

CLIENT ALERT

SEC Enforcement – Top Developments from January 2024

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In January, securities regulators and their criminal enforcement counterparts picked up where they left off in 2023, pressing assertive enforcement actions across their remit. In this alert we briefly summarize the top five securities enforcement developments from the last month:

- A block trading investigation and resolution, featuring a rare deferred prosecution agreement;
- A novel action resolving violations of the whistleblower protection rules;
- A coordinated FCPA settlement between the SEC, Department of Justice, and global regulators;
- Hearings in two blockbuster crypto enforcement litigations: SEC v. Coinbase, Inc. and SEC v. Binance; and
- A SPAC IPO disclosure action, following on the heels of the adoption of new SPAC rules.

1. SEC and SDNY Resolve Block Trade Investigation

On January 12, 2024, the U.S. Securities and Exchange Commission (“SEC” or the “Commission”)¹ and the U.S. Attorney’s Office for the Southern District of New York² resolved parallel civil and criminal cases involving information concerning upcoming block trades. The criminal actions were resolved through a non-prosecution agreement between the government

¹ The SEC’s block trading resolution press release is available [here](#).

² The U.S. Attorney’s Office for the Southern District of New York’s block trading resolution press release is available [here](#).

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and a registered entity and a rare deferred prosecution agreement with an individual. Both the criminal and civil actions cited to the entity's policies and procedures, and other registrants may wish to consult the orders in benchmarking their own policies. More broadly, these settlements reflect a continuation of the government's heightened interest in policies and procedures around the dissemination of confidential information.³

2. SEC Brings Action Alleging Violation of Whistleblower Protection Provisions in Case Involving Customer Contracts

On January 16, 2024, the SEC settled charges involving the confidentiality provisions in a financial institution's settlement agreements with advisory clients and brokerage customers.⁴ According to the SEC's order, the agreements violated the whistleblower protection rules in Exchange Act Rule 21F-17(a) where they "did not permit voluntary communications with the Commission concerning potential securities law violations."

This recent action is notable for its expansion of the enforcement of the SEC whistleblower provisions to agreements with clients and customers. In the press release announcing the case, SEC enforcement staff suggested that they will take an expansive view of the scope of agreements implicating the whistleblower provisions. The SEC brought five enforcement actions involving the whistleblower provisions in 2023,⁵ and enforcement of the whistleblower provisions is likely to continue to be a key area of focus for the SEC. As a result, firms may wish to consider reviewing and updating their existing confidentiality agreements, policies and procedures, and training materials to promote compliance with Rule 21F-17.

3. SEC Brings FCPA Charges Against Global Software Company

On January 10, 2024, the SEC brought Foreign Corrupt Practices Act ("FCPA") bribery, recordkeeping, and internal accounting controls charges against a global software company for bribery schemes that the SEC alleges the company maintained in multiple nations around the globe.⁶ The software company, whose American Depositary Shares trade on the New York Stock Exchange, violated the FCPA by employing third-party intermediaries and consultants across a span of approximately seven years to pay bribes to government officials to obtain business with public sector customers in the countries mentioned above.

To settle the charges, the company agreed to cease and desist from causing any additional FCPA violations and to pay disgorgement and prejudgment interest totaling approximately \$98 million. The SEC's action comes as part of a coordinated global settlement between the U.S. Department of Justice ("DOJ") and criminal and civil authorities in South Africa.

Notably, the SEC brought charges for a broader range of conduct than the DOJ, signaling that the SEC is not afraid to occasionally stake a more aggressive prosecutorial position than other enforcement entities. In addition to the allegations

³ The SEC's policies and procedures resolution press release is available [here](#).

⁴ The SEC's whistleblower protections violation press release is available [here](#).

⁵ The SEC's Office of the Whistleblower Annual Report to Congress for Fiscal Year 2023 is available [here](#).

⁶ The SEC's FCPA resolution press release is available [here](#).

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of misconduct in South Africa and Indonesia common to both the SEC and DOJ's actions, the SEC's order also details bid-rigging and corrupt payments made by intermediaries on behalf of the company. The SEC also faulted the company for inaccurately recording various payments as commissions, lacking "internal accounting controls sufficient to detect or prevent such payments," and not having in place payment approval controls to ensure services were actually rendered before issuing such payments. Finally, the SEC found that the company had "insufficient formal monitoring" to "ensure" employees at the various subsidiaries were adhering to relevant policies.

Click [here](#) to read the Willkie Client Alert addressing this topic and learn more about the settlement with the SEC, DOJ, and international regulators.

4. District Courts Hear Oral Argument in SEC v. Coinbase, Inc. and SEC v. Binance Holdings Ltd.

On January 17, 2024, Judge Katherine Polk Failla of the Southern District of New York heard approximately five hours of oral argument between the Commission and Coinbase. This oral argument, which follows an earlier motion for judgment on the pleadings filed by Coinbase, is the latest courtroom development in the Commission's high-profile enforcement action against the crypto exchange, which was originally filed in June 2023.⁷

The parties largely adhered to their previously-stated arguments. The Commission argued that certain tokens traded on Coinbase's exchange constitute "securities" under U.S. law, and that Coinbase operates as an unregistered securities exchange, broker, and clearing agency. Coinbase again argued that the Commission lacks the authority to regulate Coinbase because: (i) none of the crypto tokens traded on their platform constitute securities; and (ii) the SEC's action against Coinbase's trading platform violates the "Major Questions Doctrine," which curbs the powers of executive agencies in adopting new regulatory schemes or programs absent a grant of authority from Congress.

The majority of the hearing was spent discussing various questions regarding whether crypto tokens constituted "investment contracts" under SEC v. Howey.⁸ Judge Failla posed questions regarding Coinbase's staking product, which allows users to deposit certain cryptocurrencies and earn a yield, as well as the Major Questions Doctrine discussed above. Judge Failla also had questions for the parties around what pleadings she could take into account when considering Coinbase's Fair Notice affirmative defense.

The following week, on January 22, 2024, Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia heard oral argument on Binance's motion to dismiss. In addition to allegations of registration violations, the SEC's case against Binance includes fraud charges.⁹ Throughout the hearing, Judge Berman Jackson focused questioning on the BNB token, which the SEC alleges Binance issued in an unregistered securities offering, and which, among other tokens, the

⁷ The SEC's Coinbase enforcement action press release is available [here](#).

⁸ 328 U.S. 293 (1946).

⁹ The SEC's Binance enforcement action press release is available [here](#).

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SEC alleges trades on Binance’s centralized exchange in violation of the federal securities laws. The Major Questions Doctrine was also a subject of questioning from Judge Berman Jackson.

At the conclusion of both hearings, the respective judges declined to issue rulings from the bench and will take more time to weigh the parties’ arguments. It will likely be a matter of months before either judge issues a ruling on the defendants’ motions.

Click [here](#) to read this Willkie Client Alert for additional context regarding the Commission’s enforcement action against Coinbase and other entities active in the crypto industry.

5. SEC Charges SPAC with Material Misrepresentations in IPO Disclosures

On January 25, 2024, the SEC settled charges against a SPAC for failing to disclose in its pre-IPO filings that it had initiated substantive merger discussions with a target company and that company’s controlling shareholder. Per the SEC’s order, the SPAC failed to disclose these pre-IPO merger discussions—which occurred approximately one month before the SPAC went public—in its subsequent Form S-4 Filing.¹⁰

The settlement came one day after the SEC’s adoption of new SPAC rules designed to increase pre-IPO and merger-related disclosures.¹¹ The SPAC rules require enhanced disclosures regarding conflicts of interest, SPAC sponsor compensation, and share dilution. The rules also require registrants to provide additional information about merger target companies to shareholders prior to business combination (de-SPAC) transactions. With the SPAC boom largely behind us, it remains to be seen what effect the adoption of the new SPAC rules will have on the number of actions, and the types of charges, brought against SPACs in the months to come.

¹⁰ The SEC’s SPAC material misrepresentations press release is available [here](#).

¹¹ The SEC’s new SPAC rules press release is available [here](#).

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