

“SEC Enforcement: Priorities and Trends”

Wednesday, November 13, 2024

Course Materials

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2 to 3 p.m. Eastern [archive and transcript to follow]

The SEC's Division of Enforcement recently completed another active year, with several high-profile investigations, enforcement actions and settlements, and the agency's enforcement efforts show no sign of letting up in 2025. Corporate boards and management and their legal advisors need to stay up to date on the SEC's enforcement priorities and trends in the agency's enforcement efforts in order to ensure that they stay out of its crosshairs. Join our panel of experts as they share lessons learned from recent enforcement activities and insights into what the new year might hold.

Joining us are:

- **Scott Kimpel**, Partner, Hunton Andrews Kurth LLP
- **Allison O'Neil**, Partner, Locke Lord LLP
- **Kurt Wolfe**, Of Counsel, Quinn Emanuel Urquhart & Sullivan, LLP

Topics:

1. SEC Enforcement Activities in 2024 and Priorities for 2025
2. Implications of *Jarkesy* for SEC's Enforcement Program
3. Monetary and Non-Monetary Penalties
4. Accounting and Disclosure Actions, and Actions Targeting "Internal Controls"
5. Self-Reporting and Cooperation Credit
6. Coordination with DOJ Investigations

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Course Outline

1. SEC Enforcement Activities in 2024 and Priorities for 2025

- Beneficial Ownership Reporting
 - In late September, the SEC announced settled enforcement proceedings against 23 entities and individuals arising out of late beneficial ownership reports.
 - This resulted from SEC enforcement initiatives focused on Schedules 13D and 13G filings and Forms 3, 4 and 5 filed under Section 16(a) of the Exchange Act.
 - In August, the SEC announced settled enforcement proceedings against Carl Icahn and Icahn Enterprises arising out of alleged failures to comply with disclosure requirements in Schedule 13D and Form 10-K applicable to pledging arrangements.
- Auditing Failures
 - In May, the SEC’s Division of Enforcement announced proceedings against the BF Borgers CPA PC accounting firm and its sole partner, Benjamin Borgers, for alleged “deliberate and systemic failures” to comply with PCAOB standards in audits and reviews incorporated in more than 1,500 SEC filings from January 2021 through June 2023 and imposed a permanent suspension.
- Climate and ESG
 - The SEC shut down the Enforcement Division’s Climate and ESG Task Force prior to September 2024, but noted “the expertise developed by the task force now resides across the Division,” and the Division continued to bring ESG-related enforcement actions in 2024.
 - In September, the SEC announced settled charges against Keurig Dr Pepper Inc. for allegedly inaccurate statements about the recyclability of its K-Cup pods.

- Cyber Disclosures
 - In June, the SEC announced an enforcement action against R.R. Donnelley & Sons (“RRD”) arising out of alleged disclosure and internal controls violations associated with a series of cyber incidents occurring in November and December 2021 that resulted in a hacker obtaining information belonging to 29 of the company’s clients.
 - In July, U.S. District Judge Paul Engelmayer dismissed a significant part the SEC’s allegations against SolarWinds in a closely watched and sprawling case that the SEC has been pursuing for several years.
 - In October, after the end of the 2024 fiscal year, the SEC announced charges against four current and former public companies for allegedly making materially misleading disclosures regarding cybersecurity risks and intrusions — all arising from the SEC’s investigation of public companies that were potentially impacted by the compromise of SolarWinds’ Orion software.
- Perennial Issues
 - Market Estimates: In September, the SEC announced settled enforcement proceedings arising out of allegedly misleading IPO disclosures about a biotechnology company’s overall market potential, revenue prospects and customer pipeline for the company’s only commercially available product.
 - Regulation FD: In late September, the SEC announced a settled enforcement proceeding against DraftKings arising out of the use of its CEO’s social media accounts to disseminate material nonpublic information.
 - Impeding Whistleblowers: In September, as part of an ongoing investigation that resulted in several settlements last year, the SEC announced settlements with seven public companies that allegedly used employment, separation and other agreements

that impeded whistleblowers from reporting potential misconduct to the SEC — in violation of Exchange Act Rule 21F-17(a).

- Related Party Transactions & Perks: SEC Enforcement continued its series of “related party transaction” cases by announcing a settlement in March with Skechers, alleging that the company: (i) did not comply with related person transaction disclosure requirements when it failed to disclose its employment of two relatives of its executives and did not disclose a consulting relationship involving a person who shared a household with one of its executives; and (ii) failed to disclose that two of its executives owed more than \$120,000 to the company for personal expenses that had been paid for by Skechers but not yet reimbursed by the executives.

2. Implications of *Jarkesy* for SEC's Enforcement Program

- In June, the Supreme Court decided [*SEC v. Jarkesy*](#), in which a 6-3 majority found that the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties for securities fraud. This means the SEC’s in-house administrative proceedings violate the Seventh Amendment’s right to jury trial to the extent they adjudicate claims such as fraud charges and civil penalties.
- In September, as reported by Reuters, the SEC moved to dismiss all active misconduct proceedings against accountants that had been pending before administrative law judges — eight in total. *Jarkesy* did not directly address proceedings under Rule 102(e) of the SEC Rules of Practice, which empowers the SEC to censure or bar professionals found to have engaged in “improper professional conduct,” such as repeated violations of applicable professional standards. SEC dismissals seem to suggest that the agency is taking the position that *Jarkesy* precludes litigating Rule 102(e) proceedings administratively.

3. Monetary and Non-Monetary Penalties

- In February 2024, the SEC denied a rulemaking petition from the “New Civil Liberties Alliance” to change the Commission’s policy that

defendants that settle civil claims with the Commission can't go out afterward and deny the allegations, which is known as the "gag rule."

4. Accounting and Disclosure Actions, and Actions Targeting "Internal Controls"

- In the RRD enforcement action, the SEC used Section 13(b)(2)(B) in a setting not involving accounting controls, which the dissenting Commissioners argued "breaks new ground" by treating RRD's computer systems as an asset subject to the internal accounting controls provision — ignoring the distinction between internal accounting controls and broader administrative controls.
- 56% of actions alleged violations of internal accounting controls in FY 2023, up from 41% in FY 2021, and 21 actions alleged violations of both internal accounting controls and disclosure controls and procedures.

5. Self-Reporting and Cooperation Credit

- Some enforcement actions continue to describe cooperation and remedial policies and procedures (including training), so you can look to the terms of recent settlements to identify some of the cooperation factors that are likely to contribute to reduced penalties — or even a decision not to impose penalties.
- Former SEC Enforcement Director Gurbir Grewal gave a speech titled "The Five Principles of Effective Cooperation with the SEC" at the Securities Enforcement Forum West 2024 program:
 - Principle 1: The best cooperation starts early and well before the SEC gets involved, with self-policing.
 - Principle 2: Once you discover a possible violation, self-report without delay.
 - Principle 3: Don't stop with the self-report. Remediate.
 - Principle 4: The type of cooperation that earns credit requires going above and beyond what's legally required — more than simply complying with subpoenas without undue delay or gamesmanship.

- Principle 5: Collaborate with Enforcement staff early, often and substantively.

6. Coordination with DOJ Investigations

- The DOJ recently announced a string of sweeping policy changes aimed at encouraging voluntary disclosure of misconduct and holding the real “bad guys” accountable
 - In February 2023, the DOJ announced a voluntary self-disclosure policy for corporations.
 - In March 2023, the DOJ announced a pilot program on compensation incentives and clawbacks.
 - In October 2023, the DOJ announced the M&A voluntary self-disclosure safe harbor.
 - In mid-April, the DOJ launched a pilot program on voluntary self-disclosure for individuals.
 - In August, the DOJ’s Criminal Division launched a new pilot whistleblower program that provides corporate whistleblowers with financial awards. The DOJ provided detailed [guidance](#) about the program, a [fact sheet](#) and an [intake form](#).
 - In September, the DOJ’s Criminal Division announced a number of updates to its Evaluation of Corporate Compliance Programs guidance, including updates addressing risks related to emerging technology such as artificial intelligence, whistleblowers and the DOJ’s use of data analytics.