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2022 Mid-Year Securities Enforcement Update

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I. Introduction: Themes and Notable Developments in Rulemaking & Enforcement

A. Heightened Enforcement

In our 2021 Year-End Review, we noted that the Division of Enforcement under this Administration had outlined its vision of aggressive, heightened enforcement through an escalation of existing remedies, including increased penalties, individual bars and admissions. The first half of 2022 reflected the Enforcement Division pursuing the playbook as forecasted.

In the first half of 2022, the Commission filed complaints or settled matters in many of its priority areas, such as digital assets and environmental, social and governance ("ESG") disclosures, and assessed significantly heightened monetary penalties.[1]

The Commission also brought its first substantive enforcement action involving Regulation Best Interest ("Reg BI").[2] Reg BI—which establishes a "best interest" standard for investment recommendations by broker-dealers—went into effect on June 20, 2020, and abrogates the prior suitability standard for retail customers. The SEC filed a complaint relating to the sale of allegedly high-risk bonds to a number of retail customers alleging, among other things, that the broker-dealer did not conduct adequate diligence on the bonds, did not adequately advise its brokers of the risks, and did not have adequate policies and procedures for compliance with Reg BI.

The Commission's Reg BI action is also an example of its continuing emphasis on naming and/or charging individual respondents along with entities. Notwithstanding the alleged institutional shortcomings, the complaint also names five individual brokers who earned as little as $5,400 in commissions from the sale of the bonds. All the defendants are litigating the action.[3] (More details are provided in the Broker-Dealers section below.) The result inevitably increases the litigation burden on the Staff of the Enforcement Division.

B. The Age of Dissent

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Also of note is the extent to which the Commission's heightened enforcement agenda is routinely drawing public dissent from at least one of the Commissioners, Hester Peirce.

Commissioner Peirce has long been critical of the Commission's approach to regulation of the market for digital assets. In February, she reiterated that same criticism in response to a settled enforcement action against a financial services company to which investors lend crypto assets in exchange for a variable interest rate generated through the use of the crypto assets in lending and investment activities. The settled enforcement action alleged, among other things, violations of the registration provisions of the Securities Act and Investment Company Act. Commissioner Peirce again criticized the Commission's lack of flexibility in subjecting the respondent to challenging registration requirements of the Investment Company Act without a willingness to structure a workable exemption that would still accomplish the Commission's regulatory mission. Commissioner Peirce admonished that if the Commission is sincere in its invitation to hear from participants in digital asset markets, then the Commission "need[s] to commit to working with these companies to craft sensible, timely, and achievable regulatory paths."[4]

In another example, in response to a settled insider trading enforcement action, Commissioner Peirce undertook a granular analysis of the factual findings of the Commission's order and criticized the sufficiency of the evidence to establish the elements of a violation. The Commission found that the respondent had misappropriated material nonpublic information from a business partner who was on the board of the issuer. In finding that the respondent had become aware of material nonpublic information, the order pointed to public facts that the business partner had joined the board in part to assist with pursuing strategic opportunities combined with the respondent "observing [the insider's] increased activities" at the issuer. Describing the order's series of inferences as "a rickety structure at best," Commissioner Peirce noted that the order appears to endorse an unsupported approach to the standard of materiality in which "the existence of a relationship of trust and confidence somehow transmogrifies non-material, public information into material, non-public information." Of course, as a settled order, the Commission's theory of liability is not subject to the test of litigation.[5]

More recently, Commissioner Peirce dissented from a settled enforcement action against a broker-dealer for alleged violations of the suitability, compliance and recordkeeping provisions arising from the sale of certain variable rate structured products. Commissioner Peirce dissented because the settlement order recited that, in accepting the respondent's offer, the Commission took into consideration the respondent's remedial acts, which included adopting a policy that prohibits the sale of the securities at issue to retail customers. Commissioner Peirce argued that the "Commission's orders should not intimate that certain types of investments are never suitable for particular classes of investors." In particular, Commissioner Peirce noted that the Commission's acknowledgment of, and reliance on, the remedial step taken by the respondent "may be read either as implying that an absolute prohibition on the sale of a specific product is the only acceptable remedial measure here or as an expectation for other firms dealing with retail clients."[6]

In another recent example, Commissioner Peirce issued a lengthy public dissent from a settled enforcement action against an accounting firm because the action was based in part on an alleged failure of the respondent to update a response to a voluntary information request from the Staff, notwithstanding that the respondent firm investigated and self-reported the underlying issue to its primary regulator, the PCAOB. Commissioner Peirce sharply criticized the Commission's position as "lack[ing] sound legal grounding," "woefully misguided" and "patently unfair."[7]

These examples are important in that persons and entities subject to investigation have an audience on the Commission, albeit a minority, that provides a potential counterweight to the most aggressive instincts of this Commission, and may be receptive to arguments or positions that are contrary to those advanced by the Enforcement Division. However, make no mistake: the majority of this Commission will continue to pursue an aggressive

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enforcement agenda for the remainder of this Administration.

C. Litigation Update

In mid-July, the United States Court of Appeals for the Second Circuit issued a decision in *SEC v. Rio Tinto plc*, definitively limiting the way that the SEC has interpreted the boundaries of scheme liability after the Supreme Court's decision in *Lorenzo v. SEC*. The SEC argued in *Rio Tinto* that alleged misstatements and omissions in annual reports and offering documents could form the basis of a scheme liability claim. The Second Circuit disagreed, holding that *Lorenzo* did not abrogate prior caselaw that scheme liability requires fraudulent conduct beyond mere misstatements and omissions. Our prior client alert provides additional information regarding the decision.

D. Commissioner and Senior Staffing Update

In the first half of 2022, the Commission experienced a number of changes in its senior staff, as well as the addition of a new Commissioner (with another Commissioner joining in July).

In June, Mark T. Uyeda was sworn into office as a Commissioner, filling the position most recently held by Elad Roisman.[8] He is the first Asian Pacific American to serve as a Commissioner at the SEC. He served on the staff of the SEC for 15 years before his appointment to the Commission, including as a Senior Advisor to various Commissioners and in roles in the Division of Investment Management. Commissioner Uyeda, a Republican, and Jaime Lizárraga, a Democrat, were both confirmed by the Senate earlier that month.[9] Mr. Lizárraga most recently served as a Senior Advisor to House Speaker Nancy Pelosi, and previously worked on the Democratic staff of the House Financial Services Committee.[10] He was sworn in on July 18 to fill the seat of Allison Herren Lee following her departure from the Commission.

At the staff level, the Division of Examinations, in particular, saw significant changes in leadership. Daniel S. Kahl, Acting Director of the Division, left the SEC in March.[11] Following Mr. Kahl's departure, Richard R. Best left his post as Director of the New York Regional Office to serve as Acting Director and, later, Director of the Division of Examinations.[12] In January, the Division's Deputy Director since 2018, Kristin Snyder, also left the agency.[13] Ms. Snyder had also led the Investment Adviser/Investment Company (IA/IC) examination program, including the Private Funds unit, since 2016. Following her departure, Joy Thompson has been serving as Acting Deputy Director and Acting Associate Director of the Private Funds Unit, and Natasha Vij Greiner has been serving as Acting Co-National Associate Director of the IA/IC examination program.

There was significant turnover at the regional offices, with five of eleven regional offices experiencing changes in leadership. Those changes, as well as other changes in the senior staffing of the Commission, include:

- In February, Lori H. Price was named Acting Director of the Office of Credit Ratings, replacing Ahmed A. Abonamah, who left the agency that month.[14]
- Also in February, Kelly L. Gibson, Director of the SEC's Philadelphia Regional Office since 2020, left the agency.[15] Scott Thompson and Joy Thompson have been serving as Acting Co-Directors of the Philadelphia Regional Office following Ms. Gibson's departure.
- In March, Lara Shalov Mehraban began serving as Acting Director of the New York Regional Office following Richard R. Best's transition to his new role in the Division of Examinations.[16]
- Also in March, Erin E. Schneider, Director of the SEC's San Francisco Regional Office since 2019, left the agency.[17] Monique C. Winkler has been serving as Acting Regional Director following Ms. Schneider's departure.

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- In June, Tracy S. Combs was named Director of the Salt Lake Regional Office.[18] Combs previously served in the agency's Division of Enforcement, including as counsel to the Director of Enforcement since 2021. Tanya Beard, who served as Acting Director prior to Ms. Comb's appointment, remains in the Salt Lake Regional Office as Assistant Regional Director of Enforcement.
- In July, Kurt. L. Gottschall, Director of the Denver Regional Office since 2018, left the SEC.[19] Jason J. Burt and Thomas M. Piccone have been serving as Co-Acting Regional Directors following Mr. Gottschall's departure.

E. SPACs

The SEC continued its focus on Special Purpose Acquisition Companies ("SPACs") in the first half of 2022. While there were no enforcement actions specifically related to SPACs, the SEC, in March, proposed new rules intended to enhance disclosure and investor protection in initial public offerings ("IPOs") by SPACs and in subsequent business combinations between SPACs and private operating companies ("de-SPAC transactions").[20] SEC Chair Gary Gensler described these proposed rules as crucial to "help ensure" that "disclosure[,] standards for marketing practices[,] and gatekeeper and issuer obligations" as applied in the traditional IPO context also apply to SPACs.[21] Chair Gensler further observed that "[f]unctionally, the SPAC target IPO is being used as an alternative means to conduct an IPO."[22]

The proposed rules, which include new rules and amendments to existing rules, involve four key components:

- Disclosure and Investor Protection: creating specific disclosure requirements with respect to, among other things, compensation paid to sponsors, potential conflicts of interest, dilution, and the fairness of the business combination, for both the SPAC IPOs and de?SPAC transactions;
- Business Combinations Involving Shell Companies: deeming a business combination transaction involving a reporting shell company and a private operating company as a "sale" of securities under the Securities Act of 1933 (the "Securities Act") and amending the financial statement requirements applicable to transactions involving shell companies. Furthermore, the rules will amend the current "blank check company" definition to make clear that SPACs cannot rely on the safe harbor provision under the Private Securities Litigation Reform Act of 1995 when marketing a de-SPAC transaction;
- Projections: expanding and updating the Commission's guidance on the presentation of projections in filings with the Commission to address the reliability of such projections; and
- New Safe Harbor under the Investment Company Act of 1940: creating a safe harbor that SPACs may rely on to avoid being subject to registration as investment companies under the Investment Company Act of 1940. The safe harbor would (i) require SPACs to hold only assets comprising of cash, government securities, or certain money market funds; (ii) require the surviving entity to be engaged primarily in the business of the target company; and (iii) impose a time limit, from the SPAC IPO, of 18 months for the announcement (and 24 months for the completion) of the de-SPAC transaction.

For a more detailed discussion of these proposed rules, see our prior alert on the subject.

F. Cybersecurity

The SEC continued its history of rulemaking in the area of cybersecurity matters during the first half of 2022.

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1. Public Companies

In March, the SEC proposed further amendments to its rules which would require, among other things, current reporting about material cybersecurity incidents and periodic reporting to provide updates about previously reported cybersecurity incidents.[23] The proposal also would require periodic reporting about a public company's policies and procedures to identify and manage cybersecurity risks; the registrant's board of directors' oversight of cybersecurity risk; and management's role and expertise in assessing and managing cybersecurity risk and implementing cybersecurity policies and procedures. The proposal further would require annual reporting or certain proxy disclosure about the board of directors' cybersecurity expertise, if any.

For a more detailed discussion of the proposed rule, see our prior alert on the subject.

2. Investment Management

In February, the SEC voted to propose rules related to cybersecurity risk management for registered investment advisers, and registered investment companies and business development companies (funds), as well as amendments to certain rules that govern investment adviser and fund disclosures.[24] The proposed rules would require advisers and funds to adopt and implement written cybersecurity policies and procedures. The proposed rules also would require advisers to report significant cybersecurity incidents affecting the adviser or its fund or private fund clients to the Commission on a new confidential form, and to publicly disclose cybersecurity risks and significant cybersecurity incidents that occurred in the last two fiscal years in their brochures and registration statements. Additionally, the proposal would set forth new recordkeeping requirements for advisers and funds.

For further discussion of the proposed rule, see our prior alert regarding 2022 rule proposals targeting advisers to private funds.

G. ESG

The Division of Enforcement's Climate and ESG Task Force, led by Sanjay Wadhwa, Deputy Director of the Division of Enforcement, has ramped up its efforts since its founding in May 2021, reportedly using "sophisticated data analysis to mine and assess information" to identify "material gaps or misstatements" in issuer's disclosures and disclosures relating to investment advisers' and funds' ESG strategies.[25] Meanwhile, the Commission is also engaged in a number of rulemaking efforts relating to ESG.

1. Public Companies

In March, the SEC proposed rule changes that would require registrants to include certain climate-related disclosures in their registration statements and periodic reports.[26] The proposed rule changes would require a registrant to disclose information about (i) the issuer's governance of climate-related risks and relevant risk management processes; (ii) how any climate-related risks identified by the registrant have had or are likely to have a material impact on its business and consolidated financial statements, which may manifest over the short-, medium-, or long-term; (iii) how any identified climate-related risks have affected or are likely to affect the registrant's strategy, business model, and outlook; and (iv) the impact of climate-related events, and transition activities on the line items of a registrant's consolidated financial statements, as well as on the financial estimates and assumptions used in the financial statements.

For public companies that already conduct scenario analyses, have developed transition plans, or publicly set climate-related targets or goals, the proposed amendments would require certain disclosures to enable investors to learn about those aspects of the registrants' climate risk management.

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The proposed rules also would require a registrant to disclose information about its direct greenhouse gas ("GHG") emissions and indirect emissions from purchased electricity or other forms of energy, as well as from upstream and downstream activities in its value chain. The proposed rules provide a safe harbor for liability and an exemption from certain disclosure requirements for smaller reporting companies. Under the proposed rule changes, accelerated filers and large accelerated filers would be required to include an attestation report from an independent attestation service provider, with additional phase-ins over time.

According to Chair Gensler, the SEC has received 14,500 comment letters on the proposal.[27] For a more detailed discussion of the proposal, see our prior alert on the subject.

2. Investment Management

In May, the SEC proposed amendments to rules and reporting forms applying to certain registered investment advisers, advisers exempt from registration, registered investment companies, and business development companies.[28] The proposed amendments seek to categorize certain types of ESG strategies broadly and require funds and advisers to provide more specific disclosures in fund prospectuses, annual reports, and adviser brochures based on the ESG strategies they pursue. Funds focused on the consideration of environmental factors generally would be required to disclose the GHG emissions associated with their portfolio investments. Funds claiming to achieve a specific ESG impact would be required to describe the specific impacts they seek to achieve and summarize their progress on achieving those impacts. Funds that use proxy voting or other engagement with issuers as a significant means of implementing their ESG strategy would be required to disclose information regarding their voting of proxies on particular ESG-related voting matters and information concerning their ESG engagement meetings. Finally, the proposal would require certain ESG reporting on Forms N-CEN and ADV Part 1A.

In May, the SEC also proposed amendments to the Investment Company Act "Names Rule" with the stated goal of "moderniz[ing] the Names Rule for today's markets," including for ESG-related funds.[29] The current rule requires registered investment companies whose names suggest a focus in a particular type of investment to adopt a policy to invest at least 80% of the value of their assets in those types of investments. The proposed amendments would extend the requirement to any fund name with terms suggesting that the fund focuses in investments that have (or whose issuers have) particular characteristics, including fund names with terms such as "growth" or "value," or terms indicating that the fund's investment decisions incorporate one or more ESG-related factors.

An investment adviser ESG-related disclosure case is described below in III.B.

H. Whistleblower Awards

Coming off a record-breaking year, the pace and size of whistleblower awards has slowed in the first half of 2022. Through June of this year, the SEC's whistleblower program has awarded approximately $88 million to 22 separate whistleblowers. This is less than half of the payments awarded during the same time period in 2021, which saw nearly $200 million in awards to 45 individuals.

Still, the whistleblower program remains significant for the Commission, with approximately $1.3 billion paid to 273 individuals since the program's inception in 2012. Further, the SEC remains committed to incentivizing whistleblowers to come forward with information, and to rewarding their efforts. In February, the SEC proposed two amendments to whistleblower program rules aimed at further enticing whistleblowers to come forward.[30] The first proposed change would allow the Commission to pay

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whistleblower awards, even if the awards might otherwise be paid under another federal agency program.[31] The second change would affirm the SEC's discretionary authority to consider the dollar amount of potential awards for the sole purpose of *increasing* any award under Rule 21F-6, which would preclude considering the dollar amount to decrease any award.[32]

Significant whistleblower awards granted during the first half of this year include:

- Three awards in January, including a payment of over $13 million to a whistleblower who "promptly" notified the Commission of an ongoing fraud and provided "extensive" assistance thereafter, which led to the opening of an investigation and a successful enforcement action;[33] an award totaling more than $4 million to three whistleblowers in two separate enforcement proceedings, all described as providing "critical" information during the investigation;[34] and awards totaling more than $40 million to four whistleblowers, two of whom received a combined $37 million for providing "key evidence," while the third received approximately $1.8 million for providing information which prompted a separate related action, and the fourth received a $1.5 million award for providing information that "shaped the staff's instigative strategy."[35]
- Four awards in March, including a payment of more than $3.5 million to a whistleblower for contributing to the success of two enforcement actions and helping save the SEC staff time and resources;[36] an award of approximately $14 million to a whistleblower whose online report and outreach to staff exposed an ongoing fraud and prompted a successful enforcement action along with restitution to investors;[37] awards totaling approximately $3 million to three whistleblowers who provided information that prompted the SEC staff to open investigations and provided ongoing assistance in three separate actions;[38] and an award of $1.25 million to a whistleblower who provided "high-quality information and exemplary cooperation," including identifying witnesses and explaining key documents, which led to a successful enforcement action and saved the SEC staff time and resources.[39]
- An award in April of $6 million to five whistleblowers in a single enforcement proceeding who each provided ongoing assistance, in the form of either key documents or firsthand accounts of misconduct.[40]
- An award in May totaling nearly $3.5 million to four whistleblowers who provided information which led to a successful enforcement action. Three of these whistleblowers provided the SEC with information that led to the opening of a new investigation, while the fourth provided analysis, which "focused the staff's attention on new allegations."[41]

II. Public Company Actions

Public company accounting and disclosure cases continued to comprise a significant portion of the SEC's cases in the first half of 2022, and included a range of financial reporting, disclosure, and professional responsibility enforcement actions.

A. Financial Reporting

In February, the SEC announced settled charges against a healthcare company and two former employees for alleged accounting improprieties stemming from intra-company

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foreign exchange transactions that resulted in a purported misstatement of the company's net income.[42] The SEC alleged that, from 1995 to 2019, the company used a non-GAAP convention for converting non-U.S. dollar transactions, assets, and liabilities on its financial statements. The SEC further alleged that, beginning in 2009, the company purposefully used this convention for the purpose of generating foreign exchange accounting gains and avoiding losses of the same. Further, the SEC alleged that one former employee did not take steps to investigate the company's consistently generated gains. Without admitting or denying the allegations, the company and its former employees agreed to cease and desist from future violations. The company agreed to pay an $18 million fine, and the former employees agreed to pay nearly $315,000 combined in civil penalties and disgorgement.

In April, the SEC announced a settled action against a pest control company and a former executive for allegedly making improper accounting adjustments through reducing accounting reserves without analyzing appropriate criteria under GAAP in order to meet quarterly earnings per share targets.[43] The SEC further alleged that the company and former executive failed to adequately memorialize the basis for these accounting entries and that the company failed to document other quarterly entries from 2016 to 2018. Without admitting or denying the allegations, the company and executive agreed to cease and desist from future violations, and pay penalties of $8 million and $100,000, respectively. The company's penalty was the highest yet under the SEC's earnings per share ("EPS") initiative, which relies on data analytics to uncover hard-to-detect accounting and disclosure violations.

In June, the SEC announced a settled action against a telecommunications-support technology company and several of its senior employees for improper accounting practices, including improperly recognizing revenue on multiple transactions and misleading the company's auditors.[44] The SEC alleged that, from 2013 to 2017, senior employees of the company improperly accounted for three categories of transactions which resulted in overstating revenue in pursuit of meeting earnings targets: (1) transactions without persuasive evidence of an arrangement; (2) acquisitions and divestitures where revenue was recognized on license agreements instead of netting those amounts against purchase prices; and (3) license and hosting transactions where it recognized revenue upfront, instead of rated over the term of the arrangement. The SEC also alleged that certain employees attempted to conceal that revenue had been improperly recognized upfront when, instead, it was contingent on future events. Without admitting or denying the SEC's findings, the company agreed to cease and desist from further violations and pay a $12.5 million civil penalty; three former employees and one current employee settled for civil penalties ranging from $15,000 to $90,000; and the company's former general counsel agreed to pay a $25,000 penalty and to a suspension from appearing or practicing as an attorney before the SEC for 18 months. The company's founder and former CEO, while not charged with misconduct, agreed to reimburse the company $1.3 million in stock sale profits and bonuses, and return shares of company stock. Additionally, the SEC filed a complaint in the Southern District of New York against both the company's former CFO and the former Controller, seeking civil penalties, restitution, bars, and permanent injunctions. That litigation remains ongoing.

B. Public Statements and Filing Disclosures

In January, the SEC settled an action—without any monetary penalties—against a private technology company after it made significant remedial efforts in the wake of an internal investigation into misconduct by its now-former CEO.[45] As profiled in our last update, the SEC issued a complaint against the then-CEO of the company, after he allegedly inaccurately claimed the company had achieved strong and consistent revenue and customer growth in order to push it to a "unicorn" valuation of over $1 billion. The company's Board of Directors conducted an internal investigation leading to the CEO's removal and a revised valuation down to $300 million. The Board instituted other remedial measures, including the repayment of investors, hiring of new senior management,

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expansion of its board, and institution of processes and procedures to increase transparency and accuracy of deal reporting. The SEC highlighted these remedial actions and the company's extensive cooperation in the matter as factors counseling against imposing a penalty. Accordingly, the company settled the complaint for a permanent injunction against further violations without admitting or denying wrongdoing.

In April, the SEC filed a complaint against a former executive of a Brazilian reinsurance company for making allegedly false statements claiming that a large, multi-national conglomerate had recently made a substantial investment in the company.[46] The SEC alleged that, in February 2020, the executive planted misleading stories with the media, created and shared fabricated shareholder lists purporting to show substantial purchases of the company's stock by the conglomerate, and shared information with analysts and investors purporting to show this investment. The SEC alleged that, as a result of this information, the reinsurance company's stock price rose by more than 6% during the following 24 hours, and dropped more than 40% after the conglomerate denied the investment. The SEC filed a complaint against the former executive seeking a permanent injunction, officer and director bar, and civil monetary penalties. The Department of Justice also announced criminal charges against the individual.

In May, the SEC announced settled charges against a healthcare supply chain company and a complaint against its former CEO and Chairman of the Board for making allegedly false statements regarding the company's plan to distribute COVID-19 rapid test kits.[47] The SEC alleged that, in April 2020, the company issued a press release announcing a "committed purchase order" for two million COVID-19 test kits, as well as an ongoing commitment to purchase two million more test kits every week for nearly six months. However, the company allegedly had neither an executed purchase agreement nor a supplier for the tests. The SEC alleged that after the announcement, the company, which was struggling financially at the time, saw a 425% increase in stock price from the prior trading day. Without admitting or denying the allegations, the company agreed to a settlement that included permanent injunctions, a $125,000 penalty, and more than $500,000 in disgorgement. The U.S. Attorney's Office for the District of New Jersey and the U.S. Department of Justice's Criminal Division also announced criminal charges against the former CEO.

C. Gatekeepers

In June, the Commission instituted a settled action against a credit rating agency and its CEO for allegedly violating various conflict of interest rules.[48] The SEC's complaint alleged that the CEO engaged in sales and marketing activities related to a client while, at the same time, determining that client's credit rating, in violation of Rules 17g-5(c)(8)(i)–(ii) of the Exchange Act. The complaint also alleged that the agency violated Rule 17g-5(c)(1) (the "Ten Percent Rule") by allegedly continuing to issue and maintain ratings for another client, even though that client had contributed more than 10% of the agency's revenues in the prior fiscal year. Lastly, the SEC alleged that the agency did not establish, maintain, and enforce sufficient internal controls to manage these conflicts of interest. Without admitting or denying the SEC's findings, both the agency and its CEO agreed to pay a total of $2 million in civil penalties, as well as over $146,000 in disgorgement.

Also in June, the SEC instituted a settled action against an audit firm and three of its partners for alleged improper professional conduct after failing to investigate two clients' financial statements despite known concerns about the accuracy of one client's goodwill impairment calculations and another's related party transactions.[49] The SEC alleged that, in 2016 and 2017, the audit firm and its partners allegedly improperly accepted its clients' determination that their goodwill had not been impaired or reduced in value, despite internal beliefs that the goodwill valuation methods employed by the clients were insufficient. The SEC also alleged that the audit firm's quality control systems led to the failure to adhere to adequate professional auditing standards. Without admitting or denying the allegations, the audit firm agreed to pay a $1.9 million penalty, to be censured,

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and to retain an independent consultant to review and evaluate certain control policies and procedures. The partners, without admitting or denying the allegations, agreed to each pay penalties ranging from $20,000 to $30,000; two partners additionally agreed to one- and three-year suspensions to practicing before the SEC, and the third partner agreed to a censure. The audit firm's two clients at issue previously settled with the SEC related to the same financial disclosures, but with different outcomes: one of the audit firm's clients and the client's employees agreed to a settlement involving multi-million dollar monetary fines, restitution, and injunctive relief in June 2019;[50] the other client agreed to a no-penalty settlement without admitting or denying wrongdoing.[51]

Also in June, the SEC settled an action with an accounting firm relating to cheating by the firm's employees on CPA ethics exams over a number of years, which was aggravated by the SEC's perceived failure by the firm to correct its response to an earlier SEC voluntary request for information regarding the matter.[52] In June 2019, in the wake of a settlement with a different accounting firm regarding a similar issue, the firm received a voluntary information request from the SEC regarding complaints about cheating on CPA ethics exams, and the SEC asked for a response only one day later. The firm complied with the short response timeline, but its response did not include a relevant whistleblower report that was first made the same day the firm received the voluntary information request, and of which the legal department was not aware of its existence at the time of its initial response to the SEC. After becoming aware of this report, the firm conducted an internal investigation into the issue and later reported its results to the PCAOB. However, the SEC reasoned that the firm had violated the PCAOB's professionalism rules because it did not promptly supplement its initial response to the SEC's June 2019 voluntary information request with information about the whistleblower's report. The firm settled the SEC's allegations, agreeing to pay a $100 million fine, as well as to engage two independent consultants to make recommendations for further internal improvements. As noted above, Commissioner Peirce issued a forceful dissent from the settlement, arguing that the SEC's "unduly punitive terms" were overly focused on the firm's "imperfect compliance" with the SEC staff's request to respond with information the next day, and ignored the "central issue" of cheating by the auditing professionals employed by the firm.[53]

III. Investment Advisers

A. Misuse of Investor Funds

In January, the SEC charged a financial adviser (dual registered representative of a broker-dealer and investment adviser) for allegedly misappropriating nearly $6 million from a client[54] over a six-year period and using the money for personal expenses, and to repay money that he had taken from another client. The SEC alleged the adviser created false account statements, forged signatures on documents, and altered financial records to cover up his actions. The SEC is seeking injunctive relief, disgorgement, and civil penalties. The U.S. Attorney's Office for the Southern District of Florida filed parallel criminal charges.

In March, the SEC announced fraud charges against an investment adviser for allegedly using investor funds for personal expenses and a Ponzi-like scheme.[55] According to the SEC, the adviser told investors that their pooled money would be invested using a proprietary algorithm. The SEC alleged that, instead, the adviser used investor funds to pay off his own personal expenses and to repay previous investors while misleading current investors about their returns. The same adviser was permanently barred from the securities industry in a 1992 SEC enforcement action.[56] In the current case, the SEC is seeking an injunction, disgorgement, and penalties against the adviser. The U.S. Attorney's Office for the District of New Jersey brought parallel criminal charges.

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In May, the SEC charged a hedge fund and its sole owner for allegedly misappropriating millions of investors' funds.[57] According to the SEC, over a period of nearly five years, the hedge fund and its owner raised approximately $39 million from more than 100 investors and thereafter made inaccurate statements about the fund's performance (incurring $27 million in trading losses), falsified investors account documents, misrepresented the fact that the fund did not have an auditor, engaged in a Ponzi-like scheme with new investor funds being paid to earlier investors, and took money from the fund to pay for personal expenses, including jewelry. The SEC sought and obtained emergency relief and an asset freeze against the hedge fund and its owner, and the litigation remains ongoing.

B. Material Misrepresentations

In February, the SEC announced a settled action against a robo-adviser based on allegations that it made misleading statements and failed to comply with its own representations that it was compliant with Shari'ah law.[58] The SEC alleged the robo-adviser promoted its own proprietary funds when no such funds existed, then used investor funds to seed an exchange-traded fund without any disclosure to the investors. In addition, the SEC claimed that the robo-adviser promoted itself as compliant with Shari'ah law, including marketing an income purification process, but then took no actions to ensure this compliance. Without admitting or denying the allegations, the adviser agreed to a cease-and-desist order, to retain an independent compliance consultant, and to pay a $300,000 penalty.

In February, the SEC announced charges against the former Chief Investment Officer and founder of an investment adviser to a mutual fund and a hedge fund, based on allegations that the CIO significant overvalued assets, resulting in his receipt of $26 million of improper profit distributions.[59] According to the SEC, the CIO altered documents describing the funds' valuation policies and sent forged term sheets to the auditor of the mutual and private funds. The former CIO was removed from his position in February 2021 after the SEC's Staff showed the firm information suggesting that the CIO had been adjusting the company's third-party pricing model. Shortly thereafter, at the mutual fund's request, the SEC issued an order suspending redemptions.[60] The U.S. Attorney's Office for the Southern District of New York is pursuing parallel criminal charges.

In March, the SEC announced a settled action against an investment adviser for using its discretionary trading authority to invest advisory clients in proprietary mutual funds and failing to disclose the corresponding conflict of interest.[61] Without admitting or denying the allegations, the adviser agreed to a cease-and-desist order, to obtain an independent compliance consultant, and to pay disgorgement and penalties totaling $30 million.

In March, the SEC announced a settled action against a venture capital fund adviser and its CEO for allegedly making misstatements about the adviser's management fees and otherwise breaching its operating agreement.[62] The SEC alleged that certain promotional material advertised a management fee that was much lower than what the adviser actually assessed. In addition, the SEC claimed that the adviser made cash transfers between various funds that were not authorized by the adviser's operating agreement. Without admitting or denying the allegations, the adviser agreed to repay $4.7 million to the affected private funds along with a $700,000 penalty; the CEO agreed to pay a $100,000 penalty.

In April, the SEC announced a settled action against an asset manager and its former co-CEOs based on alleged misrepresentations about the asset manager's prospects for growth.[63] According to the SEC, the asset manager overstated its assets by including amounts provisionally committed by clients who had no obligation to ultimately invest with the manager. The SEC alleged that the inclusion of these investments inflated the asset manager's value and led investors to vote in favor of a merger for the asset manager that would result in higher paying jobs for the co-CEOs. Without admitting or denying the

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allegations, the co-CEOs and asset manager agreed to a cease-and-desist order and to pay a $10 million penalty.

In May, the SEC charged an investment firm for alleged misstatements and omissions about ESG considerations in making investment decisions for certain mutual funds that it managed.[64] The SEC's order alleged that, from July 2018 to September 2021, the firm represented or implied in various statements that all investments in the funds had undergone an ESG quality review. But according to the SEC, numerous investments held by certain funds did not have an ESG quality review score as of the time of investment. Without admitting or denying the SEC's findings, the firm agreed to a cease-and-desist order, a censure, and to pay a $1.5 million penalty.

Also in May, the SEC announced a settled action against a variable annuities principal underwriter for alleged sales practice misconduct by its wholesalers.[65] The SEC alleged employees of the wholesaler caused exchange offers to be made to customers and clients of its affiliated retail broker-dealer and investment adviser to switch from one variable annuity to another to increase sale commissions Notably, this case represents the first-ever enforcement proceeding under Section 11 of the Investment Company Act of 1940, which, absent an exception, prohibits any principal underwriter from making or causing to be made an offer to exchange the securities of registered unit investment trusts (including variable annuities) unless the terms of the offer have been approved by the SEC. Without admitting or denying the allegations, the respondent agreed to a cease-and-desist order and to pay a $5 million penalty.

Also in May, the SEC announced charges and settlements with an investment adviser and three of the adviser's former senior portfolio managers for allegedly concealing the downside risks of an options trading strategy from approximately 114 institutional investors who invested approximately $11 billion in the strategy between 2016 and 2020.[66] According to the complaint and consent orders, the lead portfolio manager, with the assistance of two senior managers, manipulated financial reports and other information provided to investors to conceal the magnitude of the strategy's risk and the strategy's actual performance. In one instance, the senior portfolio managers allegedly reduced losses in one scenario in a risk report sent to investors from approximately negative 42.15% to negative 4.15%. The SEC alleged that the group took several steps to conceal their conduct, including by providing false testimony to the SEC. In settling the action, the investment adviser, which pleaded guilty to criminal charges, admitted that its conduct violated securities laws and agreed to a cease-and-desist order, a censure, and payment of $349.2 million in disgorgement and prejudgment interest and a fine of $675 million. Two of the three portfolio managers also consented to orders that included associational and penny stock bars as well as monetary relief to be determined in the future. The SEC's litigation against the lead portfolio manager is ongoing.

In June, the SEC announced a settled action against an investment adviser and two affiliated companies based on allegations that the affiliates did not sufficiently describe in their historical disclosures how allocating a portion of a clients' funds to cash could affect the performance of their portfolios under certain market conditions.[67] The SEC also alleged that the companies did not adequately disclose an affiliated bank's ability to earn interest from the cash deposits. The SEC concluded, however, that each of the alleged disclosure deficiencies was fully corrected in November 2018. Without admitting or denying the allegations, the companies agreed to a cease-and-desist order, providing for their payment of approximately $187 million in disgorgement and penalties.

Also in June, the SEC announced a settled action against an investment adviser for allegedly contravening its agreements by allocating certain deal-related expenses across its private equity fund clients in a non-pro rata manner and failing to properly disclose the allocations.[68] According to the SEC, investors in the private equity funds included pension funds, foundations and endowments, other institutional investors, and high net worth individuals. Without admitting or denying the SEC's allegations, the investment adviser agreed to a cease-and-desist order and to pay a $1 million penalty.

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In June, the SEC announced a settled action against an investment adviser based upon allegations that the firm's financial advisers did not adequately understand the risks associated with an options trading strategy that they recommended to approximately 600 advisory clients between February 2016 and February 2017 clients and thus the recommendations may not have been in the clients' best interest.[69] Without admitting or denying the SEC's allegations, the company agreed to a cease-and-desist order and agreed to pay a fine of $17.4 million and disgorgement and prejudgment interest of $7.2 million.

C. New Regulations

In addition to the cybersecurity and ESG-related rule proposals discussed in Section IE above, we note that in February, the SEC proposed a dramatic overhaul to the regulation of private fund advisers.[70] Among other changes, the proposed rules would require private fund advisers to provide investors with quarterly statements regarding fund fees, expenses, and performance. The proposed rule would also prohibit these advisers from giving certain kinds of preferential treatment to investors and would require disclosure to all current and prospective investors in a fund of any preferential rights granted to any investors of the fund.

For a more detailed discussion of the rule proposal, see our prior alert on the subject and the comment letter submitted by the Private Investment Funds Forum, of which GDC was a co-author.

We also note the upcoming November 2022 implementation deadline for the new Marketing Rule, which replaced the former Advertising and Solicitation rules, and caused the SEC to withdraw or modify roughly 200 No Action letters.[71]

IV. Broker-Dealers

A. Misrepresentation

In May, the SEC announced a settled action against a broker-dealer and its co-founder based on allegations that they misled customers as to restricting the purchase of so-called meme stocks in late January 2021.[72] According to the order, the broker-dealer halted purchases of the stocks for about 10 minutes, but after, the broker-dealer and its co-founder stated that it never restricted trading. Without admitting or denying the SEC's charges, the broker-dealer and co-founder agreed to retain an independent compliance consultant and pay $100,000 and $25,000 fines, respectively.

B. Form-Filling Violations

In February, the SEC announced settled charges against 12 firms, six investment advisers and six broker-dealers, based on allegations that each of the firms failed to timely file and deliver the Form CRS to their existing and/or prospective retail clients and customers.[73] In June 2019, the SEC adopted Form CRS, which SEC-registered investment advisers and broker-dealers that offer services to retail investors are required to file and keep current with the SEC, deliver to existing and prospective clients and customers beginning no later than June/July 2020, and prominently post on their websites the most recently filed version thereof. The SEC alleged that the sanctioned 12 firms missed the regulatory deadlines and, in certain instances, failed to include required information and language in their respective Form CRS. Without admitting or denying the SEC's findings, the firms each agreed to be censured, to a cease-and-desist order, and to pay civil penalties varying from $10,000 to $97,523.

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In May, the SEC announced settled charges against a broker-dealer and investment adviser for allegedly failing to file over 30 suspicious activity reports ("SARs") between April 2017 and October 2021, which are used to identify and investigate potentially suspicious activity.[74] The SEC's order alleged that for a nine-month period, the firm failed to file at least 25 SARs as a result of its deficient implementation and testing of a new anti-money laundering ("AML") transaction monitoring and alert system. The SEC further alleged that the firm failed to file at least nine additional SARs due to its failure to process wire transfer data into its AML transaction monitoring system on dates on which there was a bank holiday without a corresponding brokerage holiday. The order describes the firm's substantial cooperation and voluntary remedial measures, as well as a thorough internal investigation conducted by the firm, the findings of which were shared with Staff. Notwithstanding, in its press release the SEC characterized the firm as a recidivist, citing to a prior settlement in 2017 relating to an alleged failure to file 50 SARs. Without admitting or denying the SEC's findings, the firm agreed to a censure, a cease-and-desist order, and to pay a fine of $7 million.

C. Regulation Best Interest ("BI")

As discussed in the introduction, in June, the SEC charged a broker-dealer and five of its registered representatives for allegedly violating Reg BI when recommending and selling L Bonds to retirees and other retail investors.[75] According to the SEC's complaint, over a 10-month period, the broker's registered representatives recommended and sold retail investors approximately $13.3 million in the bonds. According to the SEC, the bond's issuer described the product as high risk, illiquid, and only suitable for customers with substantial financial resources. In the SEC's first substantive Reg BI case, the SEC alleges violations of the broker-dealer's Care Obligation (which requires that the registered representative have a reasonable basis to believe their recommendation is in the best interest of the customer), and Compliance Obligation (which requires that the broker-dealer maintain and enforce written policies and procedures designed to achieve compliance with Reg BI). The SEC is seeking permanent injunctions, disgorgement, and civil penalties.

V. Cryptocurrency and Other Digital Assets

Despite the recent current crypto winter (cryptocurrencies reportedly having lost trillions in value since market highs in 2021), digital assets continue to be a leading-edge asset class and a primary focus for the SEC's Division of Enforcement, as evidenced by multiple enforcement actions in the first half of 2022, as well as expected rulemaking proposals and dramatic staffing increases in the Commission's digital asset securities unit.

A. Agency Updates

In May, the SEC announced the allocation of 20 additional positions to the newly renamed Crypto Assets and Cyber Unit (formerly known as the Cyber Unit) in the Division of Enforcement, which will grow to 50 dedicated positions—nearly doubling the size of the unit.[76] According to the SEC, the expanded Crypto Assets and Cyber Unit will focus on investigating securities law violations related to: digital asset offerings; digital asset exchanges; digital asset lending and staking products; decentralized finance ("DeFi") platforms; non-fungible tokens ("NFTs"); and stablecoins.

B. Fraud

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In January, the SEC announced charges against an Australian citizen and two companies he founded for allegedly making false and misleading statements in connection with an unregistered offer and sale of digital asset securities.[77] According to the SEC's complaint, the Founder claimed to have raised $40.7 million through his companies in an initial coin offering ("ICO"), and allegedly told investors that the ICO proceeds would be used to develop a new technology. Instead, however, he diverted more than $5.8 million in ICO proceeds to gold mining entities. The SEC also alleged that the Founder and his companies did not register their offers and sales of tokens with the Commission, and knowingly sold them to groups of investors without determining whether the underlying investors were accredited. Without admitting or denying the allegations, the Founder and his companies consented to a permanent injunction, and to permanently disable the tokens and remove them from digital asset trading platforms. The Founder further agreed to an officer or director bar, and a penalty of $195,000.

In March, the SEC announced that it charged two individuals with allegedly defrauding retail investors out of more than $124 million through two unregistered offerings of securities involving a digital token.[78] In its complaint, the SEC alleged that the defendants—in roadshows, YouTube videos, and other materials—falsely claimed that its crypto coin was supported by one of the largest crypto mining operations in the world, but that the defendants previously abandoned mining operations after generating less than $3 million in total mining revenue. As alleged, the defendants incorrectly stated that the crypto coin had a $250 million crypto mining operation and was producing $5.4 million to $8 million per month in mining revenues. According to the complaint, the two individuals also arranged for a public website to display a wallet of an unrelated third party showing more than $190 million in assets as of November 2021, even though the coin's wallets were allegedly worth less than $500,000. Moreover, the complaint alleged that the individuals manipulated the crypto coin's price and misused investor funds for personal expenses. In a parallel action, the U.S. Attorney's Office for the Southern District of New York unsealed criminal charges against one of the individuals.

In May, the SEC announced charges against a corporation, its two founders, and two entities controlled by one of its founders.[79] According to the SEC's complaint, the two founders sold mining packages to investors and promised daily returns of 1%, paid weekly, for a period of up to 52 weeks. The complaint also alleged that, in its early days, investors were promised returns in Bitcoin, but later, defendants required investors to withdraw their investments in the corporation's own token. The complaint also alleged that investors were required to redeem those tokens on a "fake" crypto asset trading platform created and managed by one of the corporation's founders, but when investors tried to liquidate their tokens on that asset trading platform, they encountered purported errors and were required to either buy another mining package or forfeit their investments. In April, the United States District Court for the Southern District of Florida issued a temporary restraining order against all of the defendants and an order freezing defendants' assets, among other relief.

C. Registration and Disclosure

In February, the SEC announced that it charged a company with failing to register the offers and sales of its retail crypto lending product.[80] According to the SEC's order, the company offered and sold a lending product to the public, through which investors lent crypto assets to the company in exchange for the company's promise to provide a variable monthly interest payment. The SEC alleged that the lending products were securities, and the company therefore was required to register its offers and sales of the products but failed to do so or to qualify for an exemption from SEC registration. The SEC also alleged that the company operated for more than 18 months as an unregistered investment company because it issued securities and also held more than 40% of its total assets, excluding cash, in investment securities, including loans of crypto assets to institutional borrowers. Finally, the SEC alleged that the company made a false and misleading statement for more than two years on its website concerning the level of risk in

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its loan portfolio and lending activity. Without admitting or denying the SEC's allegations, the company agreed to pay a $50 million penalty, cease its unregistered offers and sales of the lending product, and attempt to bring its business within the provisions of the Investment Company Act within 60 days. Finally, in parallel actions, the company agreed to pay an additional $50 million in fines to 32 states to settle similar charges. At the time of the settlement, the company was actively engaged in litigation with multiple states including the New Jersey Attorney General. (Prior to assuming his current role as the Director of the SEC's Enforcement Division, Gurbir Grewal was the Attorney General for New Jersey.)

In May, the SEC also announced that it settled charges against a technology company for making allegedly inadequate disclosures concerning the impact of cryptomining on the company's gaming business.[81] The SEC's order found that, during consecutive quarters in fiscal year 2018, the company failed to disclose that cryptomining was a significant element of its material revenue growth. Specifically, the SEC alleged that the company did not disclose in its Forms 10-Q significant earnings and cash flow fluctuations related to a "volatile business" for investors to ascertain the likelihood that past performance was indicative of future performance. The SEC also alleged that the company's omissions about the growth of the company's gaming business were misleading given that the company made statements about how other parts of the company's business were driven by demand for crypto. Without admitting or denying the SEC's findings, the company agreed to a cease-and-desist order and to pay a $5.5 million penalty.

VI. Insider Trading

In January, the SEC announced insider trading charges against three Florida residents for allegedly trading in advance of market-moving announcements by three companies.[82] The SEC alleged that one of the individuals obtained non-public information from an insider family member and used it to trade in advance of one company's earnings announcement, another company's tender offer, and a third company's merger announcement, gaining more than $600,000 in personal brokerage profits. The individual allegedly tipped off two friends, who also allegedly traded ahead of these announcements and who were likewise charged by the SEC. According to the SEC's complaint, one of the tippees used various accounts to trade ahead of all three announcements, resulting in profits of over $4 million; the other tippee allegedly reaped profits of approximately $120,000. The SEC's complaint seeks permanent injunctions and civil penalties. The U.S. Attorney's Office of the District of Massachusetts announced criminal charges against the three men for the same conduct.

In March, the SEC filed a complaint against three software engineers of a communications tech company and four of their associates for allegedly trading on confidential information ahead of the company's positive earnings announcement for the first quarter of 2020.[83] The SEC alleged that the software engineers had learned through their company's databases that the company's customers had increased usage of the company's products and services in response to health measures imposed by the COVID-19 pandemic. The SEC further alleged that the software engineers discussed in a group chat that the company's stock price would "rise for sure," after which they tipped off, or used the brokerage accounts of, four of their family members and close friends to trade stock and options in advance of the earnings announcement to generate more than $1 million in profit. The SEC's action is pending in the Northern District of California. The U.S. Attorney's Office for the Northern District of California announced criminal charges against one of the tippees.

In April, the SEC announced a settled action against a former accountant of a large

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multinational restaurant chain for an alleged long-running scheme to trade on confidential information the accountant obtained through his role at the company in advance of the company's earnings announcements.[84] The SEC alleged that, from 2015 to 2020, the employee engaged in trades across multiple different brokerage accounts tied to himself and family members in advance of earnings announcements, resulting in more than $960,000 in profits. Without admitting or denying the allegations, the accountant consented to an order permanently enjoining him from future violations and to a penalty of over $1.9 million. He also agreed to a suspension from appearing or practicing before the SEC.

In June, the SEC announced settled insider trading charges against a former software engineer of an online gambling company and his longtime friend for allegedly trading on confidential information about the gambling company's interest in acquiring a mobile sports media company.[85] The SEC alleged that the software engineer purchased 500 out-of-the-money call options on the target mobile sports media company in the weeks and days leading up to the announcement of the acquisition, despite being told not to trade on the information he received. The SEC also alleged that he tipped off his friend about the impending deal through an encrypted messaging application, resulting in approximately $600,000 in combined profits. Without admitting or denying the allegations, the two individuals agreed to a permanent injunction, disgorgement, and civil penalties totaling more than $11,000. The U.S. Attorney's Office for the Eastern District of Pennsylvania also announced criminal charges against the former software engineer.

VII. Trading and Markets

In March, the SEC commenced an action against five individuals for operating a call center in Colombia that allegedly employed high-pressure sales tactics and made misleading statements to sell the stock of at least 18 small companies trading in U.S. markets.[86] The SEC alleged that the defendants' call centers employed false personas—including fake names, websites, and phone numbers—to appear as investment management firms. According to the complaint, the call centers then generated over $58 million in trading by making misleading or false statements about the stocks' prospects for success. The SEC alleged that the defendants received roughly $10 million in exchange for their promotion of these thinly traded stocks. The SEC's complaint seeks a permanent injunction, disgorgement and civil penalties, and a penny stock bar against the defendants. The complaint also names three additional individuals and one entity as relief defendants and seeks disgorgement from these parties as well.

In April, the SEC brought an action against an individual for making an allegedly false and misleading tender offer announcement.[87] According to the SEC's complaint, the defendant allegedly placed an advertisement in the *New York Times* announcing a proposed purchase of all existing stock of a large defense company at a substantial premium. The SEC alleged that this offer was false and misleading because neither the defendant nor his company had the resources necessary to complete the transaction. Moreover, the complaint alleged that the defendant failed to disclose a series of bankruptcies and default judgments and mischaracterized the operations and assets of his company's corporate parent. The complaint seeks injunctive relief, a monetary penalty, and an officer and director bar against the defendant. In a parallel action, the U.S. Attorney's Office for the Southern District of New York announced criminal charges against the defendant.

Also in April, the Commission, in three separate complaints, commenced actions against 15 individuals and one entity for engaging in a complex series of allegedly fraudulent microcap operations spanning three continents and generating more than $194 million in illicit proceeds.[88] The SEC alleged that, over many years, various defendants acquired,

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via offshore companies, majority interests in the penny stocks of at least 17 issuers. Thereafter, the SEC alleged that certain defendants funded promotional campaigns for these stocks to increase demand, at which point some defendants allegedly sold their stocks for significant profits. Two of the three complaints further allege that some defendants used encrypted messaging services and code names to communicate with each other and with offshore trading platforms about the scheme to avoid being detected by regulators. The press release announcing these enforcement actions stated that more than 20 countries' law enforcement authorities and securities regulators contributed to the SEC's investigation, which is also associated with parallel criminal actions by the U.S. Attorney's Office for the Southern District of New York.

Also in April, the SEC filed an action against the owner of an investment firm, as well as the firm's CFO, head trader, and chief risk officer based on allegations of securities fraud based on misrepresentations and omissions as well as market manipulation, all relating to the trading of certain securities over a seven-month period.[89] The SEC alleged that the owner had purchased, on margin, billions of dollars of total return swaps, resulting in bank counterparties taking on significant positions in the equity securities of the relevant symbols for the purpose of hedging the risk of the swaps. According to the SEC, these swap purchases were intended to drive up the price of the securities. The CFTC also brought a complaint relating to misrepresentations and omissions—but did not allege market manipulation—and the U.S. Attorney's Office for the Southern District of New York also announced that it is pursuing criminal charges against the individuals involved for the same conduct.

In June, the SEC announced a settled action against an investment adviser based on allegations that on seven occasions between December 2020 and February 2021 the firm violated Rule 105 of Regulation M of the Exchange Act by buying stock shortly after shorting that same stock during a restricted period (i.e., before a covered public offering).[90] The order explains that the firm had relevant policies and procedures and that its systems detected the possible violations both before and after the firm participated in the offerings. In each instance, according to the SEC, the firm's traders and compliance department bypassed the systematic alerts and exceptions based on their own miscalculations of the restricted period. Thereafter, according to the order, the firm self-identified its errors and the violations, voluntarily and proactively remediated the errors and self-reported the violations to the SEC. Without admitting or denying the SEC's allegations, the firm agreed to pay a fine of $200,000 and $6.7 million in disgorged profits.

VIII. Municipal Securities

In March, the SEC announced a settled action against a school district and its former CFO, alleging that they misled investors who purchased $20 million in municipal bonds.[91] The SEC also announced settled charges against the district's auditor for alleged impropriety in connection with an audit of the district's financial statements. According to the SEC's complaint and orders, the district and CFO provided investors with misleading financial statements containing inflated general fund reserves and omitted payroll and construction liabilities. The district, without admitting or denying any findings, agreed to settle the SEC's charges by consenting to a cease-and-desist order. The former CFO, also without admitting or denying the allegations, agreed to pay a $30,000 penalty and not participate in future municipal offerings. The auditor, without admitting or denying any findings, agreed to a suspension of at least three years from appearing or practicing before the SEC as an accountant and from certain auditor roles.

In June, the SEC brought an action against a town, its former mayor, the town's unregistered municipal adviser, and the adviser's owner, for allegedly misleading investors who purchased $5.8 million in municipal bonds across two offerings to finance

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the development of a water system and improvements to a sewer system.[92] According to the SEC's complaints and order, the town submitted false financial projections, created by the municipal adviser with approval by the then-mayor, overstating the number of sewer customers in order to mislead a state agency commission that needed to approve the offerings. In turn, the town and its then-mayor allegedly failed to disclose to investors that approval of the bonds was based on the allegedly false projections or that the mayor had misused proceeds from prior offerings. Without admitting or denying the findings, the town agreed to settle with the SEC by consenting to a cease-and-desist order, while the municipal adviser and its owner also agreed pay disgorgement and civil penalties in amounts to be determined at a later date.

Also in June, the SEC instituted an action against a city, its former finance director, and its school district's former CFO, alleging that they misled investors who purchased $119 million in municipal bonds.[93] The SEC also instituted an action against the city's municipal adviser and its principal for allegedly misleading investors and breaching their fiduciary duty to the city. According to the SEC's complaint, the defendants provided investors with misleading bond offering documents that failed to disclose the district's financial distress stemming from spending on teacher salaries. The SEC alleged that the district's former CFO was aware the district was facing at least a $25 million budget shortfall but misled a credit rating agency regarding the magnitude of the budget shortfall. The school district's former CFO agreed to settle with the SEC, without admitting or denying any findings, and to pay a $25,000 penalty.

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[1] *See, e.g.*, SEC Press Release, BlockFi Agrees to Pay $100 Million in Penalties and Pursue Registration of its Crypto Lending Product (Feb. 14, 2022), *available at* https://www.sec.gov/news/press-release/2022-26; SEC Press Release, Ernst & Young to Pay $100 Million Penalty for Employees Cheating on CPA Ethics Exams and Misleading Investigation (June 28, 2022), *available at* https://www.sec.gov/news/press-release/2022-114.

[2] SEC Press Release, SEC Charges Firm and Five Brokers with Violations of Reg BI (June 16, 2022), *available at* https://www.sec.gov/news/press-release/2022-110.

[3] *Id*.

[4] SEC Statement, Statement on Settlement with BlockFi Lending LLC (Feb. 14, 2022) (Commissioner Hester M. Peirce), *available at* https://www.sec.gov/news/statement/peirce-blockfi-20220214.

[5] SEC Statement, Statement on In the Matter of Lloyd D. Reed (Apr. 5, 2022) (Commissioner Hester M. Peirce), *available at* https://www.sec.gov/news/statement/peirce-lloyd-reed-20220405.

[6] SEC Statement, Statement Regarding In the Matter of Aegis Capital Corporation (July 28, 2022) (Commissioner Hester M. Peirce), *available at* https://www.sec.gov/news/statement/peirce-statement-aegis-capital-corporation-072822.

[7] SEC Statement, When Voluntary Means Mandatory and Forever: Statement on In the Matter of Ernst & Young LLP (June 28, 2022) (Commissioner Hester M. Peirce), *available at* https://www.sec.gov/news/statement/peirce-statement-ernst-and-young-062822.

[8] SEC Press Release, Mark T. Uyeda Sworn In as SEC Commissioner (June 30, 2022), *available at* https://www.sec.gov/news/press-release/2022-118.

[9] SEC Statement, Statement on Senate Confirmation of Jaime Lizárraga and Mark Uyeda (June 16, 2022), *available at* https://www.sec.gov/news/statement/commissioners-statement-confirmation-lizararago-uyeda.

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[10] White House Press Release, President Biden Announces Key Nominees (Apr. 6, 2022), *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/06/president-biden-announces-key-nominees-10/.

[11] SEC Press Release, SEC Announces New Leadership in Examinations Division and New York Regional Office (Mar. 24, 2022), *available at* https://www.sec.gov/news/press-release/2022-49.

[12] SEC Press Release, Richard R. Best Named Director of Division of Examinations (May 24, 2022), *available at* https://www.sec.gov/news/press-release/2022-87.

[13] SEC Press Release, Kristin Snyder, Deputy Director of Division of Examinations, to Leave SEC (Jan. 27, 2022), *available at* https://www.sec.gov/news/press-release/2022-13.

[14] SEC Press Release, Lori H. Price Named Acting Director of the Office of Credit Ratings; Ahmed Abonamah to Leave SEC (Feb. 1, 2022), *available at* https://www.sec.gov/news/press-release/2022-16.

[15] SEC Press Release, Kelly L. Gibson, Director of the Philadelphia Regional Office, to Leave the SEC; Scott Thompson and Joy Thompson named Office Acting Co-Heads (Feb. 11, 2022), *available at* https://www.sec.gov/news/press-release/2022-25.

[16] SEC Press Release, SEC Announces New Leadership in Examinations Division and New York Regional Office (Mar. 24, 2022), *available at* https://www.sec.gov/news/press-release/2022-49.

[17] SEC Press Release, San Francisco Regional Director Erin E. Schneider to Leave Agency (Mar. 25, 2022), *available at* https://www.sec.gov/news/press-release/2022-51.

[18] SEC Press Release, Tracy S. Combs Named Director of SEC's Salt Lake Regional Office (June 29, 2022), *available at* https://www.sec.gov/news/press-release/2022-115.

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