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SEC Releases Fiscal Year 2023 Enforcement Results

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On November 14, the Securities and Exchange Commission (SEC) published its enforcement results for fiscal year 2023, which concluded on September 30.[1] These results provide insight into the SEC's priorities and enforcement trends.

The report underscores that the SEC is rewarding self-reporting and cooperation, prioritizing actions to protect and encourage whistleblowers, and continuing to pursue active enforcement across the spectrum of securities violations.

Below is a summary of the key points addressed in the SEC's statement.

Total Enforcement Actions

In fiscal year 2023, the SEC filed 784 total enforcement actions — a 3% increase over fiscal year 2022.

Out of these actions, 501 were original or "stand-alone" enforcements covering a range of securities-related violations. The SEC also brought numerous enforcement actions aimed at improving its oversight capabilities, including actions to protect whistleblowers and enforce investor-protection requirements like record-keeping. More than 40% of the stand-alone matters brought by the SEC in fiscal year 2023 were filed in whole or in part as litigated actions.

Of the remaining enforcement actions, 162 actions were "follow-on" administrative proceedings that sought to bar or suspend individuals with criminal convictions, civil injunctions, or other orders from certain functions in the securities markets. The remaining 121 actions targeted issuers who were allegedly delinquent with required SEC filings.

Financial Remedies

In fiscal year 2023, the SEC obtained orders totaling $4.949 billion in financial remedies, of which $3.369 billion were in disgorgement and prejudgment interest, and $1.580 billion were in civil penalties. This is the second highest total for financial remedies in SEC history after fiscal year 2022.

The SEC also distributed substantial financial amounts to investors. Fiscal year 2023 saw the SEC distributing $930 million to harmed investors, marking the second consecutive year where distributions exceeded $900 million. Related to its efforts to return money to harmed investors, the SEC sought and obtained emergency orders freezing assets and obtaining other relief in numerous litigation cases.

Public Companies

SEC actions against public companies and subsidiaries increased by 34% over 2022 and accounted for 8% of the total number of standalone enforcement actions filed in fiscal year 2023.[2] SEC investigations of public companies in 2023 resulted in charges for a wide range of alleged misconduct including fraud, deficient controls, and materially misleading statements.

The total monetary settlements imposed in public company or subsidiary actions, however, declined to $1.3 billion.[3] This is the lowest total in the last eight fiscal years, and lower than the average annual monetary settlements of $1.9 billion for fiscal years 2014 to 2022.[4] The decline may be a reflection of the SEC's commitment to rewarding self-reporting and substantial cooperation, as this practice frequently results in a lack of or in substantially reduced penalties for cooperating public companies.[5]

Prosecution of Individuals

Individuals were charged in approximately two-thirds of the SEC's cases in fiscal year 2023. Continuing its efforts to protect investors from future violations, the SEC obtained 133 orders barring individuals from serving as officers and directors of public companies. This is the highest number of such orders in a decade.

The SEC also focused on "gatekeepers" such as accountants, auditors, and other professionals responsible for protecting investors. The SEC views these professionals as the first line of defense against capital markets misconduct. SEC investigations in fiscal year 2023 resulted in numerous charges against gatekeepers.

Whistleblowers

The SEC reported that fiscal year 2023 was a record-breaking year for its Whistleblower Program. Whistleblower awards totaled nearly $600 million, which is the most awarded in a single year. This total includes a record-breaking $279 million awarded to one whistleblower. The SEC said it received more than 18,000 tips, which is approximately 50% more tips than in fiscal year 2022. The SEC received a total of more than 40,000 tips, complaints, and referrals, which is a 13% increase from fiscal year 2022.

In fiscal year 2023, the SEC prioritized actions to protect whistleblowers' rights and ability to report potential securities laws violations to the SEC. In particular, the SEC brought a number of enforcement actions against firms for using employment and separation agreements that may have deterred employees from making whistleblower claims or participating in SEC investigations.

Additionally, two notable amendments to the SEC's whistleblower program went into effect in October 2022. The first allows the SEC to pay whistleblowers for their information and assistance in connection with non-SEC actions in some additional circumstances, while the second affirms the SEC's authority to consider the dollar amount of a potential award for the limited purpose of increasing an award but not to lower an award.

Cooperation

In fiscal year 2023, the SEC consistently rewarded meaningful cooperation, such as prompt self-reporting, the undertaking of affirmative remedial measures, and substantial cooperation with the SEC. Self-reporting was particularly rewarded, with results showing that firms that had cooperated with the SEC staff and were charged as part of the initiative but had not self-reported, agreed to pay substantially higher civil penalties to settle the charges.

A study of SEC enforcement against public companies determined that of the 70 public company defendants who cooperated with the SEC and settled, 13% settled without any monetary component.[6] This was the highest rate of settlements without monetary components for cooperating defendants since fiscal year 2013, and more than triple the average rate for fiscal years 2014 to 2022.[7] For several of these defendants who cooperated and received no civil penalty, the SEC noted explicitly that no civil penalty was levied because of the defendants' cooperation.[8]

Substantial cooperation in this context can be onerous and includes assistance such as providing detailed financial analyses, explanations, and summaries of factual issues; proactively identifying key documents and witnesses; and following up on requests from the staff without requiring subpoenas.

Focus Areas for Enforcement

The SEC conducted a range of initiatives to proactively investigate recurring or widespread securities law violations. Notably, the SEC focused on investigating noncompliance with the Marketing Rule (including advertisement of hypothetical performance without the required policies and procedures); the failure of insiders and major shareholders to file required forms; violations of Regulation A, which provides companies a limited exemption from registration under the Securities Act as long as they meet specific requirements; and record-keeping violations.

The SEC prioritized protecting retail investors from affinity fraud and Ponzi schemes, targeting instances of market abuse, identifying misconduct by investment professionals, and enforcing the Foreign Corrupt Practices Act. Fiscal year 2023 was also important for SEC enforcement of crypto-related misconduct, including fraud schemes, unregistered crypto assets and platforms, and illegal celebrity touting. The SEC additionally targeted cybersecurity threats and brought several enforcement actions addressing environmental, social, and governance-related allegations.

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[1] Unless otherwise noted, all data is from Press Release, U.S. Securities and Exchange Commission, SEC Announces Enforcement Results for Fiscal Year 2023 (Nov. 14, 2023), https://www.sec.gov/news/press-release/2023-234.

[2] Cornerstone Research, SEC Enforcement Activity: Public Companies and Subsidiaries—Fiscal Year 2023 Update 1,
https://www.cornerstone.com/wp-content/uploads/2023/11/SEC-Enforcement-Public-Companies-Subsidiaries-FY2023.pdf.

[3] *Id.* at 6.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 5.

[7] *Id.*

[8] *Id.*

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