

SEC Enforcement Outlook For 2022

By **Dean Seal**

Law360 (January 3, 2022, 12:02 PM EST) -- It is by now a foregone conclusion to say that 2022 will be a bustling year for the U.S. Securities and Exchange Commission's enforcement division, which has spent the last six months rattling sabers and broadcasting a sweeping oversight agenda under its new leader.

Gurbir Grewal, technically SEC Chairman Gary Gensler's second choice for enforcement director, came to the agency at the end of July following three and a half years as New Jersey's unflinching attorney general, reinforcing expectations that Gensler's SEC would be tougher on Wall Street than the previous administration.

While enforcement against public companies dropped by nearly half between 2019 and 2021, the securities regulator has spent the past two years navigating the pandemic and transitioning to new leadership.

With the regulator's key personnel now in place, "everyone is expecting a lot to happen next year," according to Crowell & Moring LLP partner Rebecca Ricigliano, a former New York federal prosecutor.

Gensler, Grewal and other top SEC officials have been building out a laundry list of stated enforcement priorities since August, either in speeches or announcements that accompany enforcement actions. Former SEC attorneys and government investigation specialists say the message is clear: Get ready.

"The bottom line is, it's shaping up to be a time of potentially unprecedented SEC enforcement," Paul Hastings LLP partner Kenneth Herzinger told Law360. "There's no question that it's at least getting back to the same levels as under the Obama administration — at this point, it might even end up being more than under the Obama administration."

Here, Law360 takes a look at five types of SEC enforcement actions to look out for in 2022.

First-Of-Its-Kind

The final months of the SEC's last fiscal year, which ended Sept. 30, saw the agency launching and closing a series of "first-of-its-kind" actions that involved new applications of securities law and novel enforcement targets.

The SEC resolved its first case against an order and execution management system for operating as an unregistered broker-dealer, its first action involving securities that used decentralized finance, or "DeFi,"

technology, and its first settlement against an "alternative data provider," among others.

In another first, the SEC is just a few months into litigation against former biopharmaceutical executive Matthew Panuwat for allegedly engaging in "shadow trading," or using confidential information about his company to profitably trade on the stock of a rival firm, rather than his own.

While the case finds the SEC entering uncharted legal waters and likely facing some unique challenges, the agency always aims its "first-of-its-kind" actions at what it sees as "clear breaches of confidentiality, and duty, and fraud," Ricigliano of Crowell & Moring said.

"The SEC is all about monitoring the market and making sure that it's a fair and level playing field for the reasonable investor, that's what's going to drive them," she told Law360. "So when they see the conduct that's alleged in the Panuwat suit or the other cases, they're going to figure out a way to get it done."

More "firsts" like the Panuwat case are expected to come down the pike as the SEC continues to expand and amplify its enforcement regime. Akerman LLP partner Brian Miller said the regulator uses "first-of-its-kind" actions to "send a message to the marketplace about conduct the SEC believes is improper."

"The publicity attendant to these cases is greater, and the SEC believes they can effectively deliver a warning to others," Miller, a former SEC attorney, told Law360.

Insider Trading

Speaking of shadow trading, although SEC enforcement of insider trading dropped last year, actions such as the Panuwat case and a pair of suits over alleged sales of insider tips on dark web forums show the agency is taking a hard line on potential misuses of material nonpublic information.

Insider trading cases have always been a staple of the SEC's enforcement diet — as they have a direct connection to market integrity and tend to end favorably for the SEC, securities attorneys said — and advancements in the regulator's market surveillance tools have only made insider trading easier to detect.

The agency is also in the process of widening its insider trading remit. In June, Gensler said the SEC was working to overhaul the rule that shields corporate executives from insider trading accusations when they buy or sell their company's stock, having found that those so-called Rule 10b5-1 corporate stock plans leave "real cracks in our insider trading regime."

The commission proposed rules in December that would implement cooling-off periods, bar overlapping trading plans and require annual reporting of a company's newly adopted insider trading policies.

The disclosure requirements for corporate stock repurchases have also come under the microscope for potential abuses by issuers, leading the SEC to also propose a rule in December that would require more frequent and detailed disclosures.

"It's insider trading across the board, they're expanding it all the way around," Herzinger of Paul Hastings said. "They're really looking at unequal access to information."

Crypto

If the crypto community had any hopes that Gensler, who taught about blockchain technology at MIT, would be an evangelist for their industry, they're surely diminished by now.

The SEC has continued to churn out enforcement actions against players both big and small in the crypto space since Gensler's confirmation in April, and the chairman has been frank about his view that most crypto assets — he eschews the term "digital assets" — are securities under his agency's purview.

That view is currently being challenged in the SEC's incendiary court battle with Ripple Labs over the yearslong offering of its signature crypto asset, but while that litigation remains ongoing, the regulator is expected to continue its campaign against supposedly unregistered crypto offerings and may start digging into other areas of alleged wrongdoing as it sees fit.

The SEC is also starting to include individual defendants in its crypto enforcement actions and has forewarned that it is cracking down on crypto exchanges and DeFi platforms as well.

"There is zero doubt in my mind that the SEC will bring aggressive crypto cases," Miller of Akerman said. "This appears to be Chairman Gensler's highest priority."

Targeting Individuals

While every SEC administration tends to make some kind of commitment to holding individuals accountable, the reality is that some administrations home in on individual wrongdoing while others more often opt for settlements with just the public company at issue, several attorneys said.

"We have seen this pendulum swing back and forth over the years, and its comeback is as predictable as the tide," Miller said.

The current administration aims to join the latter group. Both Gensler and Grewal have emphasized individual accountability in recent speeches and stressed that "gatekeepers," from accountants to auditors to attorneys to compliance officers, will be a major focus for the SEC's enforcement division.

The SEC pursued individual defendants in 70% of enforcement actions filed last year, which is generally consistent with the levels seen in recent years. But Paul Hastings partner Herzinger said that he's already seen a shift from the previous administration, where "there was much less of a focus on individual accountability."

"When we would go to negotiate a settlement, we would not include individuals, and they wouldn't push for it," Herzinger said. "Now, the staff is pushing for including individuals in the charges. That's definitely a switch, from one to the next."

ESG

The regulator's interest in tackling environmental, social and governance issues is well documented, and while there hasn't been any ESG-centric enforcement yet, attorneys say it is likely just a matter of time.

The SEC assembled a 22-member enforcement task force last spring with the express mission of developing protocols for identifying misconduct around ESG-related disclosures. The agency's examinations division issued a risk alert one month later warning of deficiencies and internal control weaknesses that it found in examinations of investment advisers and funds regarding ESG investing.

ESG has also been a mainstay of Gensler's speeches in recent months, as well as various appearances in Congress, where he frequently has to deflect accusations of SEC overreach in the area with the refrain that investors want "consistent, comparable, and decision-useful" disclosures around climate risks and human capital.

Akerman partner Miller said he expects to see SEC actions in the coming year that target so-called "greenwashing," in which a company makes misrepresentations around the sustainability of its business or products.

"At first, I predict the SEC will bring cases against 'low-hanging fruit' of private companies raising funds by falsely claiming to be environmentally friendly," he said. "Then I predict we will see only a small handful of 'messaging' cases against public companies for overstating their ESG advantages."

--Editing by Jay Jackson Jr.

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