

# Alert

## White Collar Defense, Regulatory & Investigations

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### SEC Division of Enforcement FY 2022 Results: Aggressive Approach Highlighted by Dramatic Increase in Penalties and “High Impact Cases”

By Robert Stern, Daniel Stein, Adé Heyliger, Nicole Prunetti, and Michelle Gemmell

On November 15, 2022, the U.S. Securities and Exchange Commission’s Division of Enforcement released its fiscal year 2022 [results](#). The SEC filed 760 total enforcement actions, representing a 9 percent increase over fiscal year 2021, and ordered approximately \$6.4 billion in penalties and disgorgements—the highest amount on record in SEC history. The SEC’s self-described “hallmark” of the results was “robust enforcement” through resolutions that included significant penalties, including those levied against some of the largest financial institutions. The results suggest that the Enforcement Division is prioritizing deterrence and accountability and is aggressively targeting gatekeepers as a means of achieving its goals.

#### Key Observations

##### **Drastically Increased Penalties in the Face of Decreasing Disgorgements**

The SEC ordered a record-breaking \$4.194 billion in penalties in fiscal year 2022—the highest ever on record. The amount represents a staggering 188% increase from fiscal year 2021. This number is even more striking when compared to disgorgements. Disgorgements for fiscal year 2022 were \$2.245 billion, representing a 6% decrease from fiscal year 2021, the lowest disgorgement amount on record in nearly a decade, and the first time in recent years that ordered penalties exceeded disgorgements.

Total Money Ordered (in millions)											
	FY 2022	FY 2021	FY 2020	FY 2019	FY 2018	FY 2017	FY 2016	FY 2015	FY 2014	FY 2013	FY 2012
Penalties	\$4,194	\$1,456	\$1,091	\$1,101	\$1,439	\$832	\$1,273	\$1,175	N/A	\$1,167	\$1,021
Disgorgement	\$2,245	\$2,395	\$3,588	\$3,248	\$2,506	\$2,957	\$2,809	\$3,019	N/A	\$2,257	\$2,083
Total	\$6,439	\$3,852	\$4,680	\$4,349	\$3,945	\$3,789	\$4,083	\$4,194	\$4,166	\$3,424	\$3,104
Enforcement Actions Filed											
	FY 2022	FY 2021	FY 2020	FY 2019	FY 2018	FY 2017	FY 2016	FY 2015	FY 2014	FY 2013	FY 2012
Total Actions	760	697	715	862	821	754	868	807	755	676	734

## **Substantial Penalties Against Gatekeepers**

Gurbir S. Grewal, Director of the Enforcement Division, has been transparent about the Division's use of penalties "that have a deterrent effect and are viewed as more than the cost of doing business" to carry out SEC enforcement. The results demonstrate the SEC's willingness not only to issue widespread penalties, but also to increase individual punitive amounts.

A prime example of the execution of this strategy is the enforcement action that the SEC brought against a number of large investment banks. In late September, the SEC announced [settlements](#) with 16 Wall Street firms predicated on "recordkeeping violations" concerning their "failures to maintain and preserve work-related text message communications conducted on employees' personal devices." As part of the settlements, the firms admitted to wrongdoing and agreed to pay more than \$1.1 billion, which consisted entirely of punitive penalties and represents nearly a quarter of the total penalties issues in fiscal year 2022. 13 of the 16 firms charged agreed to pay penalties of \$125 million each. Notably, the settlements did not take into account the pervasiveness or scope of any particular firm's alleged recordkeeping failures or other individualized considerations that typically form the basis for evaluating an appropriate resolution.

The SEC extracted similarly large settlements from audit firms in 2022. In June, the SEC imposed the [largest penalty ever](#) on a Big Four audit firm for "cheating on CPA ethics exams" and for "withholding evidence of this misconduct . . . during the Division's investigation of the matter." Two months later, the SEC settled an enforcement action with the Chinese affiliate of another Big Four audit firm predicated on "asking [the audit] clients to conduct their own audit work." In that settlement, the SEC levied a [\\$20 million penalty](#) against the foreign affiliate. Like the 16 Wall Street Firms, the total amounts collected from the audit firms were comprised entirely of punitive penalties. In the press releases announcing each, the SEC emphasized the role of gatekeepers, such as auditors, as essential to the health of U.S. financial markets.

## **Other Observations**

### ***Data Analytics***

The SEC noted its use of sophisticated data analytics to support its aggressive enforcement activities. In addition to detecting suspicious trading patterns and uncovering an array of schemes and violations, the SEC's Office of Market Intelligence reviewed and triaged more than 38,500 tips, complaints, and referrals of possible securities violations, which have also led to both investigations and enforcement actions.

### ***"Meaningful" Cooperation***

The SEC notes that "tangible cooperation that significantly aids enforcement investigations and litigation can yield meaningful benefits" and that when individuals and entities cooperate "meaningfully" the SEC may take that into consideration when issuing penalties. Although the SEC does not define or otherwise put any color on what it means by "tangible" or "meaningful" cooperation in the results, SEC staff [regularly comments](#) that it will look for the type of conduct outlined in the *Seaboard* report when determining whether to credit cooperation.

### ***Whistleblowers***

The SEC praised its Office of the Whistleblower as an "integral part of the Enforcement Program." In FY 2022, the SEC received a record-breaking 12,300 whistleblower tips and issued approximately \$229 million in 103 awards—the second highest year in terms of dollar amounts and number of awards. The SEC also commented on its commitment to vigorously safeguard whistleblowers' anonymity and to protect them by pursuing those who attempt to impede or retaliate against them.

## ***Enforcement Division Priorities***

The SEC listed numerous areas where it has focused its enforcement efforts. Although each provides valuable insight into the SEC's priorities and can serve as a roadmap for where the SEC may continue to focus its efforts, several stand out as particularly noteworthy.

### *Crypto*

Enforcement in the crypto asset securities space is rapidly evolving. To keep up with this trend, the SEC announced that it will be adding 20 positions to the Crypto Assets and Cyber Unit (formerly called the Cyber Unit). This will nearly double the Unit's current staff. Given the recent collapse of FTX and the ongoing litigation with [\*SEC v. Ripple Labs Inc., et al., No. 1:20-cv-10832 \(S.D.N.Y. 2020\)\*](#), we expect that the Crypto Assets and Cyber Unit will be quite busy in 2023.

### *Cybersecurity*

As noted, the SEC brought many enforcement actions against firms that allegedly failed to comply with record-keeping obligations or to safeguard customer information. The SEC notes that these actions "reflect the critical importance of firms ensuring that their policies, procedures, and practices keep pace with technological developments and the resulting changes in how business is conducted."

### *Environmental, Social and Governance (ESG)*

As ESG becomes increasingly important to investors, the SEC is focusing its attention on these issues by applying the time-tested principles of materiality, accuracy of disclosures, and fiduciary duty.

### *Private Funds*

The SEC brought many enforcement actions alleging misconduct by private fund advisors and associated individuals. In recent years, there has been a significant increase in the amount of assets managed by advisors to private funds. According to the SEC, due to some of the unique features of private funds, they lend themselves to several recurring issues, including undisclosed conflicts of interest, fees and expenses, valuation, custody, and controls around material nonpublic information. A hallmark of its enforcement in this space included a [\*settlement for over \\$1 billion\*](#) with a global investment management firm and three executives for their "massive fraudulent scheme that concealed the immense downside risks of a complex options trading strategy." The SEC has kept, and likely will continue to keep, a close watch on this industry.

## **Takeaways**

The fiscal year 2022 results leave no doubt that the SEC is in an era of robust enforcement, and is following through on [\*Chairman Gary Gensler's stated priorities\*](#) to place deterrence and accountability at the forefront of his administration and to use all available means to achieve them.

The results also leave no doubt that the SEC remains focused on gatekeepers, such as boards of directors, C-suite executives, auditors, lawyers, and others. While the SEC has explicitly stated its intention to hold gatekeepers like auditors and lawyers responsible for "failing to live up to their heightened trust and responsibility," its issuance of record-breaking penalties against banks and audit firms are particularly noteworthy. Noticeably absent from these settlements, however, were any form of disgorgement – they were purely punitive – and individualized considerations. This suggests that the SEC is signaling to those responsible for controlling corporate communications that the SEC will not hesitate to take proactive action against them for failing to put in place measures to stop misconduct before it starts. And though the SEC emphasized the benefits of cooperation in its release, a few high-profile settlements do call into question how much credit individuals and companies are actually receiving for their cooperation.

Finally, the results indicate that the SEC is also following through on [Chairman Gensler's stated priority](#) to focus on "high-impact cases." While the number of aggregate cases brought may be down slightly, the penalty amounts issued in those cases brought increased significantly.

## Looking Ahead

In light of the settlements reached with the 16 Wall Street firms, we expect that the SEC is going to continue expanding its personal device investigation in 2023, with investment advisors and private funds as the SEC's latest [target](#) on this front. In addition, although not addressed in the fiscal year 2022 results, [Chairman Gensler](#) and others recently discussed that, given the current economic environment, the SEC is going to increase its scrutiny of public companies' financial statements for indicia of earnings management. We will be keeping a close eye on both of these areas heading into 2023.

\* \* \* \* \*

Against the backdrop of the fiscal year 2022 results and where the SEC appears to be heading in 2023, the incentives for taking certain courses of action over others when dealing with the SEC may be shifting. Although still early in Chairman Gensler's tenure, the SEC's aggressive approach shows no signs of slowing down, and stakeholders that routinely interact with the SEC—particularly large public corporations—may want to carefully consider their options when deciding how to engage with the SEC going forward.

**White Collar Defense, Regulatory & Investigations** is published by the Litigation Department of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, [www.weil.com](http://www.weil.com).

If you have questions concerning the contents of this issue, or would like more information about Weil's White Collar practice, please speak to your regular contact at Weil, or to the practice group leaders or authors listed below:

### Practice Group Leaders:

Sarah Coyne (NY)	<a href="#">View Bio</a>	<a href="mailto:sarah.coyne@weil.com">sarah.coyne@weil.com</a>	+1 212 310 8920
Daniel Stein (NY)	<a href="#">View Bio</a>	<a href="mailto:daniel.stein@weil.com">daniel.stein@weil.com</a>	+1 212 310 8140
Steven A. Tyrrell (DC)	<a href="#">View Bio</a>	<a href="mailto:steven.tyrrell@weil.com">steven.tyrrell@weil.com</a>	+1 202 682 7213

### Authors:

Robert Stern (DC/NY)	<a href="#">View Bio</a>	<a href="mailto:robert.stern@weil.com">robert.stern@weil.com</a>	+1 202 682 7190
Daniel Stein (NY)	<a href="#">View Bio</a>	<a href="mailto:daniel.stein@weil.com">daniel.stein@weil.com</a>	+1 212 310 8140
Adé Heyliger (DC)	<a href="#">View Bio</a>	<a href="mailto:ade.heylinger@weil.com">ade.heylinger@weil.com</a>	+1 202 682 7095
Nicole Prunetti (NY)	<a href="#">View Bio</a>	<a href="mailto:nicole.prunetti@weil.com">nicole.prunetti@weil.com</a>	+1 212 310 8683
Michelle Gemmell (NY)	<a href="#">View Bio</a>	<a href="mailto:michelle.gemmell@weil.com">michelle.gemmell@weil.com</a>	+1 212 310 8225

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