

# SEC Enforcement Director Discusses Priorities, Off-Channel Communications, Crypto and ESG

November 15, 2023

In his remarks at the [2023 Berkeley Fall Forum on Corporate Governance](#), Gurbir Grewal, director of the Securities and Exchange Commission's Division of Enforcement, discussed the SEC's current enforcement priorities – including an investigative sweep related to the use of off-channel communications, regulation of cryptocurrencies, and developments in the area of environmental, social and governance (ESG). Among other takeaways, Director Grewal made clear that the enforcement division has been busy: Over this last fiscal year, the SEC not only brought **more** enforcement actions than in the prior fiscal year, but also – as Grewal emphasized – brought them **more quickly**. Read more of Grewal's insights below.

## Investigative sweep: off-channel communications

Grewal discussed a recent investigative sweep of registered broker-dealers and investment advisers regarding the firms' alleged failure to satisfy statutory recordkeeping obligations – specifically, by failing to maintain and preserve employees' off-channel electronic communications, including through third-party and ephemeral messaging applications, such as WhatsApp and Signal. According to Grewal, the SEC's inquiry started several years ago, when it began recognizing gaps in companies' document productions. Since then, the SEC has initiated dozens of actions, resulting in charging more than 30 firms with violations for failing to maintain and preserve electronic communications and assessing more than \$1.5 billion in related penalties. Most recently, in [August 2023](#) and [September 2023](#), the SEC announced settled charges against 21 firms that agreed to pay combined penalties of \$368 million.

Grewal explained that, in his view, this type of investigative strategy – bringing multiple coordinated actions at the same time against firms in a single industry – sends a stronger message to the market and has a more pronounced deterrent effect than does serially filing stand-alone cases.

In his remarks, Grewal also explained that the SEC's recent enforcement efforts are aimed at developing a culture of compliance and encouraged firms to self-report violations and take preemptive remediation measures. This reiterated a message from the SEC's September press release announcing settled charges against 10 firms, where Grewal noted that the penalty for one of the firms was significantly lower than the others and observed: "[There are real benefits to self-reporting, remediating and cooperating.](#)"

Read more about the SEC and Department of Justice's recent focus on employees' use of personal devices and off-channel communications for business purposes in [this March 2023 blog post](#) and [this January 2023 blog post](#).

## Cryptocurrency and digital assets

Grewal was asked to share the SEC's current thinking on the hotly debated question of whether digital assets are securities, including what factors the SEC considers when approaching this question. In response, Grewal observed that both lawyers practicing in this space and courts look to the *Howey* test to answer this question. He further noted that in *Howey*, the US Supreme Court explained that Congress intended the term "investment contract" to apply broadly to a variety of situations, that courts have since agreed this is a flexible approach capable of adaptation to new scenarios, and that using this framework, courts have found a "wide variety of offerings to constitute investment contracts" – including some crypto assets. Grewal emphasized that in his view, the point of *Howey* is that whether or not something is a security does not depend on a particular label, name or form, but rather on the economics of the offering given the totality of the circumstances.

According to Grewal, the SEC has brought more than 150 crypto actions to date. He encouraged people to review the SEC's public complaints and settled orders to see how it has applied *Howey* to this space.

## Developments in ESG

In recent years, there has been a growing focus on ESG considerations. Grewal explained that ESG matters – and, in

particular, risks posed by climate issues – have become increasingly important to both investors and companies' bottom lines. As a result, Grewal observed that more companies are discussing these issues, even in the absence of specific mandatory disclosure rules. Grewal emphasized that for the time being (unless and until particular disclosure rules for ESG-related statements go into effect), a company's statements about ESG and climate issues will be evaluated using the same long-standing disclosure principles that companies are familiar with – in other words, such disclosures must not be materially false or omit material information.

By way of example, Grewal referenced the [March 2023 settlement](#) of an [enforcement action](#) in which the SEC charged mining company Vale with making false and misleading claims about the safety of its dams. These statements were made prior to the January 2019 collapse of its dam in Brumadinho, Brazil, which killed 270 people, caused immeasurable environmental harm and led to a loss of more than \$4 billion in Vale's market capitalization. The SEC alleged that for years Vale knew the dam did not meet internationally recognized standards for dam safety, but the company's sustainability reports and other public filings nonetheless assured investors that it adhered to the "strictest international practices" in evaluating dam safety, and that all of its dams were certified in stable condition. Vale agreed to pay more than \$55 million in civil penalties and disgorgement to settle the SEC's charges.

## Individual accountability

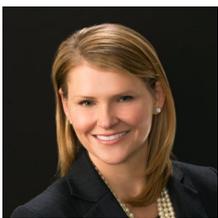
On the topic of individual accountability, Grewal noted that studies reflect the public has lost trust and confidence in our markets. In his view, holding executives accountable helps reestablish that trust by showing that everyone is subject to the same set of rules – while also sending a powerful deterrent message. For this reason, he noted, about two-thirds of the SEC's actions in recent years have involved charges against individuals.

Grewal's comments about the speed and volume of the Commission's recent enforcement activity are further underscored by the SEC's fiscal year 2023 enforcement results, which were just released. [Read more about the Commission's enforcement efforts over the last year here.](#)

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The *Howey* test comes from the Supreme Court's opinion in *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946). The test is used to determine whether an asset constitutes an "investment contract" and thus qualifies as a security under the federal securities laws. *See, e.g.*, 15 U.S.C. 77b(a)(1). In *Howey*, the Supreme Court held that "an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise." *Howey*, 328 U.S. at 298–99.

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