



Senior Division of Enforcement officials from various U.S. Securities and Exchange Commission (SEC) offices spoke with SEC alumni, private practitioners, and other legal professionals at the Securities Enforcement Forum Central 2023 (the Forum) in Chicago, Illinois, on September 19, 2023.

In anticipation of the SEC's 2023 fiscal year-end on September 30, panelists discussed emerging trends in SEC enforcement investigations and actions over the past year. Specifically, Regional Directors highlighted assistance provided by whistleblowers in carrying out the SEC's oversight mission and emphasized the need to protect "main street" investors through gatekeeping and crypto enforcement actions. In addition, the Staff discussed other popular enforcement topics, including cybersecurity, financial disclosures, and insider trading.

## Whistleblowers

The Staff explained that over the past year, whistleblowers have played a larger role in SEC investigations based on thousands of tips received during the 2023 fiscal year. In fact, the Staff indicated that the SEC is only able to pursue approximately one-third of whistleblower tips due to the overwhelming amount received throughout the year. Although the number of unpursued tips has increased, whistleblowers still play an essential role in enforcement actions. For example, whistleblowers enhanced the Staff's ability to identify appropriate document custodians, assess the credibility of witnesses, and determine whether additional cooperators could provide meaningful assistance in ongoing investigations.

Practitioners agreed, noting that the Staff requested very specific information during investigations that would not have been apparent absent whistleblower participation and insight.

Accordingly, panelists discussed the importance of updating corporate antiretaliation policies that clarify the application of provisions of the federal securities laws that protect whistleblowers. Specifically, panelists pointed to a July 2021 holding in the U.S. District Court for the Southern District of New York that extended whistleblower protections to shareholders, making clear that those protections were not restricted to employee whistleblowers.

In addition, the Staff and practitioners are closely monitoring *Murray v. UBS Sec., LLC*, which will be argued before the U.S. Supreme Court in October 2023. The plaintiff in *UBS Sec.* alleges that his employer, a broker-dealer, terminated his employment because he reported alleged fraud, thereby violating the whistleblower protections under the Dodd-Frank Wall Street Reform and Consumer Protection Act and prohibitions on retaliation in the Sarbanes-Oxley Act (SOX). The Court will determine whether SOX requires the plaintiff to prove his employer acted with retaliatory intent or whether the employer must prove a lack of retaliatory intent. A ruling that places the burden of proof on employers may prompt regulated entities to update internal policies to require additional, more thorough documentation throughout the termination process.

## Gatekeeper Liability

Regional Directors also discussed the Staff's increased focus on matters pertaining to gatekeepers for three primary reasons. First, gatekeepers are the first line of defense in ensuring markets are functioning properly and investors—in particular, retail investors—are protected. Second, gatekeeper failures are often identified through investigation into unrelated violations from the same set of underlying facts, thereby conserving SEC resources. Third, gatekeeper failures are often recurring in nature, so deterrence through enforcement is important. The Staff discussed prior gatekeeping enforcement actions to level set and highlighted the SEC's view that gatekeepers include more than just attorneys and accountants.

Panelists referenced *Crowe*, a more "traditional" gatekeeper enforcement action, where an audit firm and two of its partners settled alleged securities law violations related to their significant audit failures. Crowe audited Corporate Resource Services, Inc., which went bankrupt in 2015 after the discovery of approximately \$100 million in unpaid federal payroll tax liabilities. The SEC found that the audit did not comply with Public Company Accounting Oversight Board (PCAOB) standards for several reasons. First, Crowe was not independent due to an ongoing direct business relationship with Corporate Resource Services. Second, the audit exhibited a number of deficiencies that left investors with a misleading picture of Corporate Resource Services' financial condition.

Panelists also discussed the SEC's view that gatekeepers include those that can affect and benefit larger portions of the securities market, like broker dealers, investment advisors, and fund administrators. For example, in [Apex](#), a firm providing administrative services to private funds missed or ignored clear indications of fraud while it was contracted to keep records and prepare financial statements and investor account statements for funds managed by other investment advisory firms. This case is significant because it made clear that the gatekeeper function applies to private fund administrators. There will likely be a continued emphasis on gatekeeping enforcement actions in the coming year.

## **Cryptocurrency**

While the SEC's interest in crypto during the 2023 fiscal year was not new, the Staff detailed the SEC's intent to clarify when and how crypto assets are regulated. The Staff reiterated the SEC's view that where cryptocurrencies are securities, registration and appropriate disclosure are required. The Staff also explained that, given the complex and novel nature of crypto, enforcement in this space is a "team sport" involving multiple government agencies and aimed at protecting less educated retail investors in underserved communities.

Panelists noted an uptick in "touting" enforcement actions based on celebrities' promotion of crypto assets. The Staff expressed the particular need to protect retail investors, as the Staff's stated view is that crypto is typically directly advertised to less financially educated investors in underserved communities who likely cannot withstand losses. Promoter disclosure obligations include disclosing that advertisers are being compensated to promote crypto, how much they are being compensated, and who is compensating them.

In addition, the Staff explained that in the crypto arena, it is not uncommon for multiple government agencies to initiate investigations into illegal acts, thereby increasing the opportunity for interagency collaboration. For example, the SEC may initiate parallel or joint investigations with the Commodities Futures Trading Commission (CFTC), DOJ, or other government agencies. At the same time, state regulators could initiate similar investigations. The Staff explained that jurisdictional priorities and the specific facts and circumstances of each case will ultimately dictate whether multiple agencies or one agency will bring an enforcement action. As the law continues to develop, the interplay between government entities and their respective enforcement actions will be significant.

## **Other Areas of Interest**

The Staff also discussed SEC leadership's focus on a number of other areas, including cybersecurity, financial disclosures, and insider trading. As anticipated, cybersecurity continues to be an enforcement priority, especially in light of the final cybersecurity disclosure rule amendments, which were adopted in July 2023. The SEC also remains interested in financial disclosures, and the Staff spoke about their willingness to engage in discussions with practitioners regarding materiality, especially where an issuer has determined that certain information is not material. Finally, the Staff indicated that the SEC is continuing to pursue insider trading cases, including through advanced means such as digital asset tracing. These types of enforcement actions have been—and likely will continue to be—a core focus of the SEC in the upcoming fiscal year.

## **Key Takeaways**

Reflecting on the 2023 fiscal year, Regional Directors discussed the increase in whistleblower tips and the invaluable assistance whistleblowers provide to their investigations, and highlighted the need to protect retail investors through enforcement actions in the gatekeeper and crypto arenas. In addition, the Staff made clear that the SEC is focused on cybersecurity, financial disclosures, and insider trading. We anticipate that the SEC will

continue to focus on these topics as we enter the new fiscal year.

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## Authors



### [Jose A. Lopez](#)

Partner

[JLopez@perkinscoie.com](mailto:JLopez@perkinscoie.com) [312.324.8672](tel:312.324.8672)



### [Kathryn Campbell](#)

Counsel

[KathrynCampbell@perkinscoie.com](mailto:KathrynCampbell@perkinscoie.com) [312.324.8529](tel:312.324.8529)



### [Gina Buschatzke](#)

Associate

[GBuschatzke@perkinscoie.com](mailto:GBuschatzke@perkinscoie.com) [312.324.8464](tel:312.324.8464)

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