

Securities Investigations and Enforcement Newsletter – January 2023

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FINRA DEVELOPMENTS

FINRA ISSUES 2023 EXAMINATION AND RISK MANAGEMENT PROGRAM REPORT: WHAT IT SAYS AND HOW TO RESPOND

By [Jay Dubow](#), [Ghillaine Reid](#), [Casselle Smith](#), and [John West](#)

On January 10, FINRA published its “[2023 Report on FINRA's Examination and Risk Management Program](#)” (Report) — FINRA’s third annual compendium of guidance, covering key topics and emerging risks for member firms to consider when evaluating the efficacy of their compliance programs and operations procedures. Among other things, the Report identifies relevant rules, summarizes noteworthy findings, outlines effective practices, and provides additional resources that may be helpful to member firms when assessing their compliance obligations.

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SEC TRENDS

SEC SETTLEMENT WITH MCDONALD’S AND EX-CEO SIGNALS POTENTIAL EXPANSION OF EXECUTIVE COMPENSATION DISCLOSURE REQUIREMENTS

By [Jay Dubow](#), [Ghillaine Reid](#), [Casselle Smith](#), and [Angela Monaco](#)

On January 9, the Securities and Exchange Commission (SEC) [announced](#) that it had reached a settlement with McDonald’s and its former CEO, Stephen Easterbrook, for charges stemming from McDonald’s 2019 termination of Easterbrook for violating company policy by engaging in “an inappropriate personal relationship” with a McDonald’s employee. McDonald’s was charged with failing to disclose material information to investors regarding Easterbrook’s termination in what the dissenting commissioners called a “case of first impression.” As a consequence of its cooperative and substantial assistance to the SEC staff, however, McDonald’s ultimately avoided the imposition of monetary penalties.

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RULE 10B5-1 TRADING PLAN AMENDMENTS

SEC ADOPTS FINAL RULE AMENDMENTS FOR RULE 10B5-1 TRADING PLANS AND CREATES NEW DISCLOSURE REQUIREMENTS

By [Jay Dubow](#), [Jim Earle](#), [Dave Meyers](#), [Betty Segaar](#), Danillo Castelli, and [Zach Corenblum](#)

On [December 14, 2022](#), the Securities and Exchange Commission (SEC) [adopted](#) amendments and certain enhanced disclosure requirements related to Rule 10b5-1 trading plans.

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CRYPTO UPDATES

PROSECUTORS AND REGULATORS ANNOUNCE CRIMINAL CHARGES AND CIVIL ENFORCEMENT ACTIONS AGAINST SAM BANKMAN-FRIED FOLLOWING FTX COLLAPSE

By [Jay Dubow](#), [Ghillaine Reid](#), [Ethan Ostroff](#), [Deborah Kovsky-Apap](#), Sam Hatcher, and John Sample

On December 13, federal prosecutors announced criminal fraud and money laundering charges against Sam Bankman-Fried (SBF) in the wake of the collapse of FTX Trading Ltd. (FTX), the crypto asset trading platform that SBF co-founded and for which he served as CEO until its November bankruptcy. Additionally, on December 13, parallel civil enforcement actions were brought against SBF by the Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC).

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SEC ADVISES COMPANIES TO DISCLOSE CRYPTO MARKET EXPOSURE

By [Jay Dubow](#), [Ethan Ostroff](#), [Ghillaine Reid](#), Sam Hatcher, and John Sample

On December 8, the Securities and Exchange Commission (SEC) issued new [guidance](#) for publicly traded companies, advising them to disclose their exposure and risk in the cryptocurrency market to investors.

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CRYPTO AND THE SEC

By [Jay Dubow](#), [Keith Barnett](#), and [Ethan Ostroff](#)

In this episode of *The Crypto Exchange*, Troutman Pepper Partners Ethan Ostroff and Keith Barnett welcome their colleague Jay Dubow to discuss recent updates in the crypto space related to activities by regulators on the state and federal level around questions involving securities. Jay, who formerly worked as a branch chief in the SEC's Division of Enforcement, provides a unique perspective and insight into our conversation surrounding crypto and the SEC.

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SEC SCORES VICTORY IN ONGOING EFFORT TO CLASSIFY CRYPTOCURRENCIES AS SECURITIES

By [Jay Dubow](#), [Ethan Ostroff](#), [Deborah Kovsky-Apap](#), [Ghillaine Reid](#), and Sam Hatcher

A recent decision out of the District of New Hampshire underscores the risks proprietary cryptocurrency issuers face and provides ammunition to the SEC in its continued quest to classify cryptocurrencies as securities subject to registration and regulation. In [SEC v. LBRY, Inc.](#), Judge Paul J. Barbadoro found that LBRY, Inc. (LBRY) violated the Securities Act of 1933 by selling unregistered securities when LBRY sold its proprietary LBC token in a series of offerings. LBRY did not dispute the facts underlying the SEC's complaint but argued only that the LBC token was not a security subject to SEC regulation.

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CD&I UPDATES

SEC'S DIVISION OF CORPORATION FINANCE REVISES CD&IS ON NON-GAAP FINANCIAL MEASURES

By [Jay Dubow](#), [Dave Meyers](#), Justin Platt, [Jason Langford](#), Rachael Bushey, Jennifer Porter, and [Nicole Edmonds](#)

On December 13, the U.S. Securities and Exchange Commission's (SEC) Division of Corporation Finance staff (the staff) updated its Compliance & Disclosure Interpretations (CD&Is), concerning the [use of non-generally accepted accounting principles \(GAAP\) financial measures](#) in public company disclosures. The updates include both revisions to existing CD&Is and new guidance reflecting the staff's position on the use of non-GAAP financial measures in public company disclosures. The revised CD&Is largely confirm and reinforce the staff's position on the use of these measures, providing additional clarifications and examples of disclosures the staff would find objectionable.

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2022 SEC ENFORCEMENT RESULTS

SEC'S ENFORCEMENT RESULTS FOR FY 2022 REFLECT ROBUST ENFORCEMENT AND RECORD-BREAKING PENALTIES

By [Jay Dubow](#), [Ghillaine Reid](#), [Casselle Smith](#), and Angela Monaco

On November 15, the U.S. Securities and Exchange Commission (SEC) [announced its enforcement results](#) for fiscal year 2022, which featured the following key metrics:

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SEC ADJUDICATION SYSTEM

COMMENTARY: FULL SCALE OF CONSTITUTIONALITY OF SEC'S ADJUDICATION SYSTEM UNDERWAY

By [Jay Dubow](#), [Ghillaine Reid](#), and Sam Hatcher

This article was previously published in The Legal Intelligencer.

The Supreme Court's decision to hear CPA Michelle Cochran's appeal represents the latest challenge to the Security and Exchange Commission's in-house adjudicatory structure and could set the stage for a larger ruling on the constitutionality of agency administrative adjudication systems including those to which members of the institutional investing profession are subjected.

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SEC RECORDKEEPING

SEC MODERNIZES ITS RECORDKEEPING REQUIREMENTS FOR CERTAIN REGISTRANTS

By [Jay Dubow](#), [Megan Rahman](#), [Ghillaine Reid](#), [Isabela Palmieri](#), John Sample, and [Casselle Smith](#)

On October 12, the Securities and Exchange Commission (SEC) voted to adopt new electronic recordkeeping [requirements](#) for broker-dealers, security-based swap dealers (SBSDs), and major security-based swap participants (MSBSPs) — allowing the use of new technology, such as cloud-based storage, to satisfy obligations.

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AUDITOR RESPONSIBILITIES

SEC REITERATES AUDITOR RESPONSIBILITIES IN RISK ASSESSMENT

By [Jay Dubow](#), [Ghillaine Reid](#), and Aaron Hardy

Independent auditors have been placed on notice to tighten internal fraud investigations following an October 11 statement by the U.S. Securities and Exchange Commission's (SEC) chief accountant, which can be found [here](#). This statement follows several 2022 enforcement actions taken against auditors accused of ignoring red flags during audits, likely due to pressure from clients. Paul Munter, who heads the SEC's Office of the Chief Accountant, referenced several "deeply concerning" reports that suggest auditors are not acting skeptical enough when conducting investigations of suspected fraud. Considering the SEC's increased scrutiny, corporate attorneys foresee a potential rise in delayed filings of periodic reports resulting from auditors becoming more protective.

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