Morgan Lewis

REPORT

# CURRENT DEVELOPMENTS IN SEC ENFORCEMENT FOR PUBLIC COMPANIES

2023

www.morganlewis.com

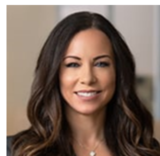
© 2023 Morgan Lewis | Morgan, Lewis & Bockius LLP, a Pennsylvania limited liability partnership

Morgan Lewis

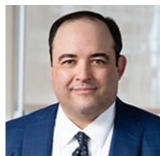
# CURRENT DEVELOPMENTS IN SEC ENFORCEMENT FOR PUBLIC COMPANIES

**2023**

## AUTHORS

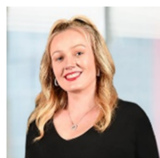
**KELLY L. GIBSON**
kelly.gibson@morganlewis.com
**Co-Leader, Securities Enforcement Practice**
+1.215.963.5121
+1.212.309.6287



**G. JEFFREY BOUJOUKOS**
jeff.boujoukos@morganlewis.com
**Co-Leader, Securities Enforcement Practice**
+1.215.963.5117
+1.202.739.5283

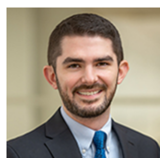
**FREDERICK L. BLOCK**
fred.block@morganlewis.com
+1.202.739.5125

**EMILY E. RENSHAW**
emily.renshaw@morganlewis.com
+1.617.951.8517
+1.212.309.6716



**MURIEL S. RAGGI**
muriel.raggi@morganlewis.com
+1.215.963.4994

**LAURIE A. CERVENY**
laurie.cerveny@morganlewis.com
+1.617.951.8527



**MATTHEW O'KEEFE**
matthew.okeefe@morganlewis.com
+1.617.341.7527


**www.morganlewis.com**


This report is provided for your convenience and does not constitute legal advice or create an attorney-client relationship. Prior results do not guarantee similar outcomes. Attorney Advertising. Links provided from outside sources are subject to expiration or change.

© 2023 Morgan Lewis

Morgan Lewis

# CURRENT DEVELOPMENTS IN SEC ENFORCEMENT FOR PUBLIC COMPANIES

## 2023

The US Securities and Exchange Commission (SEC) continued its significant focus on public companies in 2022 with its enforcement and rulemaking programs. This heightened level of attention will likely continue as the SEC approaches the end of its fiscal year on September 30, 2023, and into fiscal year 2024.

Recent enforcement activity points to several areas of interest for the SEC—and provides a valuable window for public companies into the SEC's priorities—including the following:

- Higher civil penalties and disgorgement
- Emphasis on environmental, social, and governance
- Cybersecurity
- Insider trading
- SOX 304 clawbacks
- Cryptoassets
- Regulation FD
- Disclosure of non-GAAP metrics

### Newton's Third Law

Two years ago, we devoted substantial space to reviewing US Securities and Exchange Commission (SEC or Commission) Chairman Gary Gensler's time at the Commodity Futures Trading Commission (CFTC) and forecasting a significant rise in SEC enforcement activity.[1] Last year, we focused on Director Grewal's discussion of "speeding tickets" as an indication of an SEC willing to pursue and penalize routine violations.[2] The 2022 statistics released by the SEC's Division of Enforcement reflect aggressive enforcement and outsized civil penalties untethered, in many instances, to past precedent.[3]

It would be simple to just say, "expect more of the same," because we do expect those trends to continue. However, even the least scientifically inclined among us might recall from high school physics Newton's Third Law: for every action (force) in nature there is an equal and opposite reaction. Over the last decade we have witnessed aggressive SEC enforcement approaches result in a number of unintended consequences that significantly affected the regulatory space.

As defendants eschewed settlement and litigated in federal court, the SEC lost the right to assert principles of equitable tolling,[4] disgorgement was deemed a penalty and time limited,[5] and disgorgement was limited to personal gain.[6] The SEC also suffered a successful challenge to the procedure for administrative law judge (ALJ) appointments,[7] and in April 2023, the US Supreme Court unanimously decided that a party may challenge the SEC's use of ALJs directly in federal district court without first litigating to conclusion the administrative enforcement proceeding.[8] Additionally, insider trading cases became significantly more difficult for the SEC and Department of Justice to pursue.[9] Further, the SEC appears to have forsworn its administrative forum altogether for any litigated matters.

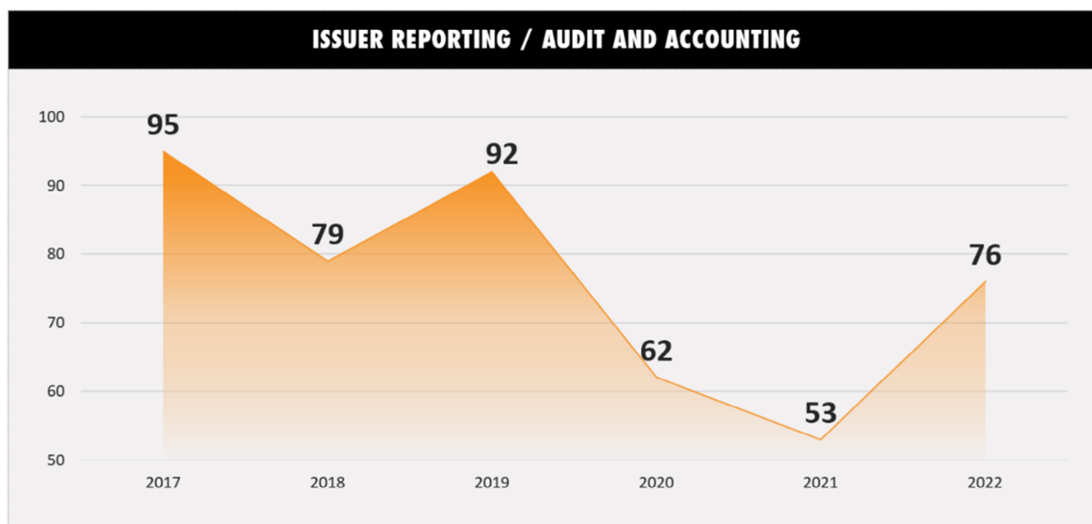
The equal and opposite reaction to oversized penalties and "speeding tickets" will again be litigation. We are not alone in this view: the SEC supported its request to Congress for increased enforcement

headcount by noting that "it is expected that the number of litigated cases will continue to rise as [the Division of Enforcement] increasingly holds wrongdoers accountable for their misconduct with more meaningful and, in some instances, escalating sanctions. [The Division of Enforcement] requires additional resources to ensure that it has an adequate number of attorneys to staff the increasing number of litigated cases."[10]

With increased litigation, we expect to learn whether "speeding ticket" cases have sufficient jury appeal. Further, because the determination of a civil penalty is governed by statutory "tiers" and decided by the judge, not the jury, in federal court,[11] the SEC's justification for outsized civil penalties will be subject to significant scrutiny in litigation. All of these factors could, once again, significantly alter the enforcement landscape.

## Continued Public Company Enforcement Focus

As the below graph demonstrates, public companies continued to be a significant focus of the SEC's enforcement and rulemaking programs in 2022. We expect this heightened level of attention to continue as the SEC approaches the end of its fiscal year on September 30, 2023. We also expect this attention to continue into fiscal year 2024.




## Higher Civil Penalties and Disgorgement

In fiscal year 2022, the SEC announced record-breaking money ordered of more than $6.4 billion, up from approximately $3.9 billion in FY 2021.[12] That staggering figure includes nearly $4.2 billion in civil penalties, which the SEC noted was the "highest on record," and more than $2.2 billion in disgorgement.

**Total Money Ordered (in millions)**

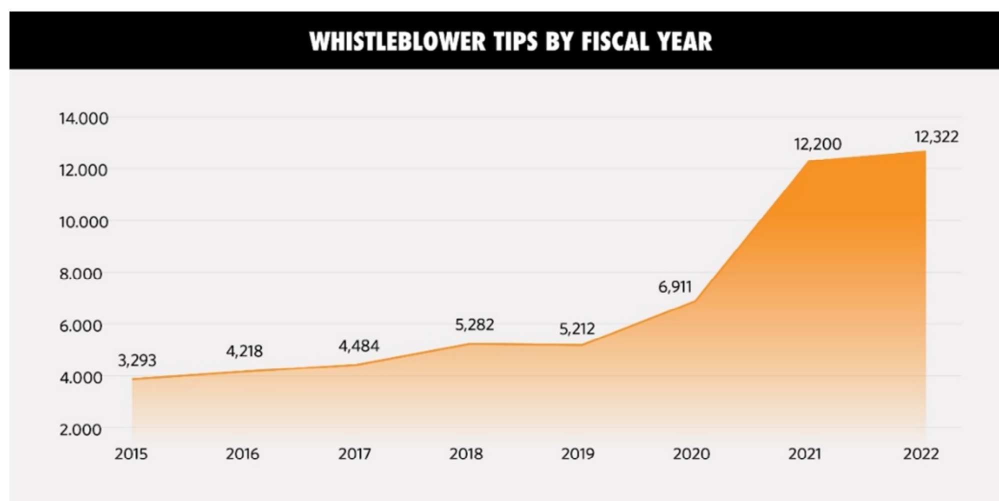
| | FY 2022 | FY 2021 | FY 2020 | FY 2019 | FY 2018 | FY 2017 |
|---|---|---|---|---|---|---|
| Penalties | **$4,194** | $1,456 | $1,091 | $1,101 | $1,439 | $832 |
| Disgorgement | **$2,245** | $2,395 | $3,588 | $3,248 | $2,506 | $2,957 |
| | $6,439 | $3,852 | $4,680 | $4,349 | $3,945 | $3,789 |

Disgorgement totals for 2020 and 2021 have been adjusted to exclude amounts ordered but waived. The currently-reported 2020 figure of $3,588 (in millions) was previously reported as $3,589 (in millions). The currently reported 2021 figure of $2,395 (in millions) was previously reported as $2,396 (in millions). No other years were adjusted.

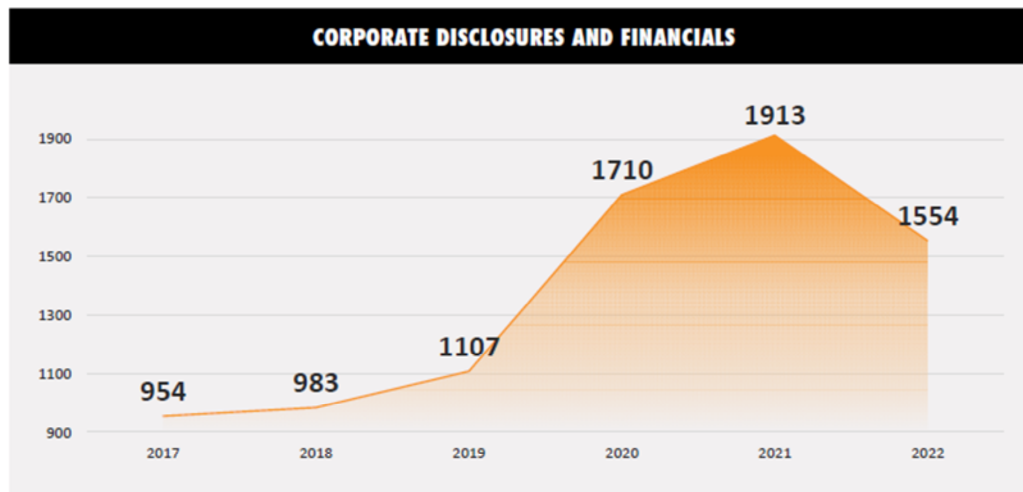
These numbers, while unprecedented, are consistent with the Commission's position that higher penalties will deter future wrongdoing. Indeed, SEC Director of Enforcement Gurbir Grewal has cautioned that "Market participants must realize that complying with securities laws is cheaper than violating those laws."[13] Recent civil penalties in the hundreds of millions of dollars[14] illustrate a more punitive approach and represent a significant departure from past precedent. However, the SEC is undeterred, conceding that it has "in a number of actions recalibrated penalties for certain violations."[15] While Director Grewal noted that the SEC does not "expect to break these records and set new ones each year,"[16] we expect higher civil penalties untethered to precedent to continue, and a recent settlement bears this out.[17]

## Whistleblower Tips and Awards Continue at Record Levels[18]

On May 5, 2023, the SEC announced the largest-ever whistleblower award of nearly $279 million, outstripping the entire prior year's awards and more than doubling the now second-largest award of $114 million from October 2020.[19] The press release stated the obvious, that the SEC intends such awards to be "a significant incentive for whistleblowers to come forward with accurate information about potential securities law violations." This follows fiscal year 2022 that saw the overall number of tips received through the whistleblower program plateau at slightly more than 12,000 tips. The Commission awarded approximately $229 million to 103 whistleblowers during the fiscal year. These figures represented the second largest dollar amount and number of individuals awarded in a single fiscal year.[20]



Over the last six years, whistleblower tips involving corporate disclosure and financials have increased dramatically. While 2022 saw a decline after the COVID-19 peak, given that whistleblower awards are paid to eligible individuals who voluntarily provide original information that leads to successful enforcement actions that result in monetary sanctions of more than $1 million, the effect of hundreds of eligible whistleblowers has been, and will continue to be, substantial.




# PUBLIC COMPANY AREAS OF FOCUS AND A LOOK AHEAD

## Emphasis on Environmental, Social, and Governance

Environmental, social, and governance (ESG) issues and disclosures were, and continue to be, a leading area of interest for the SEC. As recently as February 1, 2023, Director Grewal noted that the SEC continues to see needless risks for ESG investors from inaccurate disclosures. He remarked, "We're seeing a lot of issues around those types of disclosures" referencing misleading ESG fund marketing and corporate climate reporting.[21] Further, materiality does not appear to be a stumbling block, as Enforcement believes that ESG actions fall within "time-tested principles concerning materiality, accuracy of disclosures, and fiduciary duty, as codified in federal statutes, regulations, and case law."[22] The SEC's cases in this area offer important indicators of where investigations into ESG matters may lead.

### *The SEC Will Investigate a Broad Range of ESG-Related 'Statements'*

The SEC will not limit its actions to publicly filed documents with the Commission. Companies can expect press releases, investor presentations, statements on websites, and other public statements to be the subject of review in an ESG investigation. For example, in a recently settled litigation, the SEC alleged that the company made false and misleading claims to local governments, communities, and investors about the safety of one of its foreign operations prior to a catastrophic failure of a dam that resulted in the deaths of 270 people.[23] The company resolved this litigation by agreeing to pay $55.9 million in civil penalties, disgorgement and prejudgment interest.[24]

Similarly, in another settled action, a chief executive officer (CEO) of a technology platform, billing administrator, and distributor of short-term and limited health insurance products, was alleged to have made a series of misleading statements to investors in earnings calls and annual reports. These

misstatements allegedly concealed extensive consumer complaints about the products being sold. The CEO and company were alleged to have told investors that they held their distributors to high compliance standards and that they had 99.9% consumer satisfaction. According to the SEC, in reality, the company tracked thousands of dissatisfied consumers.[25] The company resolved the case by agreeing to pay an $11 million civil penalty and is subject to a cease-and-desist order.[26]

### *SEC Views on the 'S' and 'G' in 'ESG' Are Coming Into Focus*

We expect the SEC to continue investigating public companies that have headline-grabbing issues in the "social" and "governance" categories of ESG, such as inappropriate relationships or workplace culture issues. While not typically the focus of SEC scrutiny, and often the province of other regulators, the SEC seems intent upon regulating such ESG issues by enforcement. In the first two months of 2023, the SEC settled with two companies for alleged misleading statements and disclosure failures in this area.

- **Separation From Officers and Directors and Termination for "Cause":** In January, the SEC settled an action against a public company and its CEO arising from public filings concerning the circumstances of the executive's departure following the board's determination that he violated company policy and demonstrated poor judgment involving an "inappropriate personal relationship with an employee."[27] The SEC alleged that the company failed to fully describe the circumstances of the separation, including that the company exercised discretion in not terminating the executive for "cause," which would have prevented the executive from receiving equity-based compensation valued at approximately $44 million. Specifically, the SEC found that this alleged incomplete disclosure violated proxy solicitation rules that require discussion and analysis of compensation (Item 402(b) of Regulation S-K). However, because the company pursued the executive to recover the compensation, and extensively cooperated in the SEC investigation, no civil penalty was sought by the SEC.[28]
- **Internal Controls Over Reporting—Workplace Misconduct:** In February 2023, the SEC settled an action against a public company concerning its ability to "understand the volume and substance of employee complaints about workplace misconduct" in order to "assess whether any material issues existed that would have required public disclosure."[29] The company had disclosed that "its ability to attract, retain, and motivate employees was a particularly important risk in its business," but the SEC alleged that it lacked controls and procedures among its separate business units "to collect and analyze employee complaints of workplace misconduct."[30] The SEC's unprecedented assertion was that these failures violated Exchange Act Rule 13a-15(a) requiring the company to "maintain disclosure controls and procedures designed to ensure that information required to be disclosed by an issuer in reports it files or submits under the Exchange Act is recorded, processed, summarized, and reported within the time periods specified in the Commission's rules and forms"[31] A pointed statement in dissent to the action by Commissioner Hester M. Peirce rightly expresses concern over this regulation by enforcement.[32] Without admitting or denying the allegations, the company agreed to pay a $35 million civil penalty.[33]
- **SEC Proposed Rule on Climate-Related Disclosures Shows Where We May Be Headed:** In March 2022, the SEC proposed the Enhancement and Standardization of Climate-Related Disclosures for Investors rule,[34] which, if finalized, would dramatically alter ESG reporting requirements for public companies.[35] The rule as written would require public companies to provide climate-related financial data and greenhouse gas emission information in public disclosure filings, including
  - procedures for oversight and governance of climate-related risk by their boards and management;
  - any material effect climate-related risk has on their businesses and financial statements; and

- their process for identifying, assessing, and managing climate-related risks.[36]

Additionally, companies would have to disclose emissions for which they are directly responsible and emissions attributable to their supply chains and products.[37] Although initially closed in May 2022, the SEC reopened the comment period for this proposed rule in October 2022 due to a technological issue preventing the submission of certain comments. Once the comment period closes,[38] the SEC will review the comments and likely issue a final rule in the fall (according to information shared by a former SEC commissioner during an April webinar).[39]

## Cybersecurity Is an Increasing Area of Focus

While at first blush cybersecurity may not sound like an area the SEC is charged with regulating, it has used rulemaking and enforcement actions to influence behavior in the name of protecting investors.

### *SEC Proposes Wide-Ranging Cybersecurity Disclosure Rule*

The SEC has already proposed a rule addressing cybersecurity that would, among other things, require current reporting about material cybersecurity incidents on Form 8-K and periodic disclosures regarding companies' policies and procedures to identify and manage cybersecurity risks.[40] Some key features of the proposed rule include

- a requirement that there be prompt assessment of materiality from a disclosure perspective;
- a requirement that disclosure be made within four days of the intrusion; and
- disclosure requirements about cybersecurity expertise of board members if any members have that expertise and disclosure about whether a company has a chief information officer.

For a robust discussion of the proposed rules, refer to our March 2022 LawFlash, SEC Proposes Mandatory Cybersecurity Disclosures.

### *SEC Investigation of a Law Firm Hack*

The SEC's recent subpoena enforcement action against a law firm seeking the names of its clients affected by a cybersecurity intrusion at the firm is just the latest example of the securities law issues that surround such an event. The SEC was investigating a "Microsoft Hafnium cyberattack" that, according to the SEC, began around November 2020 and continued into at least March 2021.[41] The law firm was a victim of the hack and conceded that certain clients' information was compromised. In seeking the affected client names from the law firm, the SEC argued it needed the information to "understand the nature and scope of the attack"; "assess and identify potential illegal trading based on information gathered during the attack"; and "determine relevant disclosure obligations for public companies impacted by the attack."[42]

While the insider trading point is interesting, companies should pay particular attention to the third point and the SEC's suggestion that it will investigate disclosure issues arising from cybersecurity intrusions. On May 9, 2023, the US District Court for the District of Columbia heard argument on the SEC's motion to compel and 83 law firms filed amici in opposition to the SEC's request.

### *Internal Controls Over Reporting—Cybersecurity Incidents*

Similar to the efforts in the ESG space, the SEC has advanced internal controls charges to regulate how companies react to and disclose cybersecurity issues.

- **Timely Internal Reporting of Cyber Incidents:** In March 2023, the SEC brought a settled case against a public company for alleged misleading disclosures about a ransomware attack.[43]

The SEC asserted that the company announced that the ransomware attacker did not access donor bank account information or social security numbers. However, within days, the company's technology and customer relations personnel learned that the attacker had in fact accessed this sensitive information. The SEC focused on the alleged failure of employees to communicate this information to senior management responsible for its public disclosure because of the inadequate controls and procedures, and the company agreed to pay a $3 million civil penalty without admitting or denying the SEC's allegations.[44]

- **Reevaluation of Cybersecurity Risk Disclosures—A Risk That "May Happen" vs. "Did Happen":** In August 2021, the SEC charged a public company for allegedly failing to adequately disclose the extent of a cyber intrusion.[45] According to the SEC's settled order, the company made misleading statements and omissions about a data breach involving the theft of customer personal data and administrator log-in credentials for thousands of customer accounts. The SEC noted that in public filings the company referred to a data privacy incident as a hypothetical risk—not a risk that had already taken place.[46] Further, the SEC alleged that the company's "disclosure controls and procedures were not designed to ensure that those responsible for making disclosure determinations were informed of certain information about the circumstances surrounding the breach."[47]

To prepare for the SEC's scrutiny of cybersecurity incidents, and the upcoming rules, public companies should consider the following proactive steps:

- Review, assess, and update existing cybersecurity-related policies and procedures.
- Review and assess corporate governance structure.
- Review and implement disclosure control procedures.

## Insider Trading Will Always Be a Focus

2022 and the first part of 2023 have seen a continued focus on insider trading, including a number of cases against senior executives, several of whom were public company officers.

- **A Novel SEC Legal Theory—Trading in a Similar Company:** In its first-ever "shadow trading" enforcement action, the SEC alleged that a senior executive of a pharmaceutical company used knowledge of his employer's pending merger to invest in a separate, "economically linked" company, rather than the target.[48] In its order denying the executive's motion to dismiss, the US District Court for the Northern District of California ruled that the SEC had adequately pled an insider trading claim because "[a]lthough unique, the SEC's theory of liability falls within the contours of the misappropriation theory and language of the applicable law."[49] Discovery is closed in this matter, and motions for summary judgment are due to be filed in October 2023. This case will be watched closely as it seeks to greatly expand the misappropriation theory of insider trading.
- **Tipping of Family Members and Friends Always a Focus:** The SEC charged the former chief financial officer (CFO) of a pharmaceutical company and his former romantic partner with insider trading in the company's stock.[50] The SEC traced the tipping through the partner and three family members. Even with the numerous high profile insider trading cases over the last several years, companies continue to be victimized by the misuse of material nonpublic information by employees.
- **10b5-1 Plans Are Not Absolute Safe Havens:** The SEC charged the executive chairman of a healthcare treatment company with insider trading for selling more than $20 million of company stock while in possession of negative material nonpublic information (MNPI) relating to the

company's largest customer.[51] In this previously rare action stemming from an alleged improperly established 10b5-1 trading plan, the SEC claimed that the chairman improperly set up his trading plan while aware of a likely termination by a large customer, avoiding more than $12 million in losses. Particularly in light of the recent amendments to Rule 10b5-1 (discussed below), we expect increased scrutiny of preset trading plans and an expanding view of what constitutes MNPI.

### *Amendments to Rule 10b5-1—A Focus on Perceived Loopholes*

In December 2022, the SEC adopted amendments to Rule 10b5-1,[52] and those amendments will go into effect in the second half of 2023 or early 2024 for companies with a December 31 fiscal year-end. Chief among the changes is the addition of lengthy "cooling-off" periods before any trading can begin under a plan. The Rule's good faith requirement has also been modified, now requiring plan participants to certify that they are acting in good faith and have no material nonpublic information. Notably, existing Rule 10b5-1 plans will not be affected by these new requirements, unless modified after February 27, 2023. The amendments also set out additional public disclosures for issuers, directors, officers, and Form 4 and 5 filers. Among the new requirements, issuers now have to disclose quarterly whether any 10b5-1 plans or other trading arrangements have been adopted, modified, or terminated in the prior period, as well as the material terms of each such plan.[53]

## SOX 304 Clawbacks

### *Aggressive Approach to Clawbacks of Executive Compensation*

Section 304 of Sarbanes-Oxley (SOX 304) allows an issuer who has filed a restatement as the result of misconduct to seek reimbursement of any bonus or other incentive-based or equity-based compensation received by a CEO or CFO. The SEC has invoked this provision to force reimbursement where companies are charged with securities law violations but neither the CEO or CFO are implicated in the misconduct and "were not charged under any additional provisions."[54] Recently, SEC Enforcement leadership has laid out a new and aggressive approach to SOX 304, remarking that clawbacks "provide a form of public accountability for senior executives who presided over a firm at which misconduct occurred that required their firms to restate their financials" by incentivizing senior executives to prevent and detect "such misconduct at their firms."[55] Further, the SEC will seek the "full amount of the reimbursement that is required by the statute" and not just the amount of additional compensation the CEO or CFO may have received as a result of the misconduct.[56] In the past, the financial remedy was often just the so-called "fraud delta" and not the entire amount of the executive's compensation.

A settlement announced last fiscal year highlights this more expansive approach. The SEC settled with the CEO and two former CFOs of a public company that had restated several years of financials to correct revenue and profit margin errors related to a former executive's alleged fraud.[57] The three executives agreed to return $1.4 million, $327,000, and $176,000, respectively, which consisted of bonuses and compensation received during the restatement period. Notably, the settling executives were not themselves alleged to have participated in the misconduct.

### *The SEC's New Rule 10D-1 Imposes Clawback Obligations on Companies*

In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act added Section 10D to the Securities Exchange Act of 1934 (Exchange Act), requiring the SEC to adopt rules for national securities exchanges directing issuers to adopt and comply with a clawback policy. In October 2022, the SEC announced Rule 10D-1 that significantly alters the corporate landscape on clawbacks.[58]

The new rule is significantly broader in scope than SOX 304 in many ways:

- It provides for company enforcement, where only the SEC has enforcement power under SOX 304.
- It encompasses all executive officers (not just the CEO and CFO as under SOX 304) and requires the clawback of incentive-based compensation in the event of any type of restatement, regardless of misconduct.
- It mandates that issuers develop, implement, and disclose a clawback policy, as well as disclose all clawbacks that occur as a result of violations of that policy.
- Non-compliance may result in an issuer being delisted from its national securities exchange, as well as a potential SEC enforcement action.[59] In this regard, Director Grewal recently warned: "Executives should be on notice that we view SOX 304 as broad authority in seeking all forms of compensation that should be reimbursed to the company."[60]

## Cryptoassets—Emphasis on Disclosures

In December 2022, only about a month after a prominent centralized cryptocurrency exchange specializing in derivatives and leveraged products filed for bankruptcy, the SEC's Division of Corporation Finance published informal guidance[61] on how public companies may be asked to address the possible impact of financial distress in the cryptoasset market. The guidance includes a "sample" crypto-specific comment letter focused on disclosure that public companies should consider providing in filings made under the Securities Act of 1933 (Securities Act) and Exchange Act.[62] Although the guidance does not create new disclosure requirements, the sample letter provides insight into the Staff's scrutiny of the cryptoasset market and outlines its significant concerns about the possible impact of crypto market volatility on investors and reporting companies.[63]

To meet their disclosure requirements, companies must address cryptoasset market developments and their material impact on the companies' business in company filings, including in business descriptions, risk factors, and management discussions and analyses.[64] Examples of potential areas that may be impacted materially by volatility in the cryptoasset market include companies' liquidity, ability to obtain financing, and legal and litigation risks. Companies must proactively assess exposure and risks in these and other areas and issue appropriate disclosures, including about the potential risks to their investors. Failure to make adequate disclosures can land companies in hot water,[65] and the recently issued guidance is an indicator that there will be increased regulatory scrutiny and potential enforcement in this area.

For a discussion of the sample letter guidance, please review our December 2022 LawFlash, Public Companies: Consider Updating Disclosures to Reflect Risks Posed by Cryptoasset Markets.

## Regulation FD

Regulation FD is an issuer disclosure rule that prohibits persons who regularly communicate with securities market professionals or security holders from making an intentional disclosure of material, nonpublic information unless the information is simultaneously disclosed publicly.[66] The stated purpose of Regulation FD is to avoid unfairness that would allow those privy to the information beforehand to avoid a loss or make a profit at the expense of investors kept in the dark.[67]

The SEC obtained the largest penalty in history in a Regulation FD case at the end of 2022 in a settlement with a major telecommunications, media, and technology company.[68] There, the SEC alleged that three individuals on behalf of the company reached out to analysts to disclose material declines in sales in an effort to avoid falling short of consensus revenue expectations and also did not disclose that information to investors. The company agreed to pay a $6.25 million civil penalty for its alleged selective disclosure in violation of Regulation FD and Section 13(a) of the Exchange Act.[69]

We expect continued pursuit of penalties against companies for conduct and practices the SEC believes result in selective disclosures, earnings smoothing, and priming the market.

### Disclosure of Non-GAAP Metrics

The SEC's increased use of data analytic tools and employment of industry sweeps in enforcement lend themselves to increased focus on and enforcement related to misleading disclosures of non-GAAP metrics—numerical measures of performance, financial position, or cash flows that are not calculated in accordance with generally accepted accounting principles (GAAP).[70] In December 2022, the SEC's Division of Corporation Finance updated its Compliance & Disclosure Interpretations related to rules and regulations governing the use of non-GAAP financial measures, including those related to public companies' use of potentially misleading non-GAAP financial measures.[71] The guidance explains factors the SEC will consider when evaluating whether a non-GAAP measure is misleading, including, for example, the nature and effect of the non-GAAP adjustment and how it relates to the company's operations, revenue generating activities, business strategy, industry, and regulatory environment.[72]

Only three months after the updated guidance was issued, the SEC settled an enforcement action involving an $8 million penalty against an IT services company that allegedly made misleading disclosures about its non-GAAP financial performance that the SEC viewed as inconsistent with the company's public description of the costs that were subject to those non-GAAP adjustments.[73]

## CONCLUSION

As noted above, we expect the SEC to continue to take an aggressive approach to enforcement as the year progresses. The SEC has increased resources and at least a majority of commissioners apparently are willing to take more aggressive approaches on legal theories and remedies.

Morgan Lewis

# CONTACTS

If you have any questions or would like more information on the issues discussed in this report, please contact any of the following:

**Securities Enforcement & Litigation**


**Boston**

| | | |
|---|---|---|
| Timothy P. Burke | +1.617.951.8620 | timothy.burke@morganlewis.com |
| David Boch | +1.617.951.8485 | david.boch@morganlewis.com |
| Thomas J. Hennessey | +1.617.951.8520 | thomas.hennessey@morganlewis.com |
| Jason S. Pinney | +1.617.951.8684 | jason.pinney@morganlewis.com |
| T. Peter R. Pound | +1.617.951.8728 | peter.pound@morganlewis.com |
| Emily E. Renshaw | +1.617.951.8517 | emily.renshaw@morganlewis.com |

**Miami**

| | | |
|---|---|---|
| Ivan P. Harris | +1.305.415.3398 | ivan.harris@morganlewis.com |

**New York**

| | | |
|---|---|---|
| Michèle A. Coffey | +1.212.309.6917 | michele.coffey@morganlewis.com |
| Ariel Gursky | +1.212.309.6205 | ariel.gursky@morganlewis.com |
| Ben A. Indek | +1.212.309.6109 | ben.indek@morganlewis.com |
| Kelly L. Gibson | +1.212.309.6287 | kelly.gibson@morganlewis.com |
| Emily E. Renshaw | +1.212.309.6716 | emily.renshaw@morganlewis.com |

**Philadelphia**

| | | |
|---|---|---|
| G. Jeffrey Boujoukos | +1.215.963.5117 | jeff.boujoukos@morganlewis.com |
| Kelly L. Gibson | +1.215.963.5121 | kelly.gibson@morganlewis.com |

**San Francisco**

| | | |
|---|---|---|
| Joseph E. Floren | +1.415.442.1391 | joseph.floren@morganlewis.com |
| Susan D. Resley | +1.415.442.1351 | susan.resley@morganlewis.com |

**Washington, DC**

| | | |
|---|---|---|
| Frederick L. Block | +1.202.739.5125 | fred.block@morganlewis.com |
| G. Jeffrey Boujoukos | +1.202.739.5283 | jeff.boujoukos@morganlewis.com |
| Ivan P. Harris | +1.202.739.5692 | ivan.harris@morganlewis.com |


**Corporate, Finance & Investment Management**


**Boston**

| | | |
|---|---|---|
| Laurie A. Cerveny | +1.617.951.8527 | laurie.cerveny@morganlewis.com |

**Pittsburgh**

| | | |
|---|---|---|
| Celia A. Soehner | +1.412.560.7441 | celia.soehner@morganlewis.com |

**Washington, DC**

| | | |
|---|---|---|
| Erin E. Martin | +1.202.739.5729 | erin.martin@morganlewis.com |

**Philadelphia**

| | | |
|---|---|---|
| Joanne R. Soslow | +1.215.963.5262 | joanne.soslow@morganlewis.com |

## ABOUT US

Morgan Lewis is recognized for exceptional client service, legal innovation, and commitment to its communities. Our global depth reaches across North America, Asia, Europe, and the Middle East with the collaboration of more than 2,200 lawyers and specialists who provide elite legal services across industry sectors for multinational corporations to startups around the world. For more information about us, please visit www.morganlewis.com.

© 2023 Morgan Lewis

## REFERENCES


[1] Morgan Lewis, 2020 Year in Review and a Look Forward: Select SEC and FINRA Developments and Enforcement Cases, at 6-11 (2021).
[2] Gurbir Grewal, SEC Director of Enforcement, Remarks at PLI Broker/Dealer Regulation and Enforcement Conference 2021 (Oct. 6, 2021).
[3] Morgan Lewis, SEC Releases Fiscal Year 2022 SEC Enforcement Statistics: Trends & Takeaways (Nov. 22, 2022).
[4] *Gabelli v. Securities and Exchange Commission*, 568 U.S. 442 (2013).
[5] *Kokesh v. Securities and Exchange Commission*, 581 U.S. 455 (2017).
[6] *Liu v. Securities and Exchange Commission*, 140 S. Ct. 1936 (2020).
[7] *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018).
[8] *See* Morgan Lewis LawFlash, US Supreme Court Allows Early Constitutional Challenges to SEC Administrative Proceedings in Federal District Courts (April 18, 2023) (discussing *Axon Enter. Inc. v. Fed. Trade Comm'n*, 143 S. Ct. 890 (2023)).
[9] *See Salman v. United States*, 580 U.S. 39 (2016); *United States v. Newman*, 773 F.3d 438 (2d. Cir. 2014).
[10] Securities and Exchange Commission, Fiscal Year 2023 Congressional Budget Justification, at 24 (2022).
[11] 15 U.S.C. § 80b-9(e).
[12] Press Release, Securities and Exchange Commission, SEC Announces Enforcement Results for FY 22 (Nov. 15, 2022).
[13] Gurbir Grewal, SEC Director of Enforcement, Remarks at Securities Enforcement Forum (Nov. 16, 2022).
[14] *See, e.g.*, Press Release, Securities and Exchange Commission, Barclays Agrees to a $361 Million Settlement to Resolve SEC Charges Relating to Over-Issuances of Securities (Sept. 29, 2022); Press Release, Securities and Exchange Commission, JPMorgan Admits to Widespread Recordkeeping Failures and Agrees to Pay $125 Million Penalty to Resolve SEC Charges (Dec. 17, 2021).
[15] Press Release, Securities and Exchange Commission, SEC Announces Enforcement Results for FY 22 (Nov. 15, 2022).
[16] *Id.*
[17] Press Release, Securities and Exchange Commission, Brazilian Mining Company to Pay $55.9 Million to Settle Charges Related to Misleading Disclosures Prior to Deadly Dam Collapse (Mar. 28, 2023).
[18] Charts of whistleblower data are derived from information available in the annual reports of the SEC's Office of the Whistleblower.
[19] Press Release, Securities and Exchange Commission, SEC Issues Largest-Ever Whistleblower Award (May 5, 2023).
[20] Securities and Exchange Commission, Whistleblower Program 2022 Annual Report to Congress (Nov. 15, 2022).
[21] Andrew Ramonas, Investors Face Deceptive ESG Reporting, SEC Enforcement Boss Says, *Bloomberg* (Feb. 1, 2023).
[22] Press Release, Securities and Exchange Commission, SEC Announces Enforcement Results for FY 22 (Nov. 15, 2022).
[23] Press Release, Securities and Exchange Commission, SEC Charges Brazilian Mining Company with Misleading Investors about Safety Prior to Deadly Dam Collapse (Apr. 28, 2022).
[24] Press Release, Securities and Exchange Commission, Brazilian Mining Company to Pay $55.9 Million to Settle Charges Related to Misleading Disclosures Prior to Deadly Dam Collapse (Mar. 28, 2023).

[25] Press Release, Securities and Exchange Commission, SEC Charges Tampa-Based Health Insurance Distributor and its Former CEO with Making False Statements to Investors (July 20, 2022).
[26] *Id.*
[27] Press Release, Securities and Exchange Commission, SEC Charges McDonald's Former CEO for Misrepresentations About His Termination (Jan. 9, 2023).
[28] *Id.*
[29] Press Release, Securities and Exchange Commission, Activision Blizzard to pay $35 Million for Failing to maintain Disclosure Controls Related to Complaints of Workplace Misconduct and Violating Whistleblower Protection Rule (Feb. 3, 2023).
[30] *Id.*
[31] *Id.* The company also allegedly violated the rule that protects whistleblowers. *Id.*
[32] Hester M. Peirce, SEC Commissioner, The SEC Levels Up: Statement on In re Activision Blizzard (Feb. 3, 2023).
[33] *Id.*
[34] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (proposed Mar. 21, 2022).
[35] *See* Press Release, Securities and Exchange Commission, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022).
[36] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (proposed Mar. 21, 2022); Press Release, Securities and Exchange Commission, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022); Fact Sheet, Securities and Exchange Commission, Enhancement and Standardization of Climate-Related Disclosures (Mar. 21, 2022).
[37] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (proposed Mar. 21, 2022); Press Release, Securities and Exchange Commission, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022); Fact Sheet, Securities and Exchange Commission, Enhancement and Standardization of Climate-Related Disclosures (Mar. 21, 2022).
[38] *See* Comments for The Enhancement and Standardization of Climate-Related Disclosures for Investors.
[39] *See* S&P Global Market Intelligence, SEC Climate Disclosure Rule Delayed Until Fall, Former Commissioner Says (Apr. 26, 2023). The rule was previously slated to be finalized in April 2023 according to the agenda. *See* Regulatory Information Service Center, Fall 2022 Unified Agenda of Regulatory and Deregulatory Actions (May 3, 2023).
[40] *See* Press Release, Securities and Exchange Commission, SEC Proposes Rules on Cybersecurity Risk Management, Strategy, Governance and Incident Disclosure by Public Companies (Mar. 9, 2022).
[41] Litigation Release, Securities and Exchange Commission, SEC Files Subpoena Enforcement Action Against Law Firm Covington & Burling LLP Seeking the Names of Entities Whose Non-Public Information Was Accessed by Threat Actors Who Accessed Covington's Computer Network (Jan. 12, 2023).
[42] *Id.*
[43] Press Release, Securities and Exchange Commission, SEC Charges Software Company Blackbaud, Inc. for Misleading Disclosures About Ransomware Attack That Impacted Charitable Donors (Mar. 9, 2023).
[44] *Id.*
[45] Press Release, Securities and Exchange Commission, SEC Charges Pearson plc for Misleading Investors About Cyber Breach (Jan. 25, 2023).
[46] *In the Matter of Pearson plc*, Exchange Act Release No. 92676, AP File No. 3-20462 (Aug. 16, 2021) (Order Instituting Cease-and-Desist Proceedings, Pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Making Findings, and Imposing a Cease-and-Desist Order).

[47] Press Release, Securities and Exchange Commission, SEC Charges Pearson plc for Misleading Investors About Cyber Breach (Jan. 25, 2023).
[48] Press Release, Securities and Exchange Commission, SEC Charges Cheetah Mobile's CEO and its Former President with Insider Trading (Sept. 21, 2022).
[49] *SEC v. Panuwat*, 21-cv-06322, Dkt. 26 at 13 (N.D. Cal., Jan. 14, 2022).
[50] Press Release, Securities and Exchange Commission, SEC Charges Pharma CFO and Former Partner with Insider Trading (Dec. 2, 2021).
[51] Press Release, Securities and Exchange Commission, SEC Charges Ontrak Chairman Terren Peizer with Insider Trading (Mar. 1, 2023).
[52] Press Release, Securities and Exchange Commission, SEC Adopts Amendments to Modernize Rule 10b5-1 Insider Trading Plans and Related Disclosures (Dec. 14, 2022).
[53] *See* Morgan Lewis LawFlash, SEC Adopts Significant Changes to Rule 10b5-1 Affecting Trading by Insiders (Dec. 22, 2022) for a more fulsome discussion of the new rule and its requirements.
[54] Sanjay Wadhwa, Deputy Director of Enforcement, Remarks at SEC Speaks (Sept. 9, 2022).
[55] *Id*.
[56] Sam Waldon, Chief Enforcement Counsel, Remarks at SEC Speaks (Sept. 9, 2022); *see* Andrew Goudsward, 'They're Going to Go After the Leadership': SEC Aggressively Pursues Executive Compensation Clawbacks, *National Law Journal* (Sept. 15, 2022) (quoting Waldon's remarks).
[57] *See* Press Release, Securities and Exchange Commission, SEC Charges Infrastructure Company Granite Construction and Former Executive with Financial Reporting Fraud (Aug. 25, 2022).
[58] Press Release, Securities and Exchange Commission, SEC Adopts Compensation Recovery Listing Standards and Disclosure Rules (Oct. 26, 2022).
[59] *See* 17 C.F.R. § 240.10D-1; Fact Sheet, Securities and Exchange Commission, Recovery of Erroneously Awarded Compensation (Oct. 26, 2022).
[60] Press Release, Securities and Exchange Commission, SEC Charges Infrastructure Company Granite Construction and Former Executive with Financial Reporting Fraud (Aug. 25, 2022).
[61] Comment Letter, SEC Division of Corporation Finance, Sample Letter to Companies Regarding Recent Developments in Crypto Asset Markets (Dec. 8, 2022).
[62] *Id.*
[63] *Id.*
[64] Comment Letter, SEC Division of Corporation Finance, Sample Letter to Companies Regarding Recent Developments in Crypto Asset Markets (Dec. 8, 2022).
[65] *See*, *e.g.*, Press Release, Securities and Exchange Commission, SEC Charges NVIDIA Corporation with Inadequate Disclosures About Impact of Cryptomining (May 6, 2022) (SEC settling enforcement action with $5.5 million penalty against technology company "for inadequate disclosures concerning the impact of cryptomining on the company's gaming business" even though the revenue generated from cryptomining was appropriately accounted for).
[66] *See* 17 C.F.R. § 243.
[67] Securities and Exchange Commission, Announcement of Final Rule Regarding Selective Disclosure and Insider Training, 65 Fed. Reg. 51715 (Aug. 24, 2000) (announcing adoption of Regulation FD).
[68] Press Release, Securities and Exchange Commission, AT&T Settles SEC Charge of Selectively Disclosing Material Information to Wall Street Analysts (Dec. 5, 2022).
[69] *Id.*
[70] 17 C.F.R. § 244.101(a)(1).
[71] Securities and Exchange Commission, Compliance & Disclosure Interpretations, Non-GAAP Financial Measures (Dec. 13, 2022).
[72] *Id.*
[73] Press Release, Securities and Exchange Commission, SEC Charges IT Services Provider DXC Technology CO. for Misleading Non-GAAP Disclosures (Mar. 14, 2023).