



SEC Enforcement Data Analyses

▶ Analyses of cases filed between January 1, 2013 and September 30, 2013.

**Morvillo
Abramowitz**

Morvillo Abramowitz Grand Iason & Anello PC

Contents

- 1 SEC cases filed in the first nine months of 2013
- 1 Percentage of Core cases in which scienter was/was not alleged
- 1 Overlap between SEC scienter-based cases & related criminal cases
- 2 Percentage of criminal cases as a function of the size of the alleged fraud
- 2 Types of cases filed
- 3 Increasing use of administrative proceedings
- 3 Disgorgement
- 3 Municipal debt
- 4 SEC enforcement priorities going forward
- 4 Congressional pushback
- 4 New SEC policy on admissions in settlements
- 4 SEC morale
- 5 Failure to supervise case against Steven A. Cohen
- 5 Mortgage-backed securities cases
- 5 Comparing our statistics with the SEC's
- 5 Our data sorting



Morvillo Abramowitz Grand Iason & Anello, PC welcomes you to the inaugural publication of what will be periodic reports on the work of the Securities & Exchange Commission's Division of Enforcement, beginning with cases filed on or after January 1, 2013. Our database, derived from publicly available sources, allows us to sort voluminous information about SEC enforcement actions in ways that will assist us in understanding what the SEC's enforcement priorities have been and are likely to be in the near future.

By collecting and sorting this data, we have seen a number of trends, some of which have surprised us. Over time, we will analyze the data using different search tools to see, for example, trends in the types of cases brought by the SEC and the kinds of outcomes that have resulted therefrom, either through settlements and/or litigation.

The most notable trends we have seen to date with regard to SEC cases filed in the first nine months of 2013 are set forth below.

Number & types of cases filed by the SEC in the first nine months of 2013.

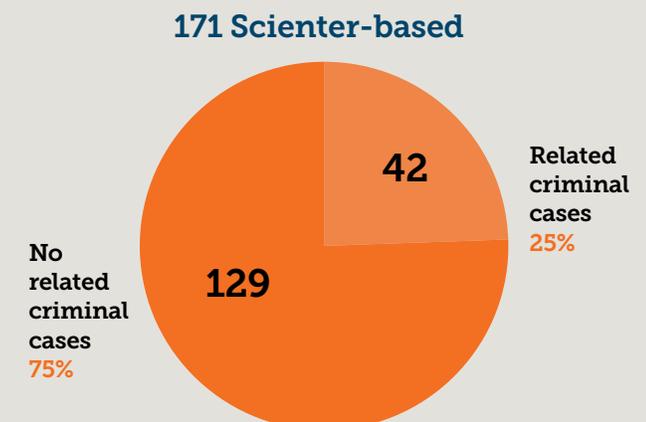
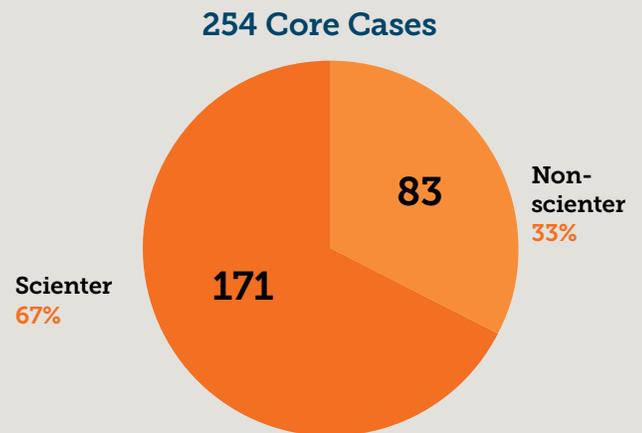
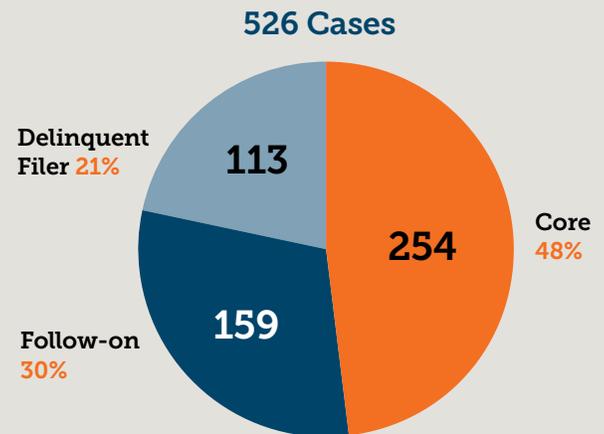
A total of **526** cases were filed by the SEC between January 1, 2013 and September 30, 2013, either in federal court or in an administrative proceeding at the SEC. **159** of the **526** cases (or 30%) were **"Follow-on"** cases, *i.e.*, administrative proceedings that followed earlier cases (either SEC injunctive actions or parallel criminal cases) citing the results in the earlier cases as a basis for the relief sought in the Follow-on cases. During the same period, **113** of all the cases filed by the SEC (or 21%) 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 and 10-Qs. Finally, of the total of **526** cases filed by the SEC from January 1, 2013 through September 30, 2013, **254** (or 48%) 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

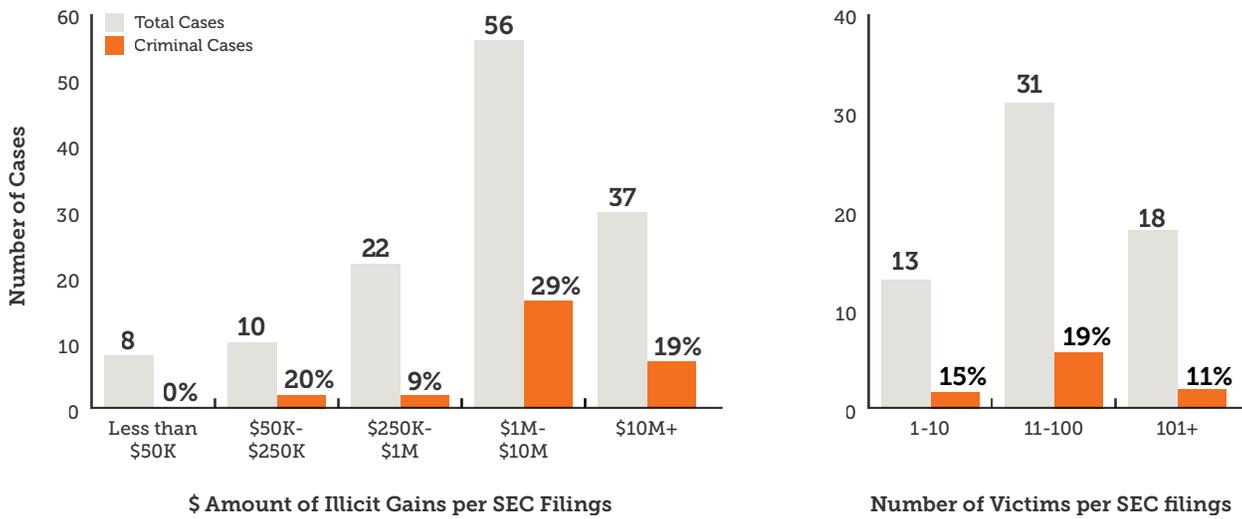
Of the **254 Core** cases filed in the first nine months of 2013, **83** (or 33%) did not allege a violation of the securities laws that required a finding of scienter. From this information, one can infer that with the right fact pattern, in negotiations with the SEC, one can still achieve settlements 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 complaints and related criminal cases was not great. Of the **171 scienter-based complaints** filed by the SEC from January 1, 2013 through September 30, 2013, **42** (or 25%) **had related criminal charges** brought on or before the filing date of the SEC complaint. Surprisingly, we found no apparent correlation between the size of the scienter-based claims filed by the SEC (in terms of number of victims and amount of ill-gotten gains or losses avoided) and the likelihood of criminal prosecution.

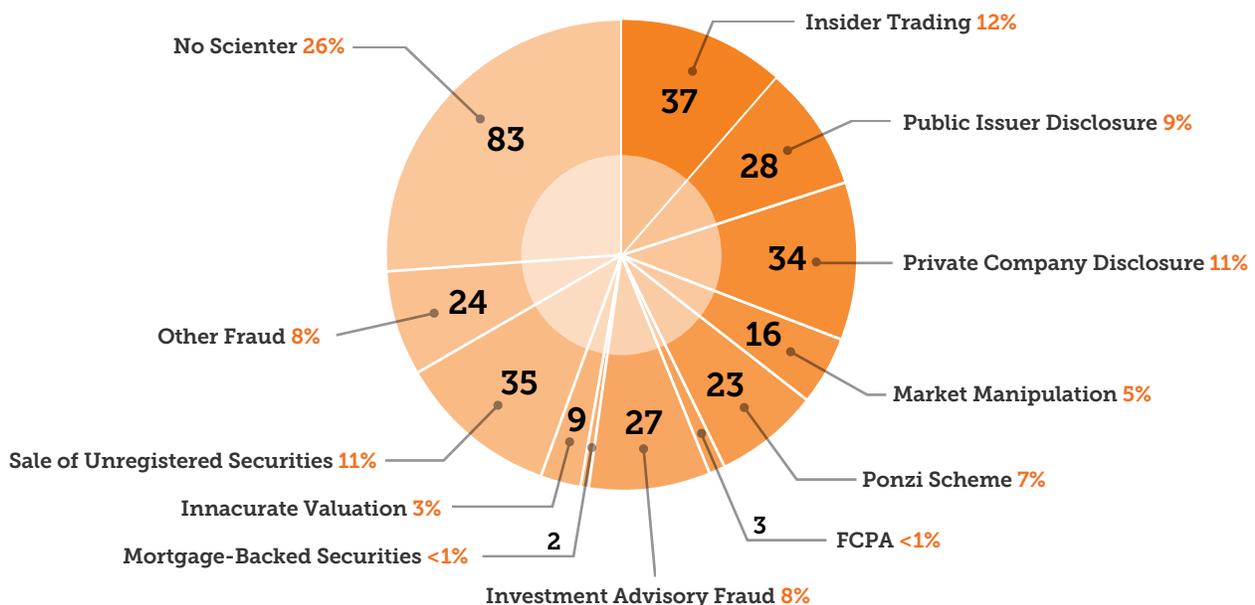


Percentage of criminal cases as a function of the size of the alleged fraud



In the fiscal year ended September 30, 2012, the SEC filed 58 insider trading cases, including 6 insider trading cases that were follow-on cases. In the first nine months of calendar year 2013, the SEC brought 37 insider trading cases, excluding cases that were Follow-on cases.

Types of cases filed



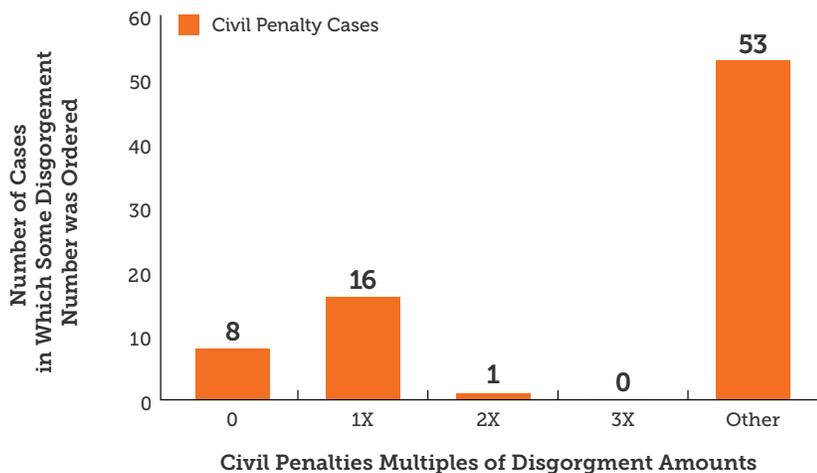
Note: Some cases were listed in more than one category to reflect the fact that the case alleged different kinds of wrongdoing.

Increasing use of administrative proceedings to litigate fraud allegations.

More and more fraud cases are being filed as administrative proceedings instead of being filed in federal court. A total of **144** scienter-based Core cases were brought by the SEC in federal court in the first nine months of 2013; **27** scienter-based Core cases were brought in administrative proceedings during that same period.

Trends in disgorgement and civil penalties

The norm is still for settled **insider trading cases** to result in full disgorgement, pre-judgment interest and **1X** the disgorgement amount in civil penalties. **3X** civil penalties—that is, civil penalties that are three times the amount of the disgorgement—are rare in settled cases, even in insider trading cases. Of the **77 Core cases** filed from January 1, 2013 through September 30, 2013 that have involved some final disgorgement number (over zero), **16** resulted in a civil penalty equal to the amount of the disgorgement. However, a significant number of cases resulted in no civil penalty or a civil penalty that was not **1X** the amount of the disgorgement, or **2X**, or even **3X** the amount of the disgorgement. And in **34** cases, there was no disgorgement ordered, but the defendant/respondent still paid a civil penalty. Other than in cases involving a **1X** civil penalty, the SEC rarely explains how it arrives at the civil penalty.



Percentage of cases that settled without litigation

Of the total **254 Core cases**, **131** (or 52%) were settled at the time the action was filed.

Increased focus on municipal debt

The SEC is increasing its focus on violations of the securities laws by municipalities. In addition to suing municipalities for non-scienter-based violations, recent cases show scienter-based claims against governmental entities, with individuals being included as defendants for the first time.

What the SEC has said about its enforcement priorities going forward in 2013

In an important speech delivered on September 26, 2013 to the Council of Institutional Investors' Fall Conference in Chicago, IL, Mary Jo White explained the SEC's enforcement priorities in the near future. The gist of her speech was that we should expect harsher penalties, a more aggressive Staff, more negligence cases where scienter cannot be proved, and more pursuit of individuals. She also addressed the new policy regarding settlements where defendants will be required to admit wrongdoing.

Ms. White also acknowledged that the SEC's increased demands for admissions as a condition of settlement may result in more prospective defendants declining to settle with the SEC, resulting in more trials. To address this potential, Ms. White observed that the SEC would have to "ensure that we have sufficient resources available to litigate cases." As discussed below, Congress may push back on the SEC's requests for more resources. It will be interesting to see how many more cases get tried because of harsher settlement demands by the Staff, what the SEC's track record will be in those trials, and whether the SEC will be able to obtain the available resources from Congress to litigate these additional cases.

Congressional pushback

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. We await Chair White's response.

New policy of insisting that defendants/respondents admit wrongdoing

On June 17, 2013, Mary Jo White announced in an email to the enforcement Staff that the SEC would, in some cases, insist that the defendant/respondent admit wrongdoing as a condition of settlement. Whether to demand such an admission as a condition of settling has been a much-debated topic, particularly since Judge Rakoff, in the Southern District of New York, refused to approve an SEC settlement without an admission of wrongdoing by the defendant, Citibank. The SEC has indicated that among the factors that the SEC will consider in deciding whether to require an admission of wrongdoing are the number of investors, the harm to markets, the nature of the defendants and the message to the markets.

This new policy was applied for the first time in a federal proceeding that was settled on August 19, 2013, subject to Court approval. [SEC v. Philip A. Falcone, et al.](#) Given the amount of publicity that Ms. White's policy change generated in June 2013, it was curious that the SEC's press release in Falcone did not note that this case was the first application of the new policy.

The second application of the new policy was in the SEC's case against JPMorgan Chase, which was settled on September 19, 2013. Unlike in the Falcone case, in the [JPMorgan Chase](#) case, the SEC attached to the Order Instituting Proceedings an "Annex A," setting forth the facts that JPMorgan Chase admitted as part of its settlement with the SEC. The inclusion of such annexes to the pleadings may become the norm in cases involving admissions of wrongdoing.

SEC morale

According to a July 2013 report of the United States Government Accounting Office, entitled "Securities and Exchange Commission, Improving Personnel Management is Critical for Agency's Effectiveness," morale at the SEC has been low ("In describing SEC's culture, many current and former SEC employees cited low morale, distrust of management, and the compartmentalized, hierarchical,

and risk-averse nature of the organization"). In a question to SEC employees about risk aversion at the Commission as of January to March 2013, 54.7% of the non-supervisory staff, 57.4% of the supervisory staff, and 62.8% of the senior officers either strongly agreed or somewhat agreed with the following statement: "Fear of public scandals has made SEC overly cautious and risk-averse." The survey also revealed that in response to the statement "The fear of being wrong makes senior officers in my division/office reluctant to take a stand on important issues", 44.6% of the non-supervisory staff strongly or somewhat agreed, whereas 44.1% of the supervisory staff and 21.9% of the senior officers strongly or somewhat agreed.

The SEC's victory in its case against former Goldman Sachs executive Fabrice Tourre is likely to boost morale. After all, it is the most publicized SEC trial in recent memory. So are the recent settlements achieved by the SEC in high-visibility cases involving large disgorgement amounts and/or civil penalties. Included in this group are the SEC's settlements with CR Intrinsic (relating to the SAC entities, resulting in disgorgement of \$274 million and a civil penalty of another \$274 million), JPMorgan Chase (civil penalty payable to the SEC of \$200 million), Total, S.A. (disgorgement of \$153 million in FCPA case), UBS Securities, LLC (\$34 million in disgorgement, and a civil penalty of \$5 million), TD Bank, N.A. (civil penalty of \$15 million), and twenty-three short sellers (disgorgement and civil penalties resulting in over \$14 million in monetary sanctions). It will be interesting to see whether those cases, combined with the addition of Mary Jo White and Andrew Ceresney to the most senior levels of the SEC, will cause SEC attorneys to feel that they need not be "overly cautious and risk averse."

Interestingly, in Ms. White's speech on September 26, 2013, she specifically said, "We must be aggressive and creative in the way we use the enforcement tools at our disposal. That means we should neither shrink from bringing tough cases, or fail to bring little ones."

This attitude may reduce the reported tendency of the Staff to be risk averse.

Failure to Supervise Case against Steven A. Cohen

On July 19, 2013, the SEC brought an administrative proceeding against Steven A. Cohen for failure to supervise. By bringing that highly visible case, the SEC sent an unmistakable signal that it will deal harshly with the most senior executives of securities firms where more than isolated wrongdoing at those firms is alleged. The cases surrounding SAC are very unusual in terms of the number of criminal violations charged against employees of one firm or group of firms. Whether the Cohen case is an indication that the SEC is going to bring more enforcement cases alleging failure to supervise remains to be seen. It should be noted that the Cohen case is hardly the only failure to supervise case brought by the SEC in the first nine months of 2013. It is, however, the most visible.

Mortgage-backed securities cases

The SEC's case against Bank of America, filed on August 6, 2013, may be the forerunner of other cases dealing with the mortgage-backed securities meltdown. With the statute of limitations looming large, the SEC is under pressure to either bring new cases in this area, or move on. Alternatively, the SEC may look for creative ways to extend the statute of limitations, e.g., by alleging acts to cover up the fraud, which could toll the statute of limitations. Again, this remains to be seen.

Comparing our statistics with the SEC's published statistics

Every year, the SEC publishes "Year-by-Year SEC Enforcement Statistics" for the end of the past fiscal year. For the fiscal year ended Sept. 30, 2012, the SEC reported that the Division of Enforcement had brought 734 cases in federal and administrative courts. Included in those 734 cases were 127 "delinquent filing cases" (17% of the 734 total). Also included in those 734 cases were "follow on" cases."

If a defendant was sued by the SEC for insider trading in an injunctive action and an injunction was issued by the court, and the SEC then brought an administrative action seeking a bar from associating with the securities industry and from participating in any way in a penny stock offering, the SEC's "Year-by-Year Enforcement Statistics" would count the injunctive action and the administrative action as two different insider trading cases. For purposes of our analysis, however, we count this scenario as one "core" insider trading case, namely, the injunctive action, because the "follow-on" administrative action requires virtually no effort by the SEC and does not reflect SEC enforcement priorities (other than to bring such administrative actions as "follow-on" actions).

The "Year-by-Year Enforcement Statistics" also put each SEC case in only one category for type of case. This involves some judgment calls, since one case may have many types of wrongdoing alleged. We believe that if one case has many kinds of wrongdoing alleged, each and every type of wrongdoing should be noted in the statistics. This will result in a fairer and more complete view of the types of cases that the SEC has brought. It will also result in the total number of cases in the analysis being greater than the total number of cases filed—since many cases will fit in more than one category.

This "over-counting" will affect a number of different categories in our database, particularly the categories where there were multiples types of violations or defendants, and multiple defendants with different types of claims against them. However, the total number of filed cases, follow-on cases and failure to file cases will not be over-counted.

We welcome comments from the readers of this publication and will be fine-tuning our analyses to improve the usefulness of this publication.

How our data has been & will be sorted

We were able to provide the analyses above by sorting publicly available data. To that end, the data we have compiled has been sorted into a number of categories:

1. In what jurisdiction (federal or administrative) was the matter filed?
2. Was the case settled at time of SEC filing?
3. Was there a related criminal case at or before time of SEC filing?
4. Was a freeze order sought by the SEC??
5. Was this a fraud case brought in an administrative proceeding rather than in a federal court action?
6. How many alleged victims were there?
7. What was the alleged dollar size of the fraud (or amount of alleged ill-gotten gains)?
8. What type of defendant was sued (e.g., governmental issuer, public company, private company, broker-dealer, underwriter, bank, mutual fund, etc.)?
9. What type of violations were alleged (e.g., insider trading, stock manipulation, Ponzi scheme, FCPA, sale of unregistered securities, etc.)?
10. What disgorgement amount, if any, was imposed on the defendant?
11. What civil penalties were imposed on the defendant (compared with amount of disgorgement)?
12. What SEC office filed the case?
13. Did the SEC insist on the defendant admitting wrongdoing?
14. Was there a trial?

By sorting this data, we can answer myriad questions about the SEC's enforcement tendencies and results. So, for example, we can track the number of cases filed by each SEC office, over what period of time, for what kinds of cases and against what types of defendants. We can also see how often the SEC settled cases sounding in fraud did not allege scienter.

We intend to keep this database current, which will result in our having more data over a longer period of time. This will allow us to see, for example, how many of the SEC's cases go to trial and what kind of success rate the SEC has in tried cases. Since our database starts with cases filed after January 1, 2013, there have been no trials of those cases this year. Obviously, that will change the longer our database collects data.

In future iterations of this publication, we will sort the data to follow the trends discussed above and also to use additional sorts to analyze different issues raised by the data, including but not limited to the activity of each SEC branch office, the frequency of applications for freeze orders, the size of the frauds alleged by the SEC, the size of the disgorgement amounts and civil penalties, the types of defendants/respondents sued by the SEC and the types of cases brought by the SEC.

www.maglaw.com

This report is the work of Morvillo, Abramowitz partner,
Lawrence S. Bader, and associate, **Peter Janowski**.

The opinions expressed herein are those of Mr. Bader and Mr. Janowski,
and are not necessarily those of Morvillo Abramowitz.

For additional information on this report, please contact
Lawrence S. Bader at lbader@maglaw.com or **212 880 9440**.

**Morvillo
Abramowitz**

Morvillo Abramowitz Grand Iason & Anello PC