

Securities Litigation Alert

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SEC Announces 2023 Division of Enforcement Results

By Robert Stern and Daniel L. Stein

On November 14, 2023, the U.S. Securities and Exchange Commission's ("SEC") Division of Enforcement released its [fiscal year 2023 enforcement results](#). The SEC filed 784 total enforcement actions, representing a 3 percent increase over fiscal year 2022, and recovered nearly \$5 billion in penalties and disgorgements – which represented the second highest amount in SEC history but a nearly 25 percent decline from 2022's record setting results. Most notably, the financial remedies obtained reflect a reversion to the longstanding trend where disgorgement and prejudgment interest are greater than civil penalties imposed, with the SEC recovering \$3.369 billion in disgorgement and prejudgment interest and \$1.580 billion in civil penalties.

I. FY 2023 SEC Enforcement Results – Key Observations

Number of Enforcements Actions Up Slightly but Settlement Amounts Revert to Historical Mean

In fiscal year 2023, the Division of Enforcement brought 501 standalone enforcement actions. This represented an 8 percent increase over fiscal year 2022. When viewed in context, however, the number of standalone actions is not indicative of a particularly robust enforcement year as the number of standalone actions brought in 2023 is less than the number of actions brought in fiscal years 2019 (see below), 2016 (548 standalone actions) and 2015 (507 standalone actions). It is also reasonably in-line with the number of actions brought in fiscal year 2018.

Number of Enforcement Actions Filed

	FY 2023	FY 2022	FY 2021	FY 2020	FY 2019	FY 2018
Standalone Enforcement Actions	501	462	434	405	526	490
Follow-On Administrative Proceedings	162	169	143	180	210	210
Delinquent Filings	121	129	120	130	126	121
Total Actions	784	760	697	715	862	821

Although the number of enforcement actions increased, the total monies recovered declined by more than 20 percent. Not only did the aggregate decline materially, so did the average settlement. The average public company settlement fell by more 60% from fiscal year 2022. The median public company settlement, on the other hand, remained fairly consistent with the median settlements obtained during the period FY 2014-FY2022 of \$4 million. Perhaps most importantly, the amount recovered in disgorgement doubled the amount recovered in fines and penalties, returning to the more traditional ratio of approximately 2:1 than the anomalous inversion of 1:2 experienced in fiscal year 2022.

Total Money Ordered (in Millions)

	FY 2023	FY 2022	FY 2021	FY 2020	FY 2019	FY 2018
Penalties	\$1,580	\$4,194	\$1,456	\$1,091	\$1,101	\$1,439
Disgorgement	\$3,369	\$2,245	\$2,395	\$3,588	\$3,248	\$2,506
Total	\$4,949	\$6,439	\$3,852	\$4,680	\$4,349	\$3,945

There were also arguably fewer of the “high-impact” cases that the SEC Chairman Gary Gensler has repeatedly made a priority. In that sense, fiscal year 2023 reflected a bit of a departure from the prior two years. The enforcement actions brought in fiscal year 2023 seemed more akin to the “broken windows” enforcement approach emblematic of Chairman Mary Jo White’s tenure than “high-impact” enforcement cases that have characterized the past two years.

The SEC’s Whistleblower Program Gains Traction

Perhaps the most surprising headline of fiscal year 2023’s enforcement results was the featured prominence and increasing traction of the SEC’s Whistleblower Program. In fiscal 2023, the SEC issued awards totaling nearly \$600 million, the most ever awarded in a year, including a record breaking \$279 million awarded to a single whistleblower. The Commission also reported that it received 18,000 tips in fiscal year 2023 – another record number – and up nearly 50 percent over the number of tips received in fiscal year 2022.

It is also worth noting that the release announcing the fiscal year 2023 results expressly called out a number of enforcement actions that the Division believes “protect whistleblowers’ rights and ability to report securities laws violations to the SEC.” The actions that the Division highlighted were ones alleging that (1) a registered investment adviser raised impediments to whistleblowing by requiring employees to sign agreements prohibiting the disclosure of confidential corporate information to third parties and (2) several firms used employment and separation agreements that violated the whistleblower protection rule.

Continued Focus on Off-Channel Communications

For the second straight year, enforcement actions predicated on improper off-channel communications headlined the SEC’s enforcement docket. This year, the SEC announced two different settlements with 25 broker-dealers, investment advisers, or dually registered broker-dealers and investment advisers based on recordkeeping failures in connection with employees’ use of unapproved applications on personal devices to engage in communications relating to the firms’ business (known as “off-channel communications”). The settlements – like the ones that preceded them – involved admissions of wrongdoing and resulted in fines and penalties of more than \$400 million, which consisted entirely of punitive penalties and represents nearly a quarter of the total penalties issues in fiscal year 2023.

Crypto Enforcement Actions Comprised an Outsized Portion of Enforcement Actions

A review of the categories of enforcement actions reveals that, perhaps unsurprisingly, the Division of Enforcement’s [addition of resources to the Crypto Assets and Cyber Unit](#) resulted in a significant increase in the number of crypto enforcement actions. As the addendum makes clear, the Division brought 167 enforcement actions that it primarily categorized as securities offering actions (the category that includes crypto enforcement), representing a nearly 50 percent increase over fiscal year 2022. With respect to standalone actions, securities offering enforcement accounted for one third of all actions brought by the Division.

ESG-Related Cases

The Division highlighted its ongoing focus on ESG enforcement actions noting “ESG issues are increasingly important to investors, resulting in a growth of ESG-branded investment products and an increased focus on ESG by public companies.” It then identified a number of enforcement actions that it believes addressed ESG issues. Among the cases cited were one against the former CEO of McDonald’s, an action against a subsidiary of a major international investment bank for making materially misleading statements about its controls concerning ESG products, and a case against a software company for failing to maintain disclosure controls and procedures to collect and analyze employee complaints of workplace misconduct

Gatekeepers

The fiscal year 2023 results continued to highlight the Division's focus on enforcement actions against gatekeepers noting that, "[g]atekeepers ... play critical roles in the capital markets and the first lines of defense against misconduct. Ensuring that they comply with their obligations is a critical part of the Division's mission." The Division then proceeded to identify a number of enforcement actions brought against gatekeepers, with a particular focus on actions brought against independent auditors.

Individual accountability – whether in the gatekeeper context or not – remains a high priority. About two-thirds of the SEC's cases involved individual accountability. The SEC obtained orders barring 133 individuals from serving as officers and directors of public companies, the highest number obtained in a decade.

II. Key Takeaways

- The Division of Enforcement continues to be active and aggressive in pursuing enforcement particularly in the areas of crypto and cyber, ESG and off-channel communications.
- The total monies recovered in fiscal year 2023 as well as the average recovery per action declined significantly. This, combined with arguably fewer enforcement actions of material legal import, could lead some to conclude the past year had fewer of the "high-impact" actions Chairman Gensler has historically sought and was more reflective of the "broken windows" approach other chairs pursued.
- The Whistleblower Program has become a key enforcement tool for the SEC. As such, the Division of Enforcement seems likely to continue its sweep of potential violations of Rule 21F-17 under the Securities Exchange Act of 1934 as a means of protecting the Whistleblower Program's efficacy.
- ESG will continue to be a major focus of Enforcement given its prominence in the release and the recent announcement that the [SEC watches all corporate ESG claims for accuracy](#).
- The SEC's [expansion of its crypto assets and cyber unit](#) resulted in a significant increase in enforcement activity. It will be interesting to see whether those dedicated positions remain in the unit or whether the Division redeploys them, as several high profile crypto actions have resolved. If the latter, the redeployment of 50 enforcement positions away from crypto and cyber could lead to increased enforcement elsewhere such as ESG or traditional earnings management actions.

We welcome the opportunity to discuss the 2023 results with you in greater detail, as well as what to expect by way of SEC enforcement in 2024.

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Practice Group Leaders:

John A. Neuwirth (NY)	View Bio	john.neuwirth@weil.com	+1 212 310 8297
Caroline Zalka (NY)	View Bio	caroline.zalka@weil.com	+1 212 310 8527

Authors:

Robert Stern (DC)	View Bio	robert.stern@weil.com	+1 202 682 7190
Daniel L. Stein (NY)	View Bio	daniel.stein@weil.com	+1 212 310 8140

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