



Senior Division of Enforcement officials from the U.S. Securities and Exchange Commission (SEC) spoke with SEC alumni, private practitioners, and other professionals at the Securities Enforcement Forum Central 2024 (the Forum), held on September 24 in Chicago—days before the SEC’s 2024 statistical year-end.

Forum panelists highlighted recent developments and trends in enforcement actions as the new government fiscal year commences. Notably, recent opinions from the Supreme Court of the United States (the Court) have placed the SEC—and administrative agencies at large—in the spotlight. Commentary during the Forum suggests the SEC does not anticipate a significant shift in the status quo and will remain steadfast in its mission to hold wrongdoers accountable. In addition, cooperation remained a significant topic of discussion, echoing previous forums and suggesting practitioners should be aware of how to take actions that may warrant cooperation credit

throughout an investigation.

## Key Developments

### Constitutionality of SEC's Administrative Proceedings

In the wake of the Court's June 2024 opinion in [SEC v. Jarkesy](#), panelists discussed its potentially transformational implications for the SEC. In *Jarkesy*, the constitutionality of the SEC's administrative proceedings was successfully challenged—the Court held that a defendant was entitled to a jury trial under the Seventh Amendment when the SEC sought civil penalties for securities fraud. In effect, this would force the SEC to bring most of its enforcement actions in federal court versus its own in-house administrative forum.

While the effects may be further reaching than initially anticipated, staff emphasized that the impact on SEC enforcement will be limited, as the *Jarkesy* holding is fairly narrow and the SEC has begun bringing its cases in federal courts and will continue to do so. Staff also explained that, given the choice, defendants may opt for the SEC's administrative tribunals for strategic considerations, such as the public nature and slower pace at which cases move in federal court. It remains to be seen where enforcement actions will be filed, but given the staff's desire to seek monetary penalties, it is likely we will see many more actions filed in federal court.

### Resources Shed Light on Cooperation

Cooperation remains at the forefront of conversations between private practitioners and staff. Staff panelists sought to clarify what constitutes cooperation and how the SEC evaluates it. The staff first pointed to Enforcement Director Gurbir Grewal's [remarks](#) at the May 2024 Securities Enforcement Forum West, which set forth various principles of effective cooperation. The staff also reiterated that SEC pronouncements—like Orders Instituting Proceedings (Orders)—are good resources since those, as Andrew Shoenthal, Counsel to the Chicago Regional Director, opined, “make very clear what cooperation is and is not.”

For example, the SEC recently [charged](#) 11 institutional investment managers for failing to file reports the SEC requires when such managers have discretion over more than \$100 million in certain securities. Two of the 11, Dixon Mitchell Investment Counsel, Inc. and Nationale-Nederlanden, did not receive any penalties as a result of their cooperation. The SEC also recently charged a number of credit reporting agencies with recordkeeping failures but agreed that two of the companies are not required to retain an independent compliance consultant as a result of their cooperation. We expect that the SEC will educate market participants by continuing to outline details of the cooperation credit that respondents receive in the SEC's public Orders. The challenge for the defense bar will be convincing the staff about the level of cooperation provided and the impact it should have on settlement discussions.

## Enforcement Agenda

### Digital Assets and Cryptocurrency

The Enforcement Division continues to focus on crypto; Crypto Assets and Cyber Unit Assistant Director Kristin Pauley confirmed that crypto enforcement is a “very high priority” since it poses significant risks to investors. Pauley highlighted the SEC's recently filed charges in federal court against entities and individuals engaged in “relationship investment scams.” In these types of scams, bad actors often hide their true identities, contact unsuspecting targets (often online or through text messages), gain their trust over time, and then defraud them through fake investments. She also pointed to the SEC's recent settlement with [eToro](#), which the SEC

found operated an unregistered broker and clearing agency through its trading platform that facilitated the purchase and sale of crypto assets as securities.

### **Insider Trading**

Panelists made clear that despite the difficulty in identifying insider trading and proving liability given that evidence is often circumstantial, these challenges would not impede the SEC and U.S. Department of Justice's (DOJ) prosecution efforts. Indeed, the Chief of the Securities and Commodities Fraud Section at the U.S. Attorney's Office for the Northern District of Illinois, Jason Yonan, explained the need to deter insider trading. He highlighted the SEC's willingness to prosecute insider trading cases, even where the agency may "lose" or where dollar amounts at issue are low, in order to send a message to the market.

In this same vein, the SEC has expanded the scope of its insider trading actions in recent years to include cases where trades were made exclusively pursuant to 10b5-1 trading plans. For example, in September 2022, in the first case of its kind, the SEC [charged](#) the CEO of Cheetah Mobile with insider trading because he sold shares pursuant to a 10b5-1 trading plan to avoid approximately \$300,000 in losses as a result. The DOJ similarly indicted (in early 2023) and won (in June 2024) its first case on the same theory, and the SEC brought [parallel charges](#). In this case, a healthcare executive entered into a 10b5-1 trading plan and traded the next day while in possession of material nonpublic information and, consequently, avoided approximately \$12.5 million in losses. Importantly, the DOJ [highlighted](#) that the safeguards of Rule 10b5-1 do not apply where the trading plan was not entered into in good faith.

Considering these cases, registrants would be wise to review their insider trading policies and assess whether they are broad enough—particularly provisions regarding 10b5-1 trading plans—and whether to conduct any employee training.

### **Key Takeaways**

Key takeaways from the Forum are:

- The agency will adjust its enforcement practices appropriately, despite challenges to its regulatory authority.
- Practitioners should look to recent SEC Orders and press releases to gain insight into cooperation.
- The SEC will continue to prioritize enforcement in the crypto space.
- Companies should review and update their insider trading policies as needed, consider whether additional training on those policies is warranted, and emphasize that 10b5-1 trading plans are not an automatic fail-safe to avoid regulatory action given the importance of the good faith requirement.

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