Article

U.S. Insider Trading Law Enforcement: Issues and Survey of SEC Actions from 2009 to 2013

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ABSTRACT

This article surveys insider trading enforcement actions brought by the Securities and Exchange Commission (SEC) in the United States in the five-year period from 2009 to 2013. We first introduce the legal framework in which securities laws are enforced in the United States and then focus our analysis on the empirical data of insider trading cases collected from the SEC's news releases and its website. By categorizing actions surveyed, information about types of defendants, types of information used, illicit gain, case results, settlement, and subsequent criminal prosecutions brought by the Department of Justice are revealed and a more complete picture of the enforcement of insider trading law in the U.S is thus provided

Accordingly, this survey offers needed factual understandings to tackle several core issues in the U.S. securities law enforcement: the reason why the SEC is taking such a prime position in securities law enforcement, the phenomenon of extensive use of settlements and their decision process, and the advantages as well as problems brought by the current approach.

Keywords: *Insider Trading Law in the U.S., SEC, Securities Law Enforcement, Settlement in Insider Trading Cases*

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I. INTRODUCTION

Securities law, for the most part, is designed to combat securities fraud. However, the answer to what is the proper method in achieving this goal is sometimes, if not often, divided. Generally, the U.S. approaches this issue with a two-layered structure which allows private litigation and government intervention complementally. Government intervention is achieved by multiple regulatory agencies which include, most importantly, the Securities and Exchange Commission (SEC), Department of Justice, Self-Regulatory Organizations such as stock exchanges and the Financial Industry Regulatory Authority. Among them, the Securities and Exchange Commission possesses a pivotal position and leads the direction of both policy-making and actual enforcement, including carrying out investigations and shaping the outcome of violations of securities law.

For years, the structural complexity of multiple-agency enforcement has been a key feature of securities law in the United States. The effectiveness of this multiple-agency enforcement, particularly the division and collaboration of work among agencies and the choice of enforcement tools, are focal points of research interest. To evaluate the division and the actual use of enforcement tools and their optimization, this Article surveys the recent enforcement of insider trading cases by the SEC from 2009 to 2013 to outline a real world picture of securities law enforcement in the United States. Using data from the SEC, we identify several interesting findings. First, the low prosecution rate, small gain cases, and the relatively light penalty coupling with settlement in the SEC's enforcement, in contrast to the high public attention from the media, are by themselves a surprising phenomenon. Second, most cases focus only on hard core insider trading which involve transmission of information from corporate insiders/financial professionals to close friends within a smaller personal circle. The enforcement rarely reaches out to the remote, multi-stop transmission. Third, criminal charges are limited in number, roughly one fifth of civil charges and the total number of defendants in years investigated ranges from 15 to 37 in the surveyed period. By collecting and analyzing these cases, we provide a clearer picture about what is happening and its effect, as well as problems of the handling of insider trading cases under the SEC's enforcement.

These findings reflect several theoretical issues worth noting. *First, the dominant position of the SEC and the extensive use of civil/administrative procedure*, compared to a very limited use of criminal procedure, reveal two realistic considerations in civil/administrative procedure: a lighter burden of proof (which links to the structural difficulties in obtaining direct evidence due to the nature of insider trading activities) and a lower litigation cost. The extensive use of civil/administrative procedure also casts a suspicious

shadow to the philosophy of punishing insider trading in the first place. *Second, how effective and unbiased the current approach is, is another important issue requiring further scrutiny*. To measure the effectiveness of enforcement, the number of cases taken by SEC needs to be compared with the total number of insider trading activities. Analytically, the cases in SEC's data are only a function of the SEC's detection techniques applied and the total activities are almost unknowable due to its victimless feature. The assessment thus becomes difficult to stand alone and needs to be supplemented by indirect methods. *Last, whether the current approach constitutes adequate deterrence* is the baseline issue subject to further evaluation. In reviewing these issues surrounding insider trading law enforcement, not only the goal of punishing insider trading activities, but also its means as well as its limits, are revisited and tested.

The remainder of this Article proceeds as follows. Part II briefly introduces the current securities law enforcement system in the United States and the SEC's central role in this, including the enforcement procedures and tools. Part III compiles empirical data from SEC enforcement news release from 2009 to 2013 to provide a more complete picture about SEC enforcement activities in insider trading law. Part IV observes and analyzes the cases gathered. By this, we explore the characteristics of these cases and discuss the merit and limits in the current approach. Part V concludes.

II. SEC AND THE ENFORCEMENT OF INSIDER TRADING LAW

According to the framework established by the Securities Act of 1933 and the Securities Exchange Act of 1934, the power and responsibility of monitoring the securities market and enforcing securities laws in the United States are placed in the hands of the Securities and Exchange Commission (the "SEC" or "Commission").[1] The SEC, especially its Division of Enforcement, brings civil enforcement actions when violations of securities laws are spotted and cooperates with other agencies or entities, including the Department of Justice (DOJ) and other self-regulatory organizations (SROs, mostly Financial Industry Regulatory Authority/FINRA and national securities exchanges), to enforce securities laws and ensure a proper function of the securities market in different proceedings.[2] Generally, the SEC only exercises civil authority and has the authority to refer cases and evidence to the DOJ when criminal sanctions are contemplated.[3]

1. STEPHEN J. CHOI & A. C. PRITCHARD, SECURITIES REGULATION: CASES AND ANALYSIS 39 (2008).
2. *Id*. at 40.
3. *Id.*; *see also* 15 U.S.C. § 78u(d)(1) (2002).

A. *The Power of Securities and Exchange Commission and Other Agencies*

The United States Securities and Exchange Commission is the federal government's principal investigative and enforcement arm with respect to the securities industry. At the same time, the Commission is in charge of the overall integrity of the securities market and plays an oversight role in regulating members in the capital market. The SEC's stated mission clearly reflects this goal, which is composed of three objectives: "to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation."[4]

1. *Organization and Responsibilities of the SEC*

The SEC has five Commissioners with staggered five-year terms in top management. One of them is the Chairman of the Commission who is appointed by the United States President. Additionally, no more than three of the Commissioners may belong to the same political party. With headquarters in Washington, D.C., the SEC has five Divisions, 23 offices, 11 regional offices and approximately 3,500 staff throughout the country.[5]

As the primary administrative agency for the securities regulation, the responsibilities of the SEC can be categorized into four main areas: rule-making, securities law enforcement, market supervising, and coordinating with other authorities.[6] These responsibilities are carried out by five divisions within the Commission, which includes the Division of Corporation Finance,[7] Division of Trading and Markets,[8] Division of

4. U.S. Securities and Exchange Commission, *Fiscal Year 2012 Agency Financial Report* (2012), http://www.sec.gov/about/secpar/secafr2012.pdf (last visited Mar. 15, 2016).

5. U.S. Securities and Exchange Commission, *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation* (2013), http://www.sec.gov/about/whatwedo.shtml (last visited Dec. 25, 2014) [hereinafter *The Investor's Advocate*].

6. *See id*.

7. *See id*.; *see also* CHOI & PRITCHARD, *supra* note 1, at 40 (the Division of Corporation Finance handles corporate disclosures from regulated companies that are readily available to the investing public. It reviews the documents that public-held companies filed with the Commission, which includes registration of newly-offered securities, periodic filings (Forms 10-K and 10-Q), proxy materials, annual reports, and filings related to mergers and acquisitions or tender offers). CHOI & PRITCHARD, *supra* note 1, at 41 (one of the more commonly used techniques for the Division of Corporate Finance to communicate with members of the securities industry is the issuance of "no-action letter." A no-action letter is typically requested by individuals or companies who are not sure about whether their new business decisions, transactions or plans would violate SEC rules. By granting a no-action letter to the requesting party, the SEC staff suggests that no further enforcement actions would be recommended to the Commission based on the facts detailed in the original applying letter).

8. *See The Investor's Advocate*, *supra* note 5 (the Division of Trading and Markets primarily acts in an oversight role on major securities market participants such as the securities exchanges, securities firms, self-regulatory organizations (SROs), *etc*. this Division also reviews and approves rules filed by

Investment Management,[9] Division of Enforcement[10] and Division of Economic and Risk Analysis.[11] These divisions, despite each having different tasks, all work toward the same ultimate goal—maintaining integrity of the capital market.

Other than the five Divisions mentioned above, there are still many offices and branches within the Commission which serve to carry out the SEC's mission of providing the investing public with fair, orderly, and efficient markets. In addition, the SEC has been actively communicating with participants in the capital markets and has asserted its cases in the courts. By doing so, information reflecting the Commission's view is directly transmitted, and the SEC maintains its primacy in promoting and enforcing securities law.

2. *Self-Regulatory Organizations*

Although the SEC is the primary regulator of the securities market, it is not the only one. Section 19 of the Securities Exchange Act of 1934 provides for the establishment of other regulatory agencies such as the national securities exchange, registered securities association, and registered clearing agency.[12] These agencies are subject to oversight by the SEC. Today, there is FINRA (Financial Industry Regulatory Authority), PCAOB (Public Company Accounting Oversight Board) and the national securities exchanges, such as NYSE (New York Stock Exchange) and NASDAQ (National Association of Securities Dealers Automated Quotations), acting as other regulators of the securities industry.

FINRA is an independent, not-for-profit organization authorized by Congress to protect investors in the securities industry. The principal

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the SROs, as well as helps the Commission in establishing rules and standards of the securities market).

9. *See id*. (the Division of Investment Management deals primarily with investment-related issues. The main goal of this Division is to make sure the investors are getting useful information from professional fund managers, analysts or investment advisers. This Division also responds to no-action requests and facilitates with enforcement staff to advance the Commission's interests).

10. *See id*. (the Division of Enforcement handles enforcement activities and executes civil power in bringing civil actions in the federal courts or administrative proceedings within the Commission to ensure securities laws and rules are followed. The goal is to ensure individuals or entities that violate securities law are subjected to appropriate sanctions, which in turn creates a deterrence effect to potential violators. The SEC's enforcement staff receives referrals from many sources such as investor complaints, Divisions and Offices of the SEC, the SROs and other securities industry sources. In addition to civil and administrative actions, the SEC can make referrals to the Justice Department for the execution of criminal cases).

11. *See id*. (the Division of Economic and Risk Analysis was created in 2009, and it serves to integrate economic and data analysis into the work of the SEC. This Division provides economic analyses and risk assessment to support SEC rule-making, enforcement, litigations and examinations in order to achieve that goal).

12. 15 U.S.C. § 78s(a)(1) (2010).

regulatory targets for FINRA are brokers and dealers. Nearly all broker-dealers in the United States are members of FINRA.[13] There are five activities that FINRA performs on a daily basis, which are: (1) deter misconduct by enforcing the rules, (2) discipline those who break the rules, (3) detect and prevent wrongdoing in the U.S. markets, (4) educate and inform investors, and (5) resolve securities disputes.[14] In 2012, FINRA brought 1,541 disciplinary actions against firms and individuals that violated FINRA rules, and imposed more than $68 million in fines and $34 million in restitution to harmed investors. Moreover, FINRA also referred 692 fraud and insider trading cases to the SEC and other agencies for further actions.[15]

Besides FINRA, national stock exchanges such as the NYSE and NASDAQ also established requirements for listed companies to follow. In general, those requirements are set to make sure listed companies are in healthy financial conditions and have a desirable corporate governance structure. Also, the PCAOB, which was created by Congress as part of the Sarbanes-Oxley Act of 2002, is responsible for overseeing the audit of public companies and broker-dealers. Public accounting firms are also required to register with the PCAOB. The ultimate goal of the PCAOB is to protect the investing public by making sure the registered companies have informative, accurate and independent audit reports.[16]

Both the SEC and SROs have the principal mission of promoting the integrity of the capital market and providing investors with a better investing environment. However, as the capital market has grown sophisticated, the mission has become complicated and multi-dimensional. To deal with this situation, Congress revised the SEC's statutory mandate to expressly require the SEC "to consider or determine whether an action is necessary or appropriate in the public interest and to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."[17] This multi-dimensional approach not only applies to rule making, but is also reflected in enforcement matters, which apparently involve some degrees of balancing competing interests.[18] In this regard, it becomes inevitable for the Commission's enforcement staff to weigh in factors when carrying out actions through various enforcement tools.

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13. CHOI & PRITCHARD, *supra* note 1, at 42.

14. FINRA, What We Do (2015), http://www.finra.org/AboutFINRA/WhatWeDo/ (last visited Dec. 25, 2014).

15. FINRA, About FINRA (2015), http://www.finra.org/AboutFINRA/ (last visited Dec. 25, 2014).

16. CHOI & PRITCHARD, *supra* note 1, at 43. *See also* PCAOB, About the PCAOB (2003), http://pcaobus.org/about/pages/default.aspx (last visited Dec. 25, 2014).

17. 15 U.S.C. § 78c(f) (2012).

18. Paul S. Atkins & Bradley J. Bondi, *Evaluating the Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program*, 13 FORDHAM J. CORP. & FIN. L. 367, 368 (2008).

B. *Enforcement Actions and Proceedings*

1. *Administrative Proceedings and Types of Sanctions*

The SEC exercises civil authority in enforcing securities law both in its own administrative proceedings and in actions brought in federal court.[19] Administrative proceedings are prosecuted by the SEC and adjudicated by a SEC administrative law judge or hearing officer.[20] Through the passage of time, the SEC currently possesses multiple sanction weapons to combat against insider trading in administrative proceedings, which are less time-consuming and more convenient compared to normal civil proceedings via the federal district court system. Those weapons include (1) cease-and-desist order, (2) temporary order, (3) disgorgement order, (4) officer and director bar order, bar from association with securities industry, and professional discipline.[21]

In a cease-and-desist proceeding, the SEC generally seeks a cease-and-desist order. In a cease-and-desist order, after notice and opportunity for a hearing, and if it is approved by a SEC administrative law judge, the SEC can require the violator and any other person that is, was, or would be a cause of the violation to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation.[22] Also, prior to the completion of the cease-and-desist proceeding, the SEC can seek a temporary order to prohibit the violator from dissipating or converting his assets to prevent harm to investors or the public.[23] In addition, the SEC can seek disgorgement[24] and an officer and director bar order[25] in cease-and desist proceedings.

The SEC can also impose three-tier monetary penalty in administrative

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19. CHOI & PRITCHARD, *supra* note 1, at 186.

20. THOMAS LEE HAZEN, HAZEN'S TREATISE ON THE LAW OF SECURITIES REGULATION, § 16.2[13] (2009).

21. SEC has power to suspend, limit, or bar "any person" from practicing before it "in any way." 17 C.F.R. § 201.102(e)(3). Rule 102(e) has been used by the SEC to discipline professionals, mostly against accountants and lawyers. More detail in SEC's power in disciplining professionals, *see* HAZEN, *id*., § 16.2[18].

22. 15 U.S.C. § 78u-3(a) (2010).

23. 15 U.S.C. § 78u-3(c)(1) (2010).

24. 15 U.S.C. § 78u-3(e) (2010). Though both are monetary assessment to defendants, generally, disgorgement goes to the plaintiff and civil penalties go to the Treasury. 15 U.S.C. § 78u-1(d)(1) (2010). Noticeably, according to the "fair fund" provision of Section 308 of the Sarbanes-Oxley Act, the SEC can designate a penalty or settlement it receives to be added to and become a part of a disgorgement fund for the benefit of investors harmed by the defendant's violation. 15 U.S.C. § 7246 (2010). For more information about the use and practice of fair fund, *see* U.S. Securities and Exchange Commission, *Distributions in Commission Administrative Proceedings: Notices and Orders Pertaining to Disgorgement and Fair Funds* (2014), http://www.sec.gov/litigation/fairfundlist.htm (last visited Dec. 25, 2014).

25. 15 U.S.C. § 78u-3(f) (2010).

proceedings.[26] Monetary penalties of $50,000 for a natural person or $250,000 for any other person can be imposed for activities involving fraud such as insider trading. The maximum penalty reaches $100,000 for a natural person or $500,000 for any other person if substantial losses or a significant risk of substantial losses to other persons or substantial pecuniary gain is incurred by such a violation.[27]

All orders from the SEC's administrative proceedings are subject to judicial review from a court of appeal.[28] However, as noted by scholarship, reviews generally do not include factual findings and circuit courts tend to defer to the SEC's interpretation of law. In this regard, a successful challenge to the SEC's administrative decision in the review process may not be easy.[29]

2. *Federal Judicial Proceeding and Remedies*

When dealing with more severe violations of securities laws, the SEC is likely to seek relief in federal district court. With judicial proceedings, according to the Securities Exchange Act of 1934 § 21 and 21A respectively, the SEC can either seek an injunction or monetary penalty in federal court.

In injunctive proceedings, the SEC has a broader range of sanctions available than it does in administrative cease-and-desist proceedings.[30] These usually include injunctions against future violations,[31] officer/director bar (sometimes termed "corporate governance reforms"),[32] and other equitable relief (most importantly disgorgement orders).[33]

For monetary penalties (also termed "civil penalty"), in insider trading cases, the SEC needs to file suit in a federal court to assess penalties which can amount to a maximum of three times the illicit profits realized or losses avoided.[34] This monetary penalty can also be imposed on controlling persons who directly or indirectly controlled the person who committed violations of securities law, rules and regulations.[35] Also, the civil penalties

26. 15 U.S.C. § 78u-2(a)(2), (b) (2010).
27. 15 U.S.C. § 78u-2(b)(2), (3) (2010).
28. 15 U.S.C. § 78y(a)(1) (1986).
29. CHOI & PRITCHARD, *supra* note 1, at 208.
30. CHOI & PRITCHARD, *supra* note 1, at 216-17.
31. 15 U.S.C. § 78u(d)(1) (2010).
32. 15 U.S.C. § 78u(d)(2) (2010).
33. 15 U.S.C. § 78u(d)(5) (2010); *see also* SEC v. First Pac. Bancorp, 142 F.3d 1186, 1191 (9th Cir. 1998) ("The district court has broad equity powers to order the disgorgement of "ill-gotten gains" obtained through the violation of the securities laws").
34. 15 U.S.C. § 78u-1(a)(2) (2010) ("The amount of the penalty which may be imposed on the person who committed such violation shall be determined by the court in light of the facts and circumstances, but shall not exceed three times the profit gained or loss avoided as a result of such unlawful purchase, sale, or communication.").
35. 15 U.S.C. § 78u-1(a)(1)(B), (3) (2010).

can be waived by the SEC[36] or assessed in addition to other sanctions.[37]

3. *Parallel Criminal Proceedings*

Insider trading also triggers serious criminal liability.[38] As the operation of authority division provided by law, the SEC's formal investigation can parallel the Justice Department's investigation, as the former exercises authority in civil proceedings to impose sanctions and the latter criminal. However, parallel investigations also lead to problems, mostly wasting scarce investigation resources and the problems of possible contradiction among agencies. To avoid these problems, the Justice Department often coordinates its investigation with the SEC since the SEC has more direct control over various sources to learn and analyze securities market irregularities and potential violations of securities laws.[39] However, there are no legal requirements of sequence or deference as both the SEC and federal prosecutor can legally possess its own investigation authority concurrently.[40]

C. *SEC's Investigative Process*

1. *General Guidelines*

SEC investigations and enforcement proceedings are conducted by the Division of Enforcement, which is the main force in executing the SEC's enforcement power. Typically, there are three steps that the enforcement staff will do in an enforcement proceeding. First, based on the facts gathered from the public or other sources, the staff will recommend the commencement of investigations of securities law violations. After a series of investigations, the staff will then decide whether or not to recommend the Commission to bring suits, and whether it will come into a federal court or before an administrative law judge. Lastly, the Division will prosecute these cases on

36. 15 U.S.C. § 78u-1(c) (2010).

37. 15 U.S.C. §78u-1(d)(3) (2010).

38. 15 U.S.C. § 78ff(a) (1988) ("Any person who willfully violates any provision of this chapter (other than section 78dd–1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, . . ., shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.").

39. CHOI & PRITCHARD, *supra* note 1, at 200.

40. 15 U.S.C. § 78u(d)(1) (2010) (the SEC may "transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this chapter or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter.").

behalf of the Commission and recover losses for the investors or impose penalties on the violators.[41]

Due to limited resources, the Division of Enforcement has to choose which cases to devote its investigative efforts to as it is practically impossible for the Division to pursue every matter it encounters. To allocate the resources efficiently, the Director of the Division or the staff rank the existing investigations and designate some particular cases as "National Priority Matters". In determining whether an investigation is a "National Priority Matter", the Director and the staff take several factors into consideration. For example, whether the case presents an opportunity to send a strong message of deterrence with respect to the markets, products and transactions; the magnitude of the misconduct; whether the case involves egregious misconduct that will pose extensive harm to the investors. Moreover, the staff will consider the role of the violators, e.g., if the violators occupy positions of substantial authority or responsibility, or owe fiduciary duties to investors or others.[42]

Among these criteria, one should pay extra attention to the first one.[43] While the above criteria can serve as important factors, other facts and circumstances known are also in play. In other words, the SEC might focus their enforcement actions on particular types of violations in response to investors' expectations or for the sake of the entire securities market, which reflects the fact that the SEC, as an agency charged with the power and responsibility to regulate the securities market, is responsive to public perception as well as political atmosphere.

2. *Initiation and Informal Investigation*

Generally, the SEC's investigations begin with informal or preliminary inquiry by the staff of the Division of Enforcement. These informal investigations are mostly confidential without notifying the targets of

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41. U.S. Securities and Exchange Commission, *How Investigations Work* (2013), http://www.sec.gov/News/Article/Detail/Article/1356125787012#.UfRvr41pn4v (last visited Dec. 25, 2014).

42. U.S. Securities and Exchange Commission, *Division of Enforcement, Enforcement Manual § 2.1.1* (2015) [hereinafter *SEC Enforcement Manual*], http://www.sec.gov/divisions/enforce/enforcementmanual.pdf (last visited Mar. 15, 2016).

43. As SEC Chairman Mary Jo White stated in her testimony in 2013, Enforcement Division of the SEC has continued to file enforcement actions that send a strong message in an increasingly complex and global securities market. Moreover, recent SEC enforcement actions reflect an aggressive and continued pursuit of institutions and individuals whose actions contributed to the financial crisis, a focus on exchanges and market structure issues and continued efforts to combat insider trading by those who abuse positions of trust and confidence for personal gain. Mary Jo White, *Testimony on Oversight of the SEC* (May 16, 2013), http://www.sec.gov/News/Testimony/Detail/Testimony/1365171516050#.UhYDgZJpmy4 (last visited Mar. 15, 2016).

investigation.[44] To initiate an investigation, the first thing to do is to gather information which might help identify possible violations of securities law. The sources of information are multiple. The staff can gather information by reviewing companies' periodic filings and the market surveillance reports which are done by the SEC or the SROs. It can come from investors' complaints or tips from whistleblowers. Moreover, it can come from reading newspaper and other media reports to see if there is any violation of securities law. Additionally, one of the major sources is referral from other regulatory agencies such as PCAOB, FINRA, Stock Exchanges and sometimes Congress.[45]

After receiving the information about violations, the enforcement staff will need to determine if the underlying facts are sufficient enough to constitute "Matter Under Inquiry" (MUI). A MUI serves as a preliminary gate-keeping function to ensure that the Commission's resources are designated to cases worth pursuing. Therefore, the staff needs to consider whether the facts could lead to an enforcement action which will address a violation of securities laws.[46] This stage is also known as an informal investigation or preliminary investigation stage.

The staff will conduct informal interviews and request documents from people they deem relevant to the case. All the investigations done in this stage are private and the information is kept confidential by the staff. For the most part, enforcement staff relies heavily on the target's cooperation during this stage since there is no legal authority such as issuing subpoenas forcing investigation targets to answer the inquiry.[47]

Once the staff has concluded the informal investigation, it has several options to take, such as authorizing an administrative proceeding, seeking injunctive relief in court, referring the case to the Department of Justice for the institution of criminal proceeding, closing the investigation without further actions, or seeking a formal order of investigation from the Commission.[48]

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44. *Id*. (but if companies are contacted for further information by investigation staff, companies frequently disclose this pending investigation in press releases or in corporate filings. This allows the targets of investigations and the general public to become aware of the investigation).

45. *SEC Enforcement Manual* § 2.2.2.

46. *SEC Enforcement Manual* § 2.3.1.

47. *See* JAMES D. COX & ROBERT W. HILLMAN, SECURITIES REGULATION: CASES AND MATERIALS 804 (2009).

48. William R. McLucas, J. Lynn Taylor & Susan A. Mathews, *A Practitioner's Guide to the SEC Investigative and Enforcement Process*, 70 TEMPLE L. REV. 53, 57 (1997).

3. *Formal Investigation*

As an investigation develops, if the case is strong enough to pass the stage of informal investigation without a settlement, the enforcement staff will seek approval to initiate a formal investigation. Currently, a formal order of investigation can be obtained based upon the issuance by the Division's senior officers.[49]

Formal investigations are generally non-public.[50] According to section 21(a) and (b), staff has the power to issue subpoenas to request documents and testimony under oath in a formal investigation. Noticeably, although the SEC has the power to issue subpoenas in a formal investigation, the SEC has to go to a district court to get an order for mandatory compliance if the recipient of a subpoena refuses to comply to a subpoena voluntarily.[51] The staff only needs to prove probable cause to the federal court that the securities laws have been violated in order to enforce the subpoena against targets who are reluctant to cooperate.[52] While issuing subpoenas is a useful way for the enforcement staff to pave its way toward a successful enforcement action, it does come with costs. Since the SEC often issues subpoenas to targets' business partners, customers, auditors or other relevant parties for testimony, it will sometimes harm the reputation or relationships between them.[53] So even though formal investigation processes are mostly nonpublic, it may still have collateral effects on parties involved.

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49. Before 2009, subpoena powers were exercised by a five-member Commission. Due to the agency's failure to detect Bernard Madoff's massive Ponzi scheme, the SEC issued a new rule to delegate subpoena powers (and the power to issue orders to initiate formal investigations) to the Director of the Division of Enforcement for a one year period in 2009 to help the enforcement division move swiftly and efficiently. This rule was made permanent in 2010. 17 C.F.R. § 200.30-4(a)(13) (2010). *See also* U.S. Government Printing Office, *74 FR 40068* (2009), http://www.gpo.gov/fdsys/granule/FR-2009-08-11/E9-19116/content-detail.html (last visited Mar. 15, 2016). Related news release, *see* U.S. Securities and Exchange Commission, *17 CFR Part 200, Release No. 34-60448* (2009), http://www.sec.gov/rules/final/2009/34-60448.pdf (last visited Mar. 15, 2016) ; U.S. Securities and Exchange Commission, *17 CFR Part 200, Release No. 34-62690* (2010), https://www.sec.gov/rules/final/2010/34-62690.pdf (last visited Mar. 15, 2016). For critics, *e.g.*, Sarah N. Lynch, *Sec Official Says Staff May Have too Much Power Over Subpoenas*, REUTERS (U.S.), (Nov 22, 2013 3:35Pm EST) http://www.reuters.com/article/2013/11/22/us-sec-piwowar-subpoenas-idUSBRE9AL12G20131122 (last visited Mar. 15, 2016).

50. 17 C.F.R. § 203.5 (2015).

51. *SEC Enforcement Manual* § 2.3.4.

52. *See* SEC v. Brigadoon Scotch Distributing Co., 480 F.2d 1047 (2d Cir. 1973).

53. John H. Sturc et al., *SEC Investigations and Enforcement Actions*, *in* SECURITIES LITIGATION: A PRACTITIONER'S GUIDE 15-1, 15-11 (Jonathan C. Dickey ed., 2006).

4. *The Wells Process*

Toward the final stage of a formal investigation, if the enforcement staff has gathered sufficient information for the case, the enforcement staff will, under its discretion, issue "Wells Notice" to inform targets of the investigation and possible enforcement action against them. The content of the "Wells Notice" will outline information including the evidence that the staff found, the legal theories behind the violations, and the charges the staff is considering recommending to the Commission. However, in some situations, often when there are concerns about dissipation of assets or destruction of documents by the target, the staff will choose not to give the notice.[54]

After receiving the notice, the targets of the investigation will then be allowed to submit "Wells Submission" to present his/her side of story and persuade the SEC that an enforcement action is not appropriate.[55] The content of the submission will often contain factual and legal arguments explaining why an enforcement action is not appropriate for the case presented.[56] In the submission, target's counsel needs to be aware of the effects that go along with the submission. The contents provided in the submission will often be taken as an admission or impeachment purpose against the target in later actions. Moreover, the submission may serve as a "roadmap" for the Commission in the litigation stage. Sometimes the federal prosecutor will also refer to the Wells Submission in a parallel criminal proceeding.[57] Therefore, counsels must consider carefully what information should be included in that submission.[58] Nevertheless, a Wells Submission still has positive effects for the target. It provides the target opportunities to meet with the staff which then allows the target to give further explanations to the conducts alleged. This will sometimes change staff's recommendation to the Commission. Furthermore, counsel or the target may occasionally persuade the staff to exclude some defendants or reduce the severity of the charges.[59]

After weighing the totality of evidence and nature of the event, the SEC will then decide on whether and what sanctions in which proceedings are appropriate.

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54. McLucas, Taylor & Mathews, *supra* note 48, at 112.

55. *See* Cornell University Law School, Wells Submission, Legal Information Institute, http://www.law.cornell.edu/wex/wells_submission (last visited Mar. 15, 2016).

56. Sturc et al., *supra* note 53.

57. Sturc et al., *supra* note 53, at 15-12.

58. McLucas, Taylor & Mathews, *supra* note 48, at 113.

59. *Id*.

5. *Recommendation and Deciding an Enforcement Action*

Most of the actions taken by the staff need authorization from the Commission, which include instituting enforcement actions, settling with defendants, and other aspects regarding civil litigation. To obtain authorization, an action memorandum, which addresses the factual and legal basis of the recommendation to the Commission, must be submitted.[60] The Director or Deputy Director is usually responsible for authorizing the action memoranda. However, the Associate Director or Regional Director, in some instances, may decide on less significant issues.[61]

When the staff makes a recommendation of instituting an enforcement action, there are three ways for the Commission to grant approval: by closed meetings, by seriatim consideration, or by Duty Officer's consideration.[62] Firstly, a closed meeting is held within the Commission where three or more Commissioners form a quorum and approve the staff's recommendation with a majority vote.[63] The enforcement staff will present the case it recommends to the Commission, and also prepare to answer questions from the Commissioners.[64] Secondly, seriatim consideration is often used when there is a timely need for an enforcement action or when the case does not qualify for the exemptions under the Sunshine Act, and therefore cannot be considered in a closed meeting. The recommendation will be circulated within the Commission for rapid seriatim consideration. However, even if the recommendation received a majority vote from the Commission, it is not authorized until each Commissioner records a vote or abstains from voting.[65] Lastly, the Commission can assign one of its members as the Duty Officer who has the authority to approve recommendations at his or her discretion. Nevertheless, a Duty Officer consideration is not appropriate when the case involves disputed legal issues or when the staff is trying to obtain an approval for settlement. It is often used when the staff is seeking an emergency action or temporary restraining order.[66]

D. *Insider Trading and Its Investigation Methods*

Insider trading is no doubt a focal point of the SEC's enforcement program. The general definition of insider trading refers to the buying and

60. *SEC Enforcement Manual* § 2.5.1.
61. *Id.*
62. *SEC Enforcement Manual* § 2.5.2.
63. The meeting is not open to the public, which is based on the exemptions in the "Government in the Sunshine Act". Pub. L. 94-409, 90 Stat. 1241, enacted Sept. 13, 1976, 5 U.S.C. § 552b (1995).
64. *SEC Enforcement Manual* § 2.5.2.1.
65. *SEC Enforcement Manual* § 2.5.2.2.
66. *SEC Enforcement Manual* § 2.5.2.3.

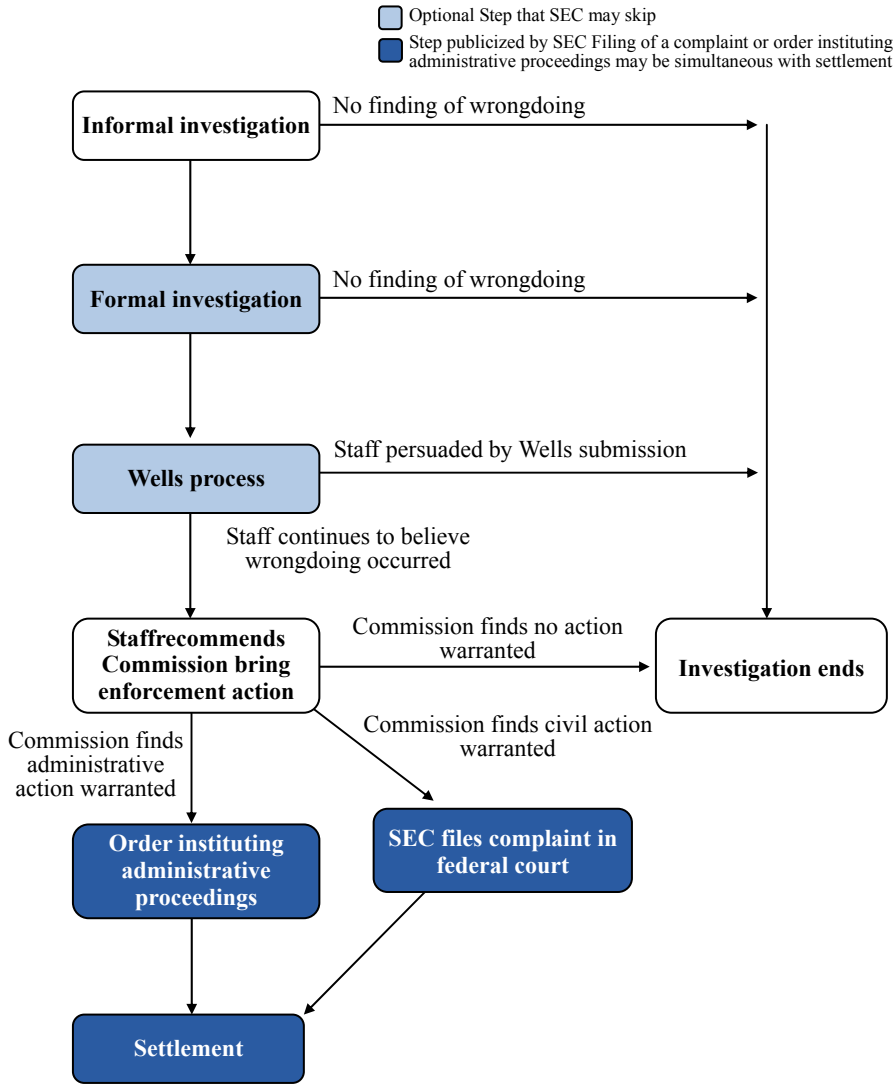

Figure: Steps in an SEC Action
Source: NERA Economic Consulting, SEC Investigation Process, http://www.securitieslitigationtrends.com/investigation-process.asp

selling of securities while in possession of material, non-public information or tipping such information to others. Moreover, it usually involves a breach of fiduciary duty and the relationship of trust and confidence.[67] As a matter of fact, insider trading enforcement actions initiated by the Commission often involves the wrongdoing of companies' top executives or directors who

67. U.S. Securities and Exchange Commission, *Spotlight on Insider Trading* (2012), http://www.sec.gov/spotlight/insidertrading.shtml (last visited Nov. 23, 2012).

are referred to as traditional "insiders". Furthermore, professionals who constantly gain access to confidential information such as accountants, consultants, investment bankers and lawyers are also under the radar of the Commission's enforcement effort. These people are viewed as "outsiders".[68] In addition to the features of the defendants, insider trading cases tend to involve a huge amount of illicit profits being misappropriated and a broad base of harmed investors. All these unique characteristics add to the urgency for the Commission to fight against insider trading.

Since insider trading has continued to be the priority of the SEC's enforcement actions, it is essential to understand how the enforcement staff treats the investigation of insider trading cases. Similar to other types of cases, the information comes from many sources. The most important ones are informants such as market professionals, disgruntled employees, anonymous calls, and sometimes the competitors.[69] Market surveillance done by the SROs also plays a large part in the investigation. SROs refer many suspicious trades to the Commission each year, and provide detailed reports to the Commission to facilitate the investigations.[70] The SEC itself has also devoted significant personnel into monitoring the market trading, which aims at catching unusual trades made by the investors.

According to the insider trading investigation outline set out by the senior attorney of the Division of Enforcement, the objectives of the insider trading investigation are to establish "materiality", "possession", "scienter", and "duty" of the alleged misconduct. Moreover, identifying suspicious trades, insiders and traders are also important. It allows the Commission to determine the scope of the misconduct. Lastly, setting the stage for disgorgement to recover illicit profits from the defendants is also an important objective of the investigation.[71]

Among various investigative techniques, there are several approaches worth noting. First, identifying suspicious trades is considered a challenging process. Although large trades are often seen as suspicious, small trades cannot be ignored since they might also be linked to other suspicious trades. Second, making phone interviews with traders to seek denials and admissions from them is often fruitful, because any false statement obtained from the traders' denial will later on become evidence for perjury charges. Third, there are many channels for the enforcement staff to obtain related documents such as requesting phone records, analyst reports, and

68. CHOI & PRITCHARD, *supra* note 1, at 352.

69. L. Hilton Foster, *Insider Trading Investigations* 3 (Jun. 21, 2015), http://www.sec.gov/about/offices/oia/oia_enforce/foster.pdf (last visited Mar. 15, 2016).

70. *Id*.

71. *Id*. at 4-5.

confidentiality agreements.[72] It is advised that the staff should act appropriately in requesting these documents in order to build a stronger case.

In sum, building an insider trading case is a long process which requires significant efforts from the enforcement staff. The Commission has developed a series of guidelines and manuals helping the staff to utilize the mechanics of investigation, as well as providing the targets/defendants with information on the rights they could exercise. However, along with the turmoil and massive loss brought by the Financial Crisis of 2008, the SEC has suffered much criticism and pressure to reform its practice to prevent financial meltdowns from taking place again. In this regard, the change in the SEC's enforcement has come into the spotlight again. But interestingly, the empirical data collected in the next Part shows a more ambiguous picture than previously thought.

III. INSIDER TRADING ENFORCEMENT FROM 2009 TO 2013

A. *Research Method*

Data collected in this Part is aimed at insider trading enforcement actions the SEC brought from 2009 until 2013. The data collected is primarily based on the content of cases that appeared in annual Select SEC and Market Data Report and the corresponding litigation releases in the SEC's database.[73] Besides the SEC's database, we also use LexisNexis, Westlaw and JUSTIA Dockets & Filings to search case details. By tracking every insider trading enforcement action and their litigation result, this Part attempts to describe the SEC's actual practice and attitude in enforcing inside trading cases. By this means, a more complete picture, as well as a useful comparison, can be learned.[74]

B. *Overview*

From 2009 to 2013, the SEC initiated a steady while increasing number of insider trading enforcement actions. It grew from 37 cases in 2009, 53 cases in 2010, 57 cases in 2011, to 58 cases in 2012, but was down to 44 cases in 2013. Total defendants in 2009 were 85, the number increased to

72. For more detail, *see id*. at 7-14.

73. U.S. Securities and Exchange Commission, *Litigation Releases*, http://www.sec.gov/litigation/litreleases.shtml (last visited Mar. 3, 2016). Fiscal year is used in SEC material and this survey.

74. Not all cases provide every piece of information that we need, as the nature of the aforementioned databases shows. For example, courts often set a different (and later) date for determining disgorgement amount and civil penalties than judgment date. Therefore, settlement amount and civil penalties are not available in every case from the statistics.

138 in 2010, then slightly decreased to 126 in 2011 and 131 in 2012, and decreased to 95 in 2013.[75] See the numbers shown in Table 1.

Table 1: Insider Trading Enforcement Actions Initiated by the SEC—2009 to 2013

	2009	2010	2011	2012	2013
Civil Action	31	34	48	52	43
Administrative Proceeding	6	19	9	6	1
Total Cases	37	53	57	58	44
Total Defendants*	78(85)	119(138)	106(126)	120(131)	83(95)

Source: U.S. Securities and Exchange Commission, Select SEC and Market Data Fiscal 2009 to 2013.

(*This calculated number excludes relief defendants. Number in parenthesis indicates the number of defendants released by SEC which includes relief defendants)

The numbers provide additional perspective if they are categorized into the content of action brought by the SEC. Insider trading cases are consistently 6 to 8 percent of all securities law violation cases. Compared to its high publicity, insider trading enforcement actually plays a less significant role in its numbers.

Table 2: Classification and Numbers of All SEC Enforcement Actions—2009 to 2013

	2009		2010		2011		2012		2013	
	Civil	Adm	Civil	Adm	Civil	Adm	Civil	Adm	Civil	Adm
Securities Offering	106	35	72	72	82	41	73	16	76	27
Issuer Reporting & Disclosure	68	75	58	68	32	57	39	40	31	37
Investment Advisors/Companies	29	47	33	80	33	113	35	112	21	119
Delinquent Filings	0	92	0	106	0	121	0	127	0	132

75. U.S. Securities and Exchange Commission, *Select SEC and Market Data Fiscal 2009* (2009), http://www.sec.gov/about/secstats2009.pdf (last visited Mar. 15, 2016); U.S. Securities and Exchange Commission, *Select SEC and Market Data Fiscal 2010* (2010), http://www.sec.gov/about/secstats2010.pdf (last visited Mar. 15, 2016); U.S. Securities and Exchange Commission, *Select SEC and Market Data Fiscal 2011* (2011), http://www.sec.gov/about/secstats2011.pdf (last visited Mar. 15, 2016); U.S. Securities and Exchange Commission, *Select SEC and Market Data Fiscal 2012* (2012), http://www.sec.gov/about/secstats2012.pdf (last visited Mar. 15, 2016); U.S. Securities and Exchange Commission, *Select SEC and Market Data Fiscal 2013* (2013), http://www.sec.gov/about/secstats2013.pdf (last visited Mar. 15, 2016).

	2009		2010		2011		2012		2013	
	Civil	Adm	Civil	Adm	Civil	Adm	Civil	Adm	Civil	Adm
Broker Dealer	26	83	6	64	7	106	7	127	7	114
Insider Trading	31	6	34	19	48	9	52	6	43	1
Market Manipulation	34	5	24	10	27	8	35	11	23	27
Other	18	9	25	10	37	14	31	23	6	12

Source: U.S. Securities and Exchange Commission, Select SEC and Market Data Fiscal 2009 to 2013.

Table 2-1: Classification and Numbers of All SEC Enforcement Actions (Percentage, civil and administrative cases combined)—2009 to 2013

	2009	2010	2011	2012	2013
Securities Offering	21%	21%	17%	12%	15%
Issuer Reporting & Disclosure	22%	18%	12%	11%	10%
Investment Advisors/Companies	11%	16%	20%	20%	21%
Delinquent Filings	14%	16%	17%	17%	20%
Broker Dealer	16%	10%	15%	18%	18%
Insider Trading	6%	8%	8%	8%	6%
Market Manipulation	6%	5%	5%	6%	7%
Other	4%	5%	7%	7%	3%

Source: U.S. Securities and Exchange Commission, Select SEC and Market Data Fiscal 2009 to 2013.

C. *Defendant's Background and Types of Information*

Insider trading, as its name indicates, includes illegal trading by corporate insiders such as directors, managers, officers, and employees. Modern insider trading law expanded the scope of the potential violators to outsider traders who receive inside information from the corporate insiders.[76] In analyzing SEC enforcement targets in insider trading cases, this research examines the backgrounds of the defendants to see what kind of people are more frequently involved in the insider trading enforcement actions.

The defendants in this survey are categorized into eight different types.

76. CHOI & PRITCHARD, *supra* note 1, at 384. In United States v. O'Hagan 117 S. Ct. 2199 (1997), the Supreme Court validated the misappropriation theory which addressed the liability of traders who breach the fiduciary duty to or "misappropriate" from the source of the information. CHOI & PRITCHARD, *supra* note 1, at 384-86.

"Corporate Insider" represents traditional corporate insiders, such as directors, officers/managers, employees and major shareholders of the company. "Corporate Insider (Friends & Family)" represents friends or family members who either are tipped by the corporate insiders or trade based on the information learned from the corporate insiders. "Quasi-insider" includes attorneys, accountants, public relation advisors and those who gain access to the inside information occasionally with the permission of the company. Quasi-insiders are sometimes referred to as "temporary insiders". "Quasi-insider (Friends & Family)" represents friends or family members who either are tipped by quasi-insiders or trade based on the information learned from the quasi-insiders. "Financial Professional" represents members of the securities or investment industry, such as brokers or dealers, investment bankers, portfolio managers, and analysts. "Financial Professional (Friends & Family)" represents friends or family members who either are tipped by the financial professionals or trade based on the information learned from the financial professionals. "Company" represents the companies which trades on its own securities and are listed as defendants. "Others" represents defendants who do not belong to any of the seven categories mentioned above. It includes entities that trade in other companies' shares, persons or entities that SEC could not identify where or how they obtained their insider information, and foreign persons or entities that cannot be identified by the SEC.

Table 3: Types of Defendant—2009 to 2013

	2009	2010	2011	2012	2013
Corporate Insider	17	27	29	29	26
Corporate Insider (Friends & Family)	8	39	30	39	16
Quasi-insider	10	10	14	15	4
Quasi-insider (Friends & Family)	4	14	10	3	1
Financial Professional	14	18	12	10	18
Financial Professional (Friends & Family)	22	5	3	14	13
Company	0	0	1	0	0
Others	3	6	7	10	5
Total Defendants	78	119	106	120	83
Percentage of Friends & Family to total number of defendants	43.6%	48.7%	40.57%	46.28%	36.14%

Source: U.S. Securities and Exchange Commission, Litigation Releases. Calculated and cross-checked with LexisNexis by authors on a case-by-case basis.

One can observe from the table above that corporate insiders are still the main source of violations, or at least are the main targets of investigation in the SEC actions. Financial professionals also play an important role in trading with illegal inside information. Two of the most important recent cases include SEC v. Galleon Management, LP, et al. (2010) and SEC v. Mark Anthony Longoria et al. (2011) (the former involved twenty-one defendants in civil proceedings and eleven defendants in parallel criminal proceedings, and the latter involved eleven in civil and eight in criminal proceedings). Also, tipping close friends or family members is common across all categories of defendants as the percentage of the friends & family member of total defendants accounted for around 35% to 50%.

We then examine the types of information being used or misappropriated. This survey reveals the types of information that are often linked to insider trading. As expected, the category of mergers and related events constitutes an overwhelming majority of the federal insider trading law violation investigations. However, it may simply reflect the limits of the tactics of investigation employed by the SEC, or its preference, and may not necessarily be the whole picture of the world of insider trading activities.

Table 4: Types of Information Used—2009 to 2013

	2009	2010	2011	2012	2013
M&A and Other Major Transactions	27	30	45	45	31
Earnings & Financial Reports	3	11	8	9	12
Capital Related (e.g., Large New Stock Issuance)	3	0	2	2	4
Major Events Regarding Business Operation	4	8	5	3	6
Other	2	6	1	1	0

Source: U.S. Securities and Exchange Commission, Litigation Releases. Calculated and cross-checked with LexisNexis by authors on a case-by-case basis.

D. *Settlements and Illicit Gain*

The handlings and their results are the core concern of any legal action. As discussed earlier, literatures and observations repeatedly emphasize that most of the SEC's enforcement action end up with settlement. In analyzing it, we first summarize the results of action in the following table and confirm that observation with calculated numbers.

Table 5: Results of Action—2009 to 2013

Case Result	2009	2010	2011	2012	2013	total
Settled	30	42	38	38	28	176
Court Decided without Settlement	4	4	9	10	10	37
Only Part of Defendants Settled	2	6	5	6	3	22
Data Not Available	1	1	5	4	3	14
Settled Cases to All Cases with Relevant Information[77]	83%	81%	73%	70%	68%	75%

Source: U.S. Securities and Exchange Commission, Litigation Releases. Calculated and cross-checked with LexisNexis by authors on a case-by-case basis.

Table 6: Number of Settled Defendants & Settlement Rates (2009 to 2013)

	2009	2010	2011	2012	2013	total
Total Number of Defendants[78]	78	119	106	120	83	506
Number of Settled Defendants	57	97	80	76	43	353
Settlement Ratio	73%	81%	75%	63%	52%	70%

Source: U.S. Securities and Exchange Commission, Litigation Releases. Calculated and cross-checked with LexisNexis by authors on a case-by-case basis.

Illicit gain is another focal point to understand the whole picture of U.S. insider trading law enforcement. From the table below, cases with illegal gain of more than one million range from 9% to 30 % in our survey period. Put differently, large-scale insider trading is sporadic. But noticeably, it is still unclear if this result comes from successful enforcement or lax enforcement which cannot detect large-scale violation effectively. But large numbers of small violations can logically be linked to a higher settlement rate.

Table 7: Illicit Gain—2009 to 2013 (Unit: Case. Gain is calculated by adding up all defendants' gain in each case)

	2009	2010	2011	2012	2013
Cases with Relevant Info	26	30	45	43	26
Less or Equal to $100,000	9	10	17	24	10
$100,001~$1,000,000	12	11	18	15	12
Over $1,000,000	5	9	10	4	4
Over $1,000,000 Cases to All (%)	19%	30%	22%	9%	15%

Source: U.S. Securities and Exchange Commission, Litigation Releases. Calculated and cross-checked with LexisNexis by authors on a case-by-case basis.

77. We calculate partial settlement as zero in this column.
78. Relief defendants are excluded here.

Table 7-1: Relationship between Illicit Gain and Settlement—2009 to 2013

	2009	2010	2011	2012	2013
Less or Equal to $100,000	(9/9)* 100%	(9/10) 90%	(15/17) 88.2%	(22.5/24) 93.8%	(10/10) 100%
$100,001~$1,000,000	(11/12) 91.7%	(10/11) 90.9%	(13.5/18) 75%	(11.5/15) 76.7%	(12/12) 100%
Over $1,000,000	3/5 60%	(7/9) 77.8%	(6/10) 60%	(1.5/4) 37.5%	(4/4) 100%

Source: U.S. Securities and Exchange Commission, Litigation Releases. Calculated and cross-checked with LexisNexis by authors on a case-by-case basis.
(*number of settled cases/number of cases. 0.5 means partially settled.)

E. *Civil Penalty, Other Sanctions and Settlement Amount*

Civil proceedings triggered by the SEC often lead to multiple sanctions, including monetary and non-monetary penalties. We first compile the civil penalties applied in cases that we collected from the data.

Table 8: Civil Penalty Assessed—2009 to 2013 (Unit: Case. All penalties from multiple defendants in a case are added up together)

	2009	2010	2011	2012	2013
Cases with Information	22	22	22	34	25
Civil Penalty Less or Equal to $100,000	12	15	14	23	9
Civil Penalty of $100,001~$1,000,000	9	5	5	8	10
Civil Penalty Over $1,000,000	1	2	3	3	6

Source: U.S. Securities and Exchange Commission, Litigation Releases. Calculated and cross-checked with LexisNexis by authors on a case-by-case basis.

We then compare the civil penalty to illicit gain to see the relationship. We use each defendant as the unit to see the relationship between civil penalties to illicit gain in insider trading. Noticeably, the civil penalty received is usually equal to or less than the illicit gain, in addition to the disgorged gain. Two reasons may be inferred from the results: first is likely to be the gravity of the cases that SEC actually investigated is relatively low (see table 7); second, in a settlement, the SEC usually cannot seek the highest legal penalty it can impose, which is three-times the illicit gain, as the SEC has to concede to incentivizeing defendants to reach a settlement.

Table 9: Relationship between Civil Penalties and Illicit Profits—2009 to 2013 (Calculated by defendant)

Civil Penalties/Illicit Profits	2009	2010	2011	2012	2013
Less than one time	6	13	11	20	2
Equal to one time	21	12	17	31	17
Between one time and two times	1	1	5	4	5
Greater than two times	4	6	1	5	2

Source: U.S. Securities and Exchange Commission, Litigation Releases. Calculated and cross-checked with LexisNexis by authors on a case-by-case basis.

Besides monetary remedies, there are other types of remedies that the SEC can seek to meet its regulatory goal. Among them are permanent injunctions, director/manager bars, cease-and-desist orders, temporary orders and professional disciplines. The first two are available in civil actions which take place in the federal courts. The latter three are available in administrative proceedings supervised by an administrative law judge. This research identifies the use of those remedies in each year.

According to our survey, remedies apart from monetary penalties play a more important role than was previously perceived, especially the use of permanent injunctions. This echoes the defendants' occupational status, the access to material information, and the misuse of information for the purpose of illegal trading. In other words, when only focusing on the monetary penalty, it neglects the fact that many insider trading is committed as a result of defendants' access to privileged information. Therefore, the professional position which provides the defendants access to information must be further regulated and restricted. For example, the effect on reputation triggered by an injunction is one consequence contemplated by the SEC.[79] Furthermore, the SEC seems to adapt the penalties to the harm caused or potential threat posed during the calculation of sanctions.

Table 10: Non-Monetary Remedies—2009 to 2013

Remedy Types/Number of Issuance	2009	2010	2011	2012	2013
Permanent Injunction	55	83	77	76	39
Director/Manager Bar	3	6	6	15	8
Cease-and-Desist Order	0	3	0	1	1
Professional Discipline	14	31	17	16	10
Temporary Order	0	7	3	3	15

Source: U.S. Securities and Exchange Commission, Litigation Releases. Calculated and cross-checked with LexisNexis by authors on a case-by-case basis.

79. CHOI & PRITCHARD, *supra* note 1, at 220.

In addition, we document the amount of settlement in cases, which include disgorgement (illicit gain plus interest) and civil penalty, and summarize these in the following table. These numbers, in light of the illicit gain (Table 7 and 7-1) and other civil penalty imposed (Table 8 and 9), together indicate a trend that the SEC focuses more frequently on the mid-range settlements.

Table 11: Settlement Amount—2009 to 2013

	2009	2010	2011	2012	2013
Cases with Relevant Info	22	26	31	36	26
Less or Equal to $100,000	6	5	9	12	3
$100,001~$1,000,000	12	13	15	18	13
Over $1,000,000	4	8	7	6	10

Source: U.S. Securities and Exchange Commission, Litigation Releases. Calculated and cross-checked with LexisNexis by authors on a case-by-case basis.

F. *Parallel Criminal Charges*

As mentioned, the SEC has continued to refer willful violations of the securities laws to the Department of Justice for criminal prosecution when a violation is substantial. It is thus useful to look at the number of parallel criminal actions of the insider trading cases. Our survey shows the cases that actually go to criminal proceeding are less than what is earlier assumed. The higher standard of proof in criminal proceeding and the nature of secrecy in insider trading activities may explain part of the phenomenon.

Table 12: Parallel Criminal Actions—2009 to 2013

	2009	2010	2011	2012	2013
Total Civil Cases	37	53	57	58	44
Civil Cases involving Parallel Criminal Action	8	17	22	14	17
Percentage	21.6%	32%	38.6%	24.1%	38.6%
Number of Defendants Involved in Parallel Criminal Actions	24	38	47	22	37
Total Number of Defendants in SEC Actions*	78	119	106	120	83
Percentage	30.7%	31.9%	44.3%	18.3%	44.6%

Source: U.S. Securities and Exchange Commission, Litigation Releases. Calculated and cross-checked with LexisNexis by authors on a case-by-case basis.
(*This calculated number excludes relief defendants)

In addition, the below table sets forth the relationship between illicit gain and number of criminal cases. As seen, the amount of gain may not be the only determining factor of whether to bring a criminal action or not.

Table 12-1: Relationship between Criminal Cases and Amount of Illicit Gain

Illicit Gain	Number of Criminal Cases
Less or equal to $100,000	7
$100,001~$1,000,000	18
Over $1,000,000	12

Source: U.S. Securities and Exchange Commission, Litigation Releases. Calculated and cross-checked with LexisNexis by authors on a case-by-case basis.

G. *Duration*

In this section, the dates of violation, the SEC filing date, and the closing date of cases are examined. By looking at this set of information, the length of time for the enforcement staff to investigate or resolve an insider trading case can be observed, which allows us to make an inference on the SEC's efficiency.

Table 13: Time Span from Behavior Date until SEC Filing Charges—2011 to 2013

	Number of Defendants		
Time Span from Behavior Date until SEC Filing Charges/Cases Filed in That Year	2011	2012	2013
0 to 12 months	11	16	6
12 to 36 months	41	37	26
36 to 60 months	36	52	33
Over 60 months	9	8	16

Source: U.S. Securities and Exchange Commission, Litigation Releases. Calculated and cross-checked with LexisNexis by authors on a case-by-case basis.

Table 14: Time Span from SEC Filing Charges until Settlement or Final Judgment Date —2011 to 2013

	Number of Defendants		
Time Span from Charges Filing Until Settlement or Judgment/Year	2011	2012	2013
0 to 3 months	22	58	28
3 to 12 months	34	3	17
Over 12 months	18	16	15

Source: U.S. Securities and Exchange Commission, Litigation Releases. Calculated and cross-checked with LexisNexis by authors on a case-by-case basis.

Table 15: Average Time Span—2011 to 2013

	2011	2012	2013
Time	Months		
Average Time Span From Behavior Starts Until SEC File Charges	34.8	35.2	41.23
Average Time Span From SEC File Charges Until Settlement or Final Judgment Date	8.0	4.49	6.83

Source: U.S. Securities and Exchange Commission, Litigation Releases. Calculated and cross-checked with LexisNexis by authors on a case-by-case basis.

H. *Additional Database Results*

To help compare our result with other surveys, we add enforcement actions data compiled by the SEC before the FY2009 below to improve understanding of the results.

Table 16: Insider Trading Enforcement Actions by SEC—2005 to 2008

	FY2005	FY2006	FY2007	FY2008
Insider Trading Enforcement Actions	50	46	47	61
Total SEC enforcement Actions	630	574	656	671
% of total action	8%	8%	7%	9%

Source: Selected SEC and Market Data (2005~2008).[80]

In addition, we put NERA long-term data below for reference. NERA, a private economic consulting company focusing on applying quantitative data for legal and business analysis, regularly follows SEC settlement trends and class actions and publishes their results for clients and the public. According to NERA's "SEC Settlement Trends: 2H12 Update", we can find insider trading case settlement statistics in the last decade. The difference between NERA and our survey is also listed below.

80. U.S. Securities and Exchange Commission, *Select SEC and Market Data Fiscal 2005* (2005), http://www.sec.gov/about/secstats2005.pdf (last visited Mar. 15, 2016); U.S. Securities and Exchange Commission, *Select SEC and Market Data Fiscal 2006* (2006), http://www.sec.gov/about/secstats2006.pdf (last visited Mar. 15, 2016); U.S. Securities and Exchange Commission, *Select SEC and Market Data Fiscal 2007* (2007), http://www.sec.gov/about/secstats2007.pdf (last visited Mar. 15, 2016); U.S. Securities and Exchange Commission, *Select SEC and Market Data Fiscal 2008* (2008), http://www.sec.gov/about/secstats2008.pdf (last visited Mar. 15, 2016).

Table 17: SEC's Settlement in Insider Trading—Number of Settlements for Individuals Reached, compiled by NERA Economic Consulting

Fiscal Year	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Individual	99	68	93	72	60	74	56	69	63	118
Companies	5	2	3	6	7	2	10	4	5	8
Total	104	70	96	78	67	76	66	73	68	126

Source: NERA Economic Consulting, SEC Settlement Trends: 2H12 Update.[81]

Table 18: Comparison of Settlement Surveys: NERA and Our Survey—2009 to 2012

Number of Settled Defendants	2009	2010	2011	2012	total
NERA's	66	73	68	126	333
Our Survey	57	97	80	76	310

Source: NERA Economic Consulting, SEC Settlement Trends: 2H12 Update.

Basically, two survey results apply the same method (collecting data from the SEC's litigation release). Still, we record the year of settlement in the year when the case was filed. However, the settlement date may come later in the next year. The other survey records the year when it is settled, not filed. This explains the difference between two surveys when period-to-period comparisons are conducted.

IV. OBSERVATIONS AND ISSUES

A. *General Observations*

Several key facts can be drawn from the data and survey conducted above.

1. The numbers of cases in insider trading law enforcement are basically steady in the surveyed years despite the financial crisis of 2008.

2. The total numbers of cases, however, are low, ranging from 37 to 58 each year. That is a comparatively small portion of the overall SEC law enforcement, with the highest rate being 8%.

3. Traditional corporate insiders are the main target of investigation and prosecution. Likewise, M&A and other major transactions are to be

81. NERA Economic Consulting, *SEC Settlement Trends: 2H12 Update 8* (2012), http://www.nera.com/content/dam/nera/publications/archive2/PUB_SEC_Trends_Update_2H12_0113_final.pdf (last visited Mar. 15, 2016).

monitored more closely.

4. Over 2/3 of insider trading cases are settled. In some years, settlement rate can be up to 83%.

5. Illicit gains and civil penalties are similarly modest. The percentage of cases in which illicit gain exceeds 1 million ranges from 8% to 30% in the surveyed years. The cases with penalties over $1 million range from 1 in 2009 as the lowest to 6 in 2013 as the highest.

6. Criminal cases are rare, especially compared to the market size or the total number of trading activities. In 2009 there were 8 criminal cases (the lowest) and in 2011 there were 22 criminal cases (the highest).

In sum, these numbers shown are low considering the intense attention from both the general public (including media exposure) and academic debates surrounding insider trading law. However, the exact meaning of these numbers is still subject to further discussion, which will be provided below.

B. *Procedure and Settlement-Centric System*

Clearly, civil/administrative procedure has several major advantages for the SEC. First, the procedural rules are less strict and the litigation cost is lower. Second, the burden of proof is lighter as the preponderance of evidence is applied, as opposed to proving beyond a reasonable doubt in criminal procedures. Third, when the SEC conducts an investigation, relevant persons might tend to cooperate or provide needed information when realizing the SEC's extensive power in industries and subsequent market reactions if they do not cooperate. These advantages in civil or administrative procedure eventually lead to SEC's higher percentage of success, and also explain why a civil/administrative procedure is preferred in the United States in combating securities law violation.[82]

To maximize the benefit of a civil/administrative procedure, the SEC often couples it with extensive use of settlements.[83] Settlement often appears in the form of a consent order in an administrative proceeding (under section

82. S. Klawans, *Proceedings of the 2007 Midwest Securities Law Institute Symposium*, 8 J. BUS. & SEC. L. 59, 98, In E. Spoon Chair, Symposium conducted at the meeting of Midwest Securities Law Institute (2007) (one SEC officer in a conference discussion cited the success rate of the SEC in administrative proceeding ranged between 72% and 92% from 2003 to 2007. Comment from an SEC branch officer).

83. CHOI & PRITCHARD, *supra* note 1, at 196 (scholars observe "most investigations are concluded by a settlement after the (SEC) staff's informal investigation."); *see also*, COX & HILLMAN, *supra* note 47, at 806 (Most SEC enforcement proceedings (over 90 percent) are settled, not litigated). Similar observation can be found in scholarly work in the 1980s and 1990s. *See* Committee on Federal Regulation of Securities, *Report of the Task Force on SEC Settlements*, 47 BUS. L. 1083, 1104 (1992) ("As is the case with judicial proceedings, the majority of administrative proceedings traditionally are settled prior to any evidential hearing or other adjudication of any matter of fact or issue of law").

21C or 15(c)(4) of Securities Exchange Act) or a consent decree in the district court by which the Commission approves. In general, target of investigation settles his/her case to avoid the cost of litigation and seek a less severe penalty when evidence presented constitutes a solid preponderance.

1. *Why Settle a Case?*

For the SEC, a negotiated settlement provides a needed incentive for targets of investigation to cooperate, and cooperation from targets eventually reduces the burden of investigation and contributes to better efficiency in investigation.[84] The extensive use of settlement in fact allows the SEC to handle more cases, as there is less need to go to court or go through the final stage of proceedings.[85] For respondents, settlement is also beneficial as the penalty tends to be lighter as well as allowing respondents the opportunity to prepare for and take part in the decision. Based on the factors listed, settlements are reached more often than many of the other regulatory fields.

Commentator lists four costs that targets want to avoid by settling their case: (1) the continuing harm to their reputation; (2) the enormous litigation cost against federal government; (3) a referral to the Department of Justice for possible criminal prosecution, and (4) the ruinous potential from private liability that could come from the collateral estoppels effect of an adverse judgment.[86] Similar observations can also be found in other literature.[87]

2. *Criteria in Striking a Settlement from the SEC Side*

As the Enforcement Manual indicates, the SEC lists four evaluations in striking a settlement:[88]

(1) The assistance provided by the cooperating individual in the Commission's investigation or related enforcement actions;

(2) The importance of the underlying matter in which the individual cooperated;

(3) The societal interest in ensuring that the cooperating individual is held accountable for his or her misconduct; and

(4) The appropriateness of cooperation credit based upon the profile of

84. *SEC Enforcement Manual* § 6.

85. *E.g.*, *supra* note 82 (according to an earlier report, averages around 600 or 700 actions were brought by the SEC annually in the years previous to 2007. A caseload of such magnitude requires speedier handling which presses more settlements from the SEC's side).

86. CHOI & PRITCHARD, *supra* note 1, at 191. Similar observation, *see* COX & HILLMAN, *supra* note 47, at 807.

87. *See e.g.*, Committee on Federal Regulation of Securities, *supra* note 83, at 1091-94; William R. McLucas, John H. Walsh & Lisa L. Fountain, *Settlement of Insider Trading Cases with the SEC*, 48 BUS. L. 79, 94-105 (1992) (listing SEC's consideration factors when negotiating a settlement).

88. 17 C.F.R. § 202.12 (2010); *see also SEC Enforcement Manual* § 6.1.1.

the cooperating individual.

For the SEC, most importantly, the decision to settle with the targets of investigation is based on the premise that the settlement already represents a sufficient punishment for the harm that the violation caused, and also constitutes enough deterrence for potential future violation, in light of the gravity of violations and the cost to the SEC if the legal proceeding continues. In the meantime, the SEC still litigates the cases it deems necessary to vindicate important legal principles.[89]

3. *Problems with Settlements*

Despite listed benefits, settlement in insider trading cases still faces strong criticism. The first criticism concerns the very idea of leaving the violation less than fully accountable. Settlement by its nature creates a tension between punishing violations to its full extent and providing incentive to allow cooperation.[90] This criticism considers that a wider use of settlement conceptually blurs the line between the means and end.

Second, the actual determination of a settlement—the trade-off between assistance and reduced penalty—may be distorted and hard to assess. Likewise, it is hard to know if settlements systematically go too lightly or conversely impose severe penalty in hard-to-win cases. In the worst-case scenario, this distortion can go both ways in the same case. The assessment problem becomes even more obvious when a judicial review of a settlement is absent or carried out without a full disclosure of relevant facts and evidences. But ironically, a too-detailed fact-finding and judicial review works against cost reduction—the exact motivation to have a settlement in the first place.

Last, the different bargaining power of each respondent complicates the settlement result. By the method that settlements operate, the more powerful or rich targets are, the more inclined they are to obtain a carefully calculated settlement, which generally means lighter sanctions. This result works right against the starting point to punish white-collar crime, which should be class-sensitive.[91]

89. Committee on Federal Regulation of Securities, *supra* note 83, at 1093.

90. 17 C.F.R. § 202.12 (2010); *see also SEC Enforcement Manual* § 6.1.1.

91. In addition, there are criticisms arguing that the SEC's settlements may imply too many concerns from the SEC's own perspective and there might be a potential conflict of its own interest within. *See e.g.*, Danne L. Johnson, *SEC Settlement: Agency Self-interest or Public Interest*, 12 FORDHAM J. CORP. & FIN. L. 627 (2007) (arguing the inherent self-interest problem in the SEC's settlement and advocating to re-focus on the public interest aspect in the SEC's decision).

4. *Caseload, Baseline, and Caveats*

A long-term factual comparison provides some help in analyzing arguments for and against the settlement practice. In a 1992 report on the SEC's settlement practice by a task force (appointed by the Subcommittee on Civil Litigation and SEC Enforcement Matters of the Federal Regulation of Securities Committee of the American Bar Association's Section of Business Law), several useful background understandings are revealed. In the 1990 fiscal year, the SEC received about 52,000 investor complaints and inquiries, a 290% increase over FY 1982.[92] 1,218 Matters Under Inquiry ("MUIs") were opened, which is approximately 30% more than the number in FY 1987.[93] Further, the SEC opened 362 new investigations in FY 1990, bringing the total number of pending SEC investigations to 1,152,[94] and the average life of an investigation was two years and four months, representing an increase by nearly 17% from 1987.[95]

It can be reasonably inferred that the number of complaints and MUIs grow substantially as the market evolves. Data in 2009 and 2010 below shows a similar trend.

Table 19: Investigations Open and Closed—2009 to 2010

	2009	2010
Pending investigations at the end of last fiscal year	4,088	4,317*
Newly opened investigations	944	952
Total	5,032	5,269
Investigation closed	716	975
Pending investigations at the end of current fiscal year	4,316	4,294
Formal orders of investigation issued	496	531

Source: Select SEC and Market Data 2009~2010.
(*The number of investigations pending at the beginning of the fiscal year may change from previously reported numbers due to investigations being reopened or delays in entering closed investigations in the case management system.)

92. Committee on Federal Regulation of Securities, *supra* note 83, at 1095.
93. *Id.*
94. *Id.*
95. *Id.*

Table 20: Investigations Open and Closed—2011 to 2013

	2011	2012	2013
Investigation opened[96]	933	806	908
Investigation closed	628	1,263	1187
On-going investigation at the end of fiscal year	1,665	1,475	1,444
Formal orders of investigation issued	578	479	574

Source: Select SEC and Market Data 2011~2013.

The substantial caseload lead to two observations, which can similarly be applied to the choice of civil or criminal procedures itself. First, discretion by the SEC and the differential treatments of cases are needed or hard to avoid. It is so especially when the trend of increasing caseloads continues, as the agency needs to enhance its ability to deal with cases more efficiently. Second, the answer of the fundamental issue of whether settlements can be used and trusted lies on the quality of the SEC's decision. The use of settlement can be beneficial if, and only if, the SEC constantly decides cases wisely. In this sense, the desirability and merit of extensive use of settlement is more of a function of factual variables, including the quality and effectiveness of the securities agency's investigation and assessment, and the caseloads it has to deal with. In short, it is not a right-or-wrong answer which can be simply deducted from the theory.[97]

However, two caveats remain. First, how much of the growth of MUIs can be attributed to insider trading cases is still yet to be determined as categorized data is not available. Second, the victimless feature of insider trading activities, compared to other securities law violations, is likely to make the number appearing on the SEC's MUI/enforcement breakdown lower if compared to what actually take place. This fact makes reading the enforcement number inherently biased. Therefore, the assessment of effectiveness is thus hardly complete.

96. U.S. Securities and Exchange Commission, *Select SEC and Market Data 2013*, 19, n.1 (2015), https://www.sec.gov/about/secstats2013.pdf ("Investigation opened" refers to matters at the investigative stage, and excludes those that are open solely due to litigation, collections, distributions, and other post-litigation activity. It also excludes investigations in the closing process. Prior to FY 2011, reports included aggregate count of open investigations at all stages. Since the total now refers only to ongoing investigations, it is significantly less than pre-FY 2011 totals of investigations at all stages, and is not an indication of a decrease in investigative activity) (last visited Mar. 15, 2016).

97. Therefore, from a comparative perspective, whether a country is suitable for a more extensive use of settlement for securities law violations in fact depends on the quality of the securities agency. In particular, professionalism and independence is essential in managing a trustworthy settlement mechanism.

C. *Parallel Criminal Investigation and Problems with Dual Procedures*

1. *Criminal Punishment in Securities Law*

As noted, criminal sanction is available for violating the insider trading law.[98] In reality, criminal sanction plays an essential role in securities law in deterring hard-core fraudsters.[99] But in terms of preventing securities fraud and insider trading, whether or to what extent the division of labor between civil and criminal proceeding is justified, or desirable, is still an issue of debate among academics. Interestingly, opposed to the criticism arguing against settlement due to the reduced penalty, many criminal law scholars question the very use of criminal law in white-collar crime and its effects.[100] The polarization of opinions distinctly points to the theoretic difficulty this issue faces.

Leaving the desirability aside, criminal procedure does imply a higher risk to defendants by imposing prison term, which in theory serves a deterrence purpose.

2. *Problems in Parallel Criminal Proceedings*

Beyond the theoretical debate, the fact that agencies (SEC and DOJ) coordinate their investigations, share investigation products, and use civil and paralleling criminal prosecution also creates its own issues to be addressed.

First is whether piling proceedings constitute double jeopardy. In theory, when civil penalty crosses a certain level and becomes punitive in nature, it could constitute punishment that falls within the meaning of the Double Jeopardy Clause of the Constitution.[101] However, in an important case *Hudson v. United States*,[102] the Supreme Court visited this issue and ruled

98. *See supra* part II.B.3.

99. CHOI & PRITCHARD, *supra* note 1, at 230.

100. Reasons are cited to explain why criminal law is used to punish white-collar crime. *See generally*, Geraldine Szott Moohr, *The Balance among Corporate Criminal Liability, Private Civil Suits, and Regulatory Enforcement*, 46 AM. CRIM. L. REV. 1459, 1459-79 (2009); Ellen S. Podgor, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541, 541-43 (2005); Darryl K. Brown, *The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement*, 1 OHIO ST. J. CRIM. L. 521, 544 (2004) (noting the actual use of criminal law against corporations by the DOJ is cautious and restrained, and suggesting the punitive approach is linked to populist sentiments from elected officials); JAMES WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 43-49 (2003) (suggesting that the tendency to punish white-collar offenders harshly is a method of lowering their status).

101. In the context of Civil False Claim Act, an important Supreme Court decision United States v. Halper found that when a civil penalty is so unrelated to the remedial goals of the statute that it constitutes punishment within the meaning of the Double Jeopardy Clause of the Constitution. United States v. Halper, 490 U.S. 435 (1989).

102. Hudson v. United States, 522 U.S. 93 (1997).

that when Congress clearly designates the sanctions of a money penalty in statutes as "civil," the sanctions are not punitive and thus no double jeopardy applied to bar criminal prosecution.[103] Following the same reasoning, in a more recent case *United States v. Van Waeyenberghe*,[104] which directly involved the SEC's civil action and later criminal charges, Seventh Circuit clearly affirmed criminal conviction by the lower court and rejected the double jeopardy defense. In short, without clearest proof suggesting that the sanctions were so punitive in form and effect as to render them criminal, Congress' intent and designation should be followed.[105] That is to say, in dealing with securities law violations, SEC civil proceedings and DOJ's criminal proceedings are different in legal nature and thus no double jeopardy is implied thereof.

The second issue similarly concerns the application of the Fifth Amendment privilege when multiple proceedings are looming. As commonly known, in criminal procedure defendants enjoy the privilege against self-incrimination. But whether a target can or should be allowed to assert the Fifth Amendment privilege in the SEC's civil proceeding becomes a problem, especially when the SEC reserves the right to refer the case to the DOJ and might share its investigation products with the DOJ. One example is the use of subpoenas by the SEC, which has mandatory power backed by the possibility of contempt of court charges.[106] In this instance, whether the SEC's subpoena power endangers potential defendant's Fifth Amendment right against self-incrimination becomes obvious.

To deal with these problems, at least partly, the SEC adopts a middle-ground strategy in its Rule of Practice, which provides sort of quasi-criminal procedural protection to the targets of its investigation so that those investigation products can be also used in a criminal proceeding to avoid redundancy or overlapping. For example, in formal investigations, a witness who can be compelled to furnish documents or testify,[107] has the right to counsel[108] and a reasonable opportunity of cross-examination and

103. *Id*. at 94. In *Hudson*, Supreme Court cites the test in United States v. Ward, 448 U.S. 242 (1980) and Kennedy v. Mendoza-Martinez 372 U.S. 144 (1963) and listed factors to consider in determining whether sanctions are punitive. These factors include: (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of scienter"; (4) "whether its operation will promote the traditional aims of punishment-retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears *100 excessive in relation to the alternative purpose assigned." It is important to note, however, that "these factors must be considered in relation to the statute on its face." *Id*. at 99-100.

104. United States v. Waeyenberghe, 481 F.3d 951 (7th Cir. 2007).

105. *Hudson*, 522 U.S. at 94.

106. CHOI & PRITCHARD, *supra* note 1, at 197.

107. 17 C.F.R. § 203.7(a), (b) (2015).

108. 17 C.F.R. § 203.7(c) (2015).

production of rebuttal testimony or documentary evidence if the record shall contain implications of wrongdoing of his.[109] In this regard, testimony from a SEC investigation, where witnesses need to be sworn,[110] can be used in a criminal case. Furthermore, targets of investigation in the SEC's civil proceeding can still assert the privilege against self-incrimination in response to SEC inquiries and refuse to answer.[111] However, as scholars clearly point out, this assertion might lead to an adverse inference which can be drawn against the target by the SEC if it is actually asserted.[112]

However, in a criminal case, the reality of using information and investigation products from a civil proceeding does pose risk, which is likely to weaken a defendant's right as the procedural protections in civil proceedings might be less.[113] In this regard, the SEC typically stays its action until the criminal case is resolved to avoid conflict as well as redundant investigation, and the stay is subject to the SEC's discretion and with the consent of the court.[114] Furthermore, the SEC can wait until the conviction of criminal procedure and use collateral estoppels for an easy win.[115] But it is noteworthy that findings in a civil case cannot have a collateral estoppels effect in subsequent criminal proceedings, because criminal proceedings apply beyond a reasonable doubt as standard of guilt.[116]

V. CONCLUSION

Fighting securities law violations is a difficult challenge, especially in an ever-changing market combining new technology and old desire. Limited resources in administering law and a host of regulations become obvious in light of the growing size of markets. Therefore, a flexible and multi-approach mechanism turns into a starting point to conceive an answer to all related challenges in a practical way. Among all challenges, how to

109. 17 C.F.R. § 203.7(d) (2015).

110. 17 C.F.R. § 203.4(a) (2015).

111. CHOI & PRITCHARD, *supra* note 1, at 200.

112. *Id*.

113. In fact, in SEC v. Dresser Industries, Inc., 628 F.2d 1368 (D.C. Cir.), *cert. denied*, 449 U.S. 993 (1980), court clearly pointed out the problems of having two parallel proceedings if a civil proceeding is not deferred ("The noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16 (b), expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case."); *Id*. at 1376. Court also considered a delay of the noncriminal proceeding would be justified if a delay does not seriously injure the public interest, but as no strong support is shown in the current case, the SEC's administrative proceeding does not have to stay. *Id*.

114. CHOI & PRITCHARD, *supra* note 1, at 207; *see also* Seymour Glanzer et al., *The Use of the Fifth Amendment in SEC Investigations*, 41 WASH. & LEE L. REV. 895, 920 (1984).

115. HAZEN, *supra* note 20, § 16.2[8].

116. *Id*.

build up an efficient enforcement and conduct an assessment of enforcement mechanism is critical. In this regard, a careful examination of the current system and implementation result is much needed.

Experience from the United States and its long, formidable Securities and Exchange Commission thus becomes an important reference. This Article first examines the SEC's enforcement actions during 2009 to 2013 and provides nuances in cases and a more complete picture of insider trading cases in the United States. Further with the help of the data, we analyze the design of, as well as the premise of, a workable multi-layer enforcement mechanism and its related legal issues. Surprisingly, the analysis in this paper clearly shows a more limited result in the SEC enforcement data in the period of 2009 to 2013, compared to the mega-size trading capacity of the United States securities market and the tension against financial professions as a whole after the 2008 financial crisis. It is, for us, to exemplify the inherent difficulties in combating illegal insider trading which has been one of the most prominent tasks that the SEC has claimed it to be.

An empirical visit of this kind provides not only an opportunity to understand the operation of the securities law enforcement, but also a chance to evaluate the insufficiency and possible ways to improve. Comparatively, it also gives a useful benchmark for other countries in pursuing their own strategy and a workable insider trading law enforcement mechanism, which may be even more valuable in an ever-changing trading world that we face today. Similarly, learning from the efforts as well as the difficulties based on the SEC's experience truly re-focuses the needed attention to the enforcement side, which ultimately serves as a reality check of, and a fulfillment of, the role of law, especially in a financial arena where ideals clash with human nature, perhaps inevitably.

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美國內線交易執法狀況之實證研究：以SEC 2009年至2013年資料及相關問題為核心

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摘　要

本文分析美國聯邦證券管理委員會，於2009年到2013年間提起的全體內線交易案件。架構上，第一部分處理美國法上內線交易及一般證券法違反案件的處理架構；其次，我們就美國聯邦證券管理委員會2009年到2013年所提起所有的內線交易案件進行系統性實證調查。主要的調查方法，是透過該會所發布新聞稿及網站相關資料取得案件內容。而相關案件細部內容，則分別列出案件總數，被告類型、消息類型、不法所得、案件結果、和解情形與是否後續提出刑事起訴等。透過對期間內案件的完整整理，本文得以更清楚地描繪出美國內線交易與執法情形的全貌。

本文對於相關案件的分析，提供了一個重要的機會，去觀察與討論美國證券法在執行上幾個主要關鍵點：美國聯邦證券管理委員會的程序、決策過程與主導地位；民事程序扮演在證券違法防止上的重要角色；和解的廣泛使用與實況；以及現行作法的利弊得失。

關鍵詞：美國內線交易法、美國聯邦證券管理委員會、證券法的執法情形、內線交易的和解