

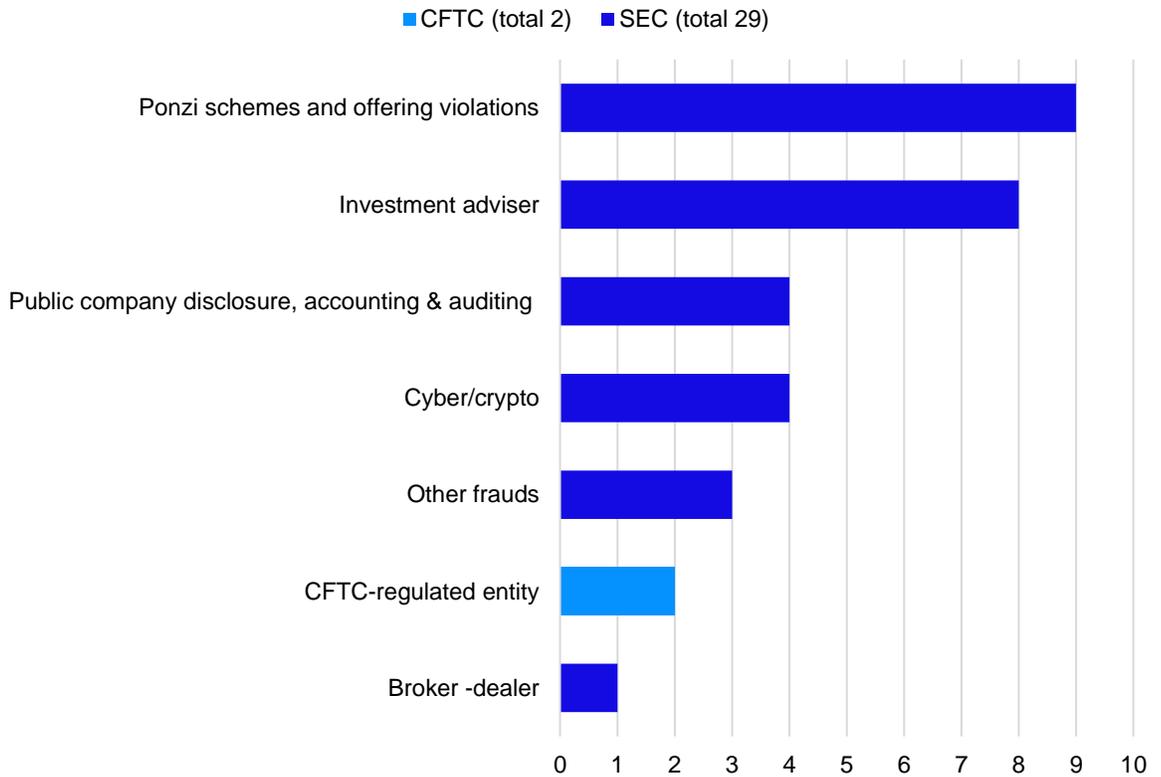
# SEC & CFTC Enforcement Update

November and December 2023

In November and December 2023, the SEC filed 29 actions and the CFTC filed two, against a combined total of 74 defendants and respondents. (These figures exclude follow-on actions, bars and suspensions.) The actions include investment adviser violations, public company disclosures, and Ponzi schemes.

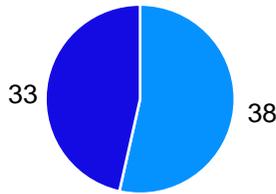
## Actions initiated by the SEC and CFTC in November and December 2023

Number of actions, by matter type

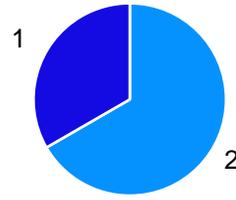


Types of defendants/respondents

SEC (total 71)



CFTC (total 3)



■ Individuals    ■ Corporate entities

Insider trading

SEC shadow insider trading case survives motion for summary judgment

SEC v. Matthew Panuwat (N.D. Cal. August 17, 2021, contested)

A novel SEC action alleging so-called “shadow insider trading” survived a motion for summary judgment. The case centers on the alleged actions of Matthew Panuwat, the former head of business development of a California-based biopharmaceutical company, Medivation, Inc. According to the SEC, Panuwat learned material, nonpublic information that Medivation was going to be acquired by a major pharmaceutical company at a significant premium. The SEC alleges that shortly after learning this news, Panuwat purchased short-term, out-of-the-money stock options in Incyte Corp., a biopharmaceutical company of a similar size and scale, believing that the price of the stock would rise after news of Medivation’s acquisition becoming public. This suit represents the first attempt to extend the misappropriation theory of insider trading to cover trading in the securities of a company based on material nonpublic information about the acquisition of a different, economically similar company. We previously discussed the case in a [client memo](#) when it survived a motion to dismiss.

The District Court denied Panuwat’s motion for summary judgment, finding that the SEC had shown genuine disputes of material fact on the issues of whether Panuwat received nonpublic information, whether that information was material to Incyte, whether Panuwat breached his duty to Medivation, and whether he acted with the requisite scienter.

[SEC complaint](#) | [Order](#)

Public company disclosures

SEC settles action related to internal accounting controls

In the Matter of Charter Communications (A.P. Nov. 14, 2023, settled)

The SEC brought and settled claims against a publicly traded broadband connectivity company for alleged failure to devise and maintain internal accounting controls sufficient to provide reasonable assurances that the Company’s trading plans followed management authorizations by satisfying Rule 10b5-1.

As we explained in a recent [client memo](#), the Company’s Board of Directors authorized stock buybacks conditional on satisfying the affirmative defense to insider trading provided by Rule 10b5-1. The SEC alleged that because the Company had the discretion to change the total dollar amounts available for share repurchases and the timing of additional repurchases, the activity did not satisfy the rule. The SEC acknowledged that the Company’s internal controls were sufficient to ensure that the Company obtain share repurchase authorization from the Board, stay within the financial limits and guidelines set by the Board, and confirm that the buybacks were accurately recorded in its accounts and ledgers. According to the SEC, those internal controls did not sufficiently evaluate whether the discretionary element of these trading plans met the elements of Rule 10b5-1 and therefore whether the plans were consistent with the Board’s authorizations.

The Company agreed to pay a \$25 million civil penalty to settle the action.

[SEC press release](#) | [SEC order](#)

## SEC settles action against mining company and former CEO for allegedly filing misleading statements

### SEC v. Rio Tinto, et al. (S.D.N.Y. November 20, 2023, settled)

The SEC settled claims against a publicly traded mining company and its former CEO for allegedly filing misleading statements regarding the value of its foreign coal assets. The case had been in litigation since 2017, and the settlement followed recent court rulings that dismissed some of the SEC's most serious allegations.

According to the SEC, the Company purchased a coal business in Mozambique for \$3.7 billion. The SEC alleged that within a year the business was capable of selling approximately five percent of the coal expected at purchase, and the mine contained significantly less and lower quality coal than assumed at purchase. The SEC alleged that the Company and its CEO and CFO concealed this analysis and valued the coal business publicly at \$3 billion. The Company then allegedly incorporated these misleading statements into U.S. debt offerings raising \$5.5 billion. The SEC alleges that, after the discovery of the concealment, the business was valued at only \$50 million within three years of the original acquisition.

The case settled following a District Court's dismissal of the SEC's scheme liability claims under Exchange Act Section 10(b), ruling that scheme liability requires more than a false statement or omission. The Second Circuit affirmed that decision.

The Company agreed to a settlement that included only non-fraud reporting and books and records violations, and payment of \$28 million as a civil penalty. The Company also agreed to retain an independent consultant to evaluate its compliance with accounting standards and to cooperate in the SEC's ongoing litigation against the Company's former CFO Guy Elliot. Finally, the former CEO agreed to pay a \$50,000 civil penalty and to cooperate in the SEC's ongoing litigation.

[SEC press release](#) | [SEC complaint](#) | [Order](#)

## SEC brings action against Nigerian conglomerate and its CEO for inflating its revenue and assets, as well as misappropriating funds

### SEC v. Mmobuosi Odogwu Banye, et al. (S.D.N.Y. December 18, 2023, contested)

The SEC brought claims against Mmobuosi Odogwu Banye and three companies he controlled: Tingo Group, Agri-Fintech Holdings, and Tingo International Holdings, Inc. According to the SEC, Banye materially overstated the revenues, profits, and assets of the three companies he controlled in SEC filings, public statements, and records provided to auditors. The SEC alleged that Banye recorded billions of dollars in non-existent revenues and hundreds of millions of dollars in nonexistent assets. In March of 2023 Tingo Group filed a Form 10-K reporting a cash balance of \$461.7 million, while the SEC alleges that the bank accounts listed in fact held less than \$50.

The SEC further alleged that Banye used his control over the three entities to effect a merger at a highly inflated value, and engaged in insider trading to benefit from the transaction. According to the SEC, Banye also misappropriated hundreds of millions of dollars in company assets to fund luxury purchases and an attempt to purchase an English Premier League Football Club.

The SEC seeks to permanently enjoin Banye from violating securities laws and require him to pay civil penalties, disgorge all ill-gotten gains, and return all bonuses and profits obtained from sale of stock in the companies, pursuant to Section 304 of the Sarbanes-Oxley Act.

[SEC press release](#) | [SEC complaint](#)

**SEC brings action for operating as an unregistered securities exchange, broker, dealer, and clearing agency****SEC v. Payward Inc., et al. (N.D. Cal. Nov. 20, 2023, contested)**

The SEC brought claims against two related companies for allegedly operating the Kraken crypto trading platform as an unregistered securities exchange, broker, dealer, and clearing agency.

According to the SEC, the Companies allegedly provided traditional services of an exchange, broker, dealer, and clearing agency, including facilitating transactions in crypto assets in several ways, but failed to register these offerings with the SEC. The Complaint also alleges that the Companies commingle customer money with their own, including paying operational expenses from accounts that hold cash belonging to its customers.

The SEC seeks to permanently enjoin all defendants from violating securities laws along with payment of disgorgement and civil penalties. The defendants previously had settled, earlier in 2023, SEC claims of unregistered offerings.

[SEC press release](#) | [SEC complaint](#) | [Prior settlement](#)

**SEC brings action against firm and its executive team for fraud and unregistered offering of crypto securities****SEC v. Safemoon LLC, et al. (S.D.N.Y. Nov. 1, 2023, contested)**

The SEC brought claims against two related companies involved in the sale of a crypto asset, as well as the Companies' founder, CEO, and CTO, for the alleged unregistered sale of the crypto asset.

According to the SEC, the founder of the crypto asset told investors that funds held in the liquidity pool could not be withdrawn by anyone, including the CEO and CTO. The CEO and CTO allegedly amplified these representations through social media posts and other public communications. Instead, the Companies withdrew funds and misappropriated more than \$200 million for personal purchases, including luxury cars, travel, and homes. The SEC also alleges that the individuals misappropriated funds to engage in wash trading, with the goal of manipulating the price of the asset to fraudulently attract new investors.

The SEC seeks to permanently enjoin all defendants from violating securities laws and prohibit defendants from participating in future offerings of any crypto assets, along with disgorgement and civil penalties.

[SEC press release](#) | [SEC complaint](#)

**Private offering fraud****SEC brings action against founder and CEO of medical device company for making false and misleading statements to investors****SEC v. Laura Tyler Perryman (S.D.N.Y. Dec. 19, 2023, contested)**

The SEC has brought claims against the founder and CEO of a Florida-based medical device company, Stimwave, for allegedly making materially false and misleading statements to investors during Stimwave's Series D funding round.

According to the SEC, the founder raised \$41 million from investors by misrepresenting that the Company's flagship device was FDA approved and the only peripheral effective nerve stimulation device on the market. The SEC alleges that the product was functionless and was surgically implanted in patients by several doctors under the false belief that it contained therapeutic properties. The founder also made alleged misrepresentations about Stimwave's historical revenues and ability to reliably generate revenue in the future.

The SEC seeks to permanently enjoin the founder from violating securities laws and prohibit her from participating in future security offerings, along with disgorgement and civil penalties.

[SEC press release](#) | [SEC complaint](#)

## Other SEC, CFTC actions and announcements

### SEC admits error in action against a crypto asset company

#### SEC v. Digital Licensing Inc., et al. (D. Utah Dec. 21, 2023, contested)

The SEC has acknowledged that in a case against a Utah based crypto asset company and 17 related individuals, it made an inaccurate representation in an *ex parte* application for a temporary restraining order (“TRO”) and failed to correct it upon learning of its inaccuracy.

Specifically, the SEC applied for a TRO, an asset freeze, and appointment of a receiver contemporaneously with the complaint. A TRO hearing was held on July 28, 2023, in which the SEC stated that the Company had closed around 33 bank accounts in the last 48 hours. On September 12, 2023, the defendants moved to dissolve the TRO, stating that there were no bank closures in July. The SEC’s opposition brief did not acknowledge that this contention was correct. The Court dissolved the TRO on October 6, 2023, and on November 30, 2023, issued an order requiring the SEC to “show cause why the court should not impose sanctions” for its “materially false and misleading representations.” The SEC’s filing on December 21, 2023, acknowledges the inaccuracy of the statement but argues against sanctions.

[SEC filing](#) | [SEC press release](#) | [SEC complaint](#)

### SEC awards whistleblowers combined awards of over \$28 million

The SEC announced awards to whistleblowers whose information and assistance led to an SEC enforcement action. The first award was for \$13 million to one whistleblower, the second award was for \$13 million to four whistleblowers, and the third award was for \$2 million to two whistleblowers.

[SEC press release](#) | [SEC order](#)

### SEC names new acting co-directors of Chicago regional office

The SEC announced that Daniel R. Gregus, Director of the Chicago Regional Office, is leaving the agency. Vanessa Horton and Kathryn Pyzaska will replace Gregus as Acting Co-Directors.

[SEC press release](#)

### SEC announces new Regional Director

The SEC has appointed Kate E. Zoladz as Regional Director of the Los Angeles Office.

[SEC press release](#)

### CFTC announces new Division of Data appointments

The CFTC has appointed Ted Kaouk as Chief Data Officer and Director of the Division of Data. The CFTC has also appointed John Coughlan as Chief Data Scientist.

[CFTC press release](#)

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your usual Davis Polk contact.

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