

(complaint filed Apr. 14, 2022) and *SEC v. Calabrigo*, No. 22 Civ. 3096 (S.D.N.Y.) (complaint filed Apr. 14, 2022), available at <https://www.sec.gov/news/press-release/2022-62>.

¹⁷One of the 15 trials in FY 22 was in *SEC v. Henry B. Sargent*, 19-cv-11416 (D. Mass). There, the jury returned a thirteenth FY 22 verdict in the SEC's favor, but a different judge of the court ruled that the trial judge's decision not to poll the jury constituted reversible error, vacating the verdict and ordering a new trial. The Commission was permitted to file an interlocutory appeal of this ruling. The Commission filed the interlocutory appeal, which is currently pending in the United States Court of Appeals for the First Circuit. See *SEC v. Henry B. Sargent*, App. No. 22-1596 (1st Cir.). A verdict for the SEC on any claim is treated as a win, unless it is later set aside by the trial court or on appeal.

¹⁸See Supreme Court of the State of New York Appellate Division: Second Judicial Department, "Orientation to the Profession" (Aug. 2006), available at <https://www.nycourts.gov/courts/ad2/forms/Law%20Guardian%20handbook/OrientationtotheProfessionProgramMaterials.pdf>.

¹⁹See *In re John W. Pauciulo, Esq.*, Release No. 33-11080 (July 7, 2022), available at <https://www.sec.gov/enforce/33-11080-s>. Without admitting or denying the SEC's findings, Pauciulo consented to an order finding that he violated the registration and antifraud provisions of Sections 5 and 17(a) of the Securities Act of 1933, and the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. Pauciulo also agreed to pay a \$125,000 civil penalty and consented to the imposition of a cease-and-desist order, and an order denying him the privilege of appearing or practicing before the SEC as an attorney, which includes the right to apply for reinstatement after five years.

²⁰See *SEC v. Coldicutt*, No. 22 Civ. 274 (S.D. Cal.) (complaint filed Mar. 1, 2022), available at <https://www.sec.gov/litigation/litreleases/2022/lr25338.htm>.

²¹See *In re Ernst & Young LLP*, Release No. 34-95167 (June 28, 2022), available at <https://www.sec.gov/news/press-release/2022-114>.

²²See *In re Deloitte Touche Tohmatsu Certified Public Accountants LLP*, Release No. 34-95938 (Sept. 29, 2022), available at <https://www.sec.gov/news/press-release/2022-176>.

²³See *In re TD Securities (USA) LLC*, Release No. 34-95751 (Sept. 13, 2022); *In re BNY Mellon Capital Markets, LLC*, Release No. 34-95750 (Sept. 13, 2022); *In re Jefferies LLC*, Release No. 34-95749 (Sept. 13, 2022); *SEC v. Oppenheimer & Co. Inc.*, No. 22 Civ.

7801 (S.D.N.Y.) (complaint filed Sept. 13, 2022), available at <https://www.sec.gov/news/press-release/2022-161>. The SEC's litigation against Oppenheimer is ongoing.

²⁴See Note 2.

²⁵See SEC Historical Society, available at https://www.sechistorical.org/collection/papers/1930/1934_05_23_Frankfurter_to_FD.pdf.

SEC/SRO UPDATE: DOJ OBTAINS FIRST CRIMINAL SHERMAN ACT MONOPOLIZATION CONVICTION IN DECADES; SEC PROPOSES NEW OVERSIGHT REQUIREMENTS FOR CERTAIN SERVICES OUTSOURCED BY INVESTMENT ADVISERS; SEC CHARGES MATTEL WITH FINANCIAL MISSTATEMENTS AND FORMER PWC AUDIT PARTNER WITH IMPROPER PROFESSIONAL CONDUCT

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DOJ Obtains First Criminal Sherman Act Monopolization Conviction in Decades

On October 31, 2022, the U.S. Department of Justice announced that it had obtained a guilty plea under Section 2 of the Sherman Act, representing the first criminal monopolization or attempted monopolization conviction for a Section 2 violation in over 40 years.

According to the indictment, Nephi Zito is the president and owner of a company located in Billings, Montana that provides crack sealing services on publicly-funded highway projects (identified in court documents as “Company A”).¹ Unnamed “Company B” is a paving and asphalt contractor that competes with Company A in bidding for crack sealing projects on highways in Wyoming and neighboring states. Company A and Company B are often the only bidders for such projects.

In January 2020, Zito proposed to the owner and president of Company B a “strategic partnership” pursuant to which (i) Company A would stop bidding for publicly-funded highway crack sealing projects in South Dakota and Nebraska, (ii) Company B would stop bidding for such projects in Montana and Wyoming, and (iii) Company A would pay Company B \$100,000 to compensate it for its loss of business in Montana and Wyoming. Unbeknownst to Zito, however, the president of Company B alerted the U.S. Department of Transportation and recorded a number of phone calls in which Zito spelled out the proposed arrangement. Zito further proposed a sham agreement that would have memorialized Zito’s proposed allocation of the companies’ markets while obscuring the true purpose of the arrangement.²

Zito pleaded guilty to one count of attempted monopolization in violation of the Sherman Act. He will be sentenced in February 2023 and faces a maximum sentence of 10 years’ imprisonment and a maximum fine of \$1 million.

Assistant Attorney General Jonathan Kanter of the Justice Department’s Antitrust Division stated that “[c]ongress criminalized monopolization and attempted monopolization to combat criminal conduct that subverts competition. The Justice Department will continue to prosecute blatant and illegitimate monopoly behavior that subjects the American public to harm.”

Although convictions of this type have been rare, it may not be surprising in that the Antitrust Division has made clear in recent months that it intends to pursue a

more aggressive enforcement agenda. In April 2022, for example, Mr. Kanter gave a speech in which he stated that “the era of lax enforcement is over, and the new era of vigorous and effective antitrust law enforcement has begun.”³

SEC Proposes New Oversight Requirements for Certain Services Outsourced by Investment Advisers

On October 26, 2022, the SEC proposed a new rule and amendments to rules under the Investment Advisers Act of 1940 (the “Advisers Act”) to prohibit registered investment advisers (“advisers”) from outsourcing certain functions and services without first meeting certain minimum requirements, including a requirement that an adviser conduct due diligence prior to engaging a service provider (the “Proposal”).

If adopted, proposed Rule 206(4)-11 under the Advisers Act would apply to SEC-registered advisers that outsource a “covered function.” Covered functions would not cover all functions outsourced by an adviser; for example, clerical, ministerial, utility, or general office functions or services would be excluded. “Covered functions” would include functions that meet the following two elements:

1. those necessary for the adviser to provide its investment advisory services in compliance with Federal securities laws; and
2. those that, if not performed or performed negligently, would be reasonably likely to cause a material negative impact on the adviser’s clients or on the adviser’s ability to provide investment advisory services.⁴

Before an adviser engages a service provider to perform a covered function, the Proposal would require the adviser to “reasonably identify and determine through due diligence that it would be appropriate to outsource the covered function, and that it would be appropriate to select that service provider,”⁵ by considering:

- The nature and scope of the services;
- Potential risks resulting from the service provider performing the covered function, including how to mitigate and manage such risks;
- The service provider's competence, capacity, and resources necessary to perform the covered function;
- The service provider's subcontracting arrangements related to the covered function;
- Coordination with the service provider for Federal securities law compliance; and
- The orderly termination of the provision of the covered function by the service provider.

Advisers would also be required to periodically monitor the performance and reassess the retention of the service provider in accordance with due diligence requirements to “reasonably determine that it is appropriate to continue to outsource those services or functions to that service provider.”⁶

With respect to third-party recordkeepers, the Proposal would require the adviser to obtain reasonable assurances that the third party will meet four standards addressing the recordkeeper's ability to:

- adopt and implement internal processes and/or systems for making and/or keeping records that meet the requirements of the recordkeeping rule applicable to the adviser in providing services to the adviser;
- make and/or keep records that meet all of the requirements of the recordkeeping rule applicable to the adviser;
- provide access to electronic records; and
- ensure the continued availability of records if the third party's operations or relationship with the adviser cease.

The Proposal also included proposed amendments to Form ADV that would require advisers to provide census-type information about outsourced functions.

The period to provide comments on the Proposal closes on December 27, 2022.

SEC Charges Mattel with Financial Misstatements and Former PwC Audit Partner with Improper Professional Conduct

On October 21, 2022, the SEC announced that Mattel, Inc. (“Mattel”) agreed to pay \$3.5 million to settle charges related to misstatements in Mattel's third and fourth quarter 2017 financial statements.⁷ The SEC also initiated a proceeding against a former audit partner at PricewaterhouseCoopers LLP (“PwC”) regarding whether the former audit partner engaged in improper professional conduct and violated auditor independence rules.⁸

According to the SEC's order (the “Mattel Order”), in 2019 Mattel disclosed in a Form 8-K that it was made aware of a letter from an anonymous whistleblower alleging accounting errors and questioning the independence of Mattel's then lead engagement partner from Mattel.⁹ As described in the Mattel Order, an independent internal investigation initiated by Mattel's audit committee “concluded that there were material misstatements in the tax-related valuation allowance for Q3 2017, which was understated by \$109 million, and in the tax expense for Q4 2017, which was overstated by \$109 million.”¹⁰

In a separate order (the “Separate Order”) related to the former audit partner, the SEC alleges that the former audit partner violated professional standards in connection with the third quarter 2017 interim review and 2017 annual audit.¹¹ As described in the SEC's press release (the “Press Release”) announcing the charges, the SEC's Separate Order alleges that the former audit partner, “failed to verify that the uncorrected \$109 million error was documented, despite knowing of it, and failed to communicate the error to Mattel's audit committee . . .,” and “failed to maintain independence by

providing prohibited human resource advice to Mattel, including suggesting to Mattel's then-CFO which candidate would be the best fit for a senior position at the company, as well as who should not be hired."¹²

The Mattel Order found that Mattel violated the negligence-based anti-fraud provisions and provisions relating to reporting, books and records, and internal controls under the Securities Act of 1933 and the Securities Exchange Act of 1934. Without admitting or denying the findings, Mattel agreed to pay a \$3.5 million civil penalty and also agreed to a cease-and-desist order.¹³ Additionally, the Press Release notes that the matter involving the former lead audit partner will be scheduled for a public hearing before the SEC to determine whether the SEC's Enforcement Division proved the allegations in the Separate Order and what (if any) remedial actions are appropriate.¹⁴

[34-96127.pdf](#).

¹²See <https://www.sec.gov/news/press-release/2022-189>.

¹³See <https://www.sec.gov/news/press-release/2022-189>.

¹⁴See <https://www.sec.gov/news/press-release/2022-189>.

ENDNOTES:

¹See <https://www.justice.gov/opa/pr/executive-pleads-guilty-criminal-attempted-monopolization>.

²See <https://www.justice.gov/opa/press-release/file/1543701/download>.

³See <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler>.

⁴See <https://www.sec.gov/rules/proposed/2022/ia-6176.pdf>.

⁵See <https://www.sec.gov/rules/proposed/2022/ia-6176.pdf>.

⁶See <https://www.sec.gov/rules/proposed/2022/ia-6176.pdf>.

⁷See <https://www.sec.gov/news/press-release/2022-189>.

⁸See <https://www.sec.gov/news/press-release/2022-189>.

⁹See <https://www.sec.gov/litigation/admin/2022/33-11122.pdf>.

¹⁰See <https://www.sec.gov/litigation/admin/2022/33-11122.pdf>.

¹¹See <https://www.sec.gov/news/press-release/2022-189>; <https://www.sec.gov/litigation/admin/2022/>