



One Firm Worldwide®



## WHITE PAPER

January 2023

### SEC Enforcement in Financial Reporting and Disclosure: 2022 Year-End Update

We are pleased to present our latest update on financial reporting and issuer disclosure enforcement activity. This *White Paper* primarily focuses on the U.S. Securities and Exchange Commission's ("SEC") enforcement activity through year-end 2022.

## INTRODUCTION

The SEC's Division of Enforcement's 2022 results reflect pledges from Chair Gary Gensler and Director of Enforcement Gurbir Grewal to aggressively enforce the securities laws. Beyond the growing number of filed enforcement actions, the Division of Enforcement (the "Division") has increasingly relied on higher penalty amounts, case-specific undertakings, and executive compensation clawbacks under Section 304 of the Sarbanes-Oxley Act ("SOX 304") in settled actions. The Division has also shown an increased willingness to litigate, taking 15 cases to trial, more than any year in the past decade, and

winning summary judgment on liability in another nine cases.<sup>1</sup> Given the SEC's ambitious rulemaking agenda, the multi-year duration of Division investigations, and continued public commentary from Gensler and Grewal, we anticipate the level of enforcement activity will only increase in 2023 and beyond.

## SUMMARY OF FY 2022 ENFORCEMENT ACTIVITY

After the past two years saw a relative decline in SEC enforcement activity, fiscal year 2022 marked a return to a level of enforcement activity closer to pre-pandemic levels.<sup>2</sup>

### ENFORCEMENT ACTIONS FILED IN FISCAL YEARS 2017 TO 2022

	FY 2022	FY 2021	FY 2020	FY 2019	FY 2018	FY 2017
Standalone Enforcement Actions	462	434	405	526	490	446
Follow-On Admin. Proceedings	169	143	180	210	210	196
Delinquent Filings	129	120	130	126	121	112
<b>Total Actions</b>	<b>760</b>	<b>697</b>	<b>715</b>	<b>862</b>	<b>821</b>	<b>754</b>

In November 2022, the SEC announced that it filed 760 total enforcement actions in fiscal year 2022 (ending September 30, 2022), which represented a 9% increase over fiscal year 2021. These included 462 stand-alone enforcement actions, a 6.5% increase over fiscal year 2021.<sup>3</sup>

While the number of enforcement actions remains below recent levels, the SEC obtained a record \$6.4 billion in civil penalties, disgorgement, and prejudgment interest during this fiscal year, including a record \$4.2 billion in civil penalties.<sup>4</sup> This total nearly doubles fiscal year 2021's total relief obtained.<sup>5</sup> In addition, the SEC returned \$937 million to affected investors, compared to \$521 million in fiscal year 2021.<sup>6</sup>

### 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
<b>Total</b>	<b>\$6,439</b>	<b>\$3,852</b>	<b>\$4,680</b>	<b>\$4,349</b>	<b>\$3,945</b>	<b>\$3,789</b>

For companies facing Division scrutiny, this data provides a few key points. Penalty amounts have risen substantially since Jay Clayton's tenure as Chair. Companies evaluating the risk of Division scrutiny or in discussions with the Division should not view penalty amounts in actions settled even two or three years ago as indicative of a settlement structure the SEC will accept today. Companies should also expect the Division to demand all forms of relief available under the facts and circumstances, including actions against individuals for aiding and abetting or causing corporate violations, officer-and-director and penny stock bars, suspension or debarment against accountants and attorneys engaged in misconduct, and SOX 304 reimbursement from CEOs and CFOs. Companies should also note that Division demands for greater relief in settlement are backed up by the Division's increased willingness to litigate enforcement actions under Gensler and Grewal.

## EMPHASIS ON FINANCIAL REPORTING AND ISSUER DISCLOSURE

The SEC continued to emphasize financial reporting and issuer disclosure enforcement, noting in its FY22 Enforcement Results announcement that "public company disclosure is the bedrock of our securities markets" and that "[t]he SEC places a high priority on pursuing issuers or their employees who make materially inaccurate disclosures, as well as auditors and their professionals who violate applicable laws and rules in connection with such disclosures."<sup>7</sup> The enforcement statistics show that 16% of all standalone SEC enforcement proceedings this year were in the areas of "Issuer Reporting/Audit & Accounting."<sup>8</sup>

The SEC has augmented this commitment with extensive new regulations and guidance related to issuer disclosure. Specifically, since the last edition of this publication, the SEC has issued final rules expanding issuer disclosure obligations for executive compensation, compensation recovery (or "clawback") policies, and 10b5-1 trading plans and related information:

- In August, the SEC issued final rules implementing the pay versus performance provisions of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").<sup>9</sup> Starting with 2023 proxy statements,

public companies must present disclosures designed to help investors understand the relationship between executive compensation and company financial performance. The expanded disclosures will require many public companies to rely on novel calculations and analysis and to develop new narrative disclosures regarding executive compensation. For additional information, see Jones Day's [White Paper](#).

- In October, the SEC issued final rules required by Dodd-Frank that established listing standards requiring issuers to adopt clawback policies that provide for the recovery of erroneously awarded incentive compensation in the event of a required accounting restatement.<sup>10</sup> The rules require issuers to disclose the policy as an exhibit to their annual reports and to provide disclosures regarding the operation of the policy when invoked. For additional information, see Jones Day's [White Paper](#).
- In December, the SEC issued final rules relating to insider trading arrangements and related disclosures.<sup>11</sup> In addition to imposing new conditions on trading conducted under Rule 10b5-1 plans, the rules imposed more frequent and comprehensive disclosure requirements with respect to directors' and officers' use of Rule 10b5-1 plans, issuer's insider trading policies, and issuers' granting of certain equity compensation awards. For additional information, see Jones Day's [White Paper](#).

Beyond these final rules, the SEC in March proposed amendments to Regulations S-K and S-X requiring registrants to provide certain climate-related information in their registration statements and periodic reports, including disclosures regarding direct, indirect, and for certain registrants, up-and-downstream emissions.<sup>12</sup> Registrants would also be obligated to provide information concerning how the climate-related risks they have identified have had, or are likely to have, a material impact on their businesses and consolidated financial statements. For additional information, see Jones Day's [Alert](#).

Also in March, the SEC proposed rules to enhance and standardize disclosures regarding cybersecurity risk management, strategy, governance, and incident reporting by public companies.<sup>13</sup> If adopted, the proposed amendments would require prompt current disclosure of material cybersecurity incidents

and require periodic reporting about policies and procedures to identify and manage cybersecurity risks and board and management expertise in cybersecurity. For additional information, see Jones Day's [Commentary](#).

Also in March, the SEC proposed rules to enhance disclosure in special purpose acquisition company ("SPAC") initial public offerings and de-SPAC transactions that would provide investors in SPACs with many of the same protections available to investors in companies going public through more traditional means.<sup>14</sup> For additional information, see Jones Day's [Commentary](#).

Less formally, in December the Division of Corporation Finance ("CorpFin") published a sample comment letter to issuers regarding potential direct or indirect impacts caused by bankruptcies and financial distress in the crypto asset market.<sup>15</sup> In the sample comments, CorpFin emphasized that companies should consider the need to address crypto asset market developments in their filings, including exposure to counterparties and other market participants, liquidity risks, and risks related to legal proceedings, investigations, and regulatory impacts in the crypto asset markets.

In all cases, the SEC's regulatory agenda and guidance documents highlight market developments the SEC is watching closely and to which companies should expect the Division to dedicate significant resources. For example, the Division has nearly doubled the size of its Crypto Assets and Cyber Unit, whose mandate expressly includes investigating issuer disclosures of cyber-related risks and incidents.<sup>16</sup> The Division likewise has formed the ESG Task Force to focus on climate-change and other ESG disclosures.<sup>17</sup> The absence of final rules on these issues has not dissuaded the SEC from bringing enforcement actions involving them. For instance, in November, the SEC filed a settled proceeding against an asset manager for policy and procedure failures related to a pair of ESG mutual funds the SEC alleged lacked written ESG research procedures for fund securities and then failed to follow the ESG research procedures it eventually adopted.<sup>18</sup> Without admitting or denying the findings, the asset manager agreed to entry of a cease-and-desist order and paid a \$4 million penalty.

The balance of this *White Paper* recaps several notable enforcement actions in the areas of financial reporting and issuer disclosure during the third and fourth quarters of 2022.

## FINANCIAL REPORTING

- On August 3, 2022, the SEC filed settled proceedings against a surgical implant manufacturer and its former CFO for allegedly engaging in a "pull-forward" scheme over the course of four years. According to the SEC, the company shipped orders before customers requested delivery to pull sales forward from future quarters and recognized revenue prematurely in violation of the Generally Accepted Accounting Principles ("GAAP"). In addition, the SEC alleged that the company's reliance on pull-forwards destroyed future revenue streams and damaged important customer relationships, while falsely reassuring investors that it was meeting revenue guidance. The SEC alleged that the company violated Sections 17(a)(2) and 17(a)(3) of the Securities Act, and Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act, and various rules thereunder. The SEC alleged the former CFO violated Sections 17(a)(2) and 17(a)(3) of the Securities Act; Exchange Act Rules 13a-14, 13b2-1, and 13b2-2, and SOX 304; caused the company's violations of Exchange Act Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B), and various rules thereunder; and engaged in improper professional conduct within the meaning Rule 102(e). Without admitting or denying the findings, the company agreed to entry of a cease-and-desist order and paid a \$2 million penalty. Also without admitting or denying the findings, the former CFO agreed to entry of a cease-and-desist order, a five-year suspension on practice before the SEC, to pay a \$75,000 penalty, and to reimburse more than \$200,000 in incentive compensation pursuant to SOX 304. In its order, the SEC specifically acknowledged the cooperation of the company in its investigation, which "substantially advanced the quality and efficiency of the staff's investigation and conserved Commission resources."

Additionally, the SEC filed a litigated civil action against the company's former CEO alleging violations of Section 17(a) of the Securities Act, Sections 10(b) and 13(b)(5) of the

Exchange Act, Rules 10b-5, 13a-14, 13b2-1, and 13b2-2 thereunder, SOX 304, and for allegedly aiding and abetting the company's violations of the securities laws. The SEC seeks a permanent injunction, civil penalties, disgorgement, prejudgment interest, SOX 304 clawback, and an officer-and-director bar.<sup>19</sup>

- On August 25, 2022, the SEC filed a settled civil action against a construction company alleging a scheme to manipulate profit margins and revenue and to improperly defer the recording of expected costs for one of the company's subdivisions in violation of GAAP. According to the SEC, the manipulation caused the company to overstate revenue by \$62 million in 2017 and materially understate revenue in 2018 and 2019. The SEC alleged that the company violated Section 17(a) of the Securities Act, Sections 10(b), 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act, and Rules 10b-5, 12b-20, 13a-1, 13a-11, and 13a-13 thereunder. Without admitting or denying the allegations, the company agreed to entry of an injunction and paid a \$12 million penalty.<sup>20</sup>

Separately, the SEC filed a litigated civil action against the former senior vice president who allegedly orchestrated the scheme. The SEC alleges that the former senior vice president violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rules 10b-5(a) and (c) and Rule 13b2-1 thereunder, and aided-and-abetted the company's violations of the Exchange Act and various rules thereunder. The SEC seeks penalties, disgorgement, prejudgment interest, and an officer-and-director bar.<sup>21</sup>

Finally, the SEC filed settled proceedings against the company's former CEO and two former CFOs who, without being accused of substantive misconduct, agreed to return nearly \$2 million, collectively, pursuant to SOX 304.<sup>22</sup>

- On August 26, 2022, the SEC filed settled proceedings against the former Controller and Chief Accounting Officer of a paint and specialty coating materials manufacturer related to the company's alleged improper earnings management practices. According to the SEC, the former executive directed staff to make improper accounting entries in violation of GAAP. Specifically, the former executive allegedly instructed staff to make, modify, or omit certain

accounting entries, to delay recording, or not to record certain expense accruals, and to misclassify certain income to manipulate earnings per share estimates and overstate the income of the company by \$13 million over two years. The SEC alleged that the former executive violated Section 17(a)(3) of the Securities Act and Section 13(b)(5) of the Exchange Act and Rule 13b2-1 thereunder, and aided and abetted the company's violations of Section 17(a)(2) of the Securities Act and Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and various rules thereunder. Without admitting or denying the findings, the former executive agreed to entry of a cease-and-desist order, to be suspended from appearing or practicing before the SEC as an accountant without an express right for reinstatement, and to pay a \$100,000 penalty.<sup>23</sup>

- On September 2, 2022, the SEC filed settled proceedings against an agricultural cooperative for allegedly violating the reporting, books and records, and internal controls measures of the Exchange Act. According to the SEC, a former trader at the company fraudulently manipulated the quantities and values of rail freight contracts the company entered into with railroads throughout North America, which led to the company filing materially false financial statements from 2014 to 2018 that inflated its net income by a total of \$123.9 million. The SEC alleged that the former trader was able to carry out this scheme because of the cooperative's allegedly insufficient internal accounting controls, which allowed the employee to both execute trades and determine their valuations. The SEC alleged that the company violated Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and various rules thereunder. Without admitting or denying the findings, the company agreed to entry of a cease-and-desist order. The SEC acknowledged the cooperation and remedial measures taken by the company, including the company's self-reporting, initiation of an internal investigation, termination of the former trader, and hiring of additional personnel to bolster its internal controls processes.<sup>24</sup>

Additionally, the SEC filed a litigated civil action against the former trader alleging violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. The complaint also alleges that he violated Section 13(b)(5) of the Exchange Act and Rule

13b2-1 thereunder, and aided and abetted the company's violations of the Exchange Act. The SEC seeks permanent injunctions, disgorgement with prejudgment interest, and a civil penalty against the former trader.<sup>25</sup>

- On September 12, 2022, the SEC filed settled proceedings against a cloud-storage software company for allegedly misleading investors about its order backlog management practices. The company allegedly deferred revenue into future quarters by delaying product deliveries to customers, concealing the company's slowing performance relative to its projections. The company allegedly used discretionary holds to increase the amount of backlog reported and to improperly delay revenue recognition to meet guidance and analysts' estimates. Further, the SEC alleged that when the company disclosed its backlog, it omitted material information. The SEC alleged that the company violated Sections 17(a)(2) and (a)(3) of the Securities Act, Section 13(a) of the Exchange Act and various rules thereunder. Without admitting or denying the findings, the company agreed to entry of a cease-and-desist order and paid an \$8 million penalty.<sup>26</sup>
- On September 29, 2022, the SEC filed settled proceedings against a publicly traded consumer products company alleging internal controls and books and records violations from at least 2016 to 2020. Specifically, the SEC's allegations concerned the company's alleged failure to integrate appropriate accounting policies and procedures into an acquired cosmetics line. The retention of certain legacy policies and procedures allegedly allowed the acquired business to override controls and inaccurately record financial results, which caused the company to misstate net sales, accounts receivable, inventories, and accrued liabilities in the company's annual and interim financial statements. The SEC alleged violations of Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act. Without admitting or denying the findings, the company agreed to entry of a cease-and-desist order and paid a \$900,000 penalty.<sup>27</sup>
- On September 30, 2020, the SEC filed a civil action against the former controller of a network infrastructure company for his role in an alleged multi-year accounting fraud. The scheme allegedly inflated the company's revenues by \$12.5 million by improperly recognizing revenue and related accounts receivable for nonexistent construction projects.

The complaint also alleged that the former controller and other former senior executives misled the company's auditor about fictitious revenue and related accounts receivable. The SEC alleged that the former controller violated Sections 17(a)(1) and (a)(3) of the Securities Act, Sections 10(b) and Section 13(b)(5) of the Exchange Act, and Rules 10b-5(a) and (c), 13b2-1, and 13b2-2 thereunder, and also that the former controller aided and abetted other individuals' violations of Sections 10(b), 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and various rules thereunder. The former controller consented to a bifurcated settlement, subject to court approval, under which, without admitting or denying the allegations, he agreed to entry of an injunction. The court will determine the amount of a civil penalty upon further motion of the SEC.<sup>28</sup>

- On October 21, 2022, the SEC filed settled proceedings against a toy manufacturing company relating to misstatements in its financial statements during the third and fourth quarters of 2017. Specifically, the allegations pertained to the company's alleged understatement of its tax-related valuation allowance for the third quarter of 2017 by \$109 million and overstatement of its tax expense for the fourth quarter of 2017 by the same amount. As a result, the company's third and fourth quarter 2017 net loss and net loss per share were understated by 15% and overstated by 63%, respectively. In addition, the SEC alleged that, at the time of the alleged misstatements, the company had no internal control specifically related to calculating a valuation allowance. The SEC alleged that the company violated Sections 17(a)(2) and 17(a)(3) of the Securities Act, and Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and various rules thereunder. Without admitting or denying the findings, the company agreed to entry of a cease-and-desist order and paid a \$3.5 million penalty.<sup>29</sup>

The SEC filed a separate litigated proceeding against the lead engagement partner of the company's external auditor alleging that he failed to comply with multiple PCAOB professional standards, including interim review standards, identifying and assessing the risks of material misstatement, audit evidence, audit documentation, and due care in the performance of work. Specifically, the SEC alleged that the audit team's work papers failed to reflect any discussion of the \$109 million error during its interim review, and the auditor failed to inform the company's Audit Committee

of the error when discovered during the annual audit. The SEC alleged that the auditor engaged in improper conduct within the meaning of Rule 102(e).<sup>30</sup>

- On November 1, 2022, the SEC filed settled proceedings against a provider of wood products and treatment chemicals for allegedly failing to disclose material information about two non-GAAP financial measures that the company highlighted regarding its debt reduction efforts. The company allegedly emphasized the importance of debt reduction and used two non-GAAP financial measures—net debt and net leverage ratio—to measure its progress. However, the company allegedly did not disclose that to achieve these targets, the company delayed making material amounts of overdue payments to its vendors. Without doing so, the company allegedly would not have achieved the 2019 year-end debt reduction goal it highlighted to investors. The SEC alleged the company violated Section 17(a)(3) of the Securities Act, Section 13(a) of the Exchange Act, and Exchange Act Rules 12b-20 and 13a-11, and Rule 100(b) of Regulation G. Without admitting or denying the findings, the company agreed to entry of a cease-and-desist order and paid a \$1.3 million penalty. The SEC acknowledged the remedial efforts of the company, including hiring outside counsel and cooperating with the SEC's investigation.<sup>31</sup>

## ISSUER DISCLOSURE

- On August 16, 2022, the SEC filed settled proceedings against a bank holding company and a settled civil action against its CEO for allegedly making false and misleading statements about related-party loans from the company to the former CEO's family trusts. According to the SEC, the company allegedly failed to disclose the loans to the former CEO's family trusts, which at times totaled nearly \$90 million, in its annual reports and proxy statements. Further, the SEC alleged the company falsely stated in press releases, news articles, and meetings with investors that the trust loans were *not* related party loans and that the bank holding company was in compliance with all related-party loan requirements. The SEC alleged the company violated Sections 17(a)(2) and 17(a)(3) of the Securities Act, Sections 13(a), 13(b)(2)(A), 13(b)(2)(B), and 14(a) of the Exchange Act, and various rules thereunder. Without admitting or denying the SEC's findings, the company agreed

to entry of a cease-and-desist order and paid disgorgement of \$2.6 million, prejudgment interest of \$750,493, and a \$10 million penalty. In the civil action, the SEC alleged the former CEO violated Sections 17(a)(2) and 17(a)(3) of the Securities Act, Section 14(a) of the Exchange Act, and Rules 13a-14 and 14a-9 thereunder. Without admitting or denying the findings, the former CEO agreed to entry of an injunction, a two-year officer-and-director bar, and paid disgorgement of \$109,000, prejudgment interest of \$22,216, and a \$300,000 penalty. In a parallel action, the Federal Reserve Board also announced settled proceedings against the company and the former CEO.<sup>32</sup>

- On September 9, 2022, the SEC filed a civil action against a cannabinoid and hemp manufacturing company, its CEO, and an individual allegedly acting as an undisclosed executive officer relating to certain allegedly material misrepresentations and omissions that the company made in press releases, Twitter posts, and Form S-1 registration statements. The company allegedly touted that it had preliminary approval to grow and process medical cannabis and hemp in the Kingdom of Eswatini, but omitted the fact that growing cannabis there is illegal. Moreover, the company allegedly made material misstatements regarding certain distribution rights granted to a third party company to sell the company's products. Further, the SEC alleged that the company's amended registration statement did not disclose that the individual acting as an undisclosed officer of the company—a convicted felon—was acting in such a capacity. The SEC alleged that the company and its CEO violated Sections 17(a)(1) and 17(a)(3) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. The SEC alleged the undisclosed executive officer violated Sections 17(a)(1) and 17(a)(3) of the Securities Act, and violated or aided and abetted violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Without admitting or denying the SEC's allegations, the company and CEO agreed to entry of an injunction. The CEO also agreed to a five year officer-and-director and penny stock bars and paid a \$150,000 penalty.<sup>33</sup>
- On September 16, 2022, the SEC announced that it had obtained partial summary judgment against both a micro-cap issuer purporting to make pain relief drugs with cobra venom and against its CEO. The defendants allegedly issued or posted a series of press releases that materially

misled investors because they allegedly implied that the issuer had taken purported steps to distribute a certain drug internationally, when it had not. Moreover the issuer allegedly touted that it had expanded and upgraded its cobra farm facilities, when there were no such expansions or upgrades. In addition, the CEO allegedly engaged in manipulative trading to try to stabilize or raise the issuer's stock price and to create the appearance of active trading. And, the corporation and the CEO allegedly failed to make numerous required filings, including those regarding the company's sales of unregistered securities and those regarding the CEO's beneficial ownership of the company's securities. The SEC moved for summary judgment on its non-fraud claims. The Court found that the issuer and CEO both violated Sections 5(a) and (c) of the Securities Act through unregistered offering of securities; that the issuer violated Section 13(a) of the Exchange Act and Rule 13a-11 thereunder for failing to file required Forms 8-K related to stock issuances; and that the CEO violated Sections 13(d)(1) and 16(a) of the Exchange Act and Rules 13d-2(a) and 16a-3 thereunder by failing to make required filings about his beneficial ownership. The Court denied the SEC's motion as to its claim that the CEO aided and abetted the corporation's failure to file the required Forms 8-K, leaving that claim, along with the SEC's fraud claims, for resolution at trial.<sup>34</sup>

- On September 23, 2022, the SEC filed a settled civil action against a director and former executives of a technology company for allegedly lying to auditors and filing periodic reports with the SEC that failed to include required information about a pending SEC investigation into the company's investment in a biotechnology company that had advanced to the Wells phase. According to the SEC, the defendants allegedly told the company's auditors that they were not aware of "any situations where the company may not be in compliance with any federal or state laws or government or other regulatory body regulations." Moreover, the company was allegedly required to disclose the potential SEC enforcement action because it was reasonably possible that it could lead to a material loss for the company, but failed to disclose it in the company's 2017 Form 10-K and 2018 first quarter Form 10-Q. The SEC alleged that the former executives and director violated Rule 13b2-2 of the Exchange Act and that the former executives violated Sections 17(a)(2) and (3) of the Securities Act and aided

and abetted the company's violations of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder. Without admitting or denying the allegations, the two former executives and director consented to entry of an injunction and paid penalties totaling \$135,000. The former executives also agreed to three year officer-and-director bars.<sup>35</sup>

- On October 18, 2022, the SEC filed a litigated civil action against the former CEO of a beverage corporation. The SEC alleged that the former CEO engaged in a multi-year fraud by disseminating numerous false and misleading press releases and making false public statements concerning business dealings, and aided and abetted the company's selective disclosure of material information in violation of Regulation FD. The SEC alleged that the former CEO, by drafting and authorizing press releases and in statements he made in earnings calls, investor conferences, and media interviews and appearances, made numerous false and misleading public statements about the business. Specifically, the former CEO allegedly attempted to falsely create the illusion that the business was a pioneer and first mover in the potentially lucrative Cannabidiol ("CBD") beverage market and was well-positioned to capitalize once CBD products became legal to sell in the United States and internationally. The SEC further alleged that the former CEO aided and abetted the company's selective disclosures of material non-public information concerning a purported deal with the U.S. military and its alleged development of a CBD-infused beverage. The SEC alleged that the former CEO violated Section 17(a) of the Securities Act and Section 10(b) of Exchange Act and Rule 10b-5 thereunder, and with aiding and abetting violations of Regulation FD and Section 13(a) of the Exchange Act. The SEC seeks injunctive relief, disgorgement, prejudgment interest, penalties, and officer-and-director and penny stock bars.<sup>36</sup>
- In late 2022, the SEC filed settled proceedings against a mining company, alleging that the company made misrepresentations to investors about its plans to reduce costs and about the production levels at one of its mines. According to the SEC, the company repeatedly assured investors that its technology upgrade at the mine was on track to materially reduce costs and boost its operating results. The SEC alleged that the company's statements were misleading because they omitted to inform investors

that costs at the mine were increasing rather than decreasing, which in the SEC's view, substantially undermined the projected savings. The SEC also alleged that the company's deficient disclosures controls and procedures resulted in the company failing to properly assess the financial risks of environmental issues at one of its former foreign facilities and of that facility's deficiencies in its related dealings with environmental authorities. The SEC alleged that the

company violated non-scienter antifraud provisions of the Securities Act, and reporting, record keeping, and financial controls requirements of the Exchange Act, and various related rules thereunder. Without admitting or denying the findings, the company agreed to entry of a cease-and-desist order, retention of a compliance consultant, and paid a penalty.<sup>37</sup>

## LAWYER CONTACTS

### Henry Klehm III

New York  
+1.212.326.3706  
[hklehm@jonesday.com](mailto:hklehm@jonesday.com)

### Joan E. McKown

Washington  
+1.202.879.3647  
[jemckown@jonesday.com](mailto:jemckown@jonesday.com)

### David Peavler

Dallas/Washington  
+1.214.969.3685/+1.202.879.3499  
[dpeavler@jonesday.com](mailto:dpeavler@jonesday.com)

### Kevin M. Comeau

Washington  
+ 1.202.879.3909  
[kmcomeau@jonesday.com](mailto:kmcomeau@jonesday.com)

### Jules H. Cantor

Chicago  
+1.312.269.1503  
[jcantor@jonesday.com](mailto:jcantor@jonesday.com)

## ADDITIONAL CONTACTS

### Walter W. Davis

Atlanta  
+1.404.581.8517  
[wwdavis@jonesday.com](mailto:wwdavis@jonesday.com)

### Ashley Heintz

Atlanta  
+1.404.581.8978  
[ahshintz@jonesday.com](mailto:ahshintz@jonesday.com)

### James Loonam

New York  
+1.212.326.3808  
[jloonam@jonesday.com](mailto:jloonam@jonesday.com)

### Michael J. McConnell

Atlanta  
+1.404.581.8526  
[mmccConnell@jonesday.com](mailto:mmccConnell@jonesday.com)

### Colleen Noonan Ryan

New York  
+1.212.326.3444  
[cnryan@jonesday.com](mailto:cnryan@jonesday.com)

### Brian Rabbitt

Washington  
+1.202.879.3866  
[brabbitt@jonesday.com](mailto:brabbitt@jonesday.com)

### Evan P. Singer

Dallas  
+1.214.969.5021  
[epsinger@jonesday.com](mailto:epsinger@jonesday.com)

### John C. Tang

San Francisco  
+1.415.875.5892  
[jctang@jonesday.com](mailto:jctang@jonesday.com)

### Alex J. Wilson

New York  
+1.212.326.8390  
[alexanderwilson@jonesday.com](mailto:alexanderwilson@jonesday.com)

*Charlotte S. Hogan and Andrew Lee, associates in the Chicago Office, contributed to the preparation of this White Paper.*

## ENDNOTES

- 1 "SEC Announces Enforcement Results for FY22" (Nov. 15, 2022).
- 2 "Addendum To Division Of Enforcement Press Release Fiscal Year 2022" (Nov. 15, 2022).
- 3 "SEC Announces Enforcement Results for FY22" (Nov. 15, 2022).
- 4 *Id.*
- 5 Approximately \$1.1 billion of the SEC's penalties came from the September 27 books and records settlements with 15 broker-dealers and an affiliated investment adviser arising from the firms' widespread failures to retain off-channel communications within their businesses. See "SEC Charges 16 Wall Street Firms with Widespread Recordkeeping Failures," (Sept. 27, 2022). Even if these penalties are removed from the calculation, the SEC in 2022 still doubled the amount of penalties imposed in fiscal year 2021.
- 6 *Id.*
- 7 *Id.*
- 8 *Id.*
- 9 <https://www.sec.gov/rules/final/2022/34-95607.pdf>
- 10 <https://www.sec.gov/rules/final/2022/33-11126.pdf>
- 11 <https://www.sec.gov/rules/final/2022/33-11138.pdf>
- 12 <https://www.sec.gov/rules/proposed/2022/33-11042.pdf>
- 13 <https://www.sec.gov/rules/proposed/2022/33-11038.pdf>
- 14 <https://www.sec.gov/rules/proposed/2022/33-11048.pdf>
- 15 <https://www.sec.gov/corpfin/sample-letter-companies-regarding-crypto-asset-markets>
- 16 "SEC Nearly Doubles Size of Enforcement's Crypto Assets and Cyber Unit" (May 3, 2022).
- 17 "SEC Announces Enforcement Task Force Focused on Climate and ESG Issues" (March 4, 2021).
- 18 SEC Press Release No. 2022-209.
- 19 SEC Press Release No. 2022-137; Exchange Act Release No. 95415.
- 20 SEC Press Release No. 2022-150.
- 21 *Id.*
- 22 *Id.*; Exchange Act Release No. 95609; Exchange Act Release No. 95610; Exchange Act Release No. 95611.
- 23 Exchange Act Release No. 95612.
- 24 Exchange Act Release No. 95663.
- 25 Litigation Release No. 25497.
- 26 Exchange Act Release No. 95744.
- 27 Exchange Act Release No. 95943.
- 28 Litigation Release No. 25543.
- 29 SEC Press Release No. 2022-189.
- 30 *Id.*
- 31 Exchange Act Release No. 96193.
- 32 SEC Press Release No. 2022-146.
- 33 Litigation Release No. 25500.
- 34 Litigation Release No. 25510.
- 35 Litigation Release No. 25517.
- 36 Litigation Release No. 25562.
- 37 Exchange Act Release No. 95889.

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at . The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.