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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

August 26, 2021

To: Gary Gensler, Chair

From: Carl W. Hoecker, Inspector General 

Subject: *Review for Racial and Ethnic Disparities in the SEC's Issuance of Corrective and Disciplinary Actions from January 1, 2017 – August 31, 2020*

Executive Summary

In June 2020, the U.S. Securities and Exchange Commission (SEC or Agency) Office of Inspector General (OIG) Office of Counsel to the Inspector General (OCIG) initiated a review of the SEC's corrective and disciplinary action program.¹ The purpose of this review was to determine if there was evidence of disparity—in particular, racial and ethnic disparity—when comparing the demographic composition of SEC employees who received a corrective or disciplinary action during the review period (that is, between January 1, 2017, and August 31, 2020) to the overall population of SEC employees. Although the sample size we reviewed was small and inconclusive, we believe opportunities exist for the Agency to better track data to identify and analyze disparities in the issuance of corrective and disciplinary actions. To accomplish this, we suggest that the Agency consider developing a plan to: better track data related to employee misconduct, corrective and disciplinary actions, and demographic information; develop a process by which data related to employee misconduct and corrective and disciplinary actions can be routinely compared with demographic variables (such as race, ethnicity, and gender); and reduce the potential for bias by standardizing processes and providing additional manager training.

Background

In 2020, a series of events highlighting racial inequity in the United States brought to the forefront the obligation for employers throughout the country to evaluate and monitor their progress in advancing diversity, equity and inclusion, and preventing racial bias in the workplace. Equity should be present in every facet of the work environment, including the manner in which SEC employees are held accountable for their conduct. The SEC has recognized the importance of diversity, equity, and inclusion in the workplace, as addressed in its Fiscal Year (FY) 2020-2022 Diversity and Inclusion Strategic Plan.² In this Plan, former Chairman Jay Clayton stated: “Our continued commitment to promoting diversity, inclusion, and equal opportunity is critical to allowing the Commission to attract and retain talent with the mix of skills and expertise needed to maximize our effectiveness.”³ The Plan's first goal is to demonstrate leadership commitment and accountability through Agency policy,

¹ As used in this letter, “corrective action” is defined as written counseling; “disciplinary action” includes letters of reprimand, suspensions from duty of any duration, removals, and reduction in grade or pay. Corrective actions are not placed in an employee's electronic Official Personnel Folder (eOPF), whereas disciplinary actions are placed in an employee's eOPF, and may remain there either temporarily or permanently.

² SEC FY 2020-2022 Diversity and Inclusion Strategic Plan, accessed at: https://www.sec.gov/files/2020_Diversity_and_Inclusion_Strategic_Plan.pdf.

³ *Id.*

messaging, and behavior that advances diversity and inclusion goals and objectives. The Plan's second goal, to foster a connected culture, includes providing for opportunities to discuss issues related to unconscious bias in both Agency-wide and targeted discussions. The work we conducted in this review endeavors to assist the Agency in identifying areas where leadership can increase transparency and accountability by ensuring that the treatment of employee misconduct, and any subsequent corrective or disciplinary action, is free from disparities that result from conscious or unconscious bias.

Moreover, on January 20, 2021, President Biden issued Executive Order (E.O.) 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government* (the "Order"), which recognized that "[e]ntrenched disparities in our laws and public policies, and in our public and private institutions, have often denied that equal opportunity to individuals and communities."⁴ In Section 9 of the Order, the President recognizes that "[m]any Federal datasets are not disaggregated by race, ethnicity, gender, disability, income, veteran status, or other key demographic variables. This lack of data has cascading effects and impedes efforts to measure and advance equity. A first step to promoting equity in Government action is to gather the data necessary to inform that effort."⁵ This observation dovetails with what we found in the course of this review, and our suggestions herein are intended to improve the SEC's ability to compare data related to allegations of employee misconduct and any resulting corrective or disciplinary action from the viewpoint of demographic variables.

Discrimination Laws in the Federal Workplace

The Federal government has long recognized equality among all employees with regard to the terms and conditions of employment. To this end, Title VII of the Civil Rights Act of 1964⁶ (Title VII) establishes that employers may not make employment decisions based on an individual's membership in a protected class—race, color, religion, sex (now interpreted to include gender identity, sexual orientation, and pregnancy) or national origin.⁷ Title VII strictly prohibits management from considering an individual's membership in a protected class even as one of several motivating factors for an employment action.⁸

Violations of Title VII may be supported by direct evidence of discriminatory intent (*e.g.*, overt statements of discriminatory intent made by a manager before taking an employment action) or indirect evidence (*e.g.*, evidence that an employee in a protected class is treated less favorably than an employee outside of that protected class).⁹ An employee can prove a *prima facie* case of discrimination in the disciplinary action context by proving: (1) the employee's membership in a protected class; (2) that the

⁴ E.O. 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government* (Jan. 2021), accessed at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>. In addition, on June 25, 2021, President Biden issued E.O. 14035, *Diversity, Equity, Inclusion, and Accessibility in the Federal Workplace*, which requires federal agencies "to take an evidence-based and data-driven approach to determine whether and to what extent agency practices result in inequitable employment outcomes, and whether agency actions may help to overcome systemic societal and organizational barriers." https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/25/executive-order-on-diversity-equity-inclusion-and-accessibility-in-the-federal-workforce/?utm_medium=email&utm_source=govdelivery. As an independent agency, the SEC is not bound by these E.O.s; however, independent agencies are "strongly encouraged to comply" with their provisions. See E.O. 13985, section 11(c); and E.O. 14035, section 15(c).

⁵ *Id.*

⁶ 42 U.S.C. §§ 2000e – 2000e-17.

⁷ 42 U.S.C. § 2000e-2(a).

⁸ 42 U.S.C. § 2000e-2(m).

⁹ See, *e.g.*, *Equal Employment Opportunity Comm'n v. Wendy's of Colorado Springs, Inc.*, 727 F. Supp. 1375, 1380-81 (D. Col. 1989).

employee was otherwise qualified for the position; (3) that the employee suffered an adverse action; and (4) that the employee was treated differently from similarly-situated members outside of the employee's protected class.¹⁰ Once an employee proves a *prima facie* case of indirect discrimination, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions.¹¹ This burden is one of production, not persuasion, meaning credibility determinations are not appropriate at this stage.¹² Once the employer provides a legitimate, non-discriminatory reason for its actions, the burden shifts back to the employee.¹³ If the employee can show by a preponderance of the evidence that the employer's alleged legitimate reason for its action is not credible, meaning it is merely a "pretext" to discriminate, then intentional discrimination will be found to have occurred.¹⁴ This type of discrimination is "disparate treatment," in which "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment."¹⁵

As numerous federal laws and directives outline—and SEC policy echoes—preventing disparate treatment is the responsibility of every manager within the SEC.¹⁶ Both the U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Office of Special Counsel (OSC) have roles in enforcing the personnel laws in place to prevent disparate treatment. Among other duties, the EEOC assures federal agency compliance with EEOC regulations, assists federal agencies with equal employment opportunity (EEO) complaint adjudication, and evaluates federal agencies' affirmative employment programs.¹⁷ OSC has jurisdiction to investigate agency officials who engage in a Prohibited Personnel Practice (PPP), one of which is discrimination.¹⁸ PPPs are behaviors that are prohibited among the entire federal workforce because they undermine the merit system principles, which demand fairness for all federal employees and applicants for federal employment.¹⁹ In part, the PPPs prohibit nepotism and political coercion, and enforce fair competition for employment, protection for whistleblowers, and

¹⁰ *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993), citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1993).

¹¹ *McDonnell Douglas Corp.*, 411 U.S. at 802-803.

¹² *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000), citing *St. Mary's Honor Center*, 509 U.S. at 510.

¹³ *McDonnell Douglas Corp.*, 411 U.S. at 804.

¹⁴ *Id.* at 807.

¹⁵ *International Brotherhood of Teamsters v. United States, et al.*, 431 U.S. 324, 335 n. 15 (1977). We also considered whether the process for imposing corrective and/or disciplinary actions within the SEC could result in "disparate impact" to certain groups of employees. "Disparate impact" occurs when employment opportunities, practices, procedures, or tests—neutral both on their face and in intent—affect one protected class more than another for reasons that are not job-related or merit-based. See *Ricci v. DeStefano*, 557 U.S. 557, 577-78 (2009); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). We ultimately determined that a disparate impact analysis was not the most appropriate analysis to shed light on potential disparities in corrective/disciplinary actions. A disparate impact analysis is more appropriate when the process—such as an entrance exam or other employment requirement—is facially *neutral*—meaning the questions and requirements are the same for each employee—but its application has a disparate result on certain protected classes. With respect to employee misconduct and corrective action/discipline, each case is inherently fact-specific, and it is unlikely that each instance is treated in the exact same way. Indeed, it is the prevalence of subjectivity in the issuance of corrective and disciplinary actions that lends itself to the potential for bias and disparate treatment.

¹⁶ 42 U.S.C. § 2000e-16; E.O. 11478 (as amended), *Equal Employment Opportunity in the Federal Government* (Aug. 1969); SEC *Equal Employment Opportunity Policy* (May 24, 2021); SEC Policy Memorandum: *Standards for Equal Opportunity, Workforce Diversity, and Workplace Inclusion* (Sept. 2016).

¹⁷ EEOC website, accessed at: <https://www.eeoc.gov/federal-sector>.

¹⁸ 5 U.S.C. § 1212(a). 5 U.S.C. § 2302(b)(1). The PPPs were created by the Civil Service Reform Act of 1978 (Pub. L. 95-454).

¹⁹ 5 U.S.C. §§ 2301, 2302.

veterans' preference rights.²⁰ The PPP prohibiting discrimination includes every protected class recognized by Title VII,²¹ as well as discrimination based on age,²² disability,²³ marital status,²⁴ and political affiliation.²⁵ Additionally, Agency policy reinforces many of these protections, including the right of every employee to work in a workplace that is free from discrimination, harassment and retaliation.²⁶ When an Agency employee is found to have engaged in discrimination, harassment, or retaliation by the Agency, EEOC, or federal court, or is found to have committed a PPP by OSC or the Merit Systems Protection Board, there can be serious consequences for such behavior, for both the Agency and the employee.²⁷

In addition to its legal obligations to prevent disparate treatment in the workplace, the Agency must also ensure that a manager's conscious or unconscious bias regarding a protected class does not result in disparate outcomes in employment actions.²⁸ Acting on bias, unconscious or not, directly threatens Agency efforts to promote diversity, equity, and inclusion. If left undetected and unaddressed, bias may lead to widespread occurrences of disparity, affecting whole teams of employees, and rooting out such disparity requires frequent analysis and examination of Agency programs and operations.

²⁰ *Id.*

²¹ OSC generally defers complaints involving discrimination on an EEO-related basis to the EEO process, but retains jurisdiction in certain cases. *See Memorandum of Understanding Between U.S. Office of Special Counsel and Equal Employment Opportunity Commission*, accessed at <https://www.eeoc.gov/mou/memorandum-understanding-between-us-office-special-counsel-and-equal-employment-opportunity>.

²² *Id.* at (b)(1)(B). This protection is pursuant to the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634. The ADEA makes it illegal to discriminate against employees age 40 and above. 29 U.S.C. § 633a(a).

²³ 5 U.S.C. § 2302(b)(1)(D). *See* the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-718. "Disability" is defined as a "physical or mental impairment that constitutes or results in a substantial impediment to employment" 29 U.S.C. § 705(9)(A).

²⁴ 5 U.S.C. § 2302(b)(1)(E).

²⁵ *Id.*

²⁶ SEC *Equal Employment Opportunity Policy* (May 24, 2021); SEC *Policy on Preventing Harassment* (May 24, 2021).

²⁷ *See, e.g.,* SECOP 27-1, *Procedures to Implement the SEC's Policy on Preventing Harassment*; SECR 6-20, *Disciplinary and Adverse Actions*; 5 U.S.C. § 1215(a)(3)(A); *Vance v. Ball State University*, 570 U.S. 421 (2013) (discusses employer's liability for sexual harassment in the workplace); *Elijah E. Cummings Federal Employee Antidiscrimination Act of 2020*, §§ 1131-1138, P.L. 116-283 (*William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021*) (Jan. 2021) (requires agencies to post statistical data of any findings of discrimination or retaliation prominently on the agency's website for not less than one year and to notify the EEOC of any discipline that occurs as a result of a finding of discrimination or retaliation).

²⁸ In cases alleging disparate treatment concerning discipline for violation of work rules, at least two Circuit Courts have held that a complainant can establish a *prima facie* case of discrimination by showing either that they did not violate the work rule, or that the complainant engaged in misconduct similar to others outside of the complainant's protected class, but that complainant was subjected to a more severe disciplinary measure. *See Jones v. Gerwens*, 874 F.2d 1534, 1540 (11th Cir. 1989), citing *Moore v. City of Charlotte*, 754 F.2d 1100, 1105-1106 (4th Cir. 1985). As further addressed in *Jones*, part of this disparate treatment analysis also requires an examination of the motives of the individuals involved in order to determine whether they were aware of but "consciously overlooked" similar misconduct by persons outside of the complainant's protected class, as this result could stem from racial bias on part of management. *Jones*, 874 F.2d at 1541-42. Even if the deciding official is not found to have a possible racial bias, that would not necessarily cure a proposing official motivated by such bias. *See Id.* at 1541 n. 13. Also, notably, the EEOC defines "intentional discrimination" to include "conscious or unconscious stereotypes about the abilities, traits or performance of individuals of certain racial groups." EEOC *Questions and Answers about Race and Color Discrimination in Employment*, EEOC-NVTA-2006-1 (April 2006), Section on Employment Decisions, accessed at: <https://www.eeoc.gov/laws/guidance/questions-and-answers-about-race-and-color-discrimination-employment#:~:text=Intentional%20discrimination%20occurs%20when%20an%20employment%20decision%20is,or%20performance%20of%20individuals%20of%20certain%20racial%20groups>.

Previous Reviews

In 2014, the OIG issued a report entitled *Audit of the Representation of Minorities and Women in the SEC's Workforce* (Report No. 528; November 20, 2014).²⁹ We assessed diversity at the SEC and compared the Agency's workforce between FY 2011 and FY 2013 to workforce data from the U.S. civilian labor workforce, the Federal workforce, and the securities industry workforce. We found that while the SEC had made efforts to promote diversity, some minority groups and women: (1) were underrepresented in the SEC workforce; (2) received relatively fewer and smaller cash awards and bonuses; (3) experienced statistically significant lower performance management and recognition scores; and (4) filed EEO complaints at rates higher than their percentage of the workforce. We determined that the SEC's Office of Equal Employment Opportunity (OEEO) had not taken steps to examine, eliminate, or modify, where appropriate, policies, practices, or procedures that create barriers to equal opportunity. Also, we found that the SEC's Office of Minority and Women Inclusion (OMWI) lacked a systematic and comprehensive method of evaluating the effectiveness of its programs and diversity efforts. Specifically, the SEC had not fully established internal policies and procedures or required workforce diversity standards needed to monitor, evaluate, and, where necessary, improve its operations to fully comply with Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act's requirement to establish an Office of Minority and Women Inclusion.³⁰ Based on our findings, we made five recommendations, which the Agency implemented and the OIG subsequently closed. One of these recommendations involved OEEO completing a barrier analysis to determine if there are particular barriers to equal employment opportunity at the SEC. In response, the SEC conducted several barrier analyses aimed at examining the participation of minorities and women in the workforce.³¹

Prior to conducting this review, the OIG also considered two reviews that the U.S. Government Accountability Office (GAO) conducted regarding disparities in the disciplinary process. In May 2019, GAO issued a report describing its review of the disciplinary process among active-duty military members, screening for a link between attributes such as race and ethnicity and the likelihood of a disciplinary action.³² GAO made 11 recommendations, including that all military components of the U.S. Department of Defense (DOD) include demographic data in their processes affecting investigations, military justice, and personnel databases to better track any possible over-representation of a particular demographic.³³ GAO also recommended that DOD further evaluate the cause of any disparities identified within the military justice system.³⁴ In June 2020, GAO issued a subsequent report of testimony before Congress to examine the progress DOD had made on GAO's 11 recommendations.³⁵ Notably, GAO found that its recommendation for DOD to track demographic data

²⁹ Accessed at: <https://www.sec.gov/about/offices/oig/reports/audits/2014/528.pdf>.

³⁰ See 12 U.S.C. § 5452.

³¹ See the SEC's FY 2016-2019 *Annual EEO Program Status Reports*, accessed at: <https://www.sec.gov/eoinfo/eooreports.htm>.

³² GAO Report to the Committee on Armed Services, House of Representatives, *DOD and the Coast Guard Need to Improve their Capabilities to Assess Racial and Gender Disparities*, GAO-19-344 (May 2019).

³³ *Id.* at pp. 34-37. GAO found that only some—not all—DOD components currently track this data, and that DOD has not determined when identified disparities warrant further review. *Id.* at p. 37.

³⁴ *Id.* at pp. 64-66. GAO found that, although DOD had conducted limited studies on disparities pertaining to race and ethnicity within the military justice system, DOD had not studied the root cause of those disparities. *Id.* at p. 64.

³⁵ GAO Testimony Before the Subcommittee on Military Personnel, Committee on Armed Services, U.S. House of Representatives, concerning GAO Report, *DOD and the Coast Guard Need to Improve their Capabilities to Assess Racial Disparities*, Statement of Brenda S. Farrell, Director, Defense Capabilities and Management, GAO-20-648T (June 16, 2020).

in the military justice process was now required by law.³⁶ GAO also found that DOD had not yet issued any criteria to determine when data indicating possible racial disparities should be further explored.³⁷

We also reviewed a GAO report from March 2018 entitled *K-12 Education: Discipline Disparities for Black Students, Boys, and Students with Disabilities*.³⁸ In this study, GAO found that black students, boys, and students with disabilities were disproportionately subjected to discipline in school.³⁹ In addition to analyzing these trends in disparity, the report looked at practices that some school districts have taken to reduce such disparities.⁴⁰ While the work environment at the SEC is not analogous to the education system, some of the work that schools have done to reduce disparities in discipline is informative. For example, school districts: created leadership teams for equity, culture, and support services; developed a district-wide equity plan that includes mandatory training on implicit bias; changed disciplinary policies to increase the consistency of disciplinary actions; and built awareness of racial bias in discipline.⁴¹

Current Review

The objective of this review was to: determine whether (i) there was evidence of disparity—in particular, racial and ethnic disparity—when comparing the demographic composition of SEC employees who received a corrective or disciplinary action during the review period (that is, between January 1, 2017, and August 31, 2020) to the overall population of SEC employees; and (ii) we could identify the reason for any such disparity. From September 2020 through February 2021, the OIG’s OCIG, in consultation with the Office of Audits,⁴² reviewed SEC employee corrective and disciplinary actions for the relevant period that were maintained in Office of General Counsel (OGC) files.⁴³ The sample we received from OGC included 116 actions. We excluded 5 actions from our review,⁴⁴ which reduced this number to 111.

In formulating our review, we considered comparing penalties that employees received for misconduct to demographic variables to determine whether certain groups received harsher penalties for similar types of misconduct. However, in the end, we did not conduct this type of analysis because there were relatively few cases (111) to compare; the facts of each matter were too varied; over a third of the actions included either multiple charges of misconduct or no charges identified, making actions difficult to compare; and consideration of the *Douglas* factors⁴⁵ in determining penalties could—and indeed,

³⁶ The FY 2020 National Defense Authorization Act requires the DOD Secretary to annually report race, ethnicity, and gender statistics within the military justice process. *Id.* at p. 12.

³⁷ *Id.* at p. 13.

³⁸ GAO-18-258 (Mar. 2018).

³⁹ *Id.* at p. 12.

⁴⁰ *Id.* at p. 22.

⁴¹ *Id.* at p. 28.

⁴² Although the Office of Audits assisted OCIG with this review, the OIG did not conduct an audit or evaluation pursuant to generally accepted government auditing standards or the Council of the Inspectors General on Integrity and Efficiency’s *Quality Standards on Inspection and Evaluation*.

⁴³ OGC does not necessarily have files related to every corrective action that SEC managers take because managers are not required to consult OGC before issuing written counseling, and OGC may not document all advice to management, if the interaction with the manager involved only quick and/or routine advice. See further discussion on page 8.

⁴⁴ We excluded four matters where the proposal letter was issued, or the case was settled, prior to January 1, 2017, and one matter [REDACTED].

⁴⁵ A set of twelve merit-based factors relevant for the Agency’s consideration in determining the appropriateness of a penalty when taking an adverse action. See *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280 (1981). See also the 2018 Collective Bargaining Agreement between SEC and the National Treasury Employees Union Article 35, Section 2.

should—lead to different penalties for similar types of misconduct. Therefore, we instead took a broader view and considered how employees are identified as having committed misconduct in the first place and whether adequate safeguards are in place to ensure that employees who engage in similar types of behavior are treated equitably at the point at which they enter the corrective/disciplinary action process. This broader view led us to compare the total number of cases that were referred to OGC and ended in either a corrective or disciplinary action to the demographic variables of the SEC as a whole.⁴⁶

That comparison, on its face, could suggest disparities among certain groups, but ultimately we concluded that the information the SEC currently maintains on employee misconduct and corrective/disciplinary actions is not sufficient to draw meaningful conclusions regarding any suggested disparities. This is not to say that the Agency improperly took any particular corrective or disciplinary action. However, because there is no comprehensive requirement or process for managers to report suspected misconduct—before deciding whether to take action—to OIG and/or management,⁴⁷ there is no comprehensive repository for allegations of employee misconduct, and thus no way to associate existing demographic data with those allegations. In sum, complete data related to all three of these components—employee misconduct, corrective and disciplinary actions, and demographics—must be present in order for a review of this type to be meaningful.

The Agency's Corrective and Disciplinary Action Process and Data Collection

The Agency's corrective and disciplinary actions are governed by U.S. Code Title 5, Chapter 75, *Adverse Actions*,⁴⁸ U.S. Code of Federal Regulations, Title 5, Part 752, SEC Regulation (SECR) 6-20, *Disciplinary and Adverse Actions*, and by Article 34, *Disciplinary Actions* and Article 35, *Adverse Actions* of the 2018 Collective Bargaining Agreement (CBA) between the SEC and the National Employees Treasury Union, Chapter 293. Most of the CBA's provisions for disciplinary and adverse actions also apply to non-bargaining-unit employees pursuant to SECR 6-20, including the Agency's agreement to employ progressive discipline for disciplinary actions and, when possible, for adverse actions.⁴⁹

To better understand the corrective and disciplinary action processes, we met with representatives from both OGC and the Office of Human Resources (OHR). To gain an understanding of the Agency's obligations related to preventing disparate treatment, promoting diversity, equity, and inclusion, and collecting demographic data, we met with representatives from OEEO and OMWI.

OHR

OHR's role in the corrective and disciplinary process has changed over time. Historically, OHR handled the bulk of the corrective and disciplinary action process for the Agency. OHR personnel

⁴⁶ OGC or OHR maintains some records on matters referred to them for which they ultimately determine that no corrective or disciplinary action is warranted. However, because management is not required to report all instances of misconduct, these records are not necessarily complete.

⁴⁷ We are aware of management's requirement (or a requirement for all SEC employees, to include management) to report employee misconduct in certain situations. For example, managers are required to immediately report any conduct that may be inconsistent with the SEC's Policy on Preventing Harassment. See *SEC Policy on Preventing Harassment* (May 24, 2021). Similarly, the Ethical Standards of Conduct require all employees to report instances of "waste, fraud, abuse and corruption to appropriate authorities." 5 C.F.R. § 2635.101(b)(11).

⁴⁸ Adverse actions encompass removals, suspensions of more than 14 days, any reduction in grade or pay, or furloughs for 30 days or fewer. For the purpose of this letter, adverse actions are included within the broader term of "disciplinary action," which also includes suspensions of any length and written reprimands.

⁴⁹ SECR 6-20, Section 5.3; CBA, Article 34, Section 2; Article 35, Section 2.

received allegations of employee misconduct, investigated those allegations as appropriate, and then separate attorneys within OHR advised SEC management on issuing corrective and disciplinary actions to employees. In 2015, OGC assumed the role of advising management on the issuance of corrective and disciplinary actions, and the OHR attorneys who previously worked on these personnel matters transitioned to OGC's Employment Law group. OHR continues to receive allegations of employee misconduct, investigate those allegations as appropriate, and refer matters to OGC for action, when warranted. Because of its past and current role in dealing with employee misconduct, OHR maintains institutional and historical knowledge on prior corrective and disciplinary actions. Accordingly, OGC may consult with OHR both during OHR's investigation, if any, and while OGC is working with management to determine the appropriate charges and penalty. OHR and OGC personnel with a need-to-know (b)(2); (b)(6) which contains information on corrective and disciplinary actions going back approximately a decade. OHR also (b)(2); (b)(6) of its open and closed investigations into employee misconduct. In addition, OGC and OHR work together to periodically train managers on how to handle employee misconduct.⁵⁰

OGC

OGC may receive allegations of employee misconduct from OHR, the SEC's Office of the Ethics Counsel, or from other sources, and its Employment Law group works with management officials to recommend corrective or disciplinary actions. For corrective actions, there is no written requirement for management to work with OGC, and it is unclear whether management is issuing counseling without first consulting OGC. When formal disciplinary action is warranted, OGC works directly with management.⁵¹ When a suspension of any length, demotion, indefinite suspension, or removal is proposed, the proposing official provides a letter that contains a discussion of the relevant mitigating and aggravating factors, which allows the affected employee to make a more meaningful oral and/or written response, if elected. (b)(2); (b)(5)

⁵² Following the proposal and the employee's optional oral and/or written reply, the SEC has delegated the Chief Human Capital Officer (CHCO) or the Chief Operating Officer to serve as the deciding official, where appropriate.⁵³ OGC also represents the Agency in any personnel actions the employees may file.

OIG

OIG may receive allegations of employee misconduct and may investigate the allegation, refer it back to management for action, or close the allegation without further action. If OIG investigates the allegation,

⁵⁰ For example, in 2019, OGC and OHR provided training entitled, "Proactive Management: Why You Should Act and What Happens When You Do," which has been viewed by 95 percent of managers within the SEC. OGC also participates in the Agency's periodic training for new managers.

⁵¹ We were also unable to find a written policy that directs managers to work with OGC before issuing disciplinary actions, but OHR and OGC officials were confident that disciplinary actions were not being issued without OGC involvement.

⁵² In determining the appropriate proposing official, the SEC relies upon Designation K-15, which requires the proposing official to be the head of the subject-employee's Division or Office (or their selected delegate), or the Chief Human Capital Officer, as directed by the Deputy General Counsel for General Law and Management. *See Amendment of Designation of Personnel to Perform Delegated Functions and Other Functions, Section K-15: Authority to Act as a Proposing Official on Disciplinary and Adverse Actions* (updated May 27, 2021).

⁵³ In determining the appropriate deciding official, the SEC relies upon Designation K-16, which requires the deciding official to be the CHCO or COO (or their selected delegate), as appropriate. *See Amendment of Designation of Personnel to Perform Delegated Functions and Other Functions, Section K-16: Authority to Act as a Deciding Official on Disciplinary and Adverse Actions* (updated May 27, 2021).

it will prepare a report upon completion of the investigation and provide that report to SEC management, including OGC, for action.

(b)(2); (b)(5)

OMWI

OMWI, created in July 2011 by Section 342 of the Dodd-Frank Act, led the development of the SEC's Diversity and Inclusion Strategic Plan.⁵⁴ OMWI is responsible for providing leadership and guidance for the Agency's diversity and inclusion efforts, including managing the Agency's "Diversity Dashboard" which displays employee demographic data.⁵⁵

The SEC collects demographic data from its employees in accordance with the U.S. Office of Management and Budget (OMB) standards.⁵⁶ These directives help to standardize ethnicity and race data among federal agencies for comparison purposes. SEC employees are asked to complete the "Ethnicity and Race Indicator" within OHR's Employee Express application. Within the "Ethnicity and Race Indicator," SEC employees first select whether they identify as Hispanic or Latino.⁵⁷ Next, they select from the following races: (1) White,⁵⁸ (2) Black or African American,⁵⁹ (3) Asian,⁶⁰ (4) American Indian or Alaskan Native,⁶¹ (5) Native Hawaiian or Other Pacific Islander,⁶² or (6) any combination of the aforementioned races/ethnicities.⁶³ Although this election in Employee Express is optional, we noted during our review that most Agency employees have designated their race(s) or ethnicity.⁶⁴

The SEC aggregates and reports data from the "Ethnicity and Race Indicator," in accordance with OMB Memo 00-02, *Guidance on Aggregation and Allocation of Data on Race for use in Civil Rights Monitoring and Enforcement* (the "OMB Memo").⁶⁵ Pursuant to the OMB Memo, only those races, ethnicities, or combinations of races/ethnicities that represent at least one percent of the Agency's composition need to be reported as a standalone group.⁶⁶ Also, the OMB Memo requires that any

⁵⁴ SEC FY 2020-2022 Diversity and Inclusion Strategic Plan, p. 14.

⁵⁵ OMWI Annual Report to Congress, March 2021, pp. 2, 6.

⁵⁶ See OMB Directive 15, *Race and Ethnic Standards for Federal Statistics and Administrative Reporting* (May 12, 1977), and OMB's *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58782 (Oct. 30, 1997).

⁵⁷ Defined in Employee Express as: "A person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race."

⁵⁸ Defined in Employee Express as: "A person having origins in any of the original peoples of Europe, the Middle East, or North Africa."

⁵⁹ Defined in Employee Express as: "A person having origins in any of the black racial groups of Africa."

⁶⁰ Defined in Employee Express as: "A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, or Vietnam."

⁶¹ Defined in Employee Express as: "A person having origins in any of the original peoples of North and South America (including Central America), and who maintains tribal affiliation or community attachment."

⁶² Defined in Employee Express as: "A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands."

⁶³ Note that prior to 2001, SEC employees could only select one race, even if they identified with more than one race.

⁶⁴ During the sample period, there were between one and four employees per pay period who did not select any race or ethnicity in Employee Express.

⁶⁵ OMB Memo 00-02 (March 9, 2000), accessed at: <https://georgewbush-whitehouse.archives.gov/omb/bulletins/b00-02.html>.

⁶⁶ *Id.* at Attachment Section I.

individual who identifies as being White plus another race or ethnicity should be characterized as being solely the non-White race or ethnicity.⁶⁷ Accordingly, despite the selections an employee may make within the “Ethnicity and Race Indicator,” the OMB Memo only requires the SEC report the following races or ethnicities: White, Black or African American, Hispanic or Latino, and Asian. American Indian or Alaskan Native, Native Hawaiian or Other Pacific Islander, and any combination of two or more non-White races are all aggregated into the “other” category per the OMB Memo.⁶⁸ These races/ethnicities are visually displayed on the Agency’s Diversity Dashboard, which the SEC posts Agency-wide “to increase transparency, provide access to current workforce data, and show the progress and challenges toward building and sustaining a diverse workforce at the SEC.”⁶⁹

OEEO

OEEO manages the EEO complaint process for the SEC. Employees may use this process to file informal and/or formal complaints alleging unlawful discrimination, harassment, or retaliation in accordance with the equal opportunity laws governing federal sector employment.⁷⁰ OEEO also produces quarterly and annual reports related to EEO activity at the SEC⁷¹ and conducts analyses to determine whether there are barriers to under-represented groups in SEC employment.⁷²

Actions to Consider

In order for the Agency to: better track data to measure whether disparities exist in the issuance of corrective and disciplinary actions and to analyze those disparities; allow for future meaningful reviews of potential disparities; achieve its diversity, equity, and inclusion strategic goals; and align with the intent of President Biden’s recent directives on using an evidence-based and data-driven approach towards advancing racial equity in the federal workplace, we encourage the SEC to consider taking the actions discussed below.

(1) The Agency should collect and centrally maintain more complete data on allegations of employee misconduct.

As previously stated, we are not able to analyze whether disparities exist in the treatment of employees who are alleged to have committed misconduct because there is no comprehensive requirement or process for managers to report suspected misconduct to OIG and/or management, nor is SEC management required to consult with OGC or OHR prior to addressing employee misconduct with a corrective action or taking no action at all. As a result, the SEC only maintains pieces of this data set. For example, OHR maintains information on its investigations into employee misconduct as well as historical data on the corrective/disciplinary actions that resulted. OGC maintains information on corrective actions that it advises management on, as well as disciplinary actions and any resulting litigation. We, the OIG, maintain records on employee misconduct investigations we conduct and referrals we make to management. However, these pieces of information are not centralized, not

⁶⁷ *Id.* at Attachment Section II.

⁶⁸ *Id.* at Attachment Section I.

⁶⁹ OMWI Annual Report to Congress (March 2021), accessed at: https://www.sec.gov/files/OMWI_Annual%20Report_FY2020_508.pdf.

⁷⁰ SEC *Equal Employment Opportunity Policy* (May 24, 2021).

⁷¹ See <https://www.sec.gov/eoinfo/nofeardata.htm>.

⁷² See Annual EEO Program Status Reports, accessed at: <https://www.sec.gov/eoinfo/eoreports.htm>.

comprehensive, and not the complete universe of employee misconduct, nor are they maintained for the purpose of conducting an analysis on disparities.

If the SEC were to centrally collect allegations of employee misconduct, it would be better able to analyze what types of misconduct are occurring; how managers are handling such misconduct; whether there are disparities in how misconduct is handled, *e.g.*, whether corrective or disciplinary action is imposed; and whether those disparities result from conscious or unconscious bias based on race, ethnicity, or other variables.⁷³ Therefore, we suggest that the SEC consider implementing a policy requiring management to centrally report all suspected employee misconduct, even if management is not planning to take action on that misconduct.⁷⁴ Other federal agencies have similar regulations or policies from which the SEC could benchmark.⁷⁵ Such a requirement would also allow OGC and/or OHR to review a broader universe of allegations of employee misconduct and determine whether to recommend for or against corrective and/or disciplinary action in particular matters.

(2) OGC should fully utilize its legal case-management software and maintain a more robust and searchable repository of corrective and disciplinary actions.

The Agency's records of past corrective and disciplinary actions are maintained (b)(2); (b)(6) [REDACTED] To better access and analyze the records related to corrective and disciplinary actions, OGC could make better use of its legal case-management system, (b)(2); (b)(6) [REDACTED]

[REDACTED] Having a more complete, organized repository of corrective and disciplinary actions would benefit OGC and the Agency in better meeting the objectives of this review.

(3) The Agency should regularly encourage employees to report and update demographic data to better assess the potential for disparities.

SEC employees are not required to self-identify their race and ethnicity within Employee Express. Employees who have reported their race(s) and ethnicity may not have revisited their selections since their time of hire. However, due to changes in OMB guidance, the options employees can select in the SEC's "Ethnicity and Race Indicator" have changed. For example, OMWI informed the OIG that prior

⁷³ Although our review focused on race, ethnicity and gender, the SEC could review for disparities among any protected classes for which data is maintained.

⁷⁴ To assist managers and employees in understanding what constitutes misconduct, and to help define an expected standard of employee conduct, the Agency may consider compiling the various expectations for employee conduct into one centralized location.

⁷⁵ For example, the U.S. Department of Agriculture's Food Safety Inspection Service has a policy requiring that supervisors "promptly report all cases of known, alleged, or suspected misconduct. Supervisors who fail to report misconduct or take other appropriate action are evading their responsibilities and subjecting themselves to possible disciplinary or adverse action." U.S. Department of Agriculture, Food Safety Inspection Service, Directive 4735.3, Revision 1, "Employee Responsibilities and Conduct," (accessed at: <https://www.fsis.usda.gov/wps/wcm/connect/98f86e3d-4c63-403a-ba33-650d9c79f1f2/4735.3.pdf?MOD=AJPERES>). Additionally, the U.S. Department of Treasury has a regulation requiring reporting of suspected misconduct by all agency employees. 31 C.F.R. § 0.203.

⁷⁶ (b)(2) [REDACTED]

to 2001, SEC employees could only select one race with which they identify.⁷⁷ Additionally, OMB changed the race groupings in 1997 to separate the designation of “Asian and Pacific Islander” into “Asian” and “Native Hawaiian or Other Pacific Islander.”⁷⁸ In that same regulation, OMB also changed the standard ethnicity listing from “Hispanic” to “Hispanic or Latino,” which may cause additional employees to now identify with this ethnicity. Despite these changes, some Agency employees may not have updated their selections in Employee Express. These data challenges may be significant because OMB guidance requires any race or ethnicity that is equivalent to at least one percent of the Agency population to be separately reported.⁷⁹ Although employees are not required to report their race and ethnicity to the Agency, the SEC should continue to prompt employees to update this information periodically, perhaps on an annual basis.⁸⁰

(4) The Agency should develop and implement a process for routinely comparing demographic variables to the data related to misconduct and any resulting corrective or disciplinary actions.

To reduce the potential for disparities resulting from conscious or unconscious bias within the Agency’s corrective and disciplinary actions, we suggest that the SEC develop a process to continually analyze employee misconduct, corrective and disciplinary actions, and demographic data to monitor for potential disparate outcomes for employees of different races, ethnicities, or genders, or other demographic variables, who commit misconduct and may receive corrective or disciplinary action. Beyond monitoring and reporting in this area, the SEC should develop criteria and a process for determining when any identified disparity among a particular race, ethnicity, or gender requires a more in-depth review to determine its root cause.

(5) The Agency should reduce the potential for bias in its corrective and disciplinary actions by better standardizing its processes and training management on the effects of bias when handling employee misconduct.

In addition to analyzing data for bias, the Agency should consider how to minimize the opportunities for bias—conscious or not—to lead to disparities within corrective and disciplinary actions. The SEC should consider how to further standardize the disciplinary process to reduce the possibility for bias. For example, we understand that OHR or OIG typically conduct investigations into allegations of employee misconduct, but there are instances where SEC component managers have completed those investigations for misconduct they deem to be mission-specific. Additionally, the SEC’s designations to standardize the proposing and deciding officials are an important step in furthering consistency within

⁷⁷ This change was in accordance with OMB’s *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58782 (Oct. 30, 1997) and OMB Memo 00-02 (March 9, 2000), accessed at: <https://georgewbush-whitehouse.archives.gov/omb/bulletins/b00-02.html>.

⁷⁸ OMB’s *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58782 (Oct. 30, 1997).

⁷⁹ OMB Memo 00-02 (March 9, 2000) at Attachment Section I, accessed at: <https://georgewbush-whitehouse.archives.gov/omb/bulletins/b00-02.html>.

⁸⁰ On July 16, 2021, and July 21, 2021, through the “SEC Today,” OEEO prompted employees to update their demographic information in Employee Express. Prior to that, the CHCO reached out to all Agency employees via email in July 2018, requesting employees review and update this information in Employee Express. Periodically prompting Agency employees to provide or update this data also helps to further the Agency’s duty pursuant to EEOC Management Directive (MD) 715, which requires agencies to “Maintain a system that collects and maintains accurate information on the race, national origin, sex and disability status of agency employees.” EEOC MD-715, *Model Title VII and Rehabilitation Act Programs*, Section II, part (E).

the disciplinary process.⁸¹ (b)(2); (b)(5)

Using as few administrative officials as necessary in administering disciplinary actions is helpful to reduce the potential for bias and to better streamline the decision-making process. In addition, managers should be required to consult with OGC as early in the corrective/disciplinary process as possible so that OGC can more quickly and thoroughly detect potential bias. Moreover, the SEC should train managers to be aware of biases when evaluating employee misconduct and determining appropriate corrective or disciplinary action. Managers may not consciously realize when biases may be impacting their decisions in these areas, and bringing it to the forefront of decision-making can help eliminate the potential for and effects of any such biases.

Next Steps

On July 22, 2021, we provided SEC management with a draft of our management letter for review and comment. In its August 12, 2021, response, management acknowledged the results of our review and its alignment with the Agency's continued commitment to promoting diversity, equity and inclusion as emphasized by its FY 2020-2022 Diversity and Inclusion Strategic Plan. Management's complete response is reprinted as an attachment to this final management letter.

To help us determine whether further action by the OIG is warranted, we request that management provide the OIG, no later than September 23, 2021, a description of the actions the Agency has taken or plans to take to address the concerns raised in this letter.

We appreciate the courtesies and cooperation extended to us during our review. We look forward to receiving more information on the Agency's efforts in the areas we highlighted above for possible improvement. If you have any questions, please contact me or Katherine Reilly, Counsel to the Inspector General.

Attachment

cc: Prashant Yerramalli, Chief of Staff, Office of Chair Gensler
Heather Slavkin Corzo, Policy Director, Office of Chair Gensler
Kevin R. Burris, Counselor to the Chair and Director of Legislative and Intergovernmental Affairs
Scott E. Schneider, Counselor to the Chair and Director of Public Affairs
Lisa Helvin, Legal Counsel to the Chair
Benjamin Vetter, Counsel, Office of Commissioner Peirce
Matthew Estabrook, Counsel, Office of Commissioner Roisman
Frank Buda, Counsel, Office of Commissioner Lee
Andrew Feller, Counsel, Office of Commissioner Lee
Armita Cohen, Counsel, Office of Commissioner Crenshaw
Kenneth Johnson, Chief Operating Officer, Office of the Chief Operating Officer
Peter Gimbrere, Senior Advisor, Office of the Chief Operating Officer
John Coates, General Counsel

⁸¹ See *Amendment of Designation of Personnel to Perform Delegated Functions and Other Functions*, Section K-15: *Authority to Act as a Proposing Official on Disciplinary and Adverse Actions* (updated May 27, 2021); *Amendment of Designation of Personnel to Perform Delegated Functions and Other Functions*, Section K-16: *Authority to Act as a Deciding Official on Disciplinary and Adverse Actions* (updated May 27, 2021).

Elizabeth McFadden, Deputy General Counsel, Office of General Counsel
Jim Blair, Assistant General Counsel for Employment Law, Office of General Counsel
James McNamara, Director of Human Resources, Office of Human Resources
Travis Elliott, Chief Counsel, Office of Human Resources
Pamela Gibbs, Director, Office of Minority and Women Inclusion
M. Stacey Bach, Acting Director, Office of Equal Employment Opportunity
Gabriel Benincasa, Chief Risk Officer
Matthew Keeler, Management and Program Analyst, Office of Chief Risk Officer

MEMORANDUM

To: Katherine H. Reilly, Counsel to the Inspector General
Office of Inspector General

From: Kenneth A. Johnson, Chief Operating Officer
Office of the Chief Operating Officer

Date: August 12, 2021

Subject: Management's Response to the Office of Inspector General's Draft Letter –
*Review for Racial and Ethnic Disparities in the SEC's Issuance of Corrective
and Disciplinary Actions from January 1, 2017 – August 31, 2020*

**KENNETH
JOHNSON** Digitally signed by
KENNETH JOHNSON
Date: 2021.08.12
14:58:45 -04'00'

Thank you for the opportunity to review and comment on the Office of Inspector General's ("OIG") Draft Letter: *Review for Racial and Ethnic Disparities in the SEC's Issuance of Corrective and Disciplinary Actions from January 1, 2017 – August 31, 2020*. We appreciate the courtesy your staff has extended to us and we welcome the benefit of your observations.

The U.S. Securities and Exchange Commission ("SEC" or "Agency") is committed to advancing diversity, equity and inclusion and preventing racial bias in the workplace. As you note in the Letter, the Agency's Fiscal Year 2020-2022 Diversity and Inclusion Strategic Plan emphasizes the Agency's "continued commitment to promoting diversity, inclusion, and equal opportunity is critical to allowing the Commission to attract and retain talent with mix of skills and expertise needed to maximize our effectiveness." As further outlined in the Strategic Plan, critical to the Agency's success in fulfilling this commitment is demonstrating leadership accountability through agency policy, messaging and behavior. We therefore appreciate the OIG's observations as a result of its review to assist the SEC in meeting its diversity, equity and inclusion goals and in particular in the areas of corrective and disciplinary actions.

Thank you again for the opportunity to review and comment on the Letter. We look forward to providing the OIG with our response to OIG's observations by the requested due date.