

# Securities Litigation Alert

**Akin Gump**  
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## SEC's Division of Enforcement Year-End Results 2022: Monetary Sanctions Take Center Stage

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### Key Takeaways

- Parties facing SEC enforcement actions should expect that monetary sanctions will remain the sanction of choice for the SEC and that the amounts of civil money penalties will continue to be substantial.
- The SEC Enforcement program continues to cover a broad waterfront of conduct in the capital markets, making it difficult to predict whether the program will focus on one industry or one form of conduct over another.
- Individuals facing SEC investigations need to assume their conduct will be a focus of the SEC Enforcement staff and need to defend themselves accordingly.

### Background

On November 15, 2022, the U.S. Securities and Exchange Commission (SEC) released its **enforcement results** for the fiscal year 2022. This was the first full fiscal year of results for the SEC's Division of Enforcement under Chair Gary Gensler's and Director Gurbir Grewal's leadership. The main headline for the SEC is that its enforcement actions are up, monetary sanctions were at a record level and individual accountability remains a priority.

The commission filed 760 enforcement actions, a 9 percent increase over fiscal year 2021. These included 462 new, or "stand alone," enforcement actions, 129 actions against issuers who were allegedly delinquent in making required filings with the SEC and 169 "follow-on" administrative proceedings seeking to bar or suspend individuals from certain functions in the securities markets based on criminal convictions, civil injunctions or other orders. The amount of monetary sanctions increased even more substantially: the SEC ordered \$6.439 billion in civil penalties, disgorgement and pre-judgment interest, a record for the SEC and over a \$2.5 billion increase from fiscal year 2021. Almost half of that increase in monetary sanctions is attributable to the \$1.235 billion in civil money penalties collected in the SEC actions for failures by financial institutions to preserve work-related text message communications on employees' personal devices. Of the total money ordered, civil penalties, at \$4.194 billion, were also the highest on record.

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The SEC's push for robust enforcement relies heavily on monetary sanctions to deter future violations. Indeed, Director Grewal emphasized that a centerpiece of the SEC's efforts was to seek penalties that are "viewed as more than the cost of doing business" to optimize the deterrent effect of the securities laws. Director Grewal also noted, however, that the SEC does not expect to break records each year because the SEC "expect[s] behaviors to change. We expect compliance."

The SEC also is using customized undertakings, i.e., "prophylactic remedies," and admissions of wrongdoing as part of its settlements. It will be important to watch how these settlement outcomes will be used by the SEC as precedent for future settlements, as the SEC **has noted** that, in some cases, previous SEC settlements had not achieved their "intended deterrent effect." Finally, pursuing actions against individuals remains a priority of the SEC. More than two thirds of the SEC's stand-alone enforcement actions involved at least one individual defendant or respondent.

## Notable Violation Types

- The SEC's announcement highlighted actions against 16 broker-dealers and one investment adviser for "widespread and longstanding failures to maintain and preserve work-related text message communications conducted on employees' personal devices." In the last week of the Commission's fiscal year alone, the SEC announced charges against 16 Wall Street firms, imposing combined civil money penalties of more than \$1.1 billion for recordkeeping violations.
- Enforcing violations of public company disclosures remained a high priority for the SEC, which continued to prosecute enforcement actions against issuers and/or their employees, as well as auditors and their professionals, for alleged false or misleading disclosures. Among others, the SEC brought an enforcement action against Boeing and its former CEO for making materially misleading public statements about the safety of its 737 MAX planes following the 2018 and 2019 crashes.
- The SEC focused on "gatekeepers" such as auditors. For example, the SEC charged the Chinese affiliate of a large global network of accounting firms with failing to comply with fundamental U.S. auditing requirements in its audits of U.S. issuers and of foreign companies listed on U.S. exchanges, after the affiliate allowed clients to select their own samples for testing and prepare their own audit documentation. As another example, the SEC's June 2022 action against a large accounting firm featured the largest penalty ever imposed by the SEC against an audit firm, after the firm admitted, among other things, that a significant number of audit professionals cheated on the ethics component of CPA exams and various other continuing professional courses.
- The SEC amplified their enforcement in the crypto space, adding 20 positions to the Crypto Assets and Cyber Unit, nearly doubling that unit's staffing. The Division of Enforcement also continued to bring enforcement actions in this area, including charges against BlockFi Lending LLC for failing to register the offers and sales of its retail crypto lending product, and, in a first-of-its-kind action against a crypto lending platform, for violating the registration requirements of the Investment Company Act of 1940.
- After Chair Gensler's 2021 warning that private fund managers should be prepared for increased regulatory scrutiny, the SEC brought a number of enforcement actions concerning conduct by private fund advisors and associated individuals. These

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actions included, among others, disclosure cases, conflict of interest cases and cases involving fees and expenses. For example, the SEC charged registered investment advisor Global Infrastructure Management, LLC for failing to properly offset management fees and for making misleading statements about the fees and expenses it charged. Global agreed to pay a \$4.5 million penalty to settle the SEC charges, and voluntarily repaid \$5.4 million to its affected clients.

## Cooperation

The SEC took into account cooperation by individuals and entities in the remedies it ordered, with an emphasis on cooperation that helps “expedite investigations and bring to light important evidence.” The SEC agreed to limit or not impose civil money penalties in certain cases based on meaningful cooperation. For example, the SEC agreed not to impose a civil money penalty on ProPetro Holding Corporation for its wrongful conduct in failing to properly disclose executive perks and stock pledges thanks to its cooperation with the staff’s investigation and its extensive remediation.

## Whistleblowers

In fiscal year 2022, the SEC issued approximately \$229 million in 103 awards to whistleblowers, making it the SEC’s second highest year in terms of dollar amounts and number of awards. The SEC emphasized the importance of protecting the anonymity of whistleblowers, as well as pursuing individuals or entities who take steps to impede or retaliate against whistleblowers.

## Need for Speed

Director Grewal **has emphasized** the need for speed in pushing investigations to completion. Some members of the SEC defense bar reacted strongly to what it perceived as the SEC, in an effort to accelerate investigations, streamlining the investigative process to the detriment of putative defendants. The SEC’s fiscal year 2022 report, however, makes no reference to what the average length of an SEC investigation is, nor does it highlight the steps being taken by the Division of Enforcement to advance its investigations more efficiently.

The full SEC Division of Enforcement 2022 report is available [here](#).

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