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Calculating SEC Civil Money Penalties: Do Hundreds of Related Acts Constitute a Single Course of Conduct or Hundreds of Separate Violations?

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In addition to going to court to seek sanctions, the Securities and Exchange Commission may impose civil money penalties in its own administrative proceedings on any person who violates, or causes a violation of, the federal securities laws. Unlike federal district courts, administrative law judges do not have authority to base penalties on respondents' pecuniary gains resulting from violations. Instead, under the various penalty statutes, maximum penalties in administrative proceedings are based on "each act or omission" violating, or causing a violation of, the federal securities laws.[1] Currently, the maximum penalties for "each act or omission" are:

	Individual	Entity
Tier 1 Any Violation	$ 7,500	$ 80,000
Tier 2 A Violation Involving Fraud, Deceit, Manipulation or Deliberate or Reckless Disregard of Regulatory Requirement	$ 80,000	$400,000
Tier 3 A Violation that Also Involves a Substantial Risk of Loss to Others or Gain to the Violator	$160,000	$775,000

The potential impact of the "*each* act or omission" language is easily seen in the following hypothetical. A public company with 50,000 investors accidentally misstates its financial results. The Commission alleges that the misstatements were reckless. The misrepresentations or omissions are contained in its quarterly and annual reports distributed to its shareholders over a two-year period and affect four statements made in each such report.

[1] 15 U.S.C. §§77h-1(g), 78u-2(b), 80a-9(d), 80b-3(i). The penalty amounts are adjusted for inflation pursuant to 17 C.F.R. §201.1004 and the adjustments are set forth in Subpt. E, Table IV of the rule. Certain other statutes, beyond the scope of this article, govern penalties for failure to file reports, violations of the Foreign Corrupt Practices Act, and insider trading violations by a controlling person. For a discussion of the evolution of the SEC's civil money penalty authority, see Eisenberg, "Brother Can You Spare $8.9 Billion? Making Sense of SEC Civil Money Penalties," K&L Gates Legal Insight (Feb. 11, 2014).

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Depending on the methodology used to calculate "each act or omission," the maximum potential liability could be any of the following:

1. Each Investor to Whom a Misleading Report Was Sent Involves a Separate "Act or Omission"

	50,000 (number of investors receiving the misleading reports)
x	$775,000 (maximum fine per "act or omission")
Total	$38.75 billion

2. Each Distinct Misleading Report Was a Separate "Act or Omission"

	8 (number of reports sent to each investor over the two-year period)
x	$775,000 (maximum fine per "act or omission")
Total	$6.2 million

3. Each Distinct Misleading Statement Within a Report Was a Separate "Act or Omission"

	4 (number of misleading statements or omissions per report)
x	$775,000 (maximum fine per "act or omission")
Total	$3.1 million

4. A Combination of 1, 2, and 3 Above

	50,000 (number of investors receiving the misleading reports)
	8 (number of reports sent to each investor over the two-year period)
	4 (number of misleading statements or omissions per report)
x	$775,000 (maximum fine per "act or omission")
Total	$1.24 trillion

5. All of the Conduct Combined Is Considered a Single "Course of Conduct" and the Course of Conduct is Considered to be One "Act or Omission"

	1 (course of conduct)
x	$775,000 (maximum fine per "act or omission")
Total	$775,000

There are many other realistic hypotheticals that could involve large multipliers. For example, for large broker-dealers a single coding error could, over time, easily lead to millions of inaccurate trade reports to an exchange. Or a failure to retain certain types of electronic communications could lead to millions of violations of recordkeeping requirements if, for example, each unretained email were considered a separate act or omission. An overly literal reading of the "each act or omission" standard could result in an exposure far out of proportion to the gravity of the violations found.

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We discuss below 28 cases, each decided between 2013 and 2016, to see how SEC administrative law judges have applied the "each act or omission" in practice. In more than a third of the cases reviewed, administrative law judges applied a "course-of-conduct" standard that combines related acts into a course of conduct and treats the course of conduct as a single act or omission for civil money penalty purposes. This greatly reduces the risk of disproportionate liability. Administrative law judges also employ other standards that reduce the number of violations, but not by as large a factor as the course-of-conduct standard. We also discuss that, in some cases, it is difficult to reconcile the different methodologies and that they often appear to be a means for backing into an amount based on other considerations—the administrative law judge's perception of the fairness of the penalty in light of the totality of factors considered, such as the degree of culpability by the violator and the harm to investors. As we discuss below, these decisions might not survive appellate scrutiny under the standards set forth in *Rapoport v. SEC*, 682 F.3d 98 (D.C. Cir. 2012), but very few respondents appeal their sanctions all the way to the D.C. Circuit.

I. Rejection of the Enforcement Staff's "Number of Investors" Standard When the Number of Investors Is Large But Not When the Number Is Small

A useful starting point is Chief Administrative Law Judge Brenda Murray's August 17, 2015, opinion in *In re Total Wealth Management, Inc., et al.,* Initial Dec. No. 860. In that case, Chief Judge Murray found violations of both the antifraud provisions and custody provisions of the securities laws. With regard to the antifraud violations, the enforcement staff urged that misrepresentations to each of 192 investors should count as separate violations. Chief Judge Murray called the staff's approach "arbitrary," and stated, "Equating the number of investors with the number of violations…. is overly simplistic and may lead to wildly disproportionate penalty amounts." Instead, with respect to the misrepresentation claims, she found a total of five violations based on there being five distinct Forms ADV that contained the misrepresentations or omissions. With respect to the four years of custody violations, she found that each year constituted only one act or omission for civil money penalty purposes. She ordered a total civil money penalty of $780,000. \

A good argument can be made that *Total Wealth Management* stands for applying a common-sense approach where the potential multiplier—whether it be the number of investors, the number of misleading communications, the number of reporting errors, the number of recordkeeping errors—is very large. One potential concern for the Commission is that the Eighth Amendment prohibition against excessive fines could be triggered by a high multiplier. *See United States v. Bajakajian,* 524 U.S. 321 (1998) (forfeiture violates the Excessive Fines Clause if it is "grossly disproportional" to the gravity of the offense that it is designed to punish). Another, however, is simply that the amount of the penalty would be unfair, particularly considering that many of the cases also include other relief, such as disgorgement, suspensions and bars, and cease-and-desist orders.

On the other hand, there are decisions that have used a number-of-investors standard when the number of investors was much smaller than the 192 investors in *Total Wealth Management*. For example, in *In re George N. Krinos, et al.,* Initial Dec. No. 929 (Dec. 21, 2015), Chief Judge Murray found that a number of false statements that she characterized as "legion" had been made to 19 individual investors over a two-year period. She treated each of the 19 individual investors as a separate "act or omission" for civil money penalty

purposes, and she imposed a total civil money penalty of $1,155,000, which she stated was close to the amount of investor funds raised.

Similarly, in *In re Gerasimowicz,* Initial Dec. No. 496 (July 22, 2013), involving antifraud violations, Judge Carol Fox FoelakFoelak imposed a penalty of $1,950,000 based on "thirteen courses of action, one for each investor… harmed by Respondents' fraudulent conduct."

In *In re Michael Bresner, et al.,* Initial Dec. No. 517 (Nov. 8, 2013), Judge Cameron Elliot found that respondents engaged in excessive trading in a number of customer accounts. For respondents who engaged in the trading, Judge Elliot imposed a single penalty for each customer whose account was traded excessively. The total penalties came to $435,000, of which $5,000 related to a failure-to-supervise charge.

II. Adoption of a "Course of Conduct" Standard to Treat Related Violations as a Single Act or Omission

Many decisions apply a "course of conduct" standard in which related acts or omissions are combined into a single violation for purposes of calculating civil money penalties. In some cases, all of the acts or omissions are combined into a single course of conduct; in others, they are combined into multiple courses of conduct. The course of conduct standard is the most favorable approach for a respondent because it results in the smallest number of "acts or omissions." We discuss a number of these decisions below.

In *In re Reliance Financial Advisors, LLC, et al.,* Initial Dec. No. 941 (Jan. 11, 2016), Judge Jason S. Patil found that respondent made eight different types of false statements to investors, that he sold interests in a fund pursuant to a private placement memorandum that he knew was false, and that he made other oral misrepresentations. Judge Patil stated, "While violative acts or omissions may be parsed many different ways, I find that there are two categories of violations that are particularly deserving of a penalty…." He then combined into a single act or omission all of the misrepresentations concerning the background of the co-founder of a fund, and into another act or omission all of the misrepresentations made to persuade clients to invest and remain in the fund. The total civil money penalty was $250,000.

In *In re David B. Havanich, Jr., et al.*, Initial Dec. No. 935 (Jan. 4, 2016), Judge Foelak found that respondent violated the broker-dealer registration provisions over a two-year period. Arguably, each securities-related transaction over that period could have been viewed as a separate act or omission. Judge Foelak, however, treated respondents' operations as an unregistered broker-dealer over the two-year period as "one course of action" and imposed a $15,000 penalty.

In *In re Spring Hill Capital Markets, LLC, et al.*, Initial Dec. No. 919 (Nov. 30, 2015), Judge Foelak found that respondents operated as an unregistered broker-dealer over a 10-month period and, after registering as a broker-dealer, then violated recordkeeping, net capital, and reporting requirements. Judge Foelak treated these as two "courses of action"—one involving all of the acts and omissions associated with being an unregistered broker-dealer, and the other being all of the violations occurring after registration as a broker-dealer. She imposed a total penalty of $82,500.

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In *In re Natural Blue Resources, Inc., et al.,* Initial Dec. No. 863 (Aug. 18, 2015), Judge Foelak found that respondents orchestrated a fraudulent scheme to control the operation and management of a company as *de facto* officers, while calling themselves "outside consultants," over a three-year period. The scheme involved numerous acts and omissions. Judge Foelak stated that they would be considered "one course of action," and she imposed a civil money penalty of $75,000 on each respondent.

In *In re Donald J. Anthony, Jr., et al.*, Initial Dec. No. 745 (Feb. 25, 2015), Chief Judge Murray found that over a period that lasted for more than five years, respondents sold unregistered notes without any applicable exemption from registration requirements, and violated the antifraud provisions of the securities laws by recommending unregistered securities offerings despite a number of red flags. She also found that respondents misrepresented the track record and safety of the investments and failed to disclose material information about the investments. Chief Judge Murray assigned a single third-tier penalty of $130,000 against each of the respondents.

In *In re Thomas C. Gonella,* Initial Dec. No. 706 (Nov. 13, 2014), Judge James E. Grimes found multiple antifraud and recordkeeping violations, and imposed one penalty for all of the antifraud violations and one penalty for all of the recordkeeping violations, which together totaled $82,500. In explaining the penalty for the recordkeeping violations, Judge Grimes stated, "Although [respondent] caused books and records violations each time he trades with [the counterparty], because I regard his actions as a single course of conduct, I impose a single penalty for the books and records violation."

In *In re John Thomas Capital Management Group LLC, et al.,* Initial Dec. 693 (Oct. 17, 2014), Judge Foelak found multiple misrepresentations and omissions concerning a fund, the fund's placement agent, and the fund's owner. She treated the various misrepresentations and omissions as involving "three courses of action" related to the subject matter of the three collections of misrepresentations and omissions. She imposed a total penalty of $450,000.

In *In re Mohammed Riad and Kevin Timothy Swanson,* Initial Dec. No. 590 (Apr. 21, 2014), Judge Foelak concluded that respondents repeatedly engaged in a trading strategy that was inconsistent with the disclosures in the fund's registration statement and that, in addition, they provided misleading information concerning the trading strategy, which was included in the fund's annual and semi-annual reports. Judge Foelak imposed a single penalty of $130,000 on each of two respondents, stating that their failure to apprise investors of the strategy "will be considered as one course of action resulting in one unit of violation."

In *In re Gregg C. Lorenzo, et al.,* Initial Dec. No. 544 (Dec. 31, 2013), Judge Foelak found that respondent violated antifraud provisions of the federal securities laws when he sent emails containing "extensive false information" to two potential investors. She stated that the events at issue would be considered "one course of action" and imposed a penalty of $15,000.

In *In re Daniel Bogar, et al.,* Initial Dec. No. 502 (Aug. 2, 2013), Judge Foelak found that two individuals who had been associated with companies owned by convicted Ponzi-schemer Allen Stanford, violated, and aided and abetted violations of, the Securities Act, the Securities Exchange Act, and the Investment Advisers Act. Despite finding many different misrepresentations and omissions, Judge Foelak stated that the events at issue would be

considered "two courses of action" for civil money penalty purposes—one for the primary violations and one for the secondary violations. She imposed a penalty of $260,000 on each respondent.

III. Other Standards that Reduce the Number of Separate Acts or Omissions

a. *Standards Based on the Number of Distinct Acts of Negligence*

In *In re Thomas R. Delaney II and Charles W. Yancey,* Initial Dec. No. 755 (Mar. 18, 2015), Judge Patil found that during a three-year period, the chief compliance officer of a clearing firm negligently caused at least 1,500 violations of Reg SHO based on the firm's failure to timely close out fails to deliver. Multiplying each violation by the maximum penalty could have led to draconian liability. Instead, Judge Patil imposed a $20,000 penalty for four units of violations, each of which consisted of a separate act of negligence—the failure to convene a meeting of relevant personnel, the incorrect assumption that the Stock Loan department was compliant, the failure to raise the issue with the individual charged with testing, and the failure to follow up on the Stock Loan Department's reaction to a FINRA exit report.

b. *Standards Based on the Number of Distinct Sets of False Statements or False Documents*

In *In re Edgar Lee Giovannetti,* Initial Dec. No. 914 (Nov. 6, 2014), Chief Judge Murray found that respondent caused six different inaccurate Forms ADV to be filed. She treated each inaccurate ADV to be a separate act or omission for civil money penalty purposes, and imposed a fine of $50,000.

In *In re Stanley Jonathan Fortenberry, et al.,* Initial Dec. 748 (Mar. 2, 2015), Judge Grimes found that respondents made nine distinct sets of false statements, and treated each set of false statements to be a separate act or omission for civil money penalty purposes. He imposed a total fine of $900,000.

c. *Standards Based on How Long the Violations Continued*

In some cases, administrative law judges based the units of violation on how long the violations continued, but there is no uniformity on the period of time chosen. As mentioned above, in Chief Judge Murray's decision in *In re Total Wealth Management,* custody violations continued for four years. She found that each year of custody violations constituted a single act or omission for civil money penalty purposes. The same was true in the *Rapoport* case discussed below, which involved broker-dealer registration violations over a multi-year period. On the other hand, in *In re J.S. Oliver Capital Management, L.P., et al.,* Initial Dec. No. 649 (Aug. 5, 2014), involving so-called "cherry picking" violations, Chief Judge Murray stated that "each month of such continuous misconduct counted as one unit of violation."

d. *Judge Elliot's "Less Prejudicial" Standard*

In a number of decisions, Judge Elliot justified the number of violations used for calculating the civil money penalties on the ground that they were less prejudicial to the respondents than the number of violations he could have used. Judge Elliot's view is that the unit of

violation is each purchase or sale, or individual deception, or each transaction, but that he has discretion to apply a different standard that is less prejudicial to a respondent.

For example, in *In re Laurie Bebo and John Buono, CPA,* Initial Dec. No. 893 (Oct. 2, 2015), Judge Elliot used a methodology in which he found four units of violations (false statements and certifications in periodic filings, false statements to auditors, falsifications of the company's books and records, and execution of a scheme to defraud) for each of seven quarters. To come up with a total penalty of $4.2 million, he performed the following calculation:

	4 (units of violations)
	7 (quarters of which the violations occurred)
x	$150,000 (the then maximum third-tier penalty per act or omission)
Total	$4.2 million

He stated, "Counting four units of violation for each quarter prejudices [respondent] less than counting the maximum legally available…"

In *In re Raymond J. Lucia Companies, Inc. and Raymond J. Lucia, Sr.,* Initial Dec. No. 540 (Dec. 6, 2013), Judge Elliot found that respondents misrepresented back-tested returns in over 40 seminars to prospective investors. He imposed a total penalty of $250,000 on the company and $50,000 on the individual. In explaining the penalties, he stated, "Although Respondents technically violated the statute hundreds of times, a one-time penalty prejudices them the least." Further, "Assuming, hypothetically, that [respondent] gave forty seminars a year for the three years actionable under the statute of limitations, at most [the company respondent] would be subject to an $87 million penalty and [the individual respondent] would be subject to an $18 million penalty. Such penalties would be plainly disproportionate."

In *In re David F. Bandimere and John O. Young,* Initial Dec. No. 507 (Oct. 18, 2013), Judge Elliot found that the respondent violated the securities registration provisions of the Securities Act and the broker-dealer registration provisions of the Securities Exchange Act, and, in addition, made 11 different misrepresentations or omissions to multiple investors in connection with multiple investments. He stated he would impose penalties for three violations and that would "prejudice [respondent] far less" than assessing penalties for a larger number of violations. The total penalty of $390,000.

In a related case, *In re David F. Bandimere and John O. Young,* Initial Dec. No. 506 (Oct. 4, 2013), he stated that the record demonstrated at least 24 false statements made by respondents to investors and that "[a]s a matter of statutory interpretation, the unit of violation is either the individual purchase or sale or the individual deception." However, the enforcement staff requested only a one-time penalty, and he imposed a one-time penalty of $100,000. In explaining the penalty, he stated, "Because imposing a single civil penalty prejudices [the respondent] less than imposing twenty-four, I find that there was one violation for purposes of the civil penalty calculation."

In *In re Angelica Aguilera,* Initial Dec. No. 501 (July 31, 2013), Judge Elliot found that respondent failed to reasonably supervise two individuals over approximately two years. He imposed a one-unit penalty of $150,000. In explaining the penalty, he stated, "Although it is

at least arguable that [respondent's] conduct in failing reasonably to supervise [two individuals] over the course of approximately two years constitutes more than one 'act or omission,' a one-time penalty of $150,000 would prejudice [the respondent] the least." He then went on to waive the entire amount based on a demonstrated inability to pay.

In *In re David Mura,* Initial Dec. No. 491 (June 14, 2013), Judge Elliot found that the respondent effected 19 transactions in securities involving 12 investors, without being registered as a broker-dealer. He imposed 12 penalties, totaling $840,000, based on the number of investors. He stated, "As a matter of statutory interpretation, the unit of violation is the individual transaction or attempted transaction." But "using individual investors as the unit of violation prejudices [respondent] less than using total transactions as the unit of violation." He noted that the penalty was roughly comparable to the investor losses caused by the conduct.

e. *Cases Finding a Large Number of Violations, But Imposing Exceptionally Small Penalties Per Violation*

The civil money penalty tiers set forth in the statute are the *maximum* penalties for each act or omission. Nothing prevents the Commission or an administrative law judge from finding a large number of "acts or omissions," but imposing very small penalties for each such act or omission.

For example, in the *Giovannetti* decision discussed above, Chief Judge Murray imposed a total penalty of $50,000, rather than the $350,000 requested by the enforcement staff. She reached that result by imposing a penalty of $7,143 for each act or omission rather than the $50,000 for each act or omission urged by the enforcement staff.

In *In re optionsXpress,* Initial Dec. No. 490 (June 7, 2013), Chief Judge Murray found that respondents violated short-sale requirements on at least 1,200 occasions. The maximum penalty based on multiplying the number of short sale violations by the then maximum per-act-or-omission penalty of $725,000 would have been $870 million. Chief Judge Murray stated that "a literal application of the each act or omission language would have an absurd result," and imposed a civil money penalty of $2 million, which she stated was based on multiplying 1,200 violations by $1,667. For a second respondent, who violated the statute not 1,200 times but 390 times, she ordered the same $2 million penalty by multiplying each of the 390 violations by $5,128. With respect to a third respondent, who did not personally profit, she ordered a civil money penalty of $75,000, but did not explain the basis for that number.

f. *Combinations of Standards Within the Same Decision*

In some cases, administrative law judges use seemingly inconsistent approaches to civil money penalty calculations within the same decision.

For example, in *In re Larry C. Grossman and Gregory J. Adams,* Initial Dec. No. 727 (Dec. 23, 2014), for one respondent Chief Judge Murray calculated the civil money penalty by taking the number of investors who testified that they had suffered a loss (5), adding that to the number of false filings that had been found (7), and multiplying that by the maximum per-act-or-omission penalty at the time, which produced a fine of $1,550,000. For the other respondent, who had been found to have misrepresented or omitted material facts

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concerning referral and consulting agreements pursuant to which he was compensated, she treated each of the 15 payments he received as a unit of violation and imposed a penalty of $50,000 for payment received, or a total penalty of $750,000.[2]

In *In re Ambassador Capital Management LLC and Derek H. Oglesby,* Initial Dec. 672 (Sept. 19, 2014), Judge Elliot found that respondents engaged in two types of misrepresentations—misrepresenting to the board the fund's exposure to Italy, and redeeming fund shares at prices other than the current net asset value ("”NAV"). With regard to the multiple misrepresentations, Judge Elliot treated them as a single unit of violation. With respect to the violations of the rule requiring shares to be redeemed only at NAV, which had a much lower maximum penalty per act or omission, he treated the violations as 85 separate violations rather than a single course of conduct.

In *In re ZPR Investment Management, Inc. and Max E. Zavanelli,* Initial Dec. No. 602 (May 27, 2014), two respondents were accused of violating or aiding and abetting the same violations related to performance advertising. Judge Elliot found that there were 11 violations/aiding and abetting violations—with each separate document in which a misleading advertisement appeared treated as a separate act or omission. In determining the number of violations for penalty purposes, however, Judge Elliot counted the number of violations differently for the two different respondents. For the company, he stated, "Although [the company] violated the statute 11 times, a one-time penalty prejudices them the least," and he imposed a one-unit penalty of $250,000. For the individual, he imposed the maximum individual penalty for each of the 11 violations, resulting in a penalty against the individual of $660,000.

IV. Conclusion

Four principal conclusions emerge from a review of the 28 cases discussed above.

First, each SEC administrative law judge is willing to avoid an overly literal approach to the "each act or omission" standard in order to avoid penalties that are disproportionate to the gravity of the underlying conduct. One way or another, the administrative law judges take a practical rather than an overly literal approach to calculating penalties.

Second, different administrative law judges address the issue in different ways. For example, Judge Foelak is most receptive to the common "course of conduct" standard, in which related acts are combined into a single unit of violation. Judge Elliot takes a more expansive approach to the meaning of "each act or omission," but then often opts for a "less prejudicial" standard in practice. Chief Judge Murray is willing to offset a large number of "acts or omissions" with small penalties for each act or omission.

Third, the analysis of the units of violation in the decisions tends to be perfunctory. In most of the decisions, some of which are more than a hundred pages, the analysis of the number of violations is only a sentence of two. Most of the civil money penalty analysis in these decisions involves not the unit-of-violation methodology but the factors that go into whether a civil money penalty is in the public interest—whether the violation involved fraud, whether it

[2] Chief Judge Murray also rejected the enforcement staff's position that she could impose a penalty in an administrative proceeding based on the amount of the respondent's pecuniary gain. The pecuniary gain standard is limited to court cases. *See, e.g.,* 15 U.S.C. §78u(d)(3)(A).

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resulted in harm to others, the extent to which there was unjust enrichment, the respondent's prior disciplinary history, the need to deter the respondent and others, and such other matters "as justice may require."

Fourth, the range of methodologies used, and especially the fact that different methodologies are used within the same case, suggests that the methodology chosen is often not the driver of the result, but instead is chosen because it provides a means of supporting a result chosen for other reasons.

It is not clear whether all of these decisions would survive appellate scrutiny. In *Rapoport v. SEC,* 682 F.3d 98 (D.C. Cir. 2012), the D.C. Circuit vacated an SEC decision refusing to set aside a default judgment against the respondent, who was found to have solicited investors over a five-year period in which his firm was not registered as a broker-dealer. One aspect of the decision involved a review of the administrative law judge's civil money penalty decision, which imposed a one-unit penalty for each of the five years in which the solicitations occurred, for a total of $315,000.[3] The D.C. Circuit stated, "These calculations do not follow the formula set by the statute. To impose second-tier penalties, the Commission must determine how many violations occurred and how many violations are attributable to each person, as the statute instructs." It described the administrative law judge's analysis as "not just superficial; it was nonexistent." Yet in that case, the administrative law judge explained that he would treat every year of violations as one violation unit.

Whether the very brief explanations of violation units in the post-*Rapoport* decisions would be viewed as more defensible in explaining how administrative law judges determined the number of units of violation is not clear. The D.C. Circuit might be surprised that the units-of-violation analysis remains as perfunctory as it is and that administrative law judges often rely on a wide variety of methodologies designed to justify rather than determine the amount of the civil money penalties. On the other hand, appellate courts generally avoid second guessing agency penalty assessments, and that may be true even after *Rapoport.* In a post-*Rapoport* case, *Collins v. SEC,* 736 F.3d 521 (D.C. Cir. 2013), the D.C. Circuit rejected a challenge to a $310,000 SEC civil money penalty, but stated that review of whether an agency's sanction is arbitrary or capricious "requires consideration of whether the sanction is out of line with the agency's decisions in other cases." Absent more respondents exercising their appellate rights to challenge Commission penalty determinations, it is difficult to predict how the courts of appeal would react. Still, the good news for respondents is that the SEC's administrative law judge precedents, including the 28 post-*Rapoport* precedents discussed above, provide a sound basis for limiting civil money penalties, even in cases involving a large number of violative acts. This is an area where common sense, rather than statutory literalism, should and does inform the decisions.

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[3] On remand, the parties entered into a settlement that included a civil money penalty of $39,000. Securities Exchange Act Release No. 68764 (Jan. 30, 2013).

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