HAYNES BOONE

SEC Enforcement Highlights

Fiscal Year 2022

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Fiscal Year 2022 was the first full year in the saddle for Gurbir Grewal, the SEC's Director of Enforcement, and Sanjay Wadhwa, the Deputy Director of Enforcement. Under Chair Gary Gensler's progressive leadership, and with the backing of a hawkish 3-2 majority on the Commission, the Division of Enforcement continued to be aggressive as to charging decisions and remedies. In FY 2022, the SEC filed 760 enforcement actions, imposed an agency record $6.43 billion in civil penalties, disgorgement and prejudgment interest, and expanded its regulatory waterfront with several first-of-their-kind cases.

In this article, we highlight some of the SEC's significant enforcement actions from FY 2022 – which spanned from October 2021 through September 2022. These actions provide significant directional guidance regarding the SEC's enforcement priorities for today and the coming year.

NEW COMMISSIONERS, BUT THE SAME BALANCE OF POWER

During FY 2022, two new Commissioners joined the SEC -- Jaime Lizarraga (Democrat) and Mark Uyeda (Republican). Prior to joining the Commission, Jaime Lizarraga previously served as a longtime senior advisor to House Speaker Nancy Pelosi and as a staff member on the House Financial Services Committee where, among other things, he helped craft the Sarbanes-Oxley Act and Dodd-Frank Act. Similarly, Mark Uyeda joined the Commission after working for the Senate Committee on Banking, Housing and Urban Affairs. Before working on Capitol Hill, Uyeda served on the SEC staff as a senior advisor to former SEC Chair Clayton and counsel to former Commissioner Atkins. While new Commissioners add different perspectives and often advocate for changing priorities, based on their backgrounds, we do not expect the addition of Commissioners Lizarraga and Uyeda to have a material impact on the SEC's enforcement program.

FISCAL YEAR 2022 ENFORCEMENT HIGHLIGHTS

Following relatively flat numbers during the height of the pandemic in FY 2020 and FY 2021, the Enforcement Division filed a total of 760 enforcement actions in FY 2022, up 9% over the prior year. The SEC filed 462 new or "stand alone" cases in FY 2022, an increase of 6.5% compared to the prior year.[1]

In announcing the SEC's FY 2022 enforcement results, Grewal emphasized the agency's all-time high of $6.43 billion in monetary relief, including total civil penalties of $4.19 billion, which was nearly triple the civil penalties imposed in FY 2021.[2] While the huge increase in civil penalties drove the SEC's record year for total monetary relief, total disgorgement of $2.24 billion was down 6% from the prior year.[3] Grewal noted that the Enforcement Division "sought to re-calibrate penalties to more effectively promote deterrence and get away from the idea that penalties are just another business expense."[4] Grewal expressed optimism that higher civil penalties would have a deterrent effect, adding that "we don't expect to break these records and set new ones each year because we expect behaviors to change. We expect compliance."[5]

The types of cases filed by the SEC during FY 2022 remained largely consistent with prior years, although the agency filed more cases involving issuers/audits/accounting (+4%) and fewer cases concerning securities offerings (-10%). The largest categories of actions filed in FY 2022 related to investment advisers/investment companies, securities offerings, delinquent filings by issuers, broker-dealers, and issuers/audits/accounting.

The SEC brought several first-of-their-kind actions in FY 2022, including a "greenwashing" case alleging that an investment adviser made misleading disclosures that underlying mutual fund investments had undergone ESG quality reviews; an action against a software company for allegedly failing to disclose its discretionary practice of *holding back some ripe sales* orders for booking in later quarters; an action against an investment adviser for allegedly misleading disclosures regarding the negative impact of significant cash allocations on "robo" adviser model portfolio returns; and actions against 16 Wall Street firms for

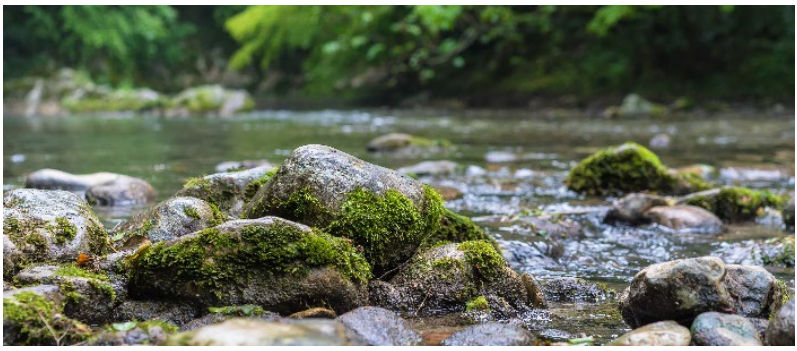
[1] https://www.sec.gov/news/press-release/2022-206
[2] Id.
[3] Id.
[4] https://www.sec.gov/news/speech/grewal-speech-securities-enforcement-forum-111522
[5] https://www.sec.gov/news/press-release/2022-206

failing to monitor, review, and preserve business-related electronic communications.

In speeches, administrative orders, and litigation releases, the SEC continued to highlight its focus on self-policing, self-reporting, and prompt remediation. The SEC noted its consideration of remediation and cooperation in accepting numerous settlements, most frequently citing voluntary repayment of harmed investors, the correction of inadequate or misleading disclosures, the overhaul of relevant policies and procedures, and the removal of culpable employees. The SEC also took into account affirmative cooperation that streamlined investigations, conserved staff resources, or proactively identified additional misconduct.

With respect to SEC operations, as of the publication of this update, the SEC has not required any staff to return to the office, even on a limited basis. While in-person activities were allowed on a voluntary basis throughout FY 2022, most interactions with enforcement and examination staff were virtual or hybrid. We understand that SEC staff will not be required to return to the office until at least January 2023, and that following a failed attempt at mediation, the NTEU (the union which represents line SEC staff) and SEC management are litigating the terms governing employees' return to the office before a Federal Service Impasses Panel.[6] Even if the SEC mandates some return to the office and/or onsite examinations in FY 2023, we expect it to be implemented gradually and on a very limited basis, which may limit opportunities to meet in-person with the staff.

Unless otherwise specified, all settled enforcement orders discussed below were agreed to on a no-admit no-deny basis.



I. Environmental, Social, and Governance Enforcement

In May 2022, **Enforcement's Climate and ESG Task Force brought its first "greenwashing" case** alleging that an investment adviser made material misstatements and omissions regarding ESG considerations in selecting investments for certain mutual funds that it managed.[7] Specifically, the SEC alleged that the investment adviser misstated or implied that a sub-adviser had conducted a proprietary ESG quality review for all underlying investments, when in reality, approximately 25% of the investments had allegedly not undergone such a review. According to the SEC's order, the investment adviser made these misleading statements in mutual fund prospectuses, certain presentations to the funds' boards, and in request-for-proposal responses to investment intermediaries that were evaluating the funds for inclusion in their own ESG strategies.

Based upon these findings, the SEC alleged that the investment adviser violated the antifraud provisions of the Investment Advisers Act of 1940 (the "Advisers Act") and the Investment Company Act of 1940 ("Investment Company Act") and Rule 206(4)-7 promulgated thereunder (the "Compliance Rule"). The investment adviser agreed to a cease-and-desist order and to pay a $1.5 million civil penalty. In accepting this settlement, the order notes that the SEC took into consideration the adviser's cooperation in the investigation, including providing factual

[6] https://www.secunion.org/news/mediation-gensler-fails-disputes-go-fsip
[7] https://www.sec.gov/news/press-release/2022-86

summaries and making substantive presentations on key topics, as well as remedial steps such as revising disclosure language and modifying relevant policies and procedures.

In April 2022, the SEC filed a litigated action against a Brazil-based issuer traded on the NYSE for allegedly **making misleading statements regarding safety prior to the collapse of a dam, which killed 270 people and released millions of tons of mining waste.**[8] The SEC alleged that in numerous filings and other public statements, the company falsely represented that its dam met international standards, while internally, it knew the dam had shown alarming signs of instability. The SEC's complaint also alleged that the company engaged in a fraudulent course of conduct by, among other things, manipulating dam safety audits, obtaining fraudulent stability certificates, using flawed and unreliable data to perform safety analyses, and misleading local communities about the safety of the dam. In the pending litigation, the SEC seeks a permanent injunction, disgorgement, and civil penalties.

II. Public Company Disclosure and Offering Registration Enforcement

Many of the SEC's FY 2022 public company disclosure cases alleged material misstatements and omissions relating to the timing and characterization of reported revenue, even in some cases where the revenue had been recognized in accordance with Generally Accepted Accounting Principles ("GAAP"). Enforcement continued to pursue its Earnings Per Share ("EPS") Initiative, which uses data analytics to flag companies with anomalous records of meeting public earnings guidance.

As part of the EPS Initiative, in August 2022, the SEC announced settled charges against a manufacturing company and its former CFO for allegedly **failing to disclose the practice of shipping orders ahead of schedule to "pull forward" revenue from future quarters**.[9] According to the SEC, over a period of almost five years, the company shipped orders weeks or months ahead of schedule in order to meet analysts' quarterly revenue and earnings targets. The SEC alleged that the company's touted financial performance was rendered misleading because of its failure to disclose that pull-forward practices cannibalized revenue from future quarters and strained relationships with important customers. The SEC further alleged that in some instances, the company shipped orders early without customer approval and recognized revenue from those transactions prematurely, in violation of GAAP.

The company and former CFO agreed to cease and desist from future violations of the antifraud provisions of federal securities laws and to pay civil penalties of $2 million and $75,000 respectively. The SEC's order noted the company's extensive cooperation during the investigation, including conducting its own internal investigation and providing the SEC with updates, key documents, and new information about the related conduct. The former CFO also agreed to a suspension from practicing before the SEC as an accountant, with a right to reapply in five years. Pursuant to Section 304(a) of the Sarbanes-Oxley Act ("SOX 304"), the former CFO and three other executives agreed to return more than $561,000 of incentive-based compensation to the company.

[8] https://www.sec.gov/news/press-release/2022-72
[9] https://www.sec.gov/news/press-release/2022-137

In September 2022, the SEC announced settled charges against a technology company for allegedly **misleading investors by delaying product deliveries to "push back" tens of millions of dollars in revenue into future quarters**.[10] The SEC alleged that over two years, the company managed earnings by intentionally holding back on some sales orders which were otherwise ready, delivering products or services shortly after the end of each quarter, inflating the order backlog that existed during reporting periods, and allowing the company to start each new quarter with a revenue buffer. In a novel theory, the SEC alleged that **by failing to disclose its pipeline management practices, the company concealed it slowing performance relative to projections.** The company agreed to a cease-and-desist order and to pay a civil penalty of $8 million.

Also in September 2022, a commercial aircraft manufacturer and its former CEO agreed to cease-and-desist orders and to pay civil penalties of $200 million and $1 million, respectively, to settle claims that they **made materially misleading public statements about the safety of the company's airplanes following two crashes** in 2018 and 2019.[11] According to the SEC's order, the company and its CEO made public statements following the first crash that assuaged the public of any safety concerns related to the aircraft despite being aware that the flight control system posed an ongoing safety issue. The SEC alleged that after the second airplane crash, the company and its CEO denied any vulnerabilities in the certification process of the flight control system, even though by that time, an internal compliance review had revealed inconsistencies in the documentation process.

In January 2022, the SEC announced settled charges against an e-commerce company alleging that it **made material misstatements and omissions regarding the independence of one of its directors due to certain interlocking relationships on two public companies' boards.**[12] According to the SEC's order, the e-commerce company director was not independent because he also served as the CFO of another public company where the e-commerce company's CEO served as a director and member of the other company's compensation committee. Based on this conduct, the company agreed to cease-and-desist from violating the SEC's disclosure-controls, proxy-disclosure, and reporting rules and to pay a civil penalty of $325,000.

In another first-of-its-kind case, in September 2022, the SEC **charged a public company bank issuer and its affiliate with the unregistered offer and sale of approximately $17.7 billion in securities in excess of two shelf registration statements**.[13] According to the order, following a settled SEC action against one of the issuer's affiliates in 2017, the issuer lost its status as a well-known seasoned issuer (WKSI) and converted two WKSI shelf registrations to non-WKSI shelf registrations. However, the SEC alleged that the issuer failed to establish internal controls to track and monitor in real-time aggregate offers and sales, resulting in the issuance of securities far in excess of the respective shelf registrations. To settle the matter, the respondents agreed to a cease-and-desist order, a $200 million civil penalty, and the payment of more than $161 million in disgorgement and prejudgment interest which was deemed satisfied by an offer of rescission made to investors in the unregistered offerings.

III. Accounting and Auditing Enforcement

During FY 2022, the SEC brought several significant actions alleging financial misstatements and auditing misconduct, including additional actions arising from the EPS Initiative.

[10] https://www.sec.gov/news/press-release/2022-160
[11] https://www.sec.gov/news/press-release/2022-170
[12] https://www.sec.gov/enforce/34-93929-s
[13] https://www.sec.gov/news/press-release/2022-179

In December 2021, the SEC announced charges against a kidney dialysis provider, two former CFOs, and a former controller for allegedly manipulating the timing of reported revenue over seven quarters.[14] The SEC alleged that the defendants **made improper "topside" adjustments that purported to reconcile cash received from insurance companies compared to prior estimates.** According to the SEC's complaint, GAAP and the company's revenue recognition policies required these adjustments to be based upon patient-level collections compared to estimates. However, the SEC alleged that defendants entered false patient-level data and presented misleading documents to the company's auditors in order to meet predetermined quarterly goals for revenue and other financial metrics. Following the discovery of this revenue manipulation, the company restated its financial statements for seven quarters, reflecting that the company had overstated net income by more than 30% for 2017 and more than 200% for the first three quarters of 2018.

The SEC's complaint charged the defendants with violations of the antifraud, reporting, books and records, and internal accounting control provisions of the federal securities laws. The complaint further charged two former chief financial officers and a former controller with lying to auditors. The company consented to a permanent injunction and the payments of a civil penalty of $2 million. In pending litigation against the three former executives, the SEC seeks permanent injunctions, disgorgement, civil penalties, officer and director bars, and SOX 304 clawbacks against the two former CFOs.

In another action stemming from the EPS Initiative, in April 2022, the SEC charged a pest control services company and its former CFO with allegedly **making unsupported reductions to its accounting reserves in amounts sufficient to enable the company to round reported EPS to the next penny to meet analysts' consensus estimates.**[15] The SEC's order alleged that in finalizing financial results in two quarters, when told of pending EPS shortfalls, the company's former CFO directed the reduction of certain reserves without analyzing the appropriate criteria under GAAP and without adequately memorializing the basis for those accounting entries. The company and the former CFO agreed to a cease-and-desist order and to pay civil penalties of $8 million and $100,000, respectively.

In August 2022, the SEC charged a construction company and a former senior vice president with **manipulating a division's profit margins by improperly deferring expenses for project cost overruns.**[16] According to the SEC, the scheme unraveled when several construction projects neared completion, and cost overruns could no longer be deferred. While the SEC credited the company for self-reporting and remediation that included redesigning its policies and procedures to increase the transparency and accuracy of expected costs for construction projects, the SEC still imposed a civil penalty of $12 million. The SEC's complaint against the former executive charged him with violating antifraud and other provisions of the federal securities laws, and seeks disgorgement, civil penalties, and an officer and

[14] https://www.sec.gov/news/press-release/2021-252
[15] https://www.sec.gov/news/press-release/2022-64
[16] https://www.sec.gov/news/press-release/2022-150

director bar. In separate administrative proceedings, the company's former CEO and two former CFOs agreed to SOX 304 clawbacks totaling more than $1.4 million.

In September 2022, the SEC announced settled charges against a Chinese affiliate of a global auditing firm for failing to comply with U.S. auditing standards in its portion of audits of U.S. issuers and foreign companies listed on U.S. exchanges.[17] The settled order cited examples that the company's personnel in China had allegedly **asked clients to select and test samples themselves, which created a risk that clients would strategically choose only supported samples and impair the reliability of the testing**. The order also found that audit staff at various levels of seniority allegedly **asked clients to prepare audit documentation purporting to show that the auditor had obtained and analyzed supporting evidence for certain account entries, when there was no evidence in the workpapers that the auditors had in fact done so.** To settle the charges, the Chinese audit affiliate agreed to pay a civil penalty of $20 million and to retain and implement recommendations by an independent compliance consultant to correct deficiencies in audit policies and procedures, to perform annual reviews of the revised procedures, and to conduct three years of additional training for all of its audit professionals who serve U.S. public company audit clients.

In June 2022, the SEC charged a national audit firm for alleged **cheating by its audit professionals on ethics exams required to obtain and maintain CPA licenses**.[18] The SEC further alleged that the firm initially withheld evidence of the misconduct from the staff during the enforcement investigation. In the settlement, the audit firm admitted the underlying facts, agreed to pay a civil penalty of $100 million – the largest penalty ever imposed by the SEC against an audit firm -- and to undertake extensive review and remediation of the firm's policies and procedures regarding ethics. **In a first-of-its-kind undertaking, the firm also agreed to retain an independent consultant to review conduct regarding its disclosure failures to the SEC staff, including whether lawyers or other employees contributed to the firm's failure to correct its initial misleading submission.**

In December 2021, the SEC charged three current or former partners of a national accounting firm and an issuer's former chief accounting officer with aiding, abetting, and causing **violations of the auditor independence rules for billing and receiving payment based on a contingent fee for tax credit and tax incentive services performed.**[19] Each of the individual respondents settled by agreeing to suspensions with a right to reapply for reinstatement ranging from one to two years, and civil penalties ranging from $10,000 to $30,000.

IV. Investment Advisers Enforcement

As in past years, the SEC focused its enforcement efforts on investment advisers to private funds and retail investors, while bringing relatively few cases against advisers to registered funds. Significant SEC cases this past fiscal year concerned fees and expenses, the concealment or failure to disclose losses and trading strategy risks, valuation of private fund and registered fund assets, and the failure to adequately disclose conflicts of interest.

In June 2022, the SEC charged an adviser to multiple private equity funds with **failing to disclose the disproportionate allocation of certain bridge financing expenses to one fund.**[20] The adviser voluntarily repaid more than $3.3 million to the impacted fund, and agreed to pay a civil penalty of $1 million.

In December 2021, the SEC charged an investment adviser to private equity funds with **failing to**

[17] https://www.sec.gov/news/press-release/2022-176
[18] https://www.sec.gov/news/press-release/2022-114
[19] https://www.sec.gov/enforce/34-93749-s
[20] https://www.sec.gov/news/press-release/2022-107

properly offset management fees to account for certain fees the adviser and its affiliates received from portfolio companies.[21] The SEC also charged the adviser with making inconsistent statements in its private placement memoranda and limited partnership agreements regarding management fee offsets for partial dispositions of portfolio companies. To settle the charges, the adviser voluntarily repaid $5.4 million to affected private fund clients and agreed to pay a $4.5 million civil penalty.

In September 2022, the SEC settled charges against a venture capital adviser for its alleged **improper calculation of post-commitment management fees.**[22] Among other things, the SEC alleged that the adviser failed to adjust fees to reflect write-downs in certain portfolio company securities and miscalculated the time period when it was appropriate to charge post-commitment management fees. To settle the charges, the firm voluntarily repaid $678,681 to the impacted funds and agreed to pay a civil penalty of $175,000.

In parallel actions in May 2022, the SEC and DOJ charged the U.S. subsidiary of a multinational investment adviser and three former senior portfolio managers, alleging that in marketing materials provided to more than 100 institutional investors, the defendants **concealed losses and downside risks of a complex options trading strategy**.[23] In settling with the SEC and DOJ, the **investment adviser admitted to defrauding investors and agreed to pay more than $5 billion in restitution and a civil penalty of $675 million**. As a collateral consequence of its guilty plea with DOJ, the U.S. affiliate of the adviser was immediately disqualified from providing advisory services to U.S. registered funds for 10 years. Two of the three former senior portfolio managers pled guilty to the criminal charges and consented to permanent injunctions in the SEC's parallel civil case, while agreeing to have the Court determine monetary relief at a later date. The DOJ and SEC cases against one of the former senior portfolio managers remain pending.

In February 2022, the SEC charged the former Chief Investment Officer and founder of an investment adviser with overvaluing private fund and registered fund assets by more than $1 billion.[24] The SEC alleged that **the former CIO altered inputs and manipulated the code used by a third-party pricing service to value the funds' assets, and then attempted to mislead the SEC staff** by creating backdated minutes of valuation committee meetings that never occurred and altering documents purporting to describe the firm's valuation policies. The former CIO subsequently pled guilty to criminal securities fraud.[25] The SEC's charges and a parallel case filed by the CFTC remain pending.

In a first-of-its-kind sweep, in September 2022, the SEC **charged nine investment advisers to private funds with standalone Advisers Act Rule 206(4)-2 ("Custody Rule") violations and very technical Form ADV disclosure violations, imposing total civil penalties of more than $1 million.**[26] The SEC alleged that eight firms failed to deliver audited financials to all private fund

[21] https://www.sec.gov/news/press-release/2021-266
[22] https://www.sec.gov/news/press-release/2022-154
[23] https://www.sec.gov/news/press-release/2022-84
[24] https://www.sec.gov/news/press-release/2022-29
[25] https://www.justice.gov/usao-sdny/pr/founder-and-former-chief-investment-officer-infinity-q-pleads-guilty-securities-fraud
[26] https://www.sec.gov/news/press-release/2022-156

investors within the requisite timeframes, and that one firm failed to obtain a private fund audit. Notably, the SEC also charged seven of the nine firms with checking a box indicating private fund audit "report not yet received," then failing to file an amended Form ADV upon receipt of audit reports. In public statements following this sweep, senior SEC officials indicated that compliance with rules governing private fund audit delivery and related Form ADV updates will remain a priority in FY 2023.

With respect to investment advisers to retail advisory clients, much of the SEC's focus in FY 2022 remained on **undisclosed conflicts of interest regarding the selection of mutual fund share classes, cash sweep products, or proprietary investment products that paid additional revenue streams to the adviser or affiliated broker-dealers**. For example, the SEC alleged that investment advisers failed to adequately disclose conflicts of interest regarding:

- Selection of mutual fund share classes that paid higher 12b-1 fees or other revenue sharing to affiliated broker-dealers.[27]
- For wrap fee programs, investment advisers' avoidance of transaction fees through the selection of higher cost mutual funds on no-transaction-fee (NTF) platforms.[28]
- Selection of cash sweep programs that paid higher revenue sharing to affiliated broker-dealers or banks.[29]
- Selection of proprietary mutual funds, without adequate disclosure of similar or nearly identical investment products with lower fees.[30]

During FY 2022, **the SEC also leveraged its enhanced capabilities to analyze large sets of trading data to detect and bring actions involving anomalous trading results**. For example, the SEC filed numerous cases during FY 2022 alleging fraudulent "cherry-picking" in which investment advisers preferentially allocated profitable trades or failed to allocate unprofitable trades to personal accounts, thereby disadvantaging client advisory accounts.[31]

The SEC also scrutinized the accuracy of marketing materials concerning algorithmic or "robo" model portfolios offered to retail investors. In June 2022, the SEC charged three subsidiaries of a large retail investment adviser with **making misleading statements regarding the cash allocation of its robo adviser portfolios.**[32] According to the SEC, the adviser represented that the cash allocation was determined through a "disciplined portfolio construction methodology," that sought "optimal return[s]," when in fact, the cash allocations were allegedly driven by the adviser's revenue targets, and the adviser's own data showed that under most market conditions, the excessive cash allocations provided an inferior risk-adjusted rate of return. To settle the matter, the respondents agreed to pay approximately $187 million in monetary relief ($52 million in disgorgement and a $135 million civil penalty) and to retain an independent consultant to review related disclosures and marketing materials.

In a relatively rare move, in June 2022, the **SEC charged a Chief Compliance Officer with aiding, abetting, and causing an investment adviser's violations of the Compliance Rule.**[33] The enforcement action against the CCO stemmed from his alleged wholesale failure to adequately implement the firm's compliance program to detect

[27] https://www.sec.gov/enforce/ia-5932-s; https://www.sec.gov/litigation/litreleases/2022/lr25340.htm; https://www.sec.gov/enforce/ia-6030-s; https://www.sec.gov/litigation/admin/2022/34-95351.pdf
[28] https://www.sec.gov/enforce/ia-6003-s; https://www.sec.gov/enforce/ia-6069-s
[29] https://www.sec.gov/enforce/ia-5932-s
[30] https://www.sec.gov/news/press-release/2022-33
[31] See e.g., https://www.sec.gov/enforce/ia-6086-s; https://www.sec.gov/litigation/litreleases/2022/lr25502.htm
[32] https://www.sec.gov/news/press-release/2022-104
[33] https://www.sec.gov/litigation/admin/2022/34-95189.pdf

misappropriation by an investment advisory representative ("IAR") of funds from two advisory clients. The SEC alleged that over a period of more than 18 months, the CCO repeatedly was made aware of red flags concerning the IAR's failure to disclose to clients his relationship to an outside business activity ("OBA"), including the suspicious transfer of advisory client assets to the OBA, and the IAR's evasion of the firm's compliance procedures relating to the OBA. To settle the charges, the CCO paid a civil penalty of $15,000 and agreed to not serve in a supervisory or compliance capacity for any registrant, with a right to reapply in five years.

In September 2022, the **SEC charged four investment advisers with violations of the pay-to-play rule in connection with municipal offerings**.[34] The SEC charged each of the investment advisers with receiving compensation for advisory services from government entities within two years after making campaign contributions to elected officials or candidates for elected office who had influence over their selection as investment advisers. Each of the investment advisers settled by agreeing to cease-and-desist orders and civil penalties ranging from $45,000 to $95,000.

V. Broker-Dealer Enforcement

The SEC's notable enforcement actions against broker-dealers included large civil penalties for recordkeeping and anti-money laundering ("AML") compliance violations, and the first case alleging violations of the care obligation under Regulation Best Interest ("Reg BI").

In September 2022, the SEC settled charges against 15 broker-dealers and one affiliated investment adviser for allegedly **failing to monitor and preserve employees' electronic communications.**[35] In almost identical orders, the SEC alleged that over almost four years, employees at all levels of seniority sent or received tens of thousands of messages regarding business matters using unauthorized text messaging applications on their personal devices. The SEC further alleged that the firms' failure to capture and preserve employees' business communications on personal devices likely resulted in incomplete document productions in numerous SEC enforcement investigations. Based on the firms' alleged widespread recordkeeping and supervisory violations, **the settled cease-and-desist orders imposed civil penalties totaling more than $1.1 billion, required the firms to admit the underlying facts, and required them to retain and**

[34] https://www.sec.gov/enforce/ia-6126-s
[35] https://www.sec.gov/news/press-release/2022-174

implement recommendations by independent compliance consultants regarding enhanced electronic communications policies and procedures, employee training, surveillance, and disciplinary measures for any prospective non-compliance by employees.

In the first case concerning Reg BI's "care obligation," in June 2022, the SEC charged a broker-dealer and five of its registered representatives with violating Reg BI in connection with the sale of certain illiquid and unrated bonds to retirees and other retail investors.[36] The SEC alleged that the defendants failed to exercise reasonable diligence and care to understand the high risks of the bonds, and therefore lacked a reasonable basis to recommend them to seven retail investors with moderate or conservative risk tolerances. In this pending litigation, the SEC seeks permanent injunctions, disgorgement, and civil penalties.

The SEC also continued to scrutinize broker-dealers' AML policies and procedures and suspicious activity reports ("SARs") filings. In May 2022, the SEC announced settled **charges against a dually registered broker-dealer and investment adviser for alleged deficient implementation and failure to test a new AML alert system.**[37] According to the SEC's order, the firm's systems failed to generate alerts for more than 1700 foreign wire transfers concerning moderate and high-risk countries and at times failed to account for foreign holidays, resulting in the firm's failure to file at least 34 SARs. The firm agreed to a cease-and-desist order and the payment of a civil penalty of $7 million.

VI. Insider Trading Enforcement

The SEC's insider trading enforcement in FY 2022 reflected its increased scrutiny of Rule 10b5-1 trading plans, material nonpublic information gained through consulting engagements, and the agency's willingness to allege insider trading in crypto securities.

In September 2022, the SEC **charged the CEO and former president of a mobile and computer application developer with insider trading, despite both executives having traded company stock pursuant to a purported Rule 10b5-1 trading plan.**[38] The SEC alleged that when both executives entered into Rule 10b5-1 plans, they were aware that the company's largest advertising partner had modified its payment algorithm, which resulted in a significant reduction in revenue over two quarters. The SEC also alleged that the CEO made misleading statements on an analyst call by attributing the revenue declines to "greater than expected seasonality."

The settled order requires the CEO and former President to pay civil penalties equal to two times their losses avoided of $556,580 and $200,254, respectively. **The settled order also imposes undertakings as to the CEO that track provisions of the SEC's *proposed* amendments to Rule 10b5-1**, which are currently pending**.**[39] For example, any trading by the CEO pursuant to a Rule 10b5-1 plan cannot commence before a 120-day cooling off period, and he may adopt only one Rule 10b5-1 plan at any given time.

In November 2021, the SEC announced settled charges against the investment adviser affiliate of a global management consulting firm for its alleged failure to maintain policies and procedures to prevent misuse of nonpublic information obtained by the firm through its consulting engagement.[40] The SEC's order alleges that the **investment affiliate invested hundreds of millions of dollars in companies advised by the management consulting firm**, and that by virtue of their management consulting work, certain personnel

[36] SEC Press Release 2022-110
[37] SEC Press Release 2022-85
[38] https://www.sec.gov/news/press-release/2022-169
[39] https://www.sec.gov/news/press-release/2021-256
[40] https://www.sec.gov/news/press-release/2021-241

overseeing the investment decisions had access to material nonpublic information regarding those companies such as financial results, bankruptcy filings, and significant transactions. The settled order charged the investment adviser affiliate with violations of the Compliance Rule and Section 204A of the Advisers Act and imposed a cease-and-desist order and a civil penalty of $18 million.

In FY 2022, the SEC brought its **first case alleging insider trading concerning transactions in crypto assets.**[41] In July 2022, the SEC alleged that a former product manager of one of the nation's largest crypto asset trading platforms tipped his brother and a friend as to imminent new listings of various crypto assets—including some crypto assets the SEC alleged were securities—on the platform. The SEC further alleged that by purchasing crypto securities ahead of the listing announcements, the defendants made more than $1 million in illicit profits. On the same day, the DOJ announced criminal charges against the same three defendants.[42] In September 2022, one of the tippees -- the brother of the former product manager -- pled guilty to conspiracy to commit wire fraud in connection with a scheme to commit insider trading in cryptocurrency assets. The SEC and DOJ cases remain pending against the other two defendants.

VII. Foreign Corrupt Practices Act Enforcement

The SEC's Foreign Corrupt Practices Act ("FCPA") enforcement during FY 2022 demonstrated enhanced cooperation with foreign regulators and the continued imposition of substantial civil penalties.

In October 2021, the SEC announced settled charges against an investment bank for allegedly misleading investors in a scheme involving two bond offerings and a syndicated loan that raised over $1 billion for state-owned entities in Mozambique.[43] The SEC alleged that at least **$200 million of offering proceeds were used to perpetrate a hidden debt scheme, pay kickbacks to investment bankers and their intermediaries, and bribe Mozambique government officials,** in violation of the antifraud provisions and the FCPA. The SEC's order alleged that the offering materials both hid the underlying scheme and also falsely stated that the proceeds would help develop Mozambique's tuna fishing industry. The SEC's order also alleged that the investment bank lacked sufficient accounting controls which failed to properly address the bribery risks and the alleged conduct. The investment bank agreed to pay disgorgement and interest of more than $34 million and a $65 million penalty to the SEC. In parallel proceedings, the investment bank also agreed to pay DOJ a criminal fine of $247 million and over $200 million to financial regulators in the United Kingdom.

In April 2022, the SEC charged a medical waste management company with FCPA violations stemming from a bribery scheme in three Latin American countries.[44] The SEC alleged that over a four-year period, **the company's Latin American subsidiaries formed sham third-party vendors that issued false invoices to conceal millions in bribes paid to government officials to obtain**

[41] https://www.sec.gov/news/press-release/2022-127
[42] https://www.justice.gov/usao-sdny/pr/three-charged-first-ever-cryptocurrency-insider-trading-tipping-scheme
[43] https://www.sec.gov/news/press-release/2021-213
[44] https://www.sec.gov/news/press-release/2022-65

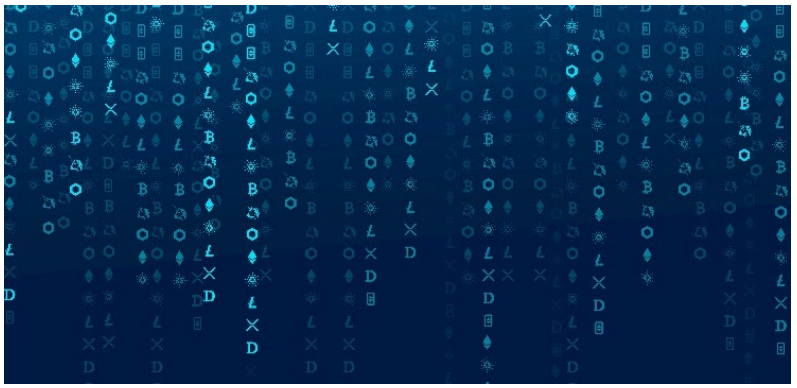
business from government entities. The company agreed to a cease-and-desist order and to pay more than $84 million to settle parallel cases by the SEC, DOJ, and Brazilian regulators. The company also agreed to retain an independent corporate monitor for two years and to self-report regarding FCPA compliance for an additional year.

VIII. Municipal Offerings Enforcement

In March 2022, the SEC charged a school district and its former CFO with misleading investors in the sale of $20 million in municipal bonds.[45] According to the SEC, **the school district and former CFO knew that the district had failed to report millions in payroll and construction liabilities and falsely reported having millions of dollars in a general fund reserve** in financial statements used in the municipal bond offering. While the SEC has rarely charged individuals in municipal offerings, this order emphasized the former CFO's primary responsibility for the financial misstatements and her central role in the bond financing process. The district agreed to a cease-and-desist order, and the former CFO paid a $30,000 civil penalty and agreed to not participate in any future municipal securities offerings.

In a related action, the SEC settled charges of improper professional conduct against the engagement partner of the auditor of the district's financial statements. The SEC alleged that **the engagement partner failed to properly verify and corroborate the district's payroll and construction liabilities, failed to properly supervise the audit, and failed to exercise professional judgment and maintain professional skepticism during the planning and performance of the audit.** The engagement partner was suspended from appearing or practicing before the Commission, with a right to reapply in three years.

In two separate complaints filed in June 2022, **the SEC charged a city, its former finance director, and a school district's former CFO with misleading investors in a bond offering** by concealing that the school district was experiencing a multi-million-dollar budget shortfall.[46] The SEC also charged the city's municipal adviser and its principal with misleading investors as to the school district's financial condition and charged the adviser and both of its principals with failing to disclose conflicts of interest regarding its compensation arrangements to almost 200 municipal advisory clients. The former school district CFO agreed to injunctive relief and the payment of a $25,000 civil penalty, and the SEC seeks injunctive relief, disgorgement, and civil penalties against each of the remaining defendants.



IX. Cryptocurrency and Cybersecurity Enforcement

In numerous public speeches in FY 2022, Chair Gensler reiterated that the SEC would continue to prioritize crypto and cyber enforcement. In May 2022, the agency nearly doubled the Enforcement Division's renamed "Crypto Assets and Cyber Unit."[47]

In FY 2022, the SEC appeared to be increasingly focused on platforms that trade or lend crypto assets. In February 2022, the SEC announced settled charges against a company that offered and sold interest-bearing crypto asset accounts to

[45] https://www.sec.gov/news/press-release/2022-43
[46] https://www.sec.gov/news/press-release/2022-108
[47] https://www.sec.gov/news/press-release/2022-78

investors.[48] The company used investors' crypto assets in its lending and investment activities, which generated income to pay variable interest to investors. The SEC charged the company with allegedly **failing to register the offers and sales of its crypto lending product and alleged that the company had misled investors as to the extent of collateral** held in its portfolio of loans to institutional investors. **In a first-of-its-kind action, the SEC also charged the company with acting as an unregistered investment company**. To settle the charges, the company agreed to pay a $50 million civil penalty to the SEC, to pay $50 million in fines to 32 states, to register its offer and sale of a new retail lending product, and to bring its business into compliance with the Investment Company Act within 60 days.

In July 2022, the SEC announced settled charges against three wealth management firms for **violations of Regulation S-ID (the identity theft red flags rule)** based on deficiencies in the firms' programs to prevent customer identity theft.[49] The SEC alleged, among other things, that the firms had failed to exercise appropriate oversight of third-party service providers, train staff to implement identify theft prevention procedures, or ensure that their procedures were reviewed and updated periodically to reflect changes in identify theft risks to customers. To settle the charges, the firms agreed to cease-and-desist orders and to pay civil monetary penalties ranging from $425,000 to $1.2 million.

X. SPAC Enforcement

Although the number of Special Purpose Acquisition Company ("SPAC") combinations plummeted in FY 2022, these transactions continue to draw close scrutiny from SEC enforcement.

In December 2021, the SEC announced that an electric truck manufacturer created through a SPAC transaction had agreed to pay $125 million to settle charges that the company had **misled investors about its vehicles, technology, and business prospects.**[50] The SEC and DOJ had previously charged the company's founder and former CEO with making numerous false and misleading statements on social media regarding the company's purported technological advancements, products, in-house production capabilities, and commercial achievements. In October 2022, a jury convicted the former CEO on charges of securities and wire fraud. The SEC's case against the former CEO remains pending.

In September 2022, the SEC **charged an investment adviser with failing to disclose alleged conflicts of interest** stemming from the firm's formation of multiple SPACs whose sponsors were owned both by the firm's personnel and by a private fund that the firm advised.[51] The SEC's order alleged the investment adviser repeatedly used fund assets for Private Investment in Public Equity ("PIPE") investments and open market purchases that helped complete the SPAC business combinations, without timely disclosing these conflicts to its fund client. The investment adviser settled by agreeing to a cease-and-desist order and the payment of a civil penalty of $1.5 million.

XI. Cooperation and Remediation Credit

Throughout the year, the SEC attempted to emphasize—in speeches and settled orders—the prospect of reduced charges and civil penalties for prompt remediation and cooperation in investigations. In an October 2021 speech, Director Grewal reiterated the SEC's longstanding policy that "we do not recommend that parties receive credit for simply living up to their legal and regulatory obligations [such as responding to

[48] https://www.sec.gov/news/press-release/2022-26
[49] https://www.sec.gov/news/press-release/2022-131
[50] SEC Press Release 2021-267
[51] SEC Press Release 2022-155

subpoenas]."[52] Grewal warned that the SEC would decline to credit self-reporting if it immediately preceded imminent public disclosure or for counsel "making a presentation to the staff that does not fairly present the facts, but instead is nothing more than an advocacy piece."[53] However, Grewal indicated that SEC enforcement would evaluate cooperation credit when defendants "took significant, tangible steps that enhanced the quality of our investigation, allowed us to conserve resources and bring charges more quickly, or helped us to identify additional conduct or other violators that contributed to the wrongdoing."[54]

Beyond this general guidance, it remained difficult to gauge how the SEC applied these cooperation and remediation metrics in specific settlement negotiations. For example, in January 2022, the **SEC declined to impose a penalty against a private technology company due in large part to the company's "significant remedial efforts."**[55] The SEC's enforcement action against the company alleged that the former CEO artificially inflated the company's valuation by approximately $800 million by falsely boosting the company's key financial metrics and customer sales, including by doctoring and falsifying customer invoices. In public statements regarding the settlement with the company, the SEC cited the company's internal investigation that uncovered the misconduct and its prompt remedial steps, which included the removal of the CEO, publication of an accurate revised valuation, the return of approximately 70% of principal to investors, hiring new senior management, expanding its board, and adopting new internal controls over financial reporting.

In November 2021, the SEC also **declined to impose a penalty against a company that failed to properly disclose the CEO's executive perks and stock pledges, and that inaccurately reported the CEO's perks in its books and records.**[56] The settled order noted the company's significant cooperation and remedial efforts, which included self-reporting, requiring the former CEO to repay the personal expenses, replacing the management team, hiring additional finance personnel, appointing new directors, and developing new internal controls regarding executive perks.

However, in February 2022, **the SEC imposed an $18 million civil penalty against a healthcare products company for allegedly engaging in improper intra-company foreign exchange transactions, despite the company's self-reporting and prompt remedial measures.**[57] Specifically, the SEC alleged that the company used improper accounting methods to convert foreign currency transactions into U.S. dollars on its

[52] https://www.sec.gov/news/speech/grewal-pli-broker-dealer-regulation-and-enforcement-100621
[53] Id.
[54] Id.
[55] https://www.sec.gov/news/press-release/2022-14
[56] https://www.sec.gov/news/press-release/2021-244
[57] https://www.sec.gov/news/press-release/2022-31

financial statements and conducted intra-company foreign exchange transactions to generate foreign exchange accounting gains and avoid foreign exchange accounting losses, thereby misstating its net income in public filings. The order found that the company had violated the antifraud, reporting, and internal controls provisions, but cited the company's cooperation, which included proactively conducting an internal investigation and self-reporting the misstatements, and providing detailed explanations of the transactions. The SEC also noted prompt remedial measures, including adopting GAAP-compliant foreign exchange rate conversion procedures, hiring a new treasurer, recouping certain executive compensation under SOX 304, and restating the company's financial statements.

LOOKING AHEAD

I. Areas of Focus

Because FY 2022 was the first full year with the current senior leadership team at the helm of the Division of Enforcement, we believe that the types of actions brought in FY 2022, and the aggressive penalties and other remedies that accompanied them, will continue to be a focus in FY 2023, particularly actions against large businesses and gatekeepers.

With what appears to be the full support of Chair Gensler and a majority of the Commissioners, Grewal has vowed to "make clear that there is only one set of rules,"[58] and we expect that mindset will translate into continued vigorous enforcement against public companies, SEC registrants, and their senior executives. In particular, we expect that in FY 2023, SEC enforcement will focus on ESG, crypto securities, cybersecurity disclosures, private funds, and a more expansive application of Reg BI.

Because Chair Gensler often has cited ESG as a priority, we expect it will continue to be a focus for rulemaking and enforcement. The SEC's Division of Examinations again included climate-related risks in its 2022 priorities,[59] and as discussed above, the Division of Enforcement's Climate and ESG Task Force brought a handful of cases in FY 2022, including the first alleged "greenwashing" case. In March 2022, the SEC announced its extensive proposed ESG disclosure framework for public companies.[60] And just two months later, in May 2022, the SEC proposed expanding required ESG investment practices by investment advisers and investment companies[61] and proposed amendments to the Investment Company Act's Names Rule to tighten perceived abuses in ESG fund branding.[62] While the precise timetable remains unclear, we expect the bulk of the proposed ESG disclosure rules to be adopted by the Commission on party-line votes sometime during FY 2023.

Despite significant fluctuations in the valuation of many cryptocurrencies and digital assets during FY 2022, product innovation in this space remains robust, and we expect it to be a focus of SEC enforcement in FY 2023 and beyond. In a speech in September 2022, Gensler asserted an expansive view of the SEC's jurisdiction over many crypto assets by asserting that under the Supreme Court's *Howey* test, "[o]f the nearly 10,000 tokens in the crypto market, I believe the vast majority are securities," and "it follows that many crypto intermediaries are transacting in securities and have to register with the SEC in some capacity [as exchanges or broker-dealers]."[63] Therefore, for

[58] https://www.sec.gov/news/speech/grewal-pli-broker-dealer-regulation-and-enforcement-100621
[59] https://www.sec.gov/files/2022-exam-priorities.pdf
[60] https://www.sec.gov/news/press-release/2022-46
[61] https://www.sec.gov/news/press-release/2022-92
[62] https://www.sec.gov/news/press-release/2022-91
[63] https://www.sec.gov/news/speech/gensler-sec-speaks-090822

crypto assets, we expect a steady stream of SEC enforcement actions alleging violations of the antifraud and offering registration provisions and a strong likelihood of actions alleging that certain platforms trading digital assets failed to register as exchanges or broker-dealers.

With respect to investment advisers, we anticipate enforcement will remain focused on the perennial issues of undisclosed conflicts of interest and improper fee and expense allocations. We also expect that under this senior leadership team, the SEC will remain willing to allege expansive theories of misconduct by investment advisers and other market participants, particularly in the wake of the implosion of high-profile firms or investment strategies.[64] With respect to the enforcement of Reg BI, the Division of Enforcement appears poised to move beyond Form CRS deficiencies to pursue cases alleging violations of Reg BI's duty of care and conflict of interest obligations, particularly in instances when high-risk or illiquid investments were sold to retail customers with limited wealth or conservative investment goals.

Finally, it is widely expected that in FY 2023, Chair Gensler and his like-minded majority on the Commission will propose significant new rulemaking regarding U.S. equity market structure and trading. While we can only speculate as to the scope of such proposed rulemaking, a June 2022 speech by Gensler telegraphed his wish list, which included, among other things, banning or limiting payment for order flow and rebates paid by exchanges to broker-dealers; requiring auction or disclosure requirements to promote "order-by-order" competition for retail trade execution; modifying the minimum increments at which securities are priced (below one penny); and harmonizing minimum increments across wholesale and retail trading venues.[65]

II. Enforcement Trends

In FY 2022, the SEC imposed record aggregate penalties of $4.19 billion, and based on messaging from the agency's senior leadership, we expect the SEC's aggressive stance on penalties to continue in FY 2023. Previously, pursuant to the SEC's 2006 guidance concerning the determination of corporate penalties, the SEC's Division of Economic and Risk Analysis ("DERA") attempted to quantify the net corporate benefit obtained by public companies resulting from violations of the federal securities laws.[66] However, at least one Commissioner has publicly advocated for the Commission to give less weight to corporate benefits, and the civil penalties assessed during FY 2022 suggest that a majority of Commissioners may agree.[67] Grewal also has publicly stated that "to achieve the intended deterrent effect, it may be appropriate to impose more significant penalties for comparable behavior over time. Doing so will make it harder for market participants to simply 'price in' the potential costs of a violation."[68] This theory seems to have taken hold, with the SEC having doubled penalties in FY 2022 for conduct that resembled past violations. For example, the $100 million penalty against a national accounting firm for widespread cheating on CPA exams doubled a previous $50 million penalty levied against another national accounting firm for a similar issue, and the $7 million penalty against a broker-dealer for AML violations, doubled a $3.5 penalty imposed against the same firm for AML violations in 2017.

[64] For example, in FY 2022, the SEC alleged that a high-profile family office and its founder orchestrated a manipulative trading scheme involving the purchase of total return swaps on margin, which resulted in billions of losses for counterparty prime brokers upon its collapse. https://www.sec.gov/news/press-release/2022-70

[65] In this speech, Gensler indicated that he had asked the SEC staff to study and make recommendations for other, more technical equity market structure issues, such as the SEC's adoption of its own best execution rule; modifying the National Best Bid and Offer ("NBBO") to include so-called "odd lot" pricing; and enhancing brokers' obligations to disclose order execution quality. https://www.sec.gov/news/speech/gensler-remarks-piper-sandler-global-exchange-conference-060822

[66] https://www.sec.gov/news/press/2006-4.htm

[67] https://www.sec.gov/news/speech/crenshaw-moving-forward-together#_ftn14

[68] https://www.sec.gov/news/speech/grewal-pli-broker-dealer-regulation-and-enforcement-100621

In FY 2023, we expect that the SEC will continue to charge individuals in more than two-thirds of its cases and be aggressive in seeking various forms of relief against them. For example, the SEC recently signaled a more aggressive stance on the clawback of performance-based compensation from executives following restatements for misconduct under Sox 304.[69] Specifically, in a shift from past administrations, Enforcement's Chief Counsel recently announced that the SEC will no longer allow executives to pay SOX 304 reimbursements with D&O insurance policies, and the SEC will seek *all* performance-based compensation awarded during the applicable twelve-month period, not merely the differential in compensation attributable to the restatement.[70] We also expect the SEC to continue its expansive application of so-called prophylactic relief. SEC Enforcement leadership has publicized that if warranted by the underlying facts, the SEC may seek to impose officer and director bars even if at the time of the conduct, the individuals were not serving as officers and directors of public companies, and pursuant to its equitable powers, it may seek such relief for some non-scienter violations.

In the coming year, we also anticipate the SEC will seek to broaden its use of conduct-based injunctions and extensive undertakings. As described above, the SEC's settlements with sixteen large broker-dealers for violations of the recordkeeping provisions required that each firm retain an independent compliance consultant to perform a comprehensive assessment of the firms' electronic communications policies and procedures. Similarly, the SEC's settled action against a national accounting firm stemming from employee cheating on CPA exams required extensive undertakings designed to prevent recurring violations. We anticipate a continuation of this prescriptive approach in the coming year.

Finally, we expect the SEC's whistleblower program to remain a key source of leads for the Enforcement Division. The SEC received more than

12,300 whistleblower tips in FY 2022. While that number constituted a record high, it was only a slight uptick from the 12,200 whistleblower tips received in FY 2021. In FY 2022, the SEC awarded approximately $229 million to 103 whistleblowers, which was less than half of the total amount of whistleblower rewards of $564 million from the record year in FY 2021. To incentivize would-be whistleblowers, the SEC also emphasized its commitment to safeguarding whistleblowers' anonymity and pursuing charges for allegedly impeding or retaliating against whistleblowers.

III. An Update on the Challenges to the SEC's Administrative Forum

Due to ongoing challenges to the constitutionality of the SEC's administrative forum, we anticipate that unless and until the agency receives clarity

[69] https://www.sec.gov/news/speech/wadwah-remarks-sec-speaks-090922
[70] SEC Speaks, Division of Enforcement Panel on September 9, 2022, remarks by Samuel J. Waldon, Enforcement Division Chief Counsel.

from the Supreme Court, the SEC will bring litigated proceedings in its administrative forum only where it is pursuing relief unavailable elsewhere, such as suspensions and bars of accountants and attorneys from appearing or practicing before the SEC pursuant to Rule 102(e) of the Commission's Rules of Practice. In particular, two cases during FY 2022 prompted the SEC's continued conservative use of its administrative proceedings.

In *SEC v. Cochran*, the Fifth Circuit (sitting *en banc*) held that the district court had subject-matter jurisdiction to hear a respondent's constitutional challenge to the SEC's administrative forum. Cochran, the respondent in an SEC action, sought to enjoin that action as unconstitutional on the basis that the two-layered for-cause removal protections applicable to the SEC's administrative law judges unconstitutionally restricted the President's removal powers under Article II of the Constitution. The Fifth Circuit held that the district court had subject-matter jurisdiction notwithstanding the fact that the respondent had not been aggrieved by a "final order" of the Commission. In May 2022, the Supreme Court granted the SEC's petition for certiorari. When the Supreme Court held oral arguments on November 7, 2022, several of the justices appeared highly skeptical of the SEC's position.

Just two days after the Supreme Court granted the writ of certiorari in *Cochran*, in *Jarkesy v. SEC,* the Fifth Circuit held that SEC administrative proceedings were unconstitutional on three grounds: (i) the SEC's use of the forum to pursue fraud claims and seek civil penalties violated the respondent's 7th Amendment right to a jury trial; (ii) under Article I of the Constitution, Congress unconstitutionally delegated legislative power to the executive branch when it gave the SEC the power to choose between district courts and its administrative forum without providing an intelligible principle to guide the SEC's decision; and (iii) the two-layered for-cause removal protections applicable to SEC administrative law judges unconstitutionally restricted the President's removal powers under Article II of the Constitution, as argued in *Cochran*. Therefore, even if the Supreme Court declines to decide the constitutional challenges to the SEC's administrative forum in *Cochran*, it may grant *cert* and consider removal along with the other issues raised in *Jarkesy.* Given the threat of these constitutional challenges, we expect the SEC will file very few, if any, litigated administrative proceedings (other than proceedings pursuant to Rule 102(e)) in FY 2023.

CONCLUSION

Under Chair Gensler and Enforcement Director Grewal, SEC enforcement hit its stride in FY 2022, and we expect FY 2023 to look similar in terms of enforcement priorities and aggressive tone. We will monitor developments closely and look forward to advising our clients on these and other topics in the securities enforcement space.

MEET THE AUTHORS

KIT ADDLEMAN chairs the firm's national Securities Enforcement Defense group and is a member of the Investment Funds Practice group. Kit defends companies, executives and directors against government charges of misconduct, particularly investigations and litigation by the SEC and DOJ. Many of her matters involve allegations of accounting and financial fraud, insider trading, hedge fund and advisor fraud, and Foreign Corrupt Practices Act violations. Prior to joining Haynes Boone, Kit was the Regional Director of the SEC's Atlanta Regional Office and spent more than 20 years prosecuting matters in four SEC offices around the country.

KURT GOTTSCHALL focuses on representing public companies and their officers and directors, auditors, investment advisers, broker-dealers and individuals in investigations by the U.S. Securities and Exchange Commission (SEC) and other government agencies, as well as internal investigations and regulatory compliance. Prior to joining Haynes Boone, Kurt was the Regional Director of the SEC's Denver Regional Office, where he managed more than 100 staff and oversaw all of the office's enforcement investigations, litigation and examinations of SEC registrants in an eight-state region.

TIM NEWMAN represents clients in government enforcement actions and complex litigation. He has extensive experience representing organizations and executives under investigation by the SEC, DOJ, FINRA, and state regulators and conducting internal investigations related to suspected accounting fraud, offering fraud, insider trading, and other securities law violations. Tim has been recognized as a "Rising Star" by the *Texas Super Lawyers* directory and was recently featured in *D Magazine*'s "Best Lawyers Under 40" List.

TARYN McDONALD defends clients under investigation by the DOJ, SEC, and FINRA and in healthcare litigation including False Claims Act qui tam matters. Taryn's experience in government investigations includes alleged violations of the Stark Law, the False Claims Act, and the Anti-Kickback statute, as well as suspected accounting fraud, insider trading, and other securities law violations. Prior to attending law school, Taryn worked for the Texas Office of Attorney General. Taryn has been recognized as a "Rising Star" by the *Texas Super Lawyers* directory and in *D Magazine*'s "Best Lawyers in Dallas" List.

BENJAMIN GOODMAN focuses on securities, healthcare and False Claims Act litigation, while also navigating clients through internal and government investigations. Benjamin's practice extends beyond white collar litigation and investigations to commercial and products liability disputes. Benjamin has been recognized in "Ones to Watch" by *Best Lawyers in American* and "Top Attorney Under 40" by the Carsozo Society of the Jewish Federation of Grater Dallas.

CARRINGTON GIAMMITTORIO focuses on securities law defense including both investigations and litigation. Her experience with both government enforcement and private securities litigation makes her uniquely suited to guide companies and individuals though parallel proceedings—helping her clients build a solid defense on all fronts. Carrington has been recognized in "Ones to Watch" by *Best Lawyers in America*.

NEIL ISSAR focuses his practice on healthcare litigation, securities enforcement defense, and government investigations, with particular expertise in fraud and abuse laws (including the False Claims Act, the Anti-Kickback Statute, and the Stark Law), navigation of regulatory and compliance issues involving the healthcare industry, representing securities market participants before the SEC, and defending and pursuing antitrust claims. Neil has been recognized in "Ones to Watch" by *Best Lawyers in America*.

MEET THE AUTHORS

KATE FREEMAN practice focuses on government investigations and litigation defense. Kate is a former Assistant District Attorney for Dallas County. She also served as a judicial clerk on the Texas Court of Criminal Appeals and previously as an attorney in ethics and compliance at the U.S. Department of Transportation.

BEN BRECKLER focuses on government investigations, securities litigation, white collar defense, and antitrust. Ben is a Teach For America, Dallas-Fort Worth corps alumni. He is a member of the State Bar of Texas, the Dallas Bar Association, and the Dallas Association of Young Lawyers.

ASHLEY KOOS practice focuses on government investigations and white-collar defense. She was a judicial clerk in the U.S. District Court for the Southern District of Texas before joining Haynes Boone. Additionally, prior to law school, Ashley served as a Teach for America corps member in Houston, Texas, where she taught middle school mathematics and English Language Arts.

PAYTON ROBERTS focuses on securities litigation, securities law defense, antitrust, and internal and government investigations. Prior to law school, Payton served as an officer in the United States Marine Corps. Payton was awarded the Navy and Marine Corps Commendation Medal and the Navy and Marine Corps Achievement Medal. Before joining the Marine Corps, Payton served on the official staff of the Honorable Kevin Brady out of the 8th Congressional District of Texas.

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