

Securities Investigations and Enforcement Newsletter – May 2023

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NEW TEAM MEMBER

TROUTMAN PEPPER RAMPS UP WHITE COLLAR + GOVERNMENT INVESTIGATIONS PRACTICE IN NORTH CAROLINA WITH PARTNER ADDITION

Matthew “Matt” Orso, a white collar litigation attorney who has significant experience counseling clients facing government investigations, has joined Troutman Pepper’s nationally recognized White Collar + Government Investigations Practice Group as a partner in Charlotte. He previously served as co-lead of the Bank Defense and Counseling team at McGuireWoods.

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FINAL RULE AMENDMENTS

SEC ADOPTS FINAL RULE AMENDMENTS THAT INCREASE DISCLOSURES RELATING TO SHARE REPURCHASES

By Robert Friedel, Michael Friedman, Betty Segaar, Danilo Castelli, and Emily Fahey

On May 3, the Securities and Exchange Commission (SEC) adopted rule amendments regarding disclosures about repurchases of an issuer’s equity securities, or issuer stock buybacks. The final rule and fact sheet can be found [here](#) and [here](#).

[Read more](#)

CRYPTO UPDATES

PROPOSED SEC RULE WOULD PLACE CRYPTOCURRENCY TRADING PLATFORMS UNDER SEC JURISDICTION

By Jay Dubow, Ethan Ostroff, Ghillaine Reid, Jason Langford, and Trey Smith

On April 14, the Securities and Exchange Commission (SEC) reopened the comment period for a January 2022 proposal that would subject cryptocurrency exchanges and decentralized finance (DeFi) platforms to the Securities Exchange Act's registration requirements. Initially, the proposed rule failed to mention cryptocurrencies at all, leading commenters during the initial comment period to inquire about the rule's applicability to digital assets. As discussed below, the SEC's reopening release provides new information regarding the proposed rule's application to cryptocurrency exchanges and DeFi platforms.

[Read more](#)

RISK ALERTS

SEC ISSUES RISK ALERT ON SAFEGUARDING CUSTOMER RECORDS AND INFORMATION AT BRANCH OFFICES

By Jay Dubow, Genna Garver, Stephanie Costantino, Ghillaine Reid, and Jackson Buday

On April 26, the SEC's Division of Examinations (EXAMS) issued a risk alert on the importance of broker-dealers and investment advisers (collectively, "firms") establishing and following written policies and procedures aimed at safeguarding customer records and information, particularly in branch offices. In its observations, the staff found that while many firms uphold their policies and procedures relating to the safeguard of customer records and information in their main offices, these firm policies and procedures are not implemented and/or adopted for remote or branch offices. This has resulted in heightened exposure to, and branch offices falling victim to, cybersecurity and data breaches.

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CLAWBACK POLICY UPDATES

SEC UPDATES CLAWBACK RULE TIMING

By Sheri Adler, James Earle, David Kaplan, and Dave Meyers

Recent updates from the Securities and Exchange Commission (SEC) make it likely that companies will need to finalize clawback policies compliant with the Dodd-Frank Act by early August 2023.

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SUPREME COURT DECISIONS

SUPREME COURT DECISION COULD SEE SEC FACING LOGJAMS IN ENFORCEMENT CASES

By Jay Dubow

Jay Dubow, co-leader of Troutman Pepper's Securities Investigations + Enforcement Practice Group, was quoted

in the May 2, 2023 *Pensions & Investments* article, “[Supreme Court Decision Could See SEC Facing Logjams in Enforcement Cases.](#)”

[Read more](#)

UNANIMOUS SUPREME COURT DECISION ALLOWS FOR EARLY CHALLENGES TO FEDERAL AGENCY ENFORCEMENT ACTIONS

By Jay Dubow, Ghillaine Reid, Casselle Smith, and Angela Monaco

On April 14, the Supreme Court [unanimously held](#) that federal district courts have jurisdiction to review constitutional challenges to the structures of the Federal Trade Commission (FTC) and Securities and Exchange Commission (SEC). This decision paves the way for parties subject to FTC, SEC, and potentially other federal administrative actions to bring early challenges to such actions via structural constitutional claims rather than undergoing the onerous process of challenging the actions during agency proceedings set forth in the FTC Act and Securities Exchange Act of 1934 (Exchange Act).

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ENCRYPTED MESSAGING

ENCRYPTED ELECTRONIC INSTANT MESSAGING APPLICATIONS CONTINUE TO CATCH THE GOVERNMENT’S ATTENTION

By Jay Dubow, Ghillaine Reid, Casselle Smith, and Tomi Balogun

In March 2023, the Department of Justice (DOJ) Criminal Division updated its [Evaluation of Corporate Compliance Programs \(ECCP\)](#) guidance to address the use of personal devices and third-party messaging applications by corporate employees. Assistant Attorney General Polite announced the new guidance during his speech at the ABA’s *38th Annual National Institute on White Collar Crime Conference*. It follows Deputy Attorney General Monaco’s September 2022 directive that the Criminal Division study best corporate practices regarding messaging and incorporate them into the next edition of the ECCP.

[Read more](#)

SEC COMMENT LETTER UPDATE

SEC COMMENT LETTER UPDATE

By Connor Nechodom, Michael Friedman, Betty Segaar, Heath Linsky, Robert Friedel, Mary Katherine Rawls, Saba Ashraf, and Paul Steffens

This article highlights comment letters publicly issued by the Securities and Exchange Commission (SEC) to Real Estate Investment Trusts (REITs) during 2022.

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SEC'S FOCUS ON NON-GAAP DISCLOSURES

SEC LEVIES \$8M FINE FOR MISLEADING NON-GAAP DISCLOSURES AND DISCLOSURE CONTROL FAILURES

By Jay Dubow, Ghillaine Reid, Dave Meyers, and Jason Langford

On March 14, DXC Technology Company (DXC) settled charges alleged by the Securities and Exchange Commission (SEC) for \$8 million. The SEC claimed that DXC made misleading disclosures and lacked adequate disclosure controls about its non-GAAP financial performance measures in several quarterly and annual reports filed with the SEC from 2018 until early 2020. The SEC [order](#) continues to highlight that the SEC remains focused on companies' non-GAAP disclosures and offers a reminder of the importance of having effective disclosure controls and procedures in place to avoid non-GAAP disclosure issues.

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WHISTLEBLOWER PROTECTION VIOLATIONS

SEC "LEVELS UP" IN \$35M RESOLUTION OF ALLEGED WHISTLEBLOWER PROTECTION VIOLATIONS AND COMPLIANCE PROGRAM FAILURES AGAINST ACTIVISION BLIZZARD

By Jay Dubow, Ghillaine Reid, and Tiffany Bracewell

On February 3, the U.S. Securities and Exchange Commission (SEC) announced that video game developer Activision Blizzard, Inc. (Activision) agreed to pay \$35 million to settle accusations that it violated whistleblower protection rules and that its compliance program lacked essential elements — the ability to collect, track, and analyze workplace complaints — even though the commission failed to identify any harm to investors. The SEC thus delivered on its [2022 end-of-year promise](#) to protect whistleblowers by both "vigorously safeguarding whistleblowers' anonymity" and pursuing enforcement actions against those who impede them.

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DISCLOSURE ASSESSMENTS

FEDERAL JUDGE REFUSES TO DISMISS TOBACCO AND CANNABIS COMPANY'S CLASS-ACTION SEC DISCLOSURE SUIT BASED ON 10B-5(B) SCIENTER AND LOSS CAUSATION REQUIREMENTS

By Jay Dubow, Ghillaine Reid, Pam Palmer, Jessica Ring, and John Sample

On January 6, a federal judge for the Western District of New York denied a cannabis and tobacco engineering company's attempt to dismiss claims that it concealed a U.S. Securities and Exchange Commission (SEC) investigation to bolster stock prices, finding that investors bringing the suit sufficiently alleged that the company both had the opportunity and motive to hide the investigation and made public statements about the investigation it knew to be false.

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2023 Securities Litigation Trends

NAVIGATING SECURITIES LITIGATION IN 2023: TRENDS FOR THE NEW YEAR

By Jay Dubow, Joanna Cline, and Kaitlin O'Donnell

Each new year brings new developments in securities litigation and enforcement. With this year's securities law trends just beginning to take shape, now is the time to reflect on last year and anticipate what is on the horizon for 2023. Companies should expect to see the Securities and Exchange Commission (SEC)—armed with an additional \$210 million in funding this year—continue to flex its regulatory muscles. With many market forecasters still predicting an economic downturn in 2023, companies can also expect shareholders to try and recoup any market losses through securities class action litigation.

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Our Cannabis Practice provides advice on issues related to applicable federal and state law. Marijuana remains an illegal controlled substance under federal law.

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