

SEC Enforcement: A Brief Review of 1Q22

I. Introduction

Analyzing the trends of SEC enforcement is key for many companies, particularly when evaluating their compliance systems. The work of the Enforcement Division during the first quarter of 2022 should be considered in the context of the still on-going pandemic. For nearly two years the Division's work has been hampered by its inability to sit across a table from a witness, pose questions, listen to the answer and do follow-up as appropriate. To be sure Zoom and Webex have been helpful. But looking at a computer screen is not the same as sitting across the table from the witness. Nevertheless, the Division has worked hard and at times achieved very good results despite the difficulties.

This analysis is divided into two parts. Part I will present the statistics for the first quarter of 2022. Part II will provide an analysis of trends drawn from the cases filed during the quarter.

II. The statistics

During the first quarter of 2022 the Commission filed 53 new enforcement actions, excluding tag-a-long, 12j actions and similar matters. The cases were spread out evenly over the three months of the quarter, although slightly fewer cases were brought as the period drew to a close.

While the cases initiated during the quarter were primarily civil injunctive actions, during the first two months of the period that was not the case in the third month of the period. In January, for example, ten civil injunctive actions were filed while eight administrative proceedings were initiated. The next month, however, the pattern reversed. Only nine civil injunctive actions were initiated while 13 administrative proceedings were commenced. In March, the pattern again reversed with almost all of the cases initiated in federal district court.

The number of actions brought in the first quarter appears to be consistent with those

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from earlier periods. For example, in the first quarter of 2020 the Commission filed 48 enforcement actions. Similarly, in the final quarter of 2020 the agency again filed 48 enforcement actions.

The numbers clearly show that more enforcement actions were filed in the first quarter of this year than in other comparable periods. Yet some would argue that a footnote is in order. During the first quarter of this year 12 of the enforcement actions involved only the failure of either an investment adviser or broker-dealer (there were six cases against investment advisers and six against broker-dealers) to file form CRS, a customer relationship summary. Each action was brought as an administrative proceeding. Some might suggest those actions differ from other more typical enforcement cases. Others may disagree. Hence the footnote. ‘

Finally, the categories into which the largest groups of actions for 1Q22 they were:

- 1) Investment advisers 18.8%
- 2) Insider trading 13.2%
- 3) Offering frauds 13.2%
- 4) Corporate/financial 7.5%

In contrast, the categories in the first quarter of 2021 were:

- 1) Misrepresentations 27%
- 2) Investment advisers 14%
- 3) Unregistered brokers 8%

Clearly the categories differ with the exception of actions focused on investment advisers, which has been something of a constant in recent periods. In contrast, the fourth quarter of 2021 was largely consistent with the results from the current period:

- 1) Investment advisers 16%
- 2) Insider trading 12.5%
- 3) Corporate/financial 10%

The difference in the categories for the two periods is the large group of cases that fall into the category of offering fraud actions in the first quarter of 2022. In the first quarter of 2022 there was a shift – many of the cases involve crypto assets in addition to those based on microcap fraud actions.

III. Analysis

During the first quarter of 2022 the Commission's enforcement program continued to experience difficulties from the pandemic. Equally clear is the fact that the "back to the future" enforcement approach that emerged at the end of last calendar year continues (here). That approach centers on filing actions in the traditional areas of focus for the Enforcement Division. Those have long been microcap fraud, investment advisers, offering fraud, insider trading and at times corporate and financial. Indeed, it was this approach that the Enforcement Director discussed in his October 2021 remarks (here).

Using a "Back to the Future" approach does not mean that the Division of Enforcement is being complacent or failing to consider emerging areas and trends. For example, during the first quarter the division filed a manipulation case keyed to scalping using Twitter – traditional manipulation technique, execution through new tech. *SEC v. Beck*, Civil Action No. 2:22-cv-00812 (C.D. Ca. Filed February 7, 2022).

Similarly, while the labels for the categories are the same from period to period, that does not necessarily mean the case mix within the group of cases in the category is identical from period to period. The best illustration of this is the "offering fraud" category. Traditionally, those cases are microcap fraud "pump-and-dump" actions. To be sure, a number of pump-and-dump cases were brought during the first quarter. The category also contained a large group of crypto asserts, a significant change. See, e.g. *SEC v. Crowd Machine, Inc.*, Civil Action No. 5:22cv-00076 (B.D. Ca. Filed January 6, 2022).

Finally, the number of cases filed during the period coupled with the updating of actions within the groupings suggests that the back to the future approach is working. Indeed, the Commission recently announced the addition of 20 new positions to a group within the division of enforcement that focuses on crypto actions, confirming the expansion of the traditional "offering fraud" category. Look for the approach to continue in the future.