

Articles + Publications | July 13, 2022

# Securities Investigations and Enforcement Newsletter – July 2022

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## SEC'S REGULATORY AGENDA

### SEC ANNOUNCES 2022 REGULATORY AGENDA

By [Jay Dubow](#), Tim Bado, and Thomas Cordova

On June 22, the Office of Information and Regulatory Affairs (OIRA) released the Spring 2022 Unified Agenda of Regulatory and Deregulatory Actions. OIRA is the government's central authority to review executive branch regulations. The report, which includes both short- and long-term regulatory actions that administrative agencies plan to take, notably included several contributions from the Securities and Exchange Commission (SEC).

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## ESG UPDATES

### SEC PROPOSES FUND NAMES RULE AMENDMENTS AND RULES GOVERNING ESG INVESTMENT DISCLOSURES

By [Joseph V. Del Raso](#), John P. Falco, [John M. Ford](#), [Terrance James Reilly](#), [Jackson Buday](#), [Theodore D. Edwards](#), and Joseph A. Goldman

In two separate May 25 releases, the U.S. Securities and Exchange Commission (SEC) proposed amendments to (1) Rule 35d-1 (the Names Rule) under the Investment Company Act of 1940 (Investment Company Act) and (2) rules and disclosure forms concerning funds' and advisers' incorporation of environmental, social, and governance (ESG) factors. The final rules, if adopted, would make investment companies and advisers subject to tighter standards regarding how funds are named and how ESG factors are disclosed.

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### RECENT SEC COMPLAINT SIGNALS INCREASED ENFORCEMENT RISK FOR COMPANIES ON ESG DISCLOSURES

By [Jay A. Dubow](#), [J. Timothy Mast](#), [Ghillaine A. Reid](#), [David I. Meyers](#), [Mary Weeks](#), [Adrianna C. ScheerCook](#), and Sam Hatcher

A complaint recently filed by the SEC against Vale S.A., a Brazilian mining company with U.S.-traded American Depositary Receipts (ADRs), signals an increased risk of enforcement actions targeting misrepresentations and omissions in companies' environmental, social, and governance (ESG) disclosures and is indicative of the commission's heightened review of ESG disclosures. On April 28, the SEC's Climate and ESG Task Force in the Division of Enforcement filed a civil action, alleging Vale materially misled investors in the years preceding the January 2019 collapse of the Brumadinho dam. The complaint alleges Vale misled investors by intentionally concealing risks that the tailings dam — used to store waste from the Vale's iron ore mining operations — would collapse. The complaint represents the SEC's increased enforcement focus on companies' ESG disclosures. This aligns with its recently announced creation of the Climate and ESG Task Force to address the "increasing investor focus and reliance on climate and ESG-related disclosure and investment," necessitating development of new initiatives to identify and prosecute ESG-related misconduct. The Climate and ESG Task Force's filing of the complaint against Vale is the latest manifestation of this new initiative.

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## **SEC'S IN-HOUSE ADJUDICATION SYSTEM**

### **RECENT DECISIONS CAST SHADOW OVER SEC'S IN-HOUSE ADJUDICATION SYSTEM**

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

Two recent judicial developments create questions about the constitutionality of the SEC's in-house judicial system. First, on May 16, the Supreme Court agreed to hear the case of Michelle Cochran, an accountant facing disciplinary proceedings before an SEC administrative law judge (ALJ). Cochran challenged the constitutionality of how the SEC's ALJs are appointed and protected from removal. The Fifth Circuit Court of Appeals ruled en banc in December 2021 that Cochran could challenge the constitutionality of the SEC's ALJs. The Supreme Court may combine the review of Cochran's case with an already pending case, challenging the appointments process for Federal Trade Commission (FTC) ALJs. The government has asked that the Court coordinate the briefing for the two cases but hold separate oral arguments. The Court has not yet indicated how the two cases will proceed.

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## **Crypto Updates**

### **SEC EXPANDS CRYPTO ASSETS AND CYBER UNIT**

By [Jay A. Dubow](#), [Ghillaine A. Reid](#), and Thomas H. Cordova

On May 3, the Securities and Exchange Commission (SEC) announced that it will greatly expand its cryptocurrency and cybersecurity unit by adding 20 positions. The additional positions will bring the unit's total members to 50, nearly doubling its size. The new hires will include supervisors, staff attorneys, trial counsel, and fraud analysts.

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## **NOT YOUR KEYS, NOT YOUR COIN: SEC TELLS CRYPTO-CUSTODY PROVIDERS TO REPORT PLATFORM USERS' CRYPTO HOLDINGS AS BALANCE SHEET LIABILITIES**

By [Keith J. Barnett](#), [Jay A. Dubow](#), [Kalama M. Lui-Kwan](#), [Ethan G. Ostroff](#), [Ghillaine A. Reid](#), [Carlin A. McCrory](#), [Addison J. Morgan](#), and [Elizabeth P. Waldbeser](#)

On March 31, the Securities and Exchange Commission (SEC) issued [Staff Accounting Bulletin No. 121](#) (Bulletin), noting that a company safeguarding or exerting custody over cryptocurrency on behalf of its platform users must clearly report the users' assets as liabilities on the company's financial statement, along with the risks consumers face by entrusting the company with their private, cryptographic keys.

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## **WORLD'S LARGEST CRYPTOCURRENCY EXCHANGE WINS DISMISSAL OF CLASS-ACTION LAWSUIT**

By [Keith J. Barnett](#), [Jay A. Dubow](#), [Kalama M. Lui-Kwan](#), [Ethan G. Ostroff](#), [Ghillaine A. Reid](#), [Carlin A. McCrory](#), [Addison J. Morgan](#), and [Elizabeth P. Waldbeser](#)

On March 31, a New York federal court [dismissed](#) a proposed securities class-action lawsuit filed against Binance, the world's largest cryptocurrency exchange. The lawsuit, one of a host of similar actions brought against cryptocurrency exchanges in 2020, was filed by token buyers who purchased cryptocurrency on Binance's platform.

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