SEC Enforcement Data Analyses

Analyses of cases filed by the SEC in calendar year 2013.

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Morvillo Abramowitz

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Contents

Welcome to the second publication of **Morvillo Abramowitz's** quarterly reports on the work of the Securities & Exchange Commission's Division of Enforcement, beginning with cases filed on or after January 1, 2013. Our firm's first publication contained data and analysis of the Enforcement Division's new cases from January 1, 2013 through September 30, 2013. This publication will analyze all of the Enforcement Division's new case filings for the entire calendar year 2013. Please note that the SEC publishes its statistics about new case filings by its fiscal year ended September 30. Thus, there won't be a perfect correlation between our statistics and the SEC's.

Number & types of cases filed by the SEC in calendar year 2013.

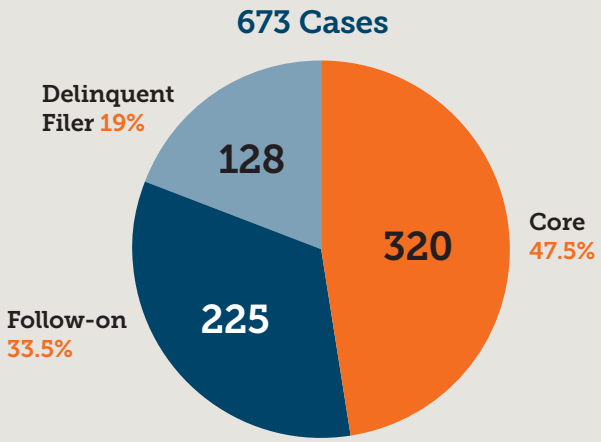
A total of **673** cases were filed by the SEC between January 1, 2013, and December 31, 2013, either in federal court or in an administrative proceeding at the SEC. **225** of the **673** cases (or 33.5 %) were **"Follow-on"** cases, i.e., administrative proceedings that followed earlier cases (either SEC injunctive actions or parallel criminal cases) citing the result in the earlier cases as a basis for the relief sought in the Follow-on cases. During the same period, **128** of all of the cases filed by the SEC (or 19%) were **"Delinquent Filer"** cases, i.e., cases in which a public company did not file required periodic filings with the SEC, such as 10-Ks or 10-Qs. Finally, of the total **673** cases filed by the SEC from January 1, 2013 through December 31, 2013, **320** (or 47.5%) were **"Core"** cases, i.e., cases that were neither Follow-on nor Delinquent Filer cases.

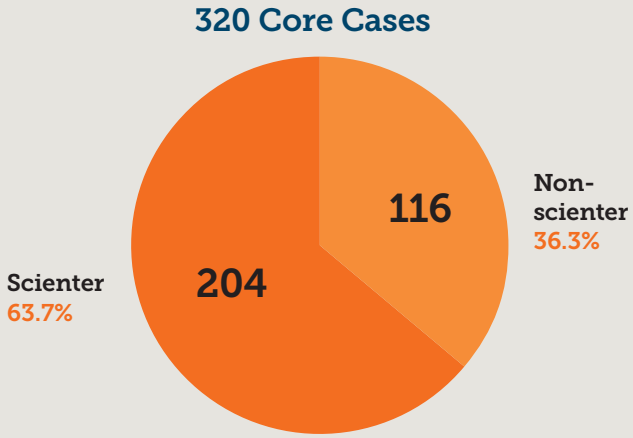
Percentage of Core cases in which scienter was/was not alleged

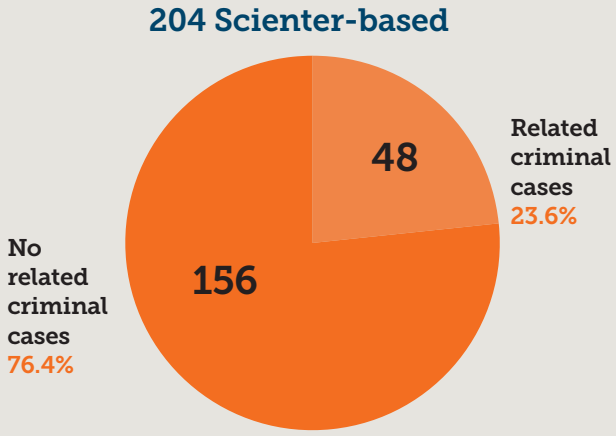
Of the **320** Core cases filed in 2013, **116** (or 36.3%) did not allege a violation of the securities laws that required a finding of scienter. From this information, one can infer that with the right fact pattern, in negotiations with the SEC, one can still achieve settlements with no scienter-based claims, notwithstanding language in the complaint that strongly suggests scienter.

Overlap between SEC scienter-based cases & related criminal cases

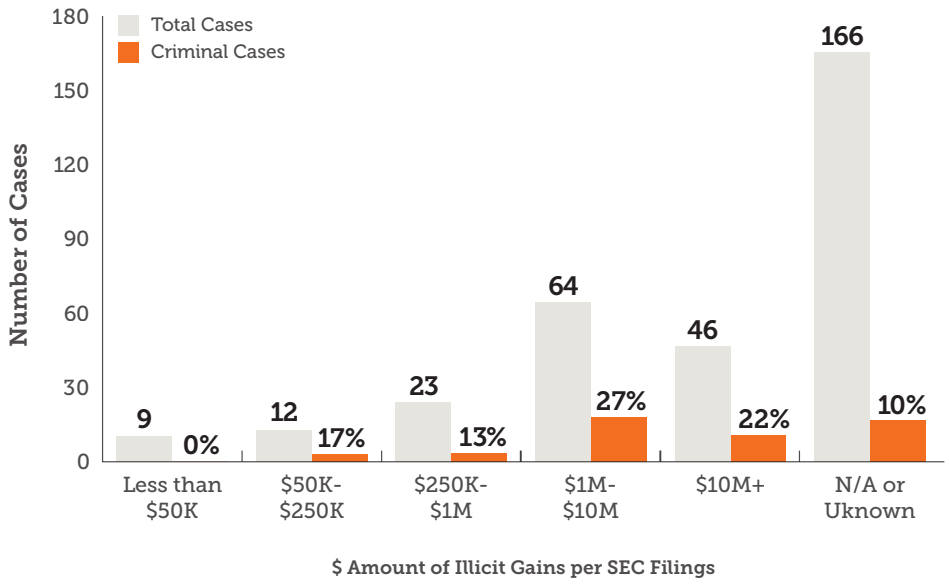
The overlap between SEC scienter-based cases and related criminal cases was not great. Of the **204** scienter-based cases filed by the SEC from January 1, 2013 through December 31, 2013, **48** (or 23.6%) had related criminal charges against the SEC defendant/respondent on or before the filing of the filing date of the SEC complaint. Surprisingly, we found only a small correlation between the size of the scienter-based claims and the likelihood of criminal prosecution.





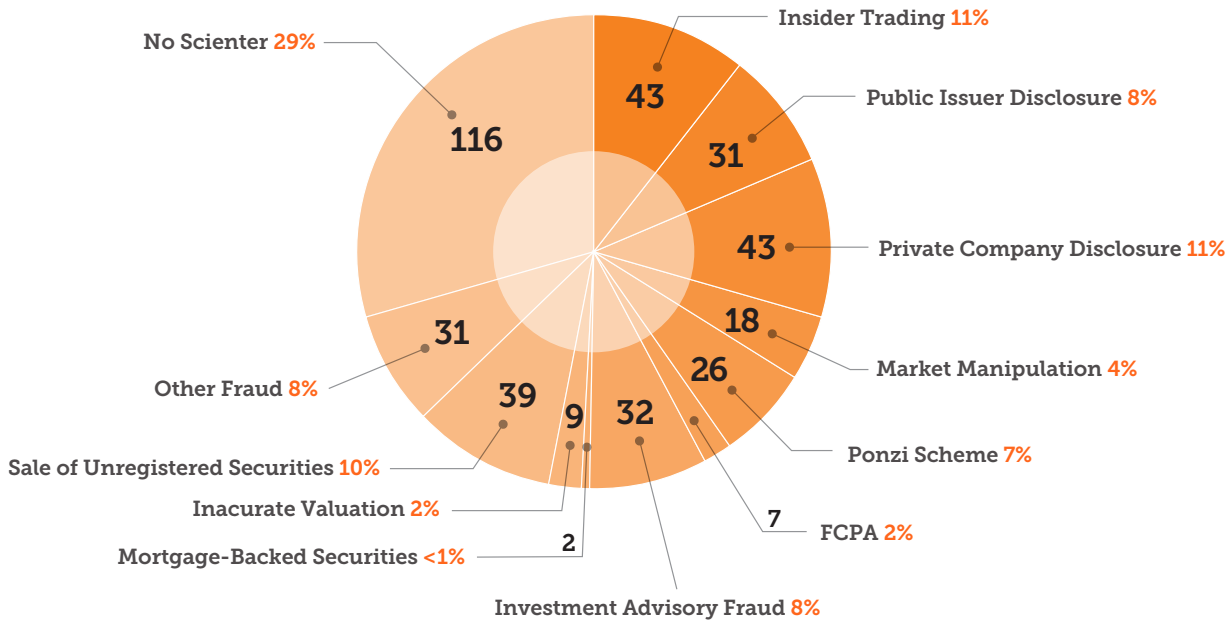


Percentage of criminal cases as a function of the size of the alleged fraud.



In the fiscal year ended September 30, 2012, the SEC filed **58** insider trading cases. In the fiscal year ended September 30, 2013, the SEC filed **44** insider trading cases. In the calendar year 2013, the SEC filed **43** insider trading cases, plus **22** insider trading cases that were Follow-on cases.

Types of cases filed



Note: Some cases were listed in more than one category to reflect the fact that the case alleged different kinds of wrongdoing.

Increasing use of administrative proceedings to litigate fraud allegations.

	Administrative Proceedngs/Core Cases	% of Month's Core Cases
January	2	14%
February	3	20%
March	8	35%
Q1	**13**	**25%**
April	10	40%
May	11	52%
June	3	17%
Q2	**24**	**38%**
July	9	33%
August	9	26%
September	43	54%
Q3	**61**	**44%**
October	11	61%
November	12	52%
December	13	57%
Q4	**36**	**56%**

More and more scienter-based cases are being filed as administrative proceedings instead of being filed in the federal court. A total of **186** scienter-based Core cases were brought by the SEC in federal court in 2013. **134** scienter-based Core cases were brought in administrative proceedings during that same period. [Each quarter of calendar year 2013 showed that the percentage of scienter-based claims being filed in administrative proceedings increased as a percentage of all scienter-based claims brought the SEC.]

There has been speculation in the press that the SEC's increasing use of administrative courts to litigate scienter-based Core cases may be due to the SEC's win-loss percentage in administrative courts versus federal court. According to an article that appeared in *The New York Times* on October 6, 2013, "[t]he SEC's track record in these [administrative] proceedings is certainly impressive. Among cases filed in fiscal 2011, the most recent period for which all the matters have been decided, the agency won seven of the eight matters that went before an administrative law judge. That's an 88 percent success rate. In district court proceedings, the agency's record is more mixed. Among cases filed that year, the S.E.C. won 7.5 out of 12, a 63 percent success rate. (The half-win represented a split decision.)" *See* Gretchen Morgenson, *At the S.E.C., a Question of Home Court Advantage, The New York Times*, Oct. 6, 2013. (After this article ran in *The New York Times*, the SEC lost two more federal court trials in cases that were filed in 2011). Given the relatively small number of cases that went to trial, however, it is probably premature to conclude that there is greater likelihood of winning at trial in an SEC administrative court than in federal court. As we accumulate more data on trials of SEC cases, whether in federal court or in SEC administrative proceedings, we will be able to better compare the results in each venue.

Among other things, the statistics cited in *The New York Times* show what a small percentage of SEC cases end up getting tried. In fiscal year 2011, the SEC brought 735 cases. The fact that only 22 cases—less than 3%—went to trial is noteworthy. However, one needs to analyze the results in the other 97% of the cases the SEC brings to see what the SEC's overall success rate is in all of the cases it litigates, not just those few that go to trial.

Of course, another reason for the SEC to bring scienter-based cases in administrative courts is that settlements of those cases are not subject to scrutiny by federal judges. Thus, to the extent that the SEC and potential defendants/respondents want to settle cases without interference by federal court judges, they can do so by bringing their settled cases in administrative proceedings. Given the more recent activism by federal judges in reviewing SEC settlements, the motive for the SEC to avoid those judges is clear.

Percentage of cases that settled without litigation.

	Core Cases Settled When Filed	% of Month's Core Cases Settled When Filed	Administrative Core Cases Settled When Filed	Federal Core Cases Settled When Filed
January	6	43%	1	5
February	7	47%	1	6
March	8	35%	5	3
Q1	**21**	**40%**	**7**	**14**
April	13	52%	8	5
May	15	71%	11	4
June	6	33%	3	3
Q2	**34**	**53%**	**22**	**12**
July	15	56%	8	7
August	10	29%	5	5
September	51	65%	38	13
Q3	**76**	**54%**	**51**	**25**
October	13	72%	10	3
November	9	39%	6	3
December	16	70%	13	3
Q4	**38**	**59%**	**29**	**9**
Total	169	53%	109	60

Each time a new enforcement team joins the SEC, we hear that they intend to not only continue the good work of those who preceded them, but to be even more aggressive. Chair White has said that the SEC's new policy of demanding admissions as part of settlements may result in fewer settlements, and therefore, more trials. And in a recent story in the Washington Post, Andrew Ceresney, the Chief of the SEC's Enforcement Division said: "If we're not losing trials, we're not being aggressive enough. It's obviously important that we win to ensure that we have credibility. But just because we lose a case it doesn't mean we shouldn't have brought the case or that we didn't try it well. Sometimes it just gets down to the unique facts of the matter. I think sophisticated people understand that." Dina Elboghdady, *Here's how the SEC is preparing for life after the financial crisis,* Washington Post (January 29, 2014). Of course, Mr. Ceresney is right that just because the SEC loses a case doesn't mean that the case should not have been brought. On the other hand, if the SEC tries more cases than it has in the past, and if, as a result, it loses a greater percentage of the cases that go to trial than it has in the past, there will be questions raised about the SEC's credibility and its use of its limited resources.

Whether the settlement demands are high in terms of dollar amounts or in terms of regulatory constraints (e.g., industry bars, suspensions, compliance undertakings), there is no doubt that higher and higher settlement demands will inevitably lead to more prospective defendants/respondents concluding that it is cheaper to go to trial and lose than to settle. Therefore, Chair White's prediction that there will be more trials seems reasonable.

How the SEC will do in those trials is anybody's guess. The two most publicized SEC cases that went to trial in 2013 were the cases against Fabrice Tourre, the former Goldman Sachs executive, which the SEC won[1], and the case against Mark Cuban, the owner of the Dallas Mavericks basketball team, which the SEC lost[2]. After those cases were decided, the SEC lost four more cases in a row after trial[3]. That reduced the SEC's won/lost record on cases filed in federal court in fiscal year 2011 to 7.5 cases out of 14, or 54%. Notably, the four consecutive losses after trial took place in four different districts.

Given how few trials occur in cases brought by the SEC, one wonders how much trial experience the Staff has. However, Chair White is not concerned. She was quoted in Law360 on November 14, 2013 as saying: "Some have asked if our attorneys are ready to go up against the best of the defense bar . . . the answer is yes." The data on future trials, which we will keep, will provide the final answer. In the meantime, no cases filed in 2013 went to trial in 2013.

[1] SEC v. Tourre, Case No. 10-CV-3229 (S.D.N.Y. Aug. 1, 2013) (jury trial).
[2] SEC v. Cuban, Case No. 08-CV-02050 (N.D. Tex. Oct. 16, 2013) (jury trial) (insider trading case).
[3] SEC v. Kovzan, Case No. 11-CV-02017 (D. Kan. Dec. 2, 2013) (jury trial) (false and misleading filings case), SEC v. Jensen, Case No. 11-CV-05316 (C.D. Cal. Dec. 10, 2013) (jury trial) (fraudulent accounting case); SEC v. Schvacho, Case No. 12-CV-2557 (N.D. Ga. Jan. 7, 2014) (bench trial) (insider trading case); SEC ; SEC v. Yang, Case No. 12-CV-02473 (N.D. Ill. Jan. 13, 2014) (jury trial) (SEC lost insider trading claim, won front-running claim).

SEC priorities in 2014

If you want to know the SEC's priorities for 2014, you need look no further than the SEC's Fiscal Year 2013 Agency Financial Report at pages 29–30. The SEC includes in its description of high priority areas "complex financial products, gatekeepers, insider trading, market structure, investment advisers and private funds, and municipal securities." The SEC also notes that "Enforcement's Financial Reporting and Audit Task Force will focus on violations relating to the preparation of financial statements, issuer reporting and disclosure, and audit failures."

One area that has not gotten the attention it deserves is the SEC policy of pursuing smaller violations. In the SEC's Fiscal Year 2013 Agency Financial Report at page 19, the SEC stated: "Even with a number of headline-making actions, Enforcement maintained an eye on smaller technical and compliance-related violations. When minor violations are overlooked or ignored, they can feed bigger violations and foster a culture where laws are treated as mere guidelines. Accordingly, the SEC moved to pursue smaller infractions through streamlined investigation and settlement approaches."

This statement should be a concern to SEC enforcement practitioners who interact with the SEC regularly. The problem with this approach is that, in negotiations with the SEC, the Staff may insist on settling for "smaller technical and compliance-related violations" because they spent so much time and effort on their investigation, they feel like they have to obtain some pound of flesh to justify all of their investigative efforts. Particularly given the high cost of litigating with the SEC, the client of the SEC enforcement practitioner may correctly conclude that it is cheaper to settle for a smaller technical and compliance-related violation than litigate and win.

Moreover, one has to wonder whether, given the demands on the SEC resources, the SEC is getting "bang for the buck" by expending its precious resources on smaller technical and compliance-related violations. This is clearly a policy decision that has been made by the Commission, and is one about which reasonably minds may differ.

Areas of SEC enforcement that have gotten the most attention in the press apply to only a small percentage of SEC enforcement actions.

In 2013, two of the most publicized areas of SEC enforcement have been the SEC's new policy to require admissions of wrongdoing in settlements with the SEC and the SEC's cases brought under the FCPA. The reason that these two areas have gotten so much publicity compared to the rest of the SEC's actions is that they involve either a lot of money or a high profile defendant/respondent.

The data shows that in 2013, the SEC only insisted on admissions of wrongdoing in two of the cases it settled, a miniscule amount. However, those cases involved high profile defendants/respondents: Phillip Falcone and the hedge fund advisory firm (agreed to pay $18 million in disgorgement), J.P. Morgan Chase (agreed by pay a $200 million penalty to the SEC as part of approximately $920 million to be paid to the SEC and other agencies).

Similarly, the data shows that the SEC filed only 7 FCPA cases in 2013, or 2% of all "core" cases it brought. Those cases also involved large amounts of money or high visibility defendants/respondents.

The SEC's use of technology

In the SEC's annual financial report, the SEC noted the many technological advancements it intended to use and improve upon in the coming fiscal year. However, no sooner was the ink dry on that report, it was reported in the press on that "Congress snatched away half of the $50 million that the Securities and Exchange Commission had set aside for technological initiatives Thursday, dashing the agency's hopes of beefing up the tools it needs to swiftly spot violations such as illegal trades and accounting fraud .... The sizable cutback 'will affect the pace and extent of our continued progress,' [Chair] White said." Dina ElBoghdady, *Congress slashes SEC's funding for technology upgrades*, Washington Post, Jan. 16, 2014.

Getting more bang for the buck

In addition to having its technology funding slashed, the SEC has been told to do more with less money. As reported last month, "[t]he S.E.C would have a budget of $1.35 billion for 2014, compared with the $1.67 billion that the agency requested last spring." The SEC was quick to respond: "This proposed level falls short of what we need to fulfill our responsibilities to investors and our markets .... It is particularly frustrating considering that funding for the S.E.C. does not contribute to the federal deficit." William Alden, *For 2 Wall Street Regulators, More Belt Tightening*, *The New York Times*, Jauary 14, 2014.

Not only has the S.E.C. seen its funding requests rejected, but it has also been criticized for the way it uses its funding. On September 12, 2013, a letter was written to Mary Jo White by the Chairman of the House Committee on Financial Services (Jeb Hensarling, R-Tex) and the Chairman of the sub-Committee on Capital Markets and Government Sponsored Enterprises (Scott Garrett, R-NJ). The letter questioned whether the SEC is spending too much of its resources on its oversight of private equity funds under Dodd-Frank, and not enough in protecting the small investor. As of the writing of this report, there is nothing on the SEC's or the Committee's websites showing that Chair White submitted a response.

Upcoming analyses using our database

As our database grows, we will be able to sort voluminous cases to find precedents useful to SEC enforcement practitioners. In our next quarterly publication, we will continue to sort the database to see the number and types of cases being brought, and the SEC's track record in cases filed since January 1, 2013. In addition, we will use the data to see what kinds of cases the SEC has recently brought that do not involve allegations of scienter. Since the percentage of non-scienter based cases is growing, practitioners should be aware of the kinds of non-scienter based settlements that have been reached by the SEC in the recent past. We will also look at the percentage of scienter-based cases that do not name any individuals as a defendant or respondent.

As always, we are anxious to hear from our readers. Please forward all comments or questions to lbader@maglaw.com or pjanowski@maglaw.com.

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This report is the work of Morvillo Abramowitz partner,
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The opinions expressed herein are those of Mr. Bader and Mr. Janowski,
and are not necessarily those of Morvillo Abramowitz.

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