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SEC Releases 2022 Enforcement Division Results: Dechert

The Securities and Exchange Commission ("SEC") released an annual summary, on November 15, 2022, of actions brought by the Division of Enforcement ("Division") over fiscal year 2022 ("Enforcement Summary"), providing an overview of its results and priorities over fiscal year 2022, Gurbir Grewal's first full year as the Division's Director.1 While these summaries, by their nature, always include a focus on the amounts obtained in penalties and disgorgement, and, in recent years the continuing importance of the whistleblower program to the Division's work, the overriding theme of this past year's report is the "breadth of issues" covered by the Division and the expectation of more proactive enforcement sweeps to come.

Overview

In fiscal year 2022, the SEC filed a total of 760 enforcement actions, which represents a nine percent increase over fiscal year 2021. Over the past year, the SEC has generally sought large monetary results, as well as bespoke undertakings depending on the particular allegations in an action. In 2022, the SEC obtained a record $6.436 billion in disgorgement, civil penalties, and prejudgment interest. The increase of almost 70 percent compared to 2021 is largely attributable to the increase in civil penalties, which nearly tripled from $1.456 billion to $4.194 billion. The SEC also returned $937 million to affected investors, compared to $521 million in fiscal year 2021.

The Enforcement Summary emphasized that "individual accountability is a pillar of the SEC's enforcement program." To support this point, the SEC cited cases it had brought against public company senior executives and senior portfolio managers in the financial industry. The SEC also noted enforcement actions brought to compel clawbacks of public company executive compensation under Sarbanes-Oxley Section 304, which Director Grewal addressed in a speech given on the same day that the Enforcement Summary was released.2

The SEC has also been more willing to litigate than in past years, which the Enforcement Summary highlighted by noting that the Division litigated a record 15 trials in 2022, the most conducted in a single year over the past decade. The SEC has also been willing to bring actions against market participants notwithstanding potential collateral consequences, such as potential waivers, particularly when cases may send a "message" to the market concerning the Division's priorities. Director Grewal's November 15 speech noted in particular that, "proactive enforcement sweeps that specifically target recurring issues … not only demonstrate[] accountability, but also [have] a more pronounced deterrent effect than if the [SEC] filed separate standalone cases."

The Enforcement Summary drew particular attention to the Division's actions against 17 market participants for what the SEC described as "failures to maintain and preserve work-related text message communications conducted on employees' personal devices." These "off-channel communications" have been a focus of the Division over the past year and have led to $1.235 billion in civil penalties (or almost 30% of the $4.194 billion in total civil penalties for 2022), as well as tailored undertakings, such as the retention of compliance consultants to ensure compliance going forward.

The SEC also identified other areas of focus for the Division, including financial fraud and issuer disclosures, gatekeepers, crypto assets, cybersecurity, ESG, private funds, insider trading and other market abuses, and complex investment products among others.

Substantive Areas of Focus

The Enforcement Summary highlighted the breadth and depth of the Division's enforcement actions over the past year, specifically naming certain industries and types of violations that the SEC found particularly noteworthy. For example, the SEC routinely brings a significant number of actions against market participants for inadequate or inaccurate disclosures. The Division continued that emphasis this year, with the SEC noting that it "places a high priority on pursuing issuers or their employees who make materially inaccurate disclosures, as well as auditors and their professionals who violate appliable laws and rules in connection with such disclosures." More broadly in this year's summary, the SEC made explicit the Division's focus on bringing actions against gatekeepers, including auditors, lawyers, and transfer agents, when the SEC believes that they "fail[] to live up to their heightened trust and responsibility."

With the continued expansion of the Division's Crypto Assets and Cyber Unit—it is set to nearly double in size—the SEC continues its focus on enforcement in the crypto asset space, as well as on cybersecurity violations broadly. For example, the SEC brought actions against crypto lending platforms, individuals in an alleged "crypto pyramid and Ponzi scheme," and those involved in insider trading related to a crypto asset trading platform. The SEC also brought actions regarding failures to comply with record-keeping and customer data requirements.

The Division continues to address "concerns" by investors regarding environmental, social, and governance ("ESG") issues. The Enforcement Summary noted that the Division will focus on principles of materiality, accuracy of disclosures, and fiduciary duty when evaluating potential enforcement actions against public companies and with regard to investment products and strategies.

The Division has increased its attention to the private funds industry, which it has signaled repeatedly over the past year. The SEC expressed its likely emphasis on the risks associated with the "unique features" of private investment, including "undisclosed conflicts of interest, fees and expenses, valuation, custody, and controls around material nonpublic information." The Division has brought several actions against private fund advisers and associated individuals over the past year, which have included fraud charges in some instances.

The Enforcement Summary also described actions over the past year addressing regulated entities, including broker-dealers and investment advisers,3 as well as associated individuals, including actions concerning trading restrictions placed on "meme stocks," failures to disclose conflicts of interest regarding SPACs, and the first action enforcing Regulation Best Interest.

As in prior years, the Division highlighted its market abuse actions involving violations such as insider trading, market manipulation, and cherry-picking, as well as actions involving complex products and strategies, and violations of the Foreign Corrupt Practices Act. Last, the Division summarized its activity in bringing actions involving public finance abuse, including actions in the municipal bond sector

Other Areas of Emphasis

In addition to the substantive areas highlighted as part of the Division's work during fiscal year 2022, the Enforcement Summary also highlighted the Division's process and areas of emphasis as it

considers, investigates, and adjudicates potential enforcement actions. The SEC places an emphasis on the deterrent effect of its enforcement actions on future misconduct. For example, the Division "recalibrated penalties for certain violations," including using undertakings to require retention of compliance consultants, requiring admissions as part of settlements, and continuing to focus on individual accountability, with more than two-thirds of the SEC's stand-alone actions involving at least one individual defendant or respondent.

The Enforcement Summary also described the Division's continued use of sophisticated data analytics in assisting its work, noting a wide range of types of cases resulting from data analytics, including insider trading, market manipulation and "cherry picking." The Enforcement Summary discussed the SEC's continued support for its whistleblower program, noting its receipt of over 12,300 whistleblower tips that led to 103 awards totaling $229 million. The Enforcement Summary also noted the SEC's reliance on both parallel criminal proceedings and "[t]angible cooperation," including "significant remedial measures" by firms under investigation.

Looking Ahead to 2023

Fiscal year 2023 will likely continue to see an active enforcement climate. Chairman Gary Gensler, as well as Director Grewal and the enforcement staff, have made clear their desire to pursue alleged violations of the securities laws vigorously, including by "push[ing] the pace of investigations" and ensuring that the Division operates with "tremendous breadth." While the SEC is expected to face increased Congressional oversight with a new, Republican-controlled House of Representatives in 2023, we expect enforcement to continue apace, particularly in priority areas such as ESG, private funds, crypto and cybersecurity, and "high-impact" actions.

Conclusion

Fiscal year 2022 brought a significant rise in the number of actions filed by the SEC, as well as a new record in total money ordered to be paid by respondents. The familiar emphasis on actions involving regulated firms, financial fraud and inadequate disclosures was coupled with an increasing number of actions brought as a result of investigations by specialized teams, including the Crypto Assets and Cyber Unit and the Climate and ESG Task Force. Those trends can be expected to continue and, more likely than not, accelerate in the coming year.

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Dechert LLP – David P. Bartels , Catherine Botticelli , Anthony S. Kelly, Mark D. Perlow, Dennis Lawson and Eric Auslander

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