists, the SEC may institute an enforcement action. Various elements of discretion govern where the SEC files charges, which charges are included, who is charged, and whether collateral consequences normally flowing from the charges will be waived. Each of these elements may be in play during settlement negotiations, particularly where an entity's cooperation is being evaluated.

gov/divisions/enforce/customer-protection-rule-initiative.shtml (modified June 23, 2016) (limited to broker-dealers).

44. *Spotlight on Enforcement*, *supra* note 41.

45. 2017 Enforcement Manual, *supra* note 30, § 6.

46. *Compare* 2017 Enforcement Manual, *supra* note 30, § 6, *with* 2010 Enforcement Manual, *supra* note 30, § 6.

47. *See* Ceresney, *supra* note 36.

The SEC has the choice of forum: it may bring an enforcement action in federal district court, or in its own administrative proceedings. In federal court, the SEC may seek, and the court may impose, statutory remedies including civil monetary penalties,[48] an officer and director bar,[49] and a penny stock bar.[50] Historically, equitable remedies[51] are also available to the SEC in federal court actions, including an injunction enjoining a defendant from future violations of the federal securities laws, disgorgement of ill-gotten gains from the misconduct[52] (plus prejudgment interest), and other relief, including asset freezes, appointment of a monitor, consultant, or receiver, or an order for an accounting. The SEC's allegations appear in a complaint, and courts typically approve settlements in which the defendants neither admit nor deny the allegations.

In an administrative proceeding, the SEC can impose a cease-and-desist order,[53] which is akin to the obey-the-law injunction in federal court. It may also order disgorgement of ill-gotten gains (and prejudgment interest),[54] and impose civil penalties[55] or an officer or director bar.[56] Other remedies available to

48. The SEC obtained administrative civil monetary penalty authority in 1990 pursuant to the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 [hereinafter Remedies Act]; *see* 15 U.S.C. §§ 77t(d)(1), 78u(d)(3), 78u-2 (2018). The amount of civil monetary penalties is governed by three tiers of potential penalties. *See, e.g.*, *id.* § 77t(d)(2). Insider trading violations are covered by the separate ITSFEA penalty provisions, allowing a penalty of up to "three times the profit gained or loss avoided as a result of" the violation. *Id.* § 78u-1(a).

49. The Remedies Act authorized the SEC to obtain a permanent or temporary officer and director bar, which precludes an individual from serving in an officer or director capacity for a public company. *Id.* § 78u-3. Prior to the Remedies Act, the SEC could seek this remedy using the equitable powers of the federal courts and obtained such bars through consent decrees. In 2002, the Sarbanes-Oxley Act section 1105 authorized the SEC to obtain the bar in cease-and-desist proceedings. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 1105, 116 Stat. 745, 809–10.

50. The Remedies Act authorized the SEC to seek a bar from participation in an offering of penny stock, through Exchange Act section 15(b)(6)(A)(iii). *See* U.S.C. § 78o(b)(6)(A)(iii) (2018).

51. The Supreme Court in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), held that SEC disgorgement was akin to a penalty for statute-of-limitations purposes under 28 U.S.C. § 2462. *Id.* at 1642. Since that time, the challenges to the SEC's authority to seek injunctions, disgorgement, and other historically equitable remedies have increased in frequency.

52. Following the Court's decision in *Kokesh*, the Court decided *Liu v. SEC*, 140 S. Ct. 1936 (2020), which narrowly held that disgorgement can be an equitable remedy for purposes of 15 U.S.C. § 78u(d)(5) (2018). *See* Carmen Lawrence et al., *Client Alert: What Is New After* Liu*: Unsettled Questions Surrounding SEC Disgorgement*, King & Spalding LLP (July 10, 2020), https://www.kslaw.com/news-and-insights/what-is-new-after-liu-unsettled-questions-surrounding-sec-disgorgement ("At first blush, the holding in *Liu* seems at odds with the holding of *Kokesh* that SEC disgorgement is a penalty, and thus subject to the five-year statute of limitations under 28 U.S.C. § 2462. The Court seemed to reconcile this apparent tension, however, by describing the question of whether the SEC may seek disgorgement through its power to obtain 'equitable relief' under 15 U.S.C. § 78u(d)(5) as 'antecedent' to the question of whether disgorgement is a penalty for purposes of § 2462. In other words, the Court suggested that even if a disgorgement award is determined to be permissible equitable relief under 15 U.S.C. § 78u(d)(2), it still can be deemed a 'penalty' within the meaning of § 2462 and subject to the five-year statute of limitations.").

53. 15 U.S.C. § 78u-3 (2018).

54. *Id.* § 78u-2.

55. *Id.* The Dodd-Frank Act, in 2010, broadened the SEC's authority to obtain penalties in cease-and-desist proceedings, previously limited to regulated entities, to apply to any person or entity. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 929P(a), 124 Stat. 1376, 1862 (2010) [hereinafter Dodd-Frank].

56. *Id.* § 78u-3(f).

the SEC in administrative proceedings include limitations, suspensions, or bars from associating with regulated entities[57] and from appearing and practicing before the Commission.[58] In settlement orders, the SEC also sometimes includes "undertakings," which reflect future actions the settling party has agreed to undertake. Administrative orders set forth the SEC's "findings," which respondents typically neither admit nor deny as part of the settlement.

The SEC also has discretion over which charges to bring against entities in its enforcement actions. For example, when the SEC has determined that a public company has engaged in fraud by intentionally or recklessly misrepresenting its financial performance in its periodic reports, the SEC could bring scienter-based charges under section 10(b) of the Exchange Act and Rule 10b-5 thereunder, as well as under section 17(a)(1) of the Exchange Act, all of which require the SEC to prove that the defendant acted with an intent to "deceive, manipulate or defraud,"[59] as well as non-scienter based fraud charges under sections 17(a)(2) and (3) of the Securities Act, that require a showing of only negligence.[60] In addition, the SEC would typically charge violations of section 13(a) of the Exchange Act and the rules thereunder, which are the periodic reporting provisions. In the appropriate circumstance to give cooperation credit, the SEC could charge violations of only sections 17(a)(2) and (3), and 13(a) of the Exchange Act, or only section 13(a). Settling companies likely prefer these negligence-based charges because they result in fewer collateral consequences[61] and in less reputational damage than a scienter-based fraud charge, which may, in turn, encourage cooperation with the SEC.

Thus, when faced with a potential enforcement action, companies consider cooperating with the SEC staff as a means of decreasing potential civil monetary penalties, or otherwise avoiding the imposition of remedies or collateral consequences. For example, entities generally prefer not to have a fraud charge included in any SEC settlement, even on a "no-admit, no-deny" basis, because of the collateral consequences resulting from such a charge.[62] By cooperating

57. *See* Dodd-Frank § 929P(a); Sarbanes-Oxley Act §§ 305, 1105, 116 Stat. at 778, 809–10.

58. 17 C.F.R. § 201.102(e) (2020).

59. Aaron v. SEC, 446 U.S. 680, 686, 695–97 (1980).

60. *See id*. at 696–97.

61. Those agreeing to settle federal court or administrative actions also must analyze a variety of federal, state, and other provisions that could impose "collateral consequences" that are not apparent on the face of the settlement documents. These can range from negative consequences that are automatically triggered by certain court-ordered or administrative remedies to actions that may be taken by other authorities based on the SEC's findings to disclose obligations resulting from the settlement. Although some of these consequences can be waived by the SEC or other relevant authority, the waiver process can be cumbersome in and of itself, and the outcome may not be predictable with certainty at the time of negotiations. *See generally* Jay Clayton, Chairman, U.S. Sec. & Exch. Comm'n, Public Statement: Statement Regarding Offers of Settlement (July 3, 2019), https://www.sec.gov/news/public-statement/clayton-statement-regarding-offers-settlement (describing various collateral consequences and announcing a new procedure whereby "an offer of settlement that includes a simultaneous waiver request negotiated with all relevant divisions . . . will be presented to, and considered by, the Commission as a single recommendation from the staff").

62. *Id*.; *see also* Carmen Lawrence et al., *Seeing Beyond the Deal: The Collateral Consequences of SEC Settlements*, Inv. Law., Nov. 2011, at 1.

with the SEC, companies also seek to maintain good relations with the agency, assure investors that they are being good corporate citizens, provide comfort to independent auditors that prior conduct is being appropriately addressed, and demonstrate to their boards of directors that the company is not unduly provoking an enforcement authority. Even with those additional benefits, though, companies considering the extent to which they might cooperate often wonder what the SEC will provide in return. Our survey was designed to discern patterns in cooperation credit the SEC affords to entities. As the next part demonstrates, few patterns emerged.

III. Methodology and Findings

Our research focused on enforcement actions the SEC settled with companies during SEC fiscal years 2017 through 2019, including specifically those that mentioned cooperation efforts by entities. Enforcement actions involving only individuals were not within our scope, other than as a means to identify "full passes" for the related entity.

In determining how best to capture cooperation credit granted to companies, we used the Division of Enforcement's annual report published for each fiscal year, which lists every enforcement action by case name, type of action, date filed, and enforcement category.[63] Using those lists, our team reviewed every enforcement action against an entity for the years 2017 through 2019. Where the action resulted in a stand-alone administrative proceeding, we reviewed the relevant order to determine whether the SEC included a reference to one or more of the cooperation factors. For civil actions against entities, we reviewed the accompanying press or litigation release to determine whether the action settled, and if so, whether the press or litigation release or complaint included a reference to one or more of the cooperation factors. Our analysis relied entirely on publicly available data and materials, including publications, administrative orders, civil complaints, press releases, and other materials made publicly available by the SEC. For reasons described below, we limited the scope of our survey to identification of three cooperation factors: self-reporting, cooperation, and remediation.

According to the SEC's annual enforcement reports for fiscal year 2017 through fiscal year 2019, on average 33 percent of its standalone administrative and civil enforcement actions were brought against entities in the three years.[64] Our survey demonstrated that less than a quarter of those entity settlements cited one or more cooperation factors. During this period, the SEC's Share Class Selection Disclosure self-reporting initiative offered cooperation credit as part of

63. *See* SEC Division of Enforcement 2019 Annual Report 30–47 (2019), https://www.sec.gov/files/enforcement-annual-report-2019.pdf; SEC Division of Enforcement 2018 Annual Report 21–37 (2018), https://www.sec.gov/files/enforcement-annual-report-2018.pdf; Addendum to SEC Division of Enforcement 2017 Annual Report 4–20 (2018), https://www.sec.gov/files/enforcement-annual-report-2017-addendum.pdf.

64. *See* SEC Division of Enforcement 2019 Annual Report, *supra* note 63, at 17; SEC Division of Enforcement 2018 Annual Report, *supra* note 63, at 2; SEC Division of Enforcement 2017 Annual Report 2 (2017), https://www.sec.gov/files/enforcement-annual-report-2017.pdf.

a specific program;[65] if settlements resulting from that program are excluded, the percentage of actions involving charges against entities was 29 percent, of which 19 percent cited one or more cooperation factors. The 19 percent figure surprised us. The fact that over 80 percent of entity settlements outside of specific programs did not mention cooperation by the settling entity could be due to a variety of causes, including a widespread lack of cooperation on the part of entities, a lack of cooperation credit given by the SEC even when companies attempted to cooperate, or a lack of enforcement action altogether resulting in a "full pass" for entities that cooperated.

Looking at these matters in greater detail reveals a number of interesting observations that may be useful in evaluating what respondents receive in return for their cooperation, what is now typical in cooperation, and how the SEC might be willing to describe the cooperation. While the SEC has consistently noted that it must consider a number of factors in determining to bring an enforcement action, including the egregiousness of the conduct and harm to investors, an examination of actions acknowledging a company's cooperation-related efforts confirms that the Seaboard Report continues to provide valuable guidance for companies considering cooperation. We examine our findings within that Seaboard Report framework, looking at how companies received credit in any or all of the categories of self-policing, self-reporting, remediation, and cooperation. But first, we review how the SEC assesses the nature and severity of the underlying violative conduct in its determination of whether to bring charges and what credit to give to companies for their cooperation efforts.

A. Conduct Assessment

Because the primary purpose of enforcement actions is to address the relevant conduct in each case it considers, the SEC must assess the relevant violative conduct and its harm to investors. Indeed, the SEC has warned that the severity of conduct may prevent a company from earning a "full pass," no matter how extensive its cooperation. Even while laying out the four factors considered for cooperation credit, the Seaboard Report emphasized the need to keep "the paramount issue" of investor protection at the forefront of enforcement decisions:

> First, the paramount issue in every enforcement judgment is, and must be, what best protects investors. There is no single, or constant, answer to that question. Self-policing, self-reporting, remediation and cooperation with law enforcement authorities, among other things, are unquestionably important in promoting investors' best interests. But, so too are vigorous enforcement and the imposition of appropriate sanctions where the law has been violated. Indeed, there may be circumstances where conduct is so egregious, and harm so great, that no amount of cooperation or other mitigating conduct can justify a decision not to bring any enforcement action at all.[66]

65. *Announcement: Share Class Disclosure Initiative*, U.S. Sec. & Exchange Commission (May 1, 2018), https://www.sec.gov/enforce/announcement/scsd-initiative [hereinafter *Share Class Initiative Announcement*]; *see infra* Part III.B.3.

66. Seaboard Report, *supra* note 16.

The Seaboard Report included the following criteria for a detailed inquiry into the nature of the alleged misconduct and the actual harm done to investors:

- What is the nature of the misconduct involved? Did it result from inadvertence, honest mistake, simple negligence, reckless or deliberate indifference to indicia of wrongful conduct, willful misconduct or unadorned venality? Were the company's auditors misled?
- Where in the organization did the misconduct occur? How high up in the chain of command was knowledge of, or participation in, the misconduct? Did senior personnel participate in, or turn a blind eye toward, obvious indicia of misconduct? How systemic was the behavior? Is it symptomatic of the way the entity does business, or was it isolated?
- How long did the misconduct last? Was it a one-quarter, or one-time, event, or did it last several years? In the case of a public company, did the misconduct occur before the company went public? Did it facilitate the company's ability to go public?
- How much harm has the misconduct inflicted upon investors and other corporate constituencies? Did the share price of the company's stock drop significantly upon its discovery and disclosure?
- Did the company immediately stop the misconduct?
- Is the company the same company in which the misconduct occurred, or has it changed through a merger or bankruptcy reorganization?[67]

While we did not track every instance of the SEC citing to the underlying violative conduct in its decision to accept a settlement offer, we did note some instances where the SEC pointed to the severity of the conduct in the settlement documents. For example, in an August 9, 2018, enforcement action against Knowledge Leaders Capital, LLC regarding conflict-of-interest-related violations, the SEC acknowledged that it considered cooperation factors as well as the underlying conduct in reaching a settlement: "Among other facts, the Commission considered the seriousness of the misconduct, which took place over three years, and Knowledge Leaders' self-report, cooperation, and remedial measures, all of which were done at the direction of the CIO, in determining the appropriate resolution in this case."[68]

67. *Id.* (bullet points are all direct quotations).

68. Order Instituting Administrative Cease-and-Desist Proceedings, *In re* Knowledge Leaders Capital, LLC, Investment Advisers Act Release No. 4980, at 2 (Aug. 9, 2018), https://www.sec.gov/litigation/admin/2018/ia-4980.pdf. The fact that the SEC specifically called out who directed these remedial measures is unusual, although we did see other instances of this in our survey. *See, e.g.*, Order Instituting Administrative Cease-and-Desist Proceedings, *In re* Options Clearing Corp., Exchange Act Release No. 86871, at 14 (Sept. 4, 2019), https://www.sec.gov/litigation/admin/2019/34-86871.pdf (noting the involvement of the board of directors); Order Instituting Administrative Cease-and-Desist Proceedings, *In re* CMB Export, LLC, Exchange Act Release No. 84264, at 7 (Sept. 21, 2018), https://www.sec.gov/litigation/admin/2018/33-10559.pdf (noting the involvement of the CEO).

B. Cooperation Factors

1. Self-Policing

Self-policing focuses on the actions of a company prior to the relevant misconduct and involves examining the efficacy of a company's existing compliance procedures, as well as the "tone at the top" from company leadership.[69] The Seaboard Report included several questions specific to self-policing that the SEC may take into consideration when evaluating a company's cooperative efforts:

- How did the misconduct arise? Is it the result of pressure placed on employees to achieve specific results, or a tone of lawlessness set by those in control of the company? What compliance procedures were in place to prevent the misconduct now uncovered? Why did those procedures fail to stop or inhibit the wrongful conduct?
- How was the misconduct detected and who uncovered it?[70]

Descriptions regarding the efficacy of existing compliance procedures provide insight on how the SEC values self-policing. In addition to identifying whether or not an enforcement action included a reference to a company's cooperation-related efforts, we also attempted to categorize which factors (self-policing, self-reporting, cooperation, and remediation) the SEC acknowledged in the settlement.

While we were able to isolate references to self-reporting, cooperation, and remediation through review and text searches detailed further in their respective sections below, we note the difficulty in accurately identifying instances where entities received credit specifically for self-policing. The SEC Enforcement Manual expressly mentions "self-policing" as one of the four credit factors,[71] but our review of the SEC's website and publicly available enforcement actions did not identify any instances of enforcement actions specifically citing to the phrase "self-policing." Looking for other indications that the SEC applied the Seaboard criteria specific to self-policing, we considered ways in which a company may "self-police[,]" including any discussion of what compliance systems were in place at the time to uncover the relevant misconduct and whether the systems were intentionally bypassed by employees or others. However, descriptions in settlement orders varied, and at times they seem inextricably linked with descriptions of remedial acts taken by a company.[72] In its enforcement actions, the SEC has often described a company's self-policing by noting how a company's compliance procedures detected and/or responded to the wrongdoing.[73]

69. *Spotlight on Enforcement*, *supra* note 41.

70. Seaboard Report, *supra* note 16 (bullet points are all direct quotations).

71. 2017 Enforcement Manual, *supra* note 30, § 6.1.2, at 98.

72. *See, e.g.*, Order Instituting Cease-and-Desist Proceedings, *In re* Barclays PLC, Exchange Act Release No. 87,132, at 9 (Sept. 27, 2019), https://www.sec.gov/litigation/admin/2019/34-87132.pdf ("Barclays voluntarily reported the conduct at issue and, prior to the Commission's investigation, undertook remedial steps including terminating senior executives and other employees involved in the misconduct, revising its hiring policies and procedures, and enhancing its compliance programs.").

73. *See, e.g.*, Order Instituting Administrative and Cease-and-Desist Proceedings, *In re* Morgan Stanley Smith Barney, LLC, Exchange Act Release No. 79,794, at 4 (Jan. 13, 2017), https://www.

Similarly, where the SEC has pointed out in its orders deficiencies in the compliance program or noted that the entity's remediation efforts included compliance enhancements, the inference can be drawn that the self-policing factor was not met.[74] Given the absence of specific references to "self-policing" in SEC settlement documents and the varying ways it could potentially (but not necessarily) have been considered, we were not able to isolate a set of effective search criteria to identify instances where a company received credit for self-policing, and so we excluded this factor from the scope of our survey. Two other publicly available statistical surveys appear to take a similar approach when attempting to track cooperation credit granted by the SEC.[75] Despite the difficulty of accurately identifying the SEC's acknowledgement of self-policing, we believe it is likely that the survey captured most, if not all, enforcement actions involving self-policing based on our identification of the other three factors. We encourage the SEC to provide improved clarity by noting self-policing efforts by entities as part of its description of cooperation factors considered in settlement.

2. Self-Reporting

The Seaboard Report included the following criteria targeting an assessment of a company's efforts to self-report:

- What steps did the company take upon learning of the misconduct?
- Did the company promptly, completely, and effectively disclose the existence of the misconduct to the public, to regulators, and to self-regulators?
- What processes did the company follow to resolve many of these issues and ferret out necessary information? Were the audit committee and the board of directors fully informed? If so, when?
- Did the company commit to learn the truth, fully and expeditiously? Did it do a thorough review of the nature, extent, origins, and consequences of the conduct and related behavior? Did management, the board, or committees consisting solely of outside directors oversee the review? Did company employees or outside persons perform the review? If outside persons, had they done other work for the company? Where the review was conducted by outside counsel, had management previously engaged such counsel? Were scope limitations placed on the review? If so, what were they?[76]

sec.gov/litigation/admin/2017/34-79794.pdf ("Of the 30 [Morgan Stanley] Originating Fee Issues, 19 were identified through [its] internal controls and procedures. . . .").

74. *See, e.g.*, Order Instituting Administrative and Cease-and-Desist Proceedings, *In re* Beam Inc., Exchange Act Release No. 83575, at 8 (July 2, 2018), https://www.sec.gov/litigation/admin/2018/34-83575.pdf (citing remedial actions including updating and expanding Beam's global anti-corruption policies and procedures).

75. *See* Stephen Choi et al., SEC Enforcement Activity: Public Companies and Subsidiaries—Fiscal Year 2019 Update (2019), https://www.cornerstone.com/Publications/Reports/SEC-Enforcement-Activity-FY-2019-Update; *Foreign Corrupt Practices Act Clearinghouse: A Collaboration with Sullivan & Cromwell LLP: About Us*, Stan. L. Sch., http://fcpa.stanford.edu/about-the-fcpac.html#methodology (last visited July 16, 2020) [hereinafter Foreign Corrupt Practices Act Clearinghouse].

76. Seaboard Report, *supra* note 16 (bullet points are all direct quotations).

Although these criteria are all considered part of self-reporting, the SEC and its staff seem to use the term "self-reporting" or its equivalents only if a company was first to report conduct to the SEC. So, for the factor of self-reporting, our team analyzed administrative orders and settled civil complaints against entities for indications that the Commission considered self-reporting in its decision to accept the offer of settlement. In addition to looking for express mentions of self-reporting, we included any instances where the Commission noted that a company voluntarily reported conduct to the SEC. In addition to identifying specific references to "self" or "voluntary" reporting or disclosure, the team also analyzed enforcement actions for any other indication that a company voluntarily raised its misconduct to the SEC.

For fiscal years 2017 through 2019, we identified 130 companies that earned credit for self-reporting that the SEC acknowledged in the settlement papers. The vast majority of these self-reporting matters were attributable to the Share Class Initiative, however, leaving only thirty-five settlements in which the SEC credited an entity's self-reporting during our entire three-year period. Just as the low percentage of settlements acknowledging cooperation credit surprised us, this low number of SEC-acknowledged self-reports also caught our attention, even knowing that the SEC's definition was narrower than it could be under the Seaboard factors.

Based on our survey, we identified the following categories and descriptions in which the SEC acknowledged self-reporting:

- Self-reporting described as "prompt" or "immediate"
- Self-reporting following the initiation and/or completion of an internal investigation, including descriptions that the investigation was "thorough" or "in-depth"
- Self-reporting conduct to the SEC and/or monitor as part of ongoing self-reporting obligations undertaken as part of an earlier settlement
- Self-reporting additional conduct to the SEC that fell outside the scope of the ongoing SEC investigation
- Self-reporting to other enforcement authorities, including foreign authorities
- Disclosing relevant allegations or the existence of an investigation to investors and the public, including noting that the company's disclosure was "prompt" or "immediate"
- Disclosing the misconduct to investors and the public by issuing restatements or disclosures in other filings, publicizing material weaknesses and any remedies, or announcing customer reimbursements
- Upon learning of potential misconduct, engaging external counsel and/or other consultants

- Initiating an internal investigation overseen by corporate management, such as the board of directors, one of its committees, or an individual executive like the chief information officer or chief compliance officer

In contrast to the way in which the SEC appears not to focus on the self-policing factor, the SEC focused extensively on self-reporting in its settled enforcement actions, reinforcing in a variety of ways that self-reporting entities receive cooperation credit. Settlement orders do not describe this analysis in consistent language, however, so comparing instances of self-reporting against each other does not clearly illustrate the cooperation credit earned. In addition, the SEC does not call out companies for self-reporting in situations where a company attempted to self-report but was not the first to raise the conduct to the Commission. We encourage the SEC to consider what credit it could afford to these situations.

3. Remedial Acts

The Seaboard Report included the following criteria the SEC takes into consideration when evaluating a company's remediation efforts:

- How long after discovery of the misconduct did it take to implement an effective response?
- What steps did the company take upon learning of the misconduct? Did the company immediately stop the misconduct? Are persons responsible for any misconduct still with the company? If so, are they still in the same positions? Did the company promptly, completely, and effectively disclose the existence of the misconduct to the public, to regulators, and to self-regulators? Did the company take steps to identify the extent of damage to investors and other corporate constituencies? Did the company appropriately recompense those adversely affected by the conduct?
- What assurances are there that the conduct is unlikely to recur? Did the company adopt and ensure enforcement of new and more effective internal controls and procedures designed to prevent a recurrence of the misconduct? Did the company provide our staff with sufficient information for it to evaluate the company's measures to correct the situation and ensure that the conduct does not recur?[77]

Our team analyzed administrative orders and settled civil complaints against entities for indications that the Commission considered remediation in its decision to accept the offer of settlement. Upon determining the SEC's acknowledgement of remediation in a particular matter,[78] we sought to identify the descriptions of voluntary remedial acts taken by entities prior to the settlement based on the criteria for remediation listed in the Seaboard Report. In addition, we

77. *Id.* (bullet points are all direct quotations).

78. The team searched for "remed*" in administrative proceedings and press releases for civil complaints against entities.

included within the survey's scope any explicit mention of undertakings being considered in the Commission's determination to accept an offer of settlement.[79] Because undertakings by themselves are not necessarily a sign that the SEC acknowledged cooperation in a settlement,[80] our scope excluded settlements with undertakings where there was no specific reference to the remedial actions having impacted the Commission's decision to reach a settlement. For in-scope enforcement actions, we identified 205 matters that included undertakings as part of their agreement, including all ninety-five (95) Share Class Initiative actions. Thirty-three (33) actions included undertakings requiring the retention of monitors, consultants, or independent compliance auditors.

Based on our survey, we identified the following types of descriptions in which the SEC acknowledged remediation:

- Acknowledgement that the SEC considered remedial acts in determining to accept a settlement offer, including descriptions that such remediation was "voluntary," "prompt," or "extensive"
- Acknowledgement that the SEC considered an order's undertakings in determining to accept a settlement offer
- Acknowledgement that the SEC considered the role of the board or specific officers in directing and overseeing remediation
- Engaging external counsel or consultants to advise on remediation, including descriptions of the consultant as independent, noting internal investigation results were used for remediation, and noting whether recommendations were adopted
- Implementing changes within relevant business unit to prevent future violations and enhance oversight, including increased parent oversight of subsidiaries
- Implementing changes to audit, internal accounting, or compliance controls, including altering reporting chains to provide greater independence for compliance personnel

79. *See, e.g.*, Order Instituting Cease-and-Desist Proceedings, *In re* Agria Corp., Exchange Act Release No. 84,763, at 9 (Dec. 10, 2018), https://www.sec.gov/litigation/admin/2018/34-84763.pdf. ("In determining whether to accept the Offer, the Commission has considered these undertakings.").

80. Undertakings in SEC enforcement settlements "require a defendant [or respondent] to take affirmative steps—either in conjunction with entry of the order or in the future—in order to come into and remain in compliance with the specific terms of the court's [or the Commission's] order." Peikin, *supra* note 21, § II. The SEC has authority to seek court-ordered undertakings in enforcement actions brought in federal court through the court's general equitable powers (the SEC "may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors"). 15 U.S.C. § 78u(d)(5) (2018). The SEC also has authority to order any person "to comply, or to take steps to effect compliance, with [the provision the SEC has found the person violated] upon such terms and conditions and within such time as the Commission may specify." *Id.* §§ 78o(c)(4), § 78u-3(a). The SEC has used this authority to require a myriad of actions from retention of compliance consultants to corporate governance enhancements.

- Including or updating disclosures in communications with investors or customers
- Personnel changes, including disciplining or terminating responsible employees and supervisors or replacing senior management
- Creation of and appointing new personnel roles, including creating a chief compliance officer position, adding additional legal, accounting, or compliance personnel, and adding board directors or a new board committee
- Voluntarily suspending or permanently ending the relevant conduct or business practice, such as withdrawing securities offerings, changing severance agreement language, and ceasing a client referral program
- Providing or enhancing employee training in compliance and/or ethics, including requiring annual certification
- Reimbursement to customers, including reimbursement of funds and returning investment account fees

We noted that, in some settlement orders, the Commission provided no details when mentioning that it considered the company's remedial efforts when accepting its offer of settlement, while in others, many details were included. Detailed descriptions of how settling entities remediated after learning of misconduct help other companies understand and think about how to address misconduct fully and appropriately in particular situations. When possible, we encourage the SEC to continue including in their settlement documents detailed descriptions of remedial acts.

4. Cooperation

The Seaboard Report included the following criteria the SEC takes into consideration when evaluating a company's cooperation efforts:

- Did the company cooperate completely with appropriate regulatory and law enforcement bodies? Did the company identify what additional related misconduct is likely to have occurred?
- Did the company promptly make available to our staff the results of its review and provide sufficient documentation reflecting its response to the situation? Did the company identify possible violative conduct and evidence with sufficient precision to facilitate prompt enforcement actions against those who violated the law? Did the company produce a thorough and probing written report detailing the findings of its review? Did the company voluntarily disclose information our staff did not directly request and otherwise might not have uncovered? Did the company ask its employees to cooperate with our staff and make all reasonable efforts to secure such cooperation?[81]

81. Seaboard Report, *supra* note 16 (bullet points are all direct quotations).

Our team analyzed administrative orders and settled civil complaints against entities for indications that the Commission considered cooperation in its decision to accept the offer of settlement. Upon determining the SEC's acknowledgement of cooperation in a particular matter,[82] we sought to identify the descriptions of cooperation, when available, undertaken by entities based on the criteria for cooperation listed in the Seaboard Report.

Based on our survey, we identified the following categories and descriptions in which the SEC acknowledged cooperation:

- Acknowledgement that the SEC considered cooperation in determining to accept a settlement offer, including descriptions that a company "fully" cooperated or cooperation was "substantial," "significant," "timely," "extensive," or "complete"
- Meeting with the SEC, including whether meetings occurred "on multiple occasions"
- Voluntarily providing factual summaries or reports, including whether the summaries were "detailed"
- Voluntarily providing summaries or "interview downloads" of witness interviews
- Declining to assert attorney-client privilege over certain in-house attorney communications
- Voluntarily providing results or updates regarding the company's internal investigation and findings
- Voluntarily compiling and providing materials such as PowerPoint presentations, key document binders, factual chronologies, and analyses of financial data
- Voluntarily making current or former employees available for interviews, including facilitating employees to travel to the United States from abroad
- Responding to requests for documents and information in a "timely and efficient manner," including "prompt" productions, highlighting "key" or "significant" documents, providing foreign-language translations, and facilitating production of documents from foreign jurisdictions
- Entering into tolling agreements[83]

As with remediation, in some instances the Commission provided no details when mentioning that it considered the company's cooperation in accepting its offer of settlement, while in others, the settlement documents included many details describing how the company cooperated with the staff. Because

82. The team searched for "coop*" in administrative proceedings and press releases for civil complaints against entities.

83. It appears that the SEC acknowledged tolling agreements as cooperation only in enforcement actions involving pre-release ADRs, discussed in Part III.B.3.

detailed descriptions of the ways settling entities cooperated assist other companies in considering how to best cooperate with the SEC, we encourage the SEC to continue to include in their settlement documents detailed descriptions of cooperation, whenever appropriate.

C. Findings on Cooperation Credit

Our survey identified hundreds of matters from 2017 through 2019 demonstrating that an entity's cooperation impacts the SEC's decisions regarding which charges, if any, to pursue, including whether to grant a "full pass"; which sanctions to impose, including the amount of civil monetary penalties, if any, and the undertakings required; and the language in the order, complaint, or litigation release, including the wording of how the entity's cooperation will be described. However, although we could observe the fact of the impact, frequently we were unable to identify the form or magnitude of the cooperation credit received in exchange for the entity's cooperation. To better understand the impact of a company's cooperation efforts, we engaged in several comparisons where seemingly similar matters resulted in different outcomes.

1. Differences Between "Full Passes" and Enforcement Actions

The ultimate in cooperation credit is a "full pass," which occurs after an investigation when no enforcement action is brought against the entity. Unless highlighted by the SEC, "full passes" can be difficult to identify. Although we know from anecdotal experience that the SEC staff determines not to pursue enforcement charges against many entities and individuals in the regular course, those "full passes" are not chronicled anywhere, and for good reason—the recipients of "full passes" should not be punished by negative publicity if they are not being charged. So the "full passes" we discuss do not begin to approach the complete set for those three years. These "full passes" were identified by the SEC itself, when charging an individual but expressly noting in its order or press release that it was not charging the entity due to its cooperation.

Two entities that recently received "full passes" for their cooperation are the College of New Rochelle and the LendingClub Corporation. In both instances, the SEC declined to sue the entities, despite finding violations of the federal securities laws, because of their "extensive" or "extraordinary" cooperation and remediation.

College of New Rochelle

In March 2019, the SEC sued Keith Borge, the former controller of the College of New Rochelle, for aiding and abetting the College's violations of the antifraud provision but did not sue the College.[84] According to the SEC's complaint, Borge engaged in an almost two-year scheme to conceal the College's distressed

84. SEC Press Release 2019-46, SEC Charges College Official for Fraudulently Concealing Financial Troubles from Municipal Bond Investors (Mar. 28, 2019), https://www.sec.gov/news/press-release/2019-46.

financial condition.[85] Borge allegedly created false financial records, failed to file payroll tax submissions, and failed to accurately record accounts receivable and payable and accrued expenses, among other things.[86] As a result, the College of New Rochelle's fiscal year 2015 audited financial statements overstated its net assets by almost $34 million.[87] The inaccurate financial statements were submitted to an online repository in connection with the College's continuing disclosure obligations stemming from a 1999 bond issuance for which the college served as obligor, and therefore they were available to investors participating in the secondary market purchases and sales of those bonds.[88]

According to the complaint, after Borge left in June 2016, the college discovered some of the financial problems resulting from Borge's misconduct and hired a forensic accountant and an outside law firm to investigate the matter, with a special committee of the board of trustees overseeing the investigation.[89] The college restated its FY15 financial statements in March 2017, less than a year later.[90] At the time of the SEC's complaint in March 2019, the college was expected to cease operations in August 2019 due to financial difficulties.[91] In the words of the SEC:

> The SEC did not charge the College of New Rochelle after considering the institution's extensive cooperation and remediation. After discovering Borge's actions and conducting a preliminary review, the college publicly reported the financial issues, promptly engaged outside expertise to conduct a full internal investigation and issued restated financial results. The college also promptly and extensively cooperated with the SEC in its investigation and proactively undertook wide-reaching remedial measures to enhance its internal controls and governance.[92]

LendingClub

In September 2018, the SEC instituted and settled administrative cease-and-desist proceedings against LendingClub Asset Management ("LCA"), a registered investment adviser, and its former president and founder, Renaud Laplanche, and former CFO, Carrie Dolan.[93] LCA's parent company, LendingClub Corporation, was not charged.[94]

The SEC made findings, which respondents did not admit or deny, that the respondents violated or caused violations of the antifraud provisions of the

85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. Complaint at para. 42, SEC v. Borge, No. 1:19-cv-2787 (S.D.N.Y. Mar. 28, 2019), https://www.sec.gov/litigation/complaints/2019/comp-pr2019-46.pdf.
90. *Id.* at para 43.
91. *Id.* at para 17.
92. SEC Charges College Official for Fraudulently Concealing Financial Troubles from Municipal Bond Investors, *supra* note 84.
93. SEC Press Release 2018-223, SEC Charges LendingClub Asset Management and Former Executives with Misleading Investors and Breaching Fiduciary Duty (Sept. 28, 2018), https://www.sec.gov/news/press-release/2018-223.
94. *Id.*

Investment Advisers Act of 1940, among others.[95] LCA provided investment advisory services to private funds that purchased loan interests offered by LendingClub Corporation, an online marketplace lending company.[96] The SEC found that, for approximately a five-month period, Laplanche engaged in fraud by improperly using fund assets to benefit LendingClub Corporation, causing one of the private funds that LCA managed to purchase interests in certain loans that were at risk of expiring unfunded on the LendingClub platform, which would have deprived LendingClub Corporation of potential revenues.[97] Additionally, the SEC found that Laplanche and Dolan improperly adjusted monthly fund returns upward.[98]

The SEC order noted the extensive remediation and cooperation by LendingClub Corporation. The SEC found that LendingClub Corporation's board of directors conducted a review in May 2016 and self-reported misconduct it identified.[99] In June 2016 and thereafter, LCA undertook extensive remedial efforts including establishing a new governing board comprised of a majority of independent members to supervise LendingClub Corporation's exercise of its fiduciary duties, outsourcing its monthly valuation to third parties, recalculating fund returns and reimbursing $1 million to investors negatively impacted by the improper return adjustments, and, in early 2017, hiring a compliance consultant to improve its compliance program and procedures, including curing its compliance deficiencies.[100]

In its press release, the SEC stated:

> The SEC's Enforcement Division determined not to recommend charges against LendingClub [C]orporation which promptly self-reported its executives' misconduct following a review initiated by its board of directors, thoroughly remediated and provided extraordinary cooperation with the agency's investigation. LCA also reimbursed approximately $1 million to investors who were adversely impacted by the improperly adjusted monthly returns.[101]

The SEC offered limited transparency into the specifics of the cooperation provided by each of these entities. LendingClub Corporation self-reported to the SEC, but while the College of New Rochelle publicly reported its financial issues, the public documents do not reflect that the College also self-reported to the SEC. Other than using adjectives to characterize the quality of the cooperation as "extraordinary" or "prompt(ly) and extensive(ly)[,]" the SEC has stated nothing else to describe specifically how either entity cooperated with the staff's

95. Order Instituting Cease-and-Desist Proceedings at paras. 36–41, *In re* Lending Club Asset Mgmt., LLC, Investment Advisers Act of 1940 Release No. 5,054 (Sept. 28, 2018), https://www.sec.gov/litigation/admin/2018/ia-5054.pdf [hereinafter *In re* Lending Club Order].

96. *Id.* at para. 1.

97. *Id.*

98. *Id.* at para. 2.

99. *Id.* at para. 43.

100. *Id.* at paras. 44-45.

101. SEC Charges LendingClub Asset Management and Former Executives with Misleading Investors and Breaching Fiduciary Duty, *supra* note 93.

investigation.[102] The SEC does, however, describe extensively the remediation efforts undertaken in each matter, and the fact that the College was expected to cease business operations soon was likely a significant consideration in the staff's decision-making.[103] Nevertheless, it is clear that these entities followed the same cooperation playbook as many other companies seeking to do the right thing, and they obtained the appropriate credit for their efforts.

Sientra

In contrast, in September 2018, the same month in which LendingClub Corporation received its "full pass," the SEC sued Sientra, Inc., a medical aesthetics company, in a cease-and-desist proceeding and sued its former CEO, Hani Zeini, in federal district court, for violations of the antifraud provisions.[104] According to the SEC's order and complaint, prior to the company's follow-on offering, Zeini learned that the sole manufacturer of its silicone breast implant product, a Brazilian company, had lost its regulatory certification and was suspended from its ability to sell products.[105] Zeini concealed the information, and the information was not disclosed in the offering.[106] One day after the offering closed, the suspension became public and Sientra filed a Form 8-K disclosing the suspension.[107] The independent board of directors "swiftly" hired outside counsel to perform an internal investigation, and after the "prompt" investigation self-reported the matter to the SEC, requested Zeini to resign, and thereafter cooperated with the SEC's investigation, including voluntarily waiving the attorney-client privilege for certain communications among its former general counsel, Zeini, and other employees.[108] The SEC imposed a cease-and-desist order against the company, but no penalty.[109] In its litigation release, the SEC stated: "In considering whether to accept Sientra's settlement the SEC considered Sientra's prompt action upon discovering the alleged fraud, self-reporting to the SEC and extensive cooperation with the agency's investigation."[110]

In exchange for its "extensive" cooperation, Sientra was sued, found to have engaged in fraud, and subjected to a cease-and-desist order, but was spared a penalty. What else could Sientra have done to get a "full pass"? Indeed, there are facts

102. *See In re* Lending Club Order, *supra* note 95, at paras. 3, 42; SEC Charges College Official for Fraudulently Concealing Financial Troubles from Municipal Bond Investors, *supra* note 84.

103. *See In re* Lending Club Order, *supra* note 95, at paras. 3, 42–46; SEC Charges College Official for Fraudulently Concealing Financial Troubles from Municipal Bond Investors, *supra* note 84; Complaint, *supra* note 89, at para. 17.

104. *See* SEC Litig. Release No. 24275, SEC Charges Medical Aesthetics Company and Its Former CEO with Misleading Investors in a $60 Million Stock Offering, https://www.sec.gov/litigation/litreleases/2018/lr24275.htm (modified Sept. 19, 2018).

105. Order Instituting Cease-and-Desist Proceedings, *In re* Sientra, Inc., Securities Act Release No. 10555, at 2 (Sept. 19, 2018), https://www.sec.gov/litigation/admin/2018/33-10555.pdf [hereinafter *In re* Sientra Order]; Complaint at para. 5, SEC v. Zeini, No. 2:18-cv-08103 (C.D. Cal. Sept. 19, 2018).

106. *See In re* Sientra Order, *supra.* note 105, at paras. 7–11.

107. *Id.* at para. 13.

108. *Id.* at para. 4.

109. *See id.* at para. 5.

110. SEC Litig. Release No. 24275, SEC Charges Medical Aesthetics Company and Its Former CEO with Misleading Investors in a $60 Million Stock Offering, https://www.sec.gov/litigation/litreleases/2018/lr24275.htm (modified Sept. 19, 2018).

present which on their face would seem to make Sientra as good a candidate, if not better, for a "full pass"—the underlying violations appear to have been isolated and short-lived, whereas the misconduct at the College of New Rochelle persisted for two years and at LendingClub Asset Management for many months; there was no indication that Sientra's compliance program was deficient prior to the misconduct, whereas it is clear from the documents that at least LendingClub Asset Management had a number of compliance deficiencies; and Sientra's "extensive" cooperation included a limited waiver of the attorney-client privilege.

So then, what differentiated the College of New Rochelle and the LendingClub Corporation, which were not sued, from Sientra and the other companies that were sued but received some form of credit, such as no penalty or a lesser penalty? Without greater transparency into how the SEC evaluated the Seaboard factors in each instance than what was provided in the SEC's orders, complaints, or releases, we could not discern the SEC's basis for the different treatment.

2. Differences in Charged Conduct and Amount of Penalties

In the three years we studied, the SEC's Division of Enforcement highlighted examples of cooperation in its annual reports only once, in the most recent year, in its annual report for fiscal year 2019. In the section of its 2019 report entitled, "Continuing Areas of Focus," the Division included a subsection entitled "Messaging Credit for Cooperation," noting that it was "endeavoring to find additional ways to message what companies and individuals have done to merit the cooperation credit they received."[111] In addition to noting that the Commission had provided information about cooperation in public orders, the Division added:

> We point to cases like PPG and Comscore as illustrative of our efforts in this space. The Commission imposed no civil penalty against PPG in recognition of its prompt self-reporting, extensive cooperation, and implementation of remedial measures immediately upon learning of the improper conduct for which it was charged. Similarly, the Commission considered Comscore's prompt remedial acts and cooperation, including sharing the results of an internal investigation, in accepting Comscore's offer to pay a $5 million penalty.[112]

Because Comscore[113] and PPG[114] were the only two cases called out specifically by the Division in the last three years' annual reports as illustrating the Division's ef-

111. Division of Enforcement 2019 Annual Report, *supra* note 63, at 8.

112. *Id*. at 8.

113. Order Instituting Cease-and-Desist Proceedings, *In re* Comscore, Inc., Securities Act Release No. 10,692 (Sept. 24, 2019), https://www.sec.gov/litigation/admin/2019/33-10692.pdf [hereinafter *In re* Comscore Order]. The lead authors of this article represented Comscore's audit committee in conducting the investigation and interfacing with the SEC staff regarding the subject matters addressed in this article. All information in the article, however, is sourced from the SEC's order and/or other Comscore public filings.

114. Order Instituting Cease-and-Desist Proceedings, *In re* PPG Indus., Inc., Securities Act Release No. 10701 (Sept. 26, 2019), https://www.sec.gov/litigation/admin/2019/33-10701.pdf [hereinafter *In re* PPG Order].

forts to message credit for cooperation, a closer look at those cases is relevant to our analysis of the current environment for cooperation credit by the SEC.

Based on the brief description in the Division's 2019 annual report, one might conclude that PPG's self-reporting represented a significant difference between its incurring no penalty and Comscore incurring a $5 million penalty. Comparing the two settlement orders might also suggest that PPG's self-reporting resulted in PPG settling with no fraud charge (thereby avoiding the resulting collateral consequences) and Comscore settling with a fraud charge. But examining the settlement orders alongside each company's public disclosures during their respective investigations and reviewing each company's cooperation based on the four Seaboard factors, reveals a more complex set of circumstances.

Underlying Conduct. Both orders contained allegations that could be read as indicating that fraudulent conduct occurred, but the description of Comscore's fraud was more extensive. The SEC order relating to Comscore noted that the company engaged in a fraudulent scheme to overstate revenue by approximately $50 million and making false and misleading statements about key performance metrics,[115] while in the PPG order the only outright mention of fraud related to "fraudulent entries in the first quarter of 2018,"[116] and those entries were corrected before the Form 10-Q for that quarter was filed. Both the PPG and Comscore matters involved relevant periods of multiple years (twenty-four months for Comscore and twenty-eight months for PPG), although the individuals called out in the settlements were the CEO in Comscore's case and the controller in the case of PPG.[117] The CEO's involvement could suggest that proof of the company's fraudulent conduct was stronger in Comscore's situation. And Comscore's overstated revenues totaled approximately $50 million, while PPG's financial statements appear to have involved approximately $6 million.[118] In short, Comscore's underlying conduct appears to have been significantly worse than PPG's.

Self-policing. Both companies conducted internal investigations, Comscore by its audit committee and PPG overseen by its audit committee. But on the negative side, the Comscore order specifically noted that Comscore's ineffective corporate culture and insufficient controls contributed to the violations.[119] No similar statements are reflected in PPG's documents, which may have led the SEC to give more self-policing credit to PPG than to Comscore.

Self-reporting. The SEC noted that, "PPG promptly self-reported to the Commission staff and, in its earnings release for the first quarter of 2018, disclosed to investors the allegations in the internal report and that it was conducting an internal investigation."[120] The SEC gave Comscore no credit for self-reporting, although Comscore noted in its March 7, 2016, Form 12b-25 Amendment

115. *In re* Comscore Order, *supra* note 113, at para. 1.
116. *In re* PPG Order, *supra* note 114, at para. 4.
117. *See In re* Comscore Order, *supra* note 113, at para. 1; *In re* PPG Order, *supra* note 114, at para. 1.
118. *See In re* Comscore Order, *supra* note 113, at para. 9; *In re* PPG Order, *supra* note 114, at para. 3.
119. *See In re* Comscore Order, *supra* note 113, at para. 37.
120. *In re* PPG Order, *supra* note 114, at para. 30.

that "[t]he Company proactively contacted the staff of the [SEC] regarding the Audit Committee's internal review."[121] The only logical conclusion from these public statements is that PPG notified the SEC staff of its issues before anyone else did, while Comscore's outreach to the SEC staff followed someone else's notice.[122] In addition, while the SEC specifically also noted that PPG notified investors of the allegation three days after receiving notice of the allegation and stated that it was conducting an investigation,[123] Comscore's Form 8-K provided notice that its audit committee had received allegations and was investigating them just ten days after receiving the allegations.[124] Arguably, this seven-day difference could have contributed to the difference in cooperation credit, although that seems unlikely. But PPG also notified investors that prior financial statements should not be relied upon less than one month after the allegation was received,[125] while Comscore's nonreliance notice occurred almost seven months after the date of the allegation.[126] And PPG's restatement occurred two months after the allegation date,[127] while Comscore's restatement occurred twenty-five months afterward.[128] Those differences may have prompted the SEC to grant more self-reporting credit to PPG than to Comscore.

Remediation. Although PPG may have received more credit for self-policing and self-reporting, it is not clear which company received more credit for remediation. The Comscore settlement order was published over three-and-a-half years after Comscore's audit committee received the allegation,[129] while the PPG matter settled much more quickly, with its settlement order being published approximately one-and-a-half years after the relevant allegation.[130] But, while this could indicate that PPG was more prompt, more information would be needed to properly compare the two situations. The Comscore order noted that: "All senior management and directors who were with Comscore at the time of the conduct described herein are no longer with Comscore,"[131] and the company's Form 8-K announcing the end of the investigation nine months

121. Comscore, Inc., Notice Under Rule 12b25 of Inability to Timely File All or Part of a Form 10-K, 10-KSB, or 10KT, at Part III (Form NT 10-K/A) (Mar. 7, 2016), https://www.sec.gov/Archives/edgar/data/1158172/000119312516494215/d149391dnt10ka.htm.

122. It is not an infrequent occurrence where a company reaches out to the staff to self-report, only to find that the staff already has an open inquiry, possibly resulting from a whistleblower complaint, tip, or the SEC's own data analytics. Even though the company was unaware of the inquiry and believed it was self-reporting, typically the SEC does not consider the contact a "self-report" and will not provide self-reporting credit.

123. *See In re* PPG Order, *supra* note 114, at para. 23.

124. *See* Comscore, Inc., Current Report (Form 8-K, Ex. 99.1) (Mar. 7, 2016), https://www.sec.gov/Archives/edgar/data/1158172/000119312516494245/d154159dex991.htm (noting allegations received on February 19, 2016, and Form 12b-25 filed in response on February 29, 2016).

125. *See* PPG Indus., Inc., Current Report, Item 4.02 (Form 8-K) (May 10, 2018), https://www.sec.gov/Archives/edgar/data/79879/000007987918000027/ppgform8-kmay102018.htm.

126. *See* Comscore, Inc., Current Report, Item 4.02 (Form 8-K) (Sept. 15, 2016), https://www.sec.gov/Archives/edgar/data/1158172/000115817216000170/scoritem402.htm.

127. *See In re* PPG Order, *supra* note 114, at paras. 23–24.

128. *See In re Comscore Order*, *supra* note 113, at para. 5.

129. *See id.* (noting a tip received in February 2016).

130. *See In re* PPG Order, *supra* note 114, at para. 23 (noting misconduct observed in April 2018).

131. *In re* Comscore Order, *supra* note 113, at para. 7.

after it began noted that, among other things, Comscore had taken action including "separating certain Company personnel."[132] In contrast, PPG's settlement order noted that PPG took disciplinary actions regarding individuals in the finance area who were involved in the misconduct, and less than one month after the allegation, PPG stated in its Form 12b-25:

> The investigation has found evidence that the improper accounting entries were made by certain employees at the direction of the Company's former Vice President and Controller. The former Vice President and Controller was put on administrative leave as of April 25, 2018, and his employment with the Company was terminated as of May 10, 2018. Two employees who acted under his direction have been reassigned to different positions within the Company where they will not have a role in PPG's internal control over financial reporting nor its disclosure control process.[133]

From these descriptions, it seems clear that, in the long run, Comscore took more drastic actions against all potentially relevant actors than did PPG, but PPG's collective remedial efforts were more prompt, its disclosures were more specific, and it identified potential wrongdoers, at least by title. The SEC specifically noted in its settlement order that Comscore also constituted a new management team, implemented a new, comprehensive compliance management system, implemented new and extensive internal control procedures and policies, and certified to the SEC full remediation of material weaknesses.[134] In contrast, while the PPG order noted various enhanced measures, including training, policies, and procedures, the descriptions did not suggest as extensive a menu of compliance and personnel changes as were implemented by Comscore.[135] In sum, it is difficult to discern, from the public information, which company engaged in more, and more appropriate or effective, remedial measures.

Cooperation. The Comscore order stated that the company kept the SEC staff informed throughout the internal investigation, shared results of its investigation with SEC staff, and continued cooperation after the investigation was completed.[136] The PPG order stated that the company provided timely updates to the SEC staff, voluntarily produced documents, reports, and other materials, and continued to cooperate with the SEC staff after issuing its restatement.[137] Based on the SEC's descriptions, this is a tie.

In short, the difference between PPG's no-fraud settlement with no penalty and Comscore's fraud settlement with a $5 million penalty appears to boil down to PPG's (1) less severe underlying conduct; (2) more prompt notice to the public that financial statements should not be relied upon; (3) more effective

132. Comscore, Inc., Current Report, Item 7.01 (Form 8-K) (Nov. 23, 2016), https://www.sec.gov/Archives/edgar/data/1158172/000119312516776610/d297088d8k.htm.

133. PPG Indus., Inc., Notice of Late Quarterly Filing, Part III (Form NT 10-Q) (May 10, 2018), https://www.sec.gov/Archives/edgar/data/79879/000007987918000025/ppgform12b-25.htm.

134. *In re* Comscore Order, *supra* note 113, at paras. 37, 45.

135. *See In re* PPG Order, *supra* note 114, at paras. 29–32.

136. *In re* Comscore Order, *supra* note 113, at para. 45.

137. *In re* PPG Order, *supra* note 114, at para. 31.

compliance program; and (4) more prompt remedial measures to remove culpable actors and restate affected financial statements.

3. Differences in Credit Awarded in Programmatic Areas of Cooperation Focus

Differences in Share Class Initiative

As Co-Director of Enforcement Stephanie Avakian stated in November 2019, the Share Class Initiative gave firms the opportunity to "identify and address harm resulting from undisclosed conflicts of interest in the sale of mutual fund shares by investment advisers[.]"[138] The Share Class Initiative provided for qualifying applicants to receive a standardized Division of Enforcement recommendation involving an administrative cease-and-desist order finding specific violations on a no-admit, no-deny basis, and censure, disgorgement, prejudgment interest, and specified undertakings, but no penalties.[139] This initiative resulted in more than ninety investment advisory firms improving their disclosures and returning over $135 million to affected mutual fund investors.[140]

Specifically, in fiscal year 2019, ninety-five (95) investment advisory firms self-reported to the SEC pursuant to the Share Class Initiative. Some firms did not participate or were not eligible to participate and were therefore unable to secure that benefit. For example, the SEC contacted Founders Financial Services, LLC ("Founders") regarding its violations before the Share Class Initiative was announced—Founders was thus unable to self-report and was not eligible for the Share Class Initiative.[141] Mid Atlantic Financial Management, Inc. ("Mid Atlantic") was eligible for the Share Class Initiative but it did not self-report to the SEC.[142] Both firms were required to pay civil monetary penalties, with Founders paying $140,000 and Mid Atlantic $300,000, and were required to accept findings of additional violations (e.g., section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder).[143] Indeed, many of the firms participating in the Share Class Initiative appear to have profited to a far greater degree from their misconduct than either Founders or Mid

138. Stephanie Avakian, Co-Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Keynote Remarks at the 2019 SEC Regulation Outside the United States Conference: What You Don't Know Can Hurt You (Nov. 5, 2019), https://www.sec.gov/news/speech/speech-avakian-2019-11-05.

139. *Announcement: Share Class Disclosure Initiative*, U.S. SEC. & EXCHANGE COMMISSION (May 1, 2018), https://www.sec.gov/enforce/announcement/scsd-initiative. The standardized settlement terms included consenting to administrative orders alleging violations of sections 206(2) and 207 of the Advisers Act, no civil monetary payment, and completion of a series of undertakings within thirty days or acknowledgement that the firm has already completed those steps. *Id.*

140. *See* Avakian, *supra* note 138 ("As of today, 95 investment advisory firms have collectively agreed to return over $135 million to affected mutual fund investors and to make full and fair disclosure of their share class selection practices.").

141. Order Instituting Administrative Cease-and-Desist Proceedings, *In re* Founders Fin. Sec., LLC, Exchange Act Release No. 87177, at 2 n.1 (Sept. 30, 2019), https://www.sec.gov/litigation/admin/2019/34-87177.pdf [hereinafter *In re* Founders Order].

142. Order Instituting Administrative Cease-and-Desist Proceedings at para. 3, *In re* Mid Atl. Fin. Mgmt., Inc., Investment Advisers Act Release No. 5387 (Sept. 30, 2019), https://www.sec.gov/litigation/admin/2019/ia-5387.pdf [hereinafter *In re* Mid Order].

143. *See In re* Founders Order, *supra* note 141, at 6, 9; *In re Mid* Order, *supra* note 142, at 6, 9.

Atlantic, with required disgorgement payments as high as $10,494,813.38.[144] In comparison, Founders and Mid Atlantic were ordered to pay disgorgement of $1,246,133.60 and $900,069, respectively.[145] So, as advertised, it appears that the benefit of participation in this cooperation initiative was the lack of a penalty, a reduction of potential charges, and certainty as to the resolution.

Differences in FCPA Enforcement Actions

As noted in then-Director Ceresney's May 2015 speech, FCPA enforcement represents a somewhat discrete group of matters for which assessment of cooperation may be "more developed."[146] Many SEC enforcement settlements take into account the resolution of parallel DOJ enforcement actions, with the SEC determining not to impose a civil money penalty against an entity if a criminal penalty was charged by the DOJ.[147] Unlike other enforcement actions, FCPA actions often also involve coordinated global outcomes with foreign regulators, yielding more efficient investigations and resolutions, both domestically and internationally.[148] Companies following SEC and DOJ guidance can enact robust compliance programs and may receive self-policing credit when misconduct is discovered.[149] The SEC staff has suggested that self-reporting is particularly valued in the FCPA context, where misconduct may occur overseas and companies may be in a better position to quickly investigate the potential misconduct.[150] As

144. *See, e.g.*, Order Instituting Administrative Cease-and-Desist Proceedings, *In re* RBC Capital Mkts., LLC, Investment Advisers Act Release No. 5198, at 5 (Mar. 11, 2019), https://www.sec.gov/litigation/admin/2019/ia-5198.pdf. Because these settlement orders contain only generic descriptions of the misconduct, we have used the amount of disgorgement required as a proxy for the measure of egregiousness.

145. *See In re* Founders Order, *supra* note 141, at 6; *In re* Mid Order, *supra* note 142, at 6.

146. *See* Ceresney, *supra* note 36.

147. *See, e.g.*, Order Instituting Administrative Cease-and-Desist Proceedings, *In re* Microsoft Corp., Exchange Act Release No. 86421, at 8 (July 22, 2019), https://www.sec.gov/litigation/admin/2019/34-86421.pdf ("Microsoft acknowledges that the Commission is not imposing a civil penalty based upon the imposition of an $8,751,795 criminal penalty as part of MS Hungary's resolution with the Department of Justice.").

148. Steven R. Peikin, Co-Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Speech to New York University School of Law: Reflections on the Past, Present, and Future of the SEC's Enforcement of the Foreign Corrupt Practices Act (Nov. 9, 2017), https://www.sec.gov/news/speech/speech-peikin-2017-11-09.

149. For example, in April 2012, the DOJ and the SEC brought FCPA charges against a former Morgan Stanley executive who disguised bribes as finder's fees owed to third parties. Both the SEC and DOJ cited to Morgan Stanley cooperation in determining not to charge the company, and the DOJ specifically called out Morgan Stanley's system of internal controls, "which provided reasonable assurances that its employees were not bribing government officials." While a number of factors may have led to the lack of SEC charges against Morgan Stanley, the praise of its compliance programs and controls suggest that the company may have demonstrated self-policing sufficient for consideration as a factor for credit. DOJ Press Release No. 12-534, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA, DOJ (Apr. 25, 2012, updated Sept. 15, 2014), https://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required; SEC Press Release 2012-78, SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Adviser Fraud (Apr. 25, 2012), https://www.sec.gov/news/press-release/2012-2012-78htm; Complaint at paras. 12–13, SEC v. Peterson, No. 1:12-cv-2033-JBW (E.D.N.Y. Apr. 25, 2012), https://www.sec.gov/litigation/complaints/2012/comp-pr2012-78.pdf.

150. *See* Ceresney, *supra* note 40.

evidence of the value of self-disclosure from 2010 through 2019, the average sanction for a company that voluntarily disclosed FCPA violations was around $35,000,000, a sharp contrast to the nearly $205,000,000 average sanction for a company that failed to self-disclose.[151]

In FCPA settled matters, entities, whether they cooperate or not, are typically charged with violations of section 13(b) of the Exchange Act, the recordkeeping and internal controls provisions,[152] and/or a violation of section 30(a) of the Exchange Act, the anti-bribery provisions.[153] Even though cooperation in FCPA enforcement may be more developed, from the staff's perspective,[154] we have nevertheless found it especially difficult to determine the amount of cooperation credit given by the SEC in these actions. In part, this is because of the parallel involvement by the DOJ and the dynamics that are frequently at play when entities seek to negotiate a global resolution. It is typical in FCPA resolutions that disgorgement is ordered in the SEC case and a penalty is imposed in the criminal case. We see this borne out consistently in SEC orders, with the SEC imposing disgorgement but noting that it is not imposing any civil penalty against the entity in light of the criminal fine.[155] When there is no parallel DOJ action, according to Ceresney, we can expect that penalties in FCPA matters "often are set at an amount equal to the disgorgement amount[.]"[156] It follows then, that if the civil penalty imposed against a cooperating company is less than its disgorgement amount, the difference may be attributable, at least in part, to the company's cooperation. We have observed that, in SEC fiscal year 2017, the amounts of civil money penalties and disgorgement in actions in which both were imposed by the SEC were generally the same. However, in SEC fiscal years 2018 and 2019, in cases in which both disgorgement and civil penalties were imposed by the SEC, it was generally the case that the civil penalty amounts were significantly lower—typically by at least 50 percent—than disgorgement amounts.[157] Our review of FCPA enforcement actions also reflects a trend of "declinations with disgorgement," by the DOJ, in which, pursuant to the FCPA Pilot Program, public companies have agreed to disgorge profits to the SEC, including amounts that

151. *See Foreign Corrupt Practices Act Clearinghouse*, *supra* note 75.

152. In 2019, ten of the fifteen FCPA actions charged only section 13(b). In 2018, seven of the eleven FCPA actions charged only section 13(b). In 2017, three of the seven FCPA actions charged only section 13(b). *See SEC Enforcement Actions: FCPA Cases*, U.S. Sec. & Exchange Commission, https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last updated July 6, 2020).

153. In 2019, five of the fifteen FCPA actions coupled the two charges. In 2018, two of the eleven FCPA actions coupled the two charges, and two charged section 13(b), section 30(a), and other violations. In 2017, four of the seven FCPA actions coupled the two charges, with one action charging section 13(b), section 30(a), and other violations. *See id*.

154. *See* Ceresney, *supra* note 36.

155. *See id*.

156. *See id*.

157. *See, e.g.*, Order Instituting Cease-and-Desist Proceedings, *In re* Sanofi, Exchange Act Release No. 84,017, at 9 (Sept. 4, 2018), https://www.sec.gov/litigation/admin/2018/34-84017.pdf (reflecting a civil money penalty of $5 million and disgorgement of $17 million); Order Instituting Cease-and-Desist Proceedings, *In re* Barclays PLC, Exchange Act Release No. 87,132, at 9 (Sept. 27, 2019), https://www.sec.gov/litigation/admin/2019/34-87132.pdf (reflecting a civil money penalty of $1.5 million and disgorgement of $3.8 million).

were time-barred as a result of *Kokesh v. SEC* and, therefore "insulated from disgorgement," in return for a declination letter from the DOJ.[158]

Of the thirty-seven settled FCPA actions initiated by the SEC against entities from 2017 through 2019, only four actions did not reflect cooperation credit. Of those four, the SEC action brought against Mobile TeleSystems PJSC in March 2019 is particularly notable, because the putative class action filed against Mobile TeleSystems to recover damages under the federal securities laws resulted from the company's failure, in part, to fully cooperate with the government. The Mobile TeleSystems action involved a large-scale bribery scheme that generated more than $2.4 billion in revenue from the Uzbek market, with $420 million in illicit payments that were improperly characterized as legitimate expenses in books and records and were falsely recorded in financial statements.[159] The SEC imposed a $100 million civil penalty and required the company to engage a monitor for a period of no less than thirty-six months.[160] The DOJ imposed a $850 million criminal penalty on Mobile TeleSystems, and the deferred prosecution agreement states that the company did not receive cooperation credit because "it significantly delayed production of certain relevant materials, refused to support interviews with current employees during certain periods of the investigation, and did not appropriately remediate, including by failing to take adequate disciplinary measures with respect to executives and other employees involved in the misconduct."[161] The March 2019 putative class action filed against Mobile TeleSystems sought damages under the federal securities laws resulting from the company's failure to disclose the bribery scheme and fines related to these government investigations, while further alleging that the company's "level of cooperation with the U.S. government and

158. *See supra* text accompanying notes 51–52; Steven Peikin, Co-Dir., Division of Enforcement, U.S. Sec. & Exch. Comm'n, PLI White Collar Crime 2018: Prosecutors and Regulators Speak—Remedies and Relief in SEC Enforcement Actions § III (Oct. 3, 2018), https://www.sec.gov/news/speech/speech-peikin-100318 ("[T]he Supreme Court ruled last term in [*Kokesh*] that disgorgement was to be considered a penalty for statute of limitations periods, and therefore the proceeds of misconduct obtained by a wrongdoer outside the statute of limitations were insulated from disgorgement."); *see, e.g.*, Order Instituting Cease-and-Desist Proceedings, *In re* Dun & Bradstreet Corp., Exchange Act Release No. 83,088, at 8 (Apr. 23, 2018), https://www.sec.gov/litigation/admin/2018/34-83088.pdf (imposing $6 million in disgorgement); Letter from Craig Carpentino, U.S. Att'y, Dist. of N.J. & Sandra Moser, Fraud Section Acting Chief, U.S. Dep't of Just. Criminal Div., to Counsel for Dun & Bradstreet Corp. 1 (Apr. 23, 2018), https://www.justice.gov/criminal-fraud/file/1055401/download (reflecting that DOJ declined to bring charges, in part, due to "the fact that the Company will be disgorging to the SEC the full amount of disgorgement as determined by the SEC"); Order Instituting Cease-and-Desist Proceedings, *In re* Polycom, Inc., Exchange Act Release No. 84,978, at 6 (Dec. 26, 2018), https://www.sec.gov/litigation/admin/2018/34-84978.pdf (reflecting disgorgement of $10.7 million and civil money penalty of $3.8 million); Letter from Sandra Moser, Fraud Section Acting Chief, U.S. Dep't of Just. Criminal Div., to Counsel for Polycom, Inc. (Dec. 20, 2018), https://www.justice.gov/criminal-fraud/file/1122966/download (declination letter reflecting agreement to disgorge profits to SEC).

159. Order Instituting Cease-and-Desist Proceedings, *In re* Mobile TeleSystems PJSC, Exchange Act Release No. 85,261, at 2 (Mar. 6, 2019), https://www.sec.gov/litigation/admin/2019/34-85261.pdf.

160. *Id.* at 9, 16.

161. Deferred Prosecution Agreement between DOJ and Mobile TeleSystems PJSC 4 (Feb. 22, 2019), https://www.justice.gov/opa/press-release/file/1141631/download.

remediation was lacking."[162] In the FCPA context where cooperation has become the norm, the company's failure to cooperate can result in increased civil and criminal penalties by the SEC and the DOJ, as well as potential increased liability in shareholder actions.

Differences in Pre-Released ADR Enforcement Actions

Beginning in January 2017, as part of its focus on market abuse, the SEC began resolving a number of matters resulting from what appeared to be an industry-wide investigation of improper practices involving the pre-release of American Depositary Receipts that resulted from abusive tax arbitrage strategies.[163] From fiscal years 2017 through 2019, all thirteen settled administrative orders against depository banks and broker-dealers included similar statutory charges as well as acknowledgement and consistent descriptions of the entities' cooperative efforts.[164] Twelve of the thirteen administrative orders noted that the SEC declined to impose a civil monetary penalty "in excess" of the amount stated in the order based on the entities' cooperation,[165] though the civil penalties were sizeable, ranging from $200,000 to nearly $50 million.[166] In addition, in ten of the thirteen orders, the SEC cited tolling agreements entered into by the entities in describing their cooperative actions.[167] We highlight reference to these tolling agreements, because while many companies enter into tolling agreements, we have rarely seen that fact included among a company's cooperative efforts.

While this collection of enforcement cases was not part of a cooperation initiative, the SEC appears to have taken a consistent approach in charging violations and describing the companies' cooperative efforts.[168] But other than the understanding that these companies would have paid a greater penalty but for

162. Class Action Complaint for Violation of the Federal Securities Laws at 28, Salim v. Mobile TeleSystems PJSC, No. 1:19-cv-01589-AMD-RLM, 2019 WL 1285250 (E.D.N.Y. Mar. 19, 2019).

163. *See, e.g.*, Order Instituting Administrative and Cease-and-Desist Proceedings, *In re* ITG Inc., Securities Act Release No. 10,279 (Jan. 12, 2017), https://www.sec.gov/litigation/admin/2017/33-10279.pdf. ADRs are U.S. securities that represent shares of a foreign company, and for all issued ADRs there must be a corresponding number of foreign shares in custody. *See id.* at para. 3. "Pre-releasing" ADRs without owning the foreign shares or taking steps to ensure they are custodied by a counterparty on whose behalf they are being obtained can result in the inflation of a foreign issuer's securities, potentially leading to inappropriate short selling and dividend arbitrage.

164. *Enforcement of Pre-Released ADRs*, U.S. Sec. & Exchange Commission, https://www.sec.gov/adr-enforcement (last visited July 16, 2020).

165. *See, e.g.*, Order Instituting Administrative Proceedings, *In re* BMO Capital Mkts. Corp., Securities Exchange Act Release No. 86693, at 9 (Aug. 16, 2019), https://www.sec.gov/litigation/admin/2019/34-86693.pdf.

166. *Compare* Order Instituting Administrative and Cease-and-Desist Proceedings, *In re* Cantor Fitzgerald & Co., Securities Act Release No. 10672, at 8 (Aug. 16, 2019), https://www.sec.gov/litigation/admin/2019/33-10672.pdf [hereinafter *In re* Cantor Order], *with* Order Instituting Cease-and-Desist Proceedings, *In re* JPMorgan Chase Bank, N.A., Securities Act Release No. 10600, at 10 (Dec. 26, 2018), https://www.sec.gov/litigation/admin/2018/33-10600.pdf.

167. *See, e.g.*, *In re* Cantor Order, *supra* note 166, at para. 32 ("Throughout the staff's investigation, Cantor provided analyses at the staff's request and entered into tolling agreements with the Commission.").

168. The SEC's New York Regional Office brought all the pre-release ADR enforcement actions.

their cooperation, how much greater a penalty and what other credit they may have received remains uncertain.

Conclusion

Based on our findings, companies continue to face a great deal of uncertainty when assessing whether and how to cooperate with the SEC. The alternatives to cooperation, however, are limited and not without their own risks and uncertainties.

In the context of an SEC investigation, a company could, for example, determine to do the minimum required under the law and respond only to document and testimony subpoenas. The SEC would then bear the full burden of dedicating resources to ferret out the facts. Because so many entities strive to cooperate, though, this strategy carries a high likelihood of alienating the SEC staff, which may result in the staff offering less flexibility on production and testimony issues and could result in the staff developing a negative perception of the entity. Should the SEC staff determine that a securities law violation exists, then this strategy also creates the risk that the staff will decline to exercise its discretion in favor of the entity when deciding what charges and relief to recommend to the Commission. Upon considering these risks as well as the low burden of proof the SEC enjoys, entities often decide to cooperate with the staff during enforcement investigations.

When potential misconduct comes to a company's attention, another alternative could be for a company to conduct an internal investigation and, if a violation is found, to remediate it, but not to self-report unless the company is legally required to do so. For an unregulated company, it is possible that the SEC may never discover the violation on its own. However, considering the whistleblower program incentives and the SEC's extensive data analytics program, there is probably a good chance that the SEC will discover the misconduct. Even so, if the investigation was thorough and the remediation was thoughtful and complete, the SEC may respect the process, consider the company's diligence and good-faith efforts to remediate the matter promptly, and either not see a need for additional enforcement or determine that a lesser penalty or milder remedy is appropriate.

Considering all the enforcement uncertainties a company faces when deciding whether and to what extent to cooperate with the SEC, it is helpful to focus on the company's values and the tone at the top it seeks to project. Public companies typically prefer to avoid, whenever possible, attracting negative regulatory or shareholder attention. As a result, despite the lack of a clear equation between efforts expended and credit received, we expect that most companies and their counsel will continue to strive for cooperation credit, even as the bar for receiving that credit moves higher.

In order to continue to encourage efficient and substantial cooperation efforts, as our research demonstrates, the SEC should exercise more consistency

in its treatment of all the Seaboard Report's cooperation factors. As noted in this article, this should include more clearly calling out which cooperation factors received consideration for credit, such as self-policing, giving consideration to providing some form of credit to entities that try to self-report, and clarifying what rewards are available for cooperation. In addition, we believe that offering more "self-reporting" programs, including those that contemplate true amnesty, would facilitate significant cooperation efforts by regulated entities.