



SEC Announces Enforcement Action Against Gatekeepers

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On September 16, 2024, the Securities and Exchange Commission (SEC) filed securities fraud charges (the Enforcement Action) against the former chief executive officer (CEO), former chief financial officer (CFO), and former audit committee chair (the AC Chair) of Kubient Inc. (Kubient), a technology company that provided services to the digital-advertising industry via a cloud-based software platform.^[1]

The complaints (the Complaints) filed in connection with the Enforcement Action allege that Kubient's CEO engaged in deceptive acts and practices to falsely inflate revenue generated by Kubient Artificial Intelligence (KAI), Kubient's flagship product, which was designed to detect fraud during digital-advertising auctions. The Complaints allege that the CEO instructed employees to fabricate KAI fraud analysis reports and further instructed the CFO to send the fabricated reports to Kubient's independent auditor, leading to false revenue recognition of \$1.3 million. The scheme is alleged to have been an effort to show the success of KAI ahead of Kubient's initial public offering in August 2020 (the IPO) and follow-on offering in December 2020 (the Follow-On). The inflated revenue was disclosed in the offering materials for both the IPO and the Follow-On, as well as in Kubient's Form 10-K for 2020.^[2]

The Complaints further allege that the CFO and the AC Chair actively engaged in a scheme to mislead Kubient's investors and independent auditor. According to the Complaints, the CFO and the AC Chair learned of the scheme prior to the launch of the Follow-On, yet took no actions to properly investigate the fraud or correct any of the misstatements to the public. Despite receiving credible evidence from an employee that the KAI fraud analysis reports had been fabricated, neither the CFO nor the AC Chair relayed the information to Kubient's independent auditor. Moreover, the AC Chair is alleged to have excluded the independent auditor from an audit committee meeting where the employee's concerns were discussed, concealed the meeting from the independent auditor, and falsely stated to the independent auditor that she was unaware of any tips or complaints regarding Kubient's financial reporting and had no knowledge of any fraud or suspected fraud affecting the company.^[3]

KEY TAKEAWAYS

This Enforcement Action is one of only a few instances in which the SEC has filed charges against an audit committee chair, but it highlights the important role of gatekeepers and the standards to which the SEC may hold them. In the press release announcing the Enforcement Action, Jason J. Burt, Director of the SEC's Denver Regional Office, noted that "this case should send an important signal to gatekeepers like CFOs and audit committee

members that the SEC and the investing public expect responsible behavior when critical issues are brought to their attention.”^[4]

While the failures of the CFO and the AC Chair may seem clear in this case, it is nonetheless a reminder to all gatekeepers to provide proper oversight, investigate all red flags, and take prompt corrective actions when necessary. This important role extends beyond directors and executive officers of a company to other individuals, such as attorneys, auditors, and underwriters, who also “have a role as gatekeepers in upholding the law.”^[5]

In a warning to securities lawyers during his speech before the Practising Law Institute’s 54th Annual Institute on Securities Regulation, SEC Chair Gary Gensler stated, “When lawyers—or other gatekeepers, like auditors and underwriters—breach their positions of trust and violate the securities laws, we will not hesitate to take action.”^[6]

The recent presidential election could lead to significant changes in the SEC’s enforcement policies, as priorities and regulatory approaches often shift with new leadership. Consequently, gatekeepers—including executives, committee members, attorneys, and underwriters—should remain vigilant, as any changes in leadership may influence the SEC’s focus and approach to enforcement in the years ahead.

Winston’s *Capital Markets and Securities Law Watch* will continue to monitor developments in this area and will provide our readers with updates.

[1] <https://www.sec.gov/files/litigation/complaints/2024/comp26107.pdf>;
<https://www.sec.gov/files/litigation/complaints/2024/comp-pr2024-131.pdf>

[2] <https://www.sec.gov/files/litigation/complaints/2024/comp26107.pdf>

[3] <https://www.sec.gov/files/litigation/complaints/2024/comp-pr2024-131.pdf>

[4] <https://www.sec.gov/newsroom/press-releases/2024-131>

[5] <https://www.sec.gov/newsroom/speeches-statements/gensler-remarks-practising-law-institute-110222>

[6] <https://www.sec.gov/newsroom/speeches-statements/gensler-remarks-practising-law-institute-110222>
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