

CLIENT ALERT

SEC Enforcement Mid-Year Review: Vigorous Enforcement, Novel Theories, and Enhanced Remedies

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Introduction

The U.S. Securities and Exchange Commission (the “SEC” or the “Commission”) has had a busy start to its Fiscal Year 2023 enforcement program, continuing its vigorous approach to enforcement with its use of novel theories and enhanced remedies. The Commission’s zealous approach has been particularly evident with respect to all aspects of crypto, as the SEC has claimed jurisdiction over crypto exchanges,¹ lending platforms,² and other intermediaries by not only charging exchanges for failing to register with the Commission but also by enforcing the more traditional anti-fraud and anti-manipulation provisions of the Exchange Act.

A Heightened Focus on Crypto Lenders and Intermediaries

Crypto exchanges, lending platforms, and token issuers were top priorities for the Commission in the first half of Fiscal Year 2023, with a flurry of enforcement activity following the collapse of FTX Trading Ltd. (“FTX”). The SEC has been particularly

¹ “Crypto exchanges” typically refer to businesses which provide their customers with a platform to buy, sell, swap, or otherwise trade crypto assets in exchange for other crypto assets or conventional fiat currencies.

² “Crypto lending platforms” typically refer to businesses which allow their customers to lend or borrow crypto assets in exchange for some kind of pecuniary gain, most typically as some form of interest payable in crypto assets or fiat currencies.

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active in bringing enforcement actions against unregistered exchanges, as well as unregistered offers and sales of securities.

Crypto asset exchanges and their operators are under heightened SEC scrutiny as of late. The Commission, for example, charged crypto asset exchange platform Beaxy.com (“Beaxy”) and its founder Artak Hamazaspyan with the unregistered offering of securities arising out of the platform’s offer of Beaxy token (“BXY”).³ Windy, Inc. (“Windy”), the entity that came to operate and maintain the Beaxy platform following Hamazaspyan’s separation, and its executives were also the subjects of numerous charges, including operating an unregistered national exchange, clearing agency, and broker-dealer.⁴ Interestingly, a market maker who coordinated with Beaxy’s operators to maintain liquidity of BXY was also charged with operating as an unregistered broker dealer.⁵ By charging a market maker operating within an unregistered exchange, the Commission may be signaling a greater intent to prosecute not only exchanges, but also sophisticated entities that avail themselves of exchanges. The Commission assessed tens of thousands of dollars in civil penalties and disgorgement plus prejudgment interest against the platform, its executives in their individual capacities, and certain companies owned by the executives.⁶ As part of consent agreements filed in the U.S. District Court of the Northern District of Illinois, the SEC required the cooperating individuals to, among other things, cease operating the Beaxy platform, perform an accounting and return all customer assets and funds to each respective customer, and to destroy any and all BXY in their possession. Beaxy has since completely ceased operations.⁷

The Commission has also charged off-shore entities and individuals that are alleged to have interacted with U.S. investors and markets. On April 17, 2023, the SEC brought charges against U.S.-based crypto asset trading platform Bittrex, Inc. (“Bittrex”) and Bittrex Global, alleging that they operated a single order book in violation of the exchange registration provisions of the federal securities laws.⁸ As with Beaxy, the SEC also charged Bittrex with operating as an unregistered broker and unregistered clearing agent and Bittrex’s former CEO, William Shihara, as a control person of Bittrex.⁹ Just over two weeks earlier, Bittrex co-founder Richie Lai announced via tweet that Bittrex would begin winding down U.S. operations

³ SEC Press Release, SEC Charges Crypto Trading Platform Beaxy and Its Executives for Operating an Unregistered Exchange, Broker, and Clearing Agency (Apr. 3, 2023), <https://www.sec.gov/litigation/litreleases/2023/lr25687.htm>. Hamazaspyan has also been charged with securities fraud related to both the offer and purchase or sale of securities. Complaint ¶¶ 142-52, *SEC v. Beaxy Digital, Ltd.*, No. 1:23-cv-01962 (N.D. Ill. Mar. 29, 2023), Dkt. No. 1.

⁴ *Id.* ¶¶ 156-66. Nicholas Murphy and Randolph Bay Abbott were charged in their capacity as control persons of Windy. *Id.* ¶¶ 162–66.

⁵ *Id.* ¶¶ 167–69.

⁶ SEC Press Release, SEC Charges Crypto Trading Platform Beaxy and Its Executives for Operating an Unregistered Exchange, Broker, and Clearing Agency (Apr. 3, 2023), <https://www.sec.gov/litigation/litreleases/2023/lr25687.htm>.

⁷ *Id.*

⁸ SEC Press Release, SEC Charges Crypto Asset Trading Platform Bittrex and its Former CEO for Operating an Unregistered Exchange, Broker, and Clearing Agency (Apr. 17, 2023), <https://www.sec.gov/news/press-release/2023-78>.

⁹ *Id.*

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by April 30, 2023, citing, among other causes, “unclear” regulatory requirements.¹⁰ Lai also indicated that “all customer funds are safe and available to withdraw.”¹¹ In a same-day message on Bittrex’s website, Lai communicated that trading on the exchange for U.S. customers would terminate April 14, 2023.¹² Despite Bittrex’s public and apparently orderly withdrawal from the U.S. market, the SEC brought charges against Bittrex for operating as an unregistered exchange, broker, and clearing agency.¹³ In charging Bittrex after the termination of trading and mere days before the company’s planned withdrawal from the United States, the Commission sent a clear message that it is prioritizing enforcement actions against crypto intermediaries.¹⁴

Similarly, the SEC brought and settled charges against crypto lending firm Nexo Capital Inc. (“Nexo”) for failing to register the offer and sale of its “retail crypto asset lending product,” Earn Interest Product (“EIP”), after it had ceased the violative conduct.¹⁵ According to the SEC’s Order, Nexo promised investors interest payments in exchange for investors transferring custody of their crypto assets to Nexo. Nexo voluntarily ceased offering the EIP to new investors in February 2022 and ceased paying interest on any new crypto assets transferred by investors to existing EIP accounts. While Nexo voluntarily ceased expansion of its EIP program nearly a year before charges were formally brought, settling with the SEC and state regulators cost the exchange \$45 million in penalties, with half going to the SEC.

Extending Traditional Theories of Fraud and Manipulation to Cryptocurrency

The Commission’s aggressive enforcement of crypto has extended beyond just crypto platforms for registration violations. In recent months, the SEC has continued bringing actions against crypto executives and companies under more traditional theories of fraud and market manipulation.

The most widely publicized example of this is the Commission’s charging of four executives of FTX, once the world’s third-largest crypto exchange by trading volume, and its sister crypto hedge fund, Alameda Research LLC (“Alameda”), following FTX’s collapse in November 2022. While the SEC has yet to bring any charges against FTX itself, the Commission filed complaints against four of the top Alameda and FTX executives: Samuel Bankman-Fried (former CEO of FTX), Gary Wang (FTX’s former Chief Technology Officer), Caroline Ellison (former CEO of Alameda), and Nishad Singh (former Co-Lead

¹⁰ @richiela, TWITTER (Mar. 31, 2023, 3:06 p.m.) (Tweet from Richie Lai announcing Bittrex’s winding-down of U.S. activities), <https://twitter.com/richiela/status/1641879643497308161?cxt=HHwWgoDRqca1kMktAAAA>.

¹¹ *Id.*

¹² Important Message for Bittrex U.S. Customers, <https://bittrex.com/discover/important-message-for-bittrex-u-s-customers>.

¹³ SEC Press Release, SEC Charges Crypto Asset Trading Platform Bittrex and its Former CEO for Operating an Unregistered Exchange, Broker, and Clearing Agency (Apr. 17, 2023), <https://www.sec.gov/news/press-release/2023-78>.

¹⁴ Bittrex has since filed for bankruptcy. See Mengqi Sun & Becky Yerak, *Bittrex Files for Bankruptcy After SEC Sues the Crypto Platform*, WALL STREET JOURNAL (May 8, 2023), https://www.wsj.com/articles/crypto-platform-bittrex-files-for-bankruptcy-f4548b9c?mod=Searchresults_pos1&page=1.

¹⁵ SEC Press Release, Nexo Agrees to Pay \$45 Million in Penalties and Cease Unregistered Offering of Crypto Asset Lending Product (Jan. 19, 2023), <https://www.sec.gov/news/press-release/2023-11>.

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Engineer at FTX).¹⁶ The complaints, all of which were filed between early December 2022 and late February 2023, allege that the four executives deceived equity investors in FTX by touting FTX as a safe crypto asset trading platform, all while diverting FTX customer funds to Alameda for the hedge fund's own trading purposes, as well as paying Alameda's lenders and bankrolling Bankman-Fried's personal investments.¹⁷ The complaints against Wang, Ellison, and Singh allege that they knew or should have known their statements touting FTX's sophisticated risk mitigation measures and insisting that Alameda received no special treatment were false and misleading and that both Wang and Singh created the software code that allowed Alameda to divert customer funds, while Ellison worked alongside Bankman-Fried to manipulate the price of FTT, an FTX-issued "exchange token" that the SEC alleges was a security.¹⁸

The Commission has alleged that this conduct, which contributed to FTX's ruin and the loss of more than \$8 billion in customer assets, constitutes securities fraud under both Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act (and Rule 10(b)(5) thereunder).¹⁹ Wang, Ellison, and Singh settled with the Commission, agreeing to, among other things, prohibitions on their participation in the issuance, purchase, offer, or sale of any securities, except for trading in their own personal accounts.²⁰ The Commission's civil action against Bankman-Fried has been stayed pending resolution of a parallel criminal case filed by the U.S. Attorney's Office for the Southern District of New York.²¹

Continuing its pursuit of alleged securities fraud, the Commission filed a similar complaint against Singapore-based blockchain firm and stablecoin operator, Terraform Labs PTE Ltd. ("Terraform"), and its CEO, Do Hyeong Kwon, in February 2023.²² The SEC alleges that Terraform offered and sold unregistered crypto asset securities, LUNA and UST, to U.S.-

¹⁶ SEC Charges Samuel Bankman-Fried with Defrauding Investors in Crypto Asset Trading Platform FTX (Jan. 19, 2023), <https://www.sec.gov/litigation/litreleases/2023/lr25616.htm>; SEC Charges Caroline Ellison and Gary Wang with Defrauding Investors in Crypto Asset Trading Platform Ftx (Jan. 19, 2023), <https://www.sec.gov/litigation/litreleases/2023/lr25617.htm>; SEC Charges Nishad Singh with Defrauding Investors in Crypto Asset Trading Platform FTX (Feb. 28, 2023), <https://www.sec.gov/litigation/litreleases/2023/lr25617.htm>.

¹⁷ *Id.*

¹⁸ SEC Charges Caroline Ellison and Gary Wang with Defrauding Investors in Crypto Asset Trading Platform Ftx (Jan. 19, 2023), <https://www.sec.gov/litigation/litreleases/2023/lr25617.htm>; SEC Charges Nishad Singh with Defrauding Investors in Crypto Asset Trading Platform FTX (Feb. 28, 2023), <https://www.sec.gov/litigation/litreleases/2023/lr25652.htm>.

¹⁹ SEC Charges Samuel Bankman-Fried with Defrauding Investors in Crypto Asset Trading Platform FTX (Jan. 19, 2023), <https://www.sec.gov/litigation/litreleases/2023/lr25616.htm>; SEC Charges Caroline Ellison and Gary Wang with Defrauding Investors in Crypto Asset Trading Platform Ftx (Jan. 19, 2023), <https://www.sec.gov/litigation/litreleases/2023/lr25616.htm>; SEC Charges Nishad Singh with Defrauding Investors in Crypto Asset Trading Platform FTX (Feb. 28, 2023), <https://www.sec.gov/litigation/litreleases/2023/lr25652.htm>.

²⁰ SEC Charges Caroline Ellison and Gary Wang with Defrauding Investors in Crypto Asset Trading Platform Ftx (Jan. 19, 2023), <https://www.sec.gov/litigation/litreleases/2023/lr25617.htm>; SEC Charges Nishad Singh with Defrauding Investors in Crypto Asset Trading Platform FTX (Feb. 28, 2023), <https://www.sec.gov/litigation/litreleases/2023/lr25652.htm>.

²¹ Order on Notice of Motion to Intervene and Stay, *S.E.C. v. Bankman-Fried*, No. 22-cv-10501-PKC (S.D.N.Y. Feb. 13, 2023).

²² SEC Press Release, SEC Charges Terraform and CEO Do Kwon with Defrauding Investors in Crypto Schemes (Feb. 16, 2023), <https://www.sec.gov/news/press-release/2023-32>.

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based investors and that both Terraform and Kwon lied when promoting these securities, including by touting their profit potential and stability, despite clear flaws in Terraform's protocols and blockchain.²³

UST was supposedly an algorithmic stablecoin that was pegged 1:1 to the U.S. dollar through an algorithm tying its value to LUNA. Because a UST could be exchanged for \$1 worth of LUNA and vice versa, the algorithm theoretically provided opportunities for traders to help keep the price of UST pegged to one dollar.²⁴ In May 2021, the UST de-pegged temporarily.²⁵ Unbeknownst to the market, Kwon and Terraform signed a deal with a third party to put a large amount of UST into the system to get the price back to \$1.²⁶ Terraform then touted the success of the algorithm, and investors purchased billions more as a result. Subsequently, in May 2022, the UST de-pegged again.²⁷ Without the intervention of the third party, the UST and LUNA bottomed out, causing \$40 billion in losses.²⁸

While Terraform's collapse was one of the first big failures at the start of the crypto winter, the Commission's case against the stablecoin operator is based on novel legal theories that distinguish it from the other cases discussed herein. Kwon and his attorneys have asserted that the Commission's complaint is unfounded because LUNA and UST are currencies, not securities.²⁹ The SEC alleges, however, that UST is in fact a security because it could be exchanged for LUNA and is therefore a "receipt" or a "right to subscribe or purchase," as articulated in Section 2(a)(1) of the Securities Act.³⁰ Likewise, the Commission asserts that LUNA, UST, and other stablecoins within the Terraform ecosystem³¹ are "investment contracts," as delineated in the Supreme Court's decision in *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), and therefore constitute a security within the regulatory jurisdiction of the Commission.³² In this regard, as it relates specifically to UST, the SEC asserts that UST is also a security because it can be invested in Terraform's Anchor Protocol, a profit-bearing opportunity whereby investors deposited their UST into a "smart contract" in exchange for an advertised 20% return.³³

²³ *Id.*

²⁴ Complaint ¶ 4, *SEC v. Terraform Labs Pte Ltd.*, No. 1:23-cv-1346 (S.D.N.Y. Feb. 16, 2023), ECF No. 1 ("Terraform Complaint").

²⁵ *Id.* ¶ 156.

²⁶ *Id.* ¶ 157.

²⁷ *Id.* ¶ 169.

²⁸ *Id.* ¶ 170.

²⁹ Memorandum of Law in Support of Defendants' Motion to Dismiss the Amended Complaint, *SEC v. Terraform Labs PTE Ltd.*, No. 1:23-cv-1346 (S.D.N.Y. Apr. 21, 2023), ECF No. 28.

³⁰ Terraform Complaint ¶ 84.

³¹ In its complaint, the Commission also alleges that Terraform's mAssets, which were created through the Mirror Protocol and intended to "mirror" the price of stocks traded in traditional U.S. markets, constituted "security-based swaps" in violation of Section 5(e) of the Securities Act and Section 6(l) of the Exchange Act. Terraform Complaint ¶¶ 97–103. The SEC bases its allegation on the following facts: (1) the transactions were executed through an exchange of the investor's payment of collateral in exchange for the mAsset, (2) the financial risk associated with any future change in value of a security was transferred during the transaction, without also conveying any ownership interest in the underlying security, and (3) the transactions were effectuated through the Mirror Protocol with or for persons who were not eligible to participate in investment contracts. *Id.* ¶¶ 101–03.

³² *Id.* ¶ 23.

³³ *Id.* ¶ 69-75.

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In another complaint filed in January 2023, the Commission charged Avraham Eisenberg with securities fraud and market manipulation under Sections 9(a)(2) and 10(b) of the Exchange Act and Rules 10b-5(a) and (c) thereunder for coordinating an attack on the crypto asset trading platform, Mango Markets.³⁴ As with UST and LUNA, the Commission alleges that the MNGO token sold and traded on the Mango Markets platform is an “investment contract” and is therefore a security.³⁵ According to the Commission’s complaint, Eisenberg manipulated the MNGO token by engaging in a series of large purchases of thinly traded MNGO tokens to artificially raise the price of MNGO tokens.³⁶ With the price inflated, Eisenberg used the increased value of his MNGO futures position to borrow and withdraw over \$110 million worth of various crypto assets from Mango Markets.³⁷ Eisenberg has admitted to his actions but claims that they were not manipulation but rather a “highly profitable trading strategy.”³⁸

While the Commission has not charged Mango Markets with any securities law violations, the complaint against Eisenberg states that “MNGO Token’s ‘Governance’ Rights Are Illusory,” noting that the “‘governance’ afforded to MNGO token holders was limited and minimal.”³⁹ This could be a shot across the bow at decentralized finance and decentralized autonomous organizations like Mango Markets that have no official governing body and rather follow a “bottom-up” management approach, as the SEC recently posted a warning to investors that “[crypto asset] securities may lack important protections for investors.”⁴⁰

In yet another litigated action in March 2023, the Commission charged Justin Sun and three of his wholly owned companies, Tron Foundation Limited, BitTorrent Foundation Ltd., and Rainberry Inc. (formerly BitTorrent, Inc.), with fraud and market manipulation.⁴¹ The Commission’s complaint alleges that Sun and his companies conducted extensive wash trading, involving the simultaneous or near-simultaneous purchase and sale of securities to make the security appear actively traded without any change in beneficial ownership.⁴² As with the complaints against Terraform/Kwon and Eisenberg, the Commission’s complaint states that Tronix (“TRX”) and BitTorrent (“BTT”), the crypto assets offered and sold through Sun’s companies, constitute “investment contracts” and therefore securities under Section 2(a)(1) of the Securities Act.⁴³ The Sun complaint explicitly clarifies the Commission’s view that the token itself, rather than the initial offer or sale of the token,

³⁴ SEC Charges Avraham Eisenberg with Manipulating Mango Markets’ “Governance Token” to Steal \$116 Million of Crypto Assets (Jan. 23, 2023), <https://www.sec.gov/litigation/litreleases/2023/lr25623.htm>.

³⁵ Complaint ¶ 30, *SEC v. Eisenberg*, No. 1:23-cv-503 (S.D.N.Y. Jan. 20, 2023), ECF No. 1.

³⁶ *Id.* ¶ 3.

³⁷ *Id.* ¶ 5.

³⁸ *Id.* ¶ 105.

³⁹ *Id.* ¶ 55.

⁴⁰ Exercise Caution with Crypto Asset Securities: Investor Alert, SEC (Mar. 23, 2023), <https://www.sec.gov/oiea/investor-alerts-and-bulletins/exercise-caution-crypto-asset-securities-investor-alert>.

⁴¹ SEC Press Release, SEC Charges Crypto Entrepreneur Justin Sun and his Companies for Fraud and Other Securities Law Violations (March 22, 2023), <https://www.sec.gov/news/press-release/2023-59>.

⁴² *Id.*

⁴³ Complaint ¶ 20, *SEC v. Sun*, No. 23-cv-2433 (S.D.N.Y. Mar. 22, 2023), ECF No. 1.

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is the investment contract and therefore the token itself is a security.⁴⁴ Beyond fraud and market manipulation, the Commission also charged Sun with illegally orchestrating a scheme to pay celebrities to tout TRX and BTT without disclosing their compensation.⁴⁵

Aggressive Touting Action

Section 17(b) of the Securities Act makes it unlawful for any person to promote a security without disclosing the receipt and amount of consideration the individual received from an issuer. With the rise of crypto's popularity and its appeal to smaller, retail investors, the Commission has also taken an aggressive approach to charging cases of illegal touting, targeting well-known celebrities and social media influencers who gave publicity to the offerings.

For example, when the SEC filed its complaint against Sun and his companies, the Commission simultaneously charged a number of celebrities who failed to disclose that they received payments from Sun and his companies to advertise TRX and BTT.⁴⁶ Those celebrities included actresses Lindsay Lohan and Michele Mason (Kendra Lust), social media influencer Jake Paul, and musicians DeAndre Cortez Way (Soulja Boy), Austin Mahone, Miles Parks McCollum (Lil Yachty), Shaffer Smith (Ne-Yo), and Aliaune Thiam (Akon). All except Soulja Boy and Austin Mahone settled the charges by agreeing to pay a total of \$400,000 in disgorgement, interest, and penalties.⁴⁷

The charges against Tron's promoters came one month after the Commission charged NBA Hall of Famer Paul Pierce with making false or misleading statements about and illegally touting EMAX tokens, a crypto asset offered and sold on the EthereumMax website, without disclosing his compensation.⁴⁸ Pierce tweeted about EMAX on May 26, 2021, stating "I made more money with this crypto in the past month than I did with y'all [ESPN] all year" and linking the EthereumMax website.⁴⁹ Pierce settled his case, without admitting or denying the charges, and agreed to pay \$240,000 in disgorgement of profits, as well as \$1.1 million as a civil penalty. The case against Pierce followed the more widely publicized charging of media mogul Kim Kardashian in October 2022.⁵⁰ As with Pierce, Kardashian posted about EMAX to her Instagram page, including a link to the website, but likewise failed to disclose that EthereumMax had paid her \$250,000 for promoting their

⁴⁴ *Id.* ¶¶ 20, 47, 88.

⁴⁵ SEC Press Release, SEC Charges Crypto Entrepreneur Justin Sun and his Companies for Fraud and Other Securities Law Violations (March 22, 2023), <https://www.sec.gov/news/press-release/2023-59>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ SEC Press Release, SEC Charges NBA Hall of Famer Paul Pierce for Unlawfully Touting and Making Misleading Statements about Crypto Security (Feb. 17, 2023) <https://www.sec.gov/news/press-release/2023-34>.

⁴⁹ @paulpierce34, TWITTER (May 26, 2021, 2:59 p.m.) (Tweet from Paul Pierce touting EMAX) <https://twitter.com/paulpierce34/status/1397628485917577217?lang=en>.

⁵⁰ SEC Press Release, SEC Charges Kim Kardashian for Unlawfully Touting Crypto Security (Oct. 3, 2022), <https://www.sec.gov/news/press-release/2022-183>.

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token.⁵¹ Kardashian also agreed to disgorge her profits and pay a \$1 million civil penalty to settle the Commission's charges against her.⁵²

Familiar Names, New Approaches

While the Commission's enforcement activity against crypto exchanges and executives has invoked novel legal theories and increasingly large penalties, their application has hardly been constrained to the new industry on the block. Other issuers and registrants have been subject to increasingly large penalties, even for strictly rule-based violations. On February 3, 2023, the SEC announced a sizeable \$35 million settlement with Activision Blizzard, Inc. for the company's alleged violation of an Exchange Act rule for failing to maintain adequate disclosure controls, as well as for violating whistleblower protections.⁵³ The hefty penalty may be explained in part by the company's alleged practice of executing separation agreements with former employees requiring them to provide notice to the company if they received a request for information from the SEC staff. The charges, which do not carry allegations of fraud, typically elicit smaller penalties.

In addition, recent enforcement activity indicates that the Commission is more willing to pursue novel theories to prosecute alleged violations of the securities laws. On January 12, 2023, the SEC announced it had filed an action seeking to enforce a subpoena against the law firm Covington & Burling LLP ("Covington") to compel the names of nearly 300 of Covington's clients, raising a debate as to the limits of attorney-client privilege and evoking a strong reaction from the legal community.^{54,55} The SEC's subpoena application arose from an investigation into the Microsoft Hafnium cyberattack. In its filing, the SEC alleges that threat actors associated with the Microsoft Hafnium cyberattack also hacked Covington's computer network, gaining unlawful access to client files.⁵⁶ The SEC argues that obtaining the names of the affected clients will aid the Commission in identifying suspicious trading activity by the threat actors or others in those clients' securities, as well as assist the SEC in determining whether the impacted clients appropriately disclosed to the investing public any cybersecurity events in connection with the Microsoft Hafnium cyberattack.⁵⁷ At the time of this alert, litigation is ongoing.

⁵¹ John Hyatt, *The Untold Story Behind Emax, The Cryptocurrency Kim Kardashian Got Busted For Hyping*, FORBES (Nov. 11, 2022), <https://www.forbes.com/sites/johnhyatt/2022/11/11/the-untold-story-behind-emax-the-cryptocurrency-kim-kardashian-got-busted-for-hyping/?sh=8340d1c40d7b>.

⁵² SEC Press Release, SEC Charges Kim Kardashian for Unlawfully Touting Crypto Security (Oct. 3, 2022), <https://www.sec.gov/news/press-release/2022-183>.

⁵³ SEC Press Release, Activision Blizzard to Pay \$35 Million for Failing to Maintain Disclosure Controls Related to Complaints of Workplace Misconduct and Violating Whistleblower Protection Rule (Feb. 3, 2023), <https://www.sec.gov/news/press-release/2023-22>.

⁵⁴ Willkie Farr & Gallagher LLP joined 82 other law firms as amici curiae supporting Covington's opposition to the SEC's application. A copy of the filed amicus brief can be found here, https://fingfx.thomsonreuters.com/gfx/legaldocs/myvmoannqvr/CovingtonSEC_amicus.pdf.

⁵⁵ SEC Press Release, SEC Files Subpoena Enforcement Action Against Law Firm Covington & Burling LLP Seeking the Names of Entities Whose Non-Public Information Was Accessed by Threat Actors Who Accessed Covington's Computer Network (Jan. 12, 2023), <https://www.sec.gov/litigation/litleases/2023/lr25612.htm>.

⁵⁶ SEC's Application for an Order to Show Cause and for an Order Requiring Compliance with Subpoena, *SEC v. Covington & Burling LLP*, No. 1:23-mc-00002-APM (D.D.C. Jan. 10, 2023), ECF No. 1. <https://www.sec.gov/litigation/litleases/2023/application25612.pdf>.

⁵⁷ *Id.* at 2.

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Whether these bold and innovative arguments will prove successful, and potentially be utilized in future enforcement actions, remains to be seen.

Conclusion

The Commission's fiscal year started with a bang with a number of high profile cases, as the agency has ramped up its litigation docket relating to crypto assets. While much remains to be seen as to whether courts will agree with the legal theories put forth by the SEC in bringing crypto assets within its purview, it is clear that the Commission has no plans of letting up on its enforcement efforts. Across the entities subject to SEC jurisdiction, many companies and individuals are willing to agree to costly settlements, while the list of litigated actions pending in federal courts across the country continues to increase.

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