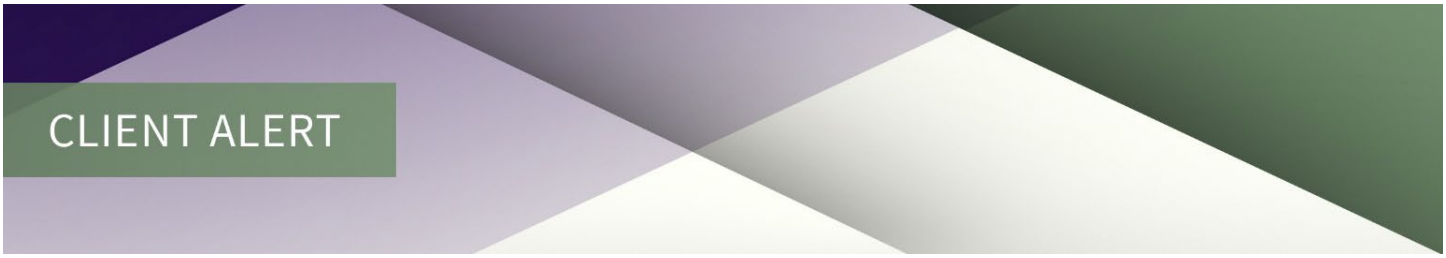

SEC Enforcement – Top Developments from February 2024

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In February, recordkeeping and Regulation Best Interest actions continued to pick up steam, while the Supreme Court provided clarification regarding the applicability of whistleblower protections. In this alert we briefly summarize the top five securities enforcement developments from the last month:

- The most recent round of recordkeeping enforcement actions brought against sixteen entities;
- A new Regulation Best Interest action addressing pricing discrepancies within a broker-dealer's IRA product;
- An action against an investment firm for failing to disclose the economics of an influencer's ETF promotional agreement;
- Clarification from the Supreme Court on when whistleblower retaliation protections are triggered; and
- A federal court's approval of the plea agreement between U.S. regulators, Binance, and its founder.

1. SEC Charges Sixteen Firms With Recordkeeping Violations

On February 9, the U.S. Securities and Exchange Commission ("SEC" or "Commission") settled charges with five broker-dealers, seven dually registered broker-dealers and investment advisers, and four affiliated investment advisers in connection with its ongoing off-channel communications probe.[1] The sixteen firms agreed to pay over $81 million in total penalties. These enforcement actions represents the latest in the SEC's ongoing pursuit of off-channel communications actions and brings the total number of such actions to 56.

In addition to monetary penalties, the firms also agreed to retain independent compliance consultants to conduct comprehensive reviews of the firms' policies and procedures relating to the retention of electronic communications on employee personal devices, as well as the firms' respective frameworks for addressing employee noncompliance with these policies and procedures.

Finally, the Commission underscored that one broker-dealer and its affiliated entities self-reported conduct and, according to the Commission, that self-report was credited in levying a reduced civil penalty.

2. Broker-Dealer Charged under Regulation Best Interest

On February 16, the SEC settled charges with a broker-dealer for failing to comply with Regulation Best Interest ("Reg BI") in connection with recommendations made to retail customers through the firm's IRA product.[2] The firm agreed to pay over $1 million in disgorgement plus prejudgment interest, as well as a $1.25 million civil penalty.

According to the SEC, the case arose from price differences in investment offerings between the firm's IRA product's pre-selected "core menu" and the optional "brokerage menu." In particular, the brokerage window offered lower-cost share classes of affiliated mutual funds also available in the core menu. This SEC order found that the availability of lower-cost share classes was not disclosed. As a result of the broker-dealer's failure to disclose the investment offerings' availability at a lower purchase price and the conflicts of interest it created, the broker-dealer was found to have violated Reg BI's General Obligation, as well as its Disclosure, Care, and Compliance Obligations, as customers who purchased products listed in the core menu wound up paying more than those customers who bought the same product through the brokerage menu.

Reg BI enforcement appears to be picking up steam. Recent Reg BI actions relate to a broader range of conduct as the SEC begins to test questions regarding Reg BI's scope, applicability, and requirements. As a result, firms may wish to

[1] The SEC's recordkeeping resolution press release is available here.

[2] The SEC's Reg BI resolution press release is available here.

consider reviewing and updating their existing products, policies and procedures, and training materials to promote compliance with Reg BI.

3. SEC Charges Investment Adviser for Failing to Disclose Influencer's Role with ETF Launch

Also on February 16, the SEC settled charges with a registered investment adviser related to, *inter alia*, its disclosures regarding the role of an influencer in promoting an ETF launch.[3] In an effort to incentivize the influencer's promotional and marketing activities regarding the ETF, the investment adviser agreed to provide a greater share of the investment adviser's management fee if the ETF achieved certain assets under management thresholds. However, according to the SEC, the specific terms of the influencer's agreement were not disclosed to the ETF's board of directors. Among other things, the Commission found that the adviser had violated Section 15(c) of the Investment Company Act of 1940, which requires an adviser to disclose information which may be reasonably necessary for a registered fund's board of directors to evaluate the terms of the adviser's contract. The adviser agreed to pay a $1.75 million penalty to settle the charges.

4. Supreme Court Clarifies Sarbanes-Oxley Whistleblower Requirements

On February 8, the Supreme Court issued a unanimous opinion in *Murray v. UBS Securities, LLC*, resolving a circuit split concerning whether, under the Sarbanes-Oxley Act of 2002, an employee-whistleblower must prove their employer acted with "retaliatory intent" when it took an unfavorable personnel action against the employee.[4] The Supreme Court held that retaliatory intent was not an element of 18 U.S.C. § 1514A, and that the employee-whistleblower must only prove that their protected activity was a contributing factor in the employer's unfavorable personnel decision.

While the Supreme Court has provided some clarity as to what an employee-whistleblower must prove in order to avail themselves of Sarbanes-Oxley's protections, the ruling also presents new questions for lower courts and enforcement authorities. For example, a company is not strictly required to continue employing a low-performing employee simply because they have made a whistleblower complaint, but it remains unclear what kind of documentary or deliberative efforts a publicly traded company must make in order to demonstrate it did not act with "retaliatory intent." Publicly traded companies should exercise great care and consult experienced counsel when evaluating whether to take an employment action concerning an employee-whistleblower.

Click here to read this Willkie Client Alert for additional context and analysis regarding the Supreme Court's recent ruling in *Murray.*

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[3] The SEC's influencer disclosure resolution press release is available here.

[4] No. 22-660, slip op. at 4 (U.S. Feb. 8, 2024).

5. Federal Court Approves Settlement Between U.S. Authorities, Binance, Founder

On February 23, Judge Richard Jones of the U.S. District Court for the Western District of Washington approved the terms of the settlement between Binance Holdings, Ltd., its founder Changpeng Zhao, and U.S. regulators. The terms of the settlement were negotiated and published by the U.S. Department of Justice, the U.S. Department of Treasury's Financial Crimes Enforcement Network and Office of Foreign Assets Control, and the U.S. Commodity Futures Trading Commission last November.[5] The settlement resolved allegations that Binance had violated the Bank Secrecy Act, the International Emergency Economic Powers Act, anti-money laundering laws, and failure to register as a money transmitting business.

The settlement is one of the largest and most sweeping resolutions in recent memory. Under the terms of the settlement, Binance is required to pay approximately $4.3 billion in penalties, must maintain an independent compliance monitor for up to five years, and its CEO, Zhao, must resign.

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[5] The DOJ's press release announcing the Binance settlement is available here.