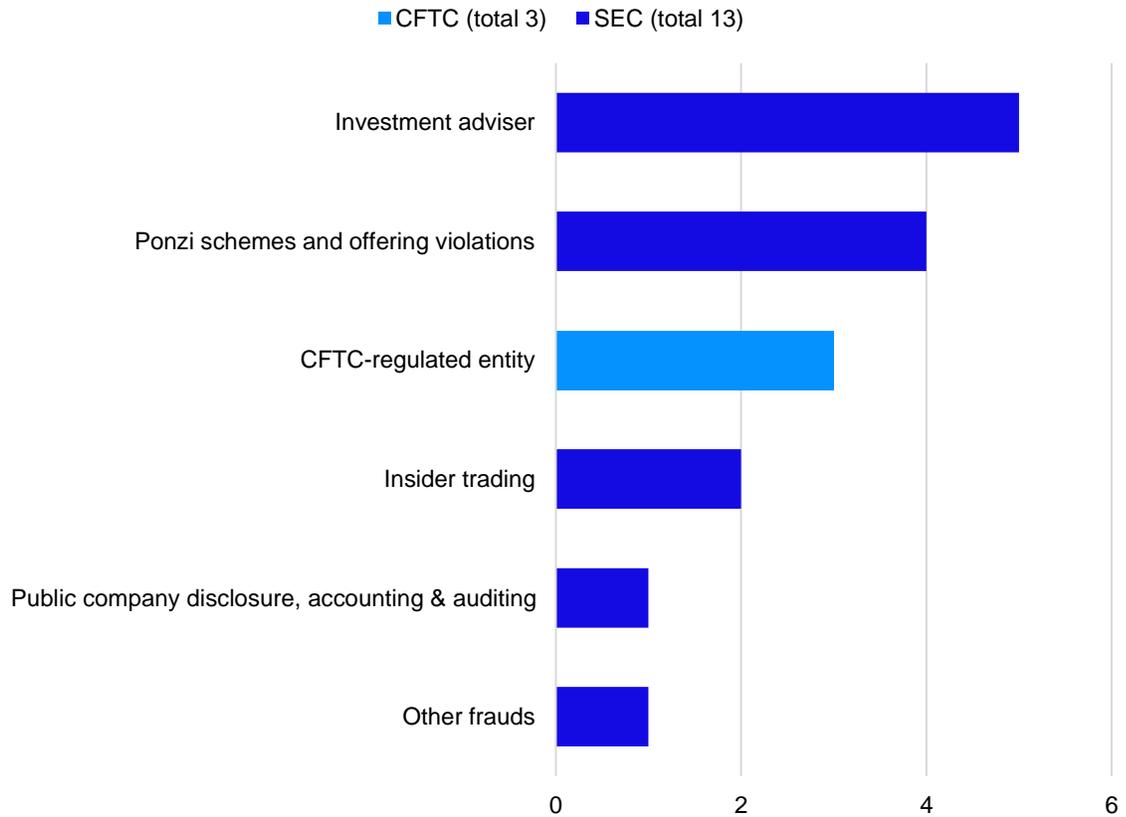


October 2023

In this edition of the newsletter, we discuss enforcement developments at the agencies in October 2023. Last month, the SEC filed 13 actions and the CFTC filed three, against a combined total of 45 defendants and respondents. (These figures exclude follow-on actions, bars and suspensions.) The actions include investment adviser violations and Ponzi schemes.

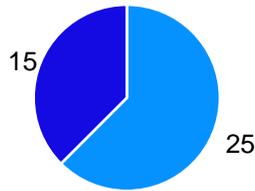
## Actions initiated by the SEC and CFTC in October 2023

Number of actions, by matter type

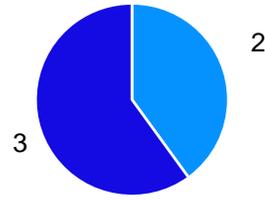


Types of defendants/respondents

SEC (total 40)



CFTC (total 5)



■ Individuals    ■ Corporate entities

Public company disclosures

SEC brings contested claims against software company for cybersecurity disclosures

In the Matter of SolarWinds Corp. et al. (A.P. Oct. 30, 2023, contested)

The SEC brought contested claims against a Texas-based software company and its Chief Information Security Officer (CISO) for fraud and internal controls failures related to alleged overstatement of the Company’s cybersecurity practices and failure to disclose known risks. According to the SEC, between October 2018 and the December 2020 announcement that it had been the target of a large cyberattack, the Company’s public statements about its cybersecurity practices and risks were inconsistent with internal assessments identifying known deficiencies and weaknesses in the company’s security practices. Most of the SEC’s complaint focuses on a Security Statement posted on the Company’s website that was not included in its SEC filings. The SEC also alleges that the Company’s risk factor disclosures were inadequate because (1) the company knew it had cybersecurity weaknesses, and (2) the company had red flags from incidents with two customers. According to the SEC, the Company’s CISO was aware of these system vulnerabilities—and questioned the company’s ability to protect against cyberattacks—but failed to resolve the issues or escalate them appropriately.

The complaint seeks permanent injunctive relief, disgorgement with prejudgment interest, civil penalties, and an officer and director bar against the CISO.

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

Investment adviser

SEC settles claims for failure to disclose conflicts of interest

In the Matter of Wilmington Trust Investment Management, LLC (A.P. Oct. 10, 2023, settled)

The SEC brought and settled claims against an investment adviser for allegedly investing certain clients’ assets in higher-cost mutual fund share classes than were otherwise available and failing to disclose the conflicts of interest associated with those investment recommendations. Specifically, the SEC alleged that, as part of its arrangement with clients with wrap accounts, the investment adviser was responsible for paying client trading costs. However, it allegedly avoided incurring transaction fees by: (1) investing certain client assets in mutual fund share classes that were higher in cost to the clients than other available share classes of the same fund; and (2) exchanging clients’ existing assets in mutual funds for other investments in the same sector that had higher expense ratios. As a result, the SEC alleges that the investment adviser breached its duty of care, including its duty to seek best execution, in connection with the selection of mutual fund share classes for clients. The SEC also alleged that the investment adviser failed to implement written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act.

The investment adviser agreed to pay \$999,559 in disgorgement, \$77,588 in prejudgment interest, and \$250,000 as a civil monetary penalty.

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

## SEC settles Rule 105 trading rule violations

### **In the Matter of Anson Advisors Inc. (A.P. Oct. 19, 2023, settled)**

The SEC settled its claims against a Canada-based investment adviser for allegedly violating Rule 105 of Regulation M (“Rule 105”) by purchasing stock in three public offerings for private fund clients after selling short the same stock for private fund clients. Rule 105 generally prohibits short selling an equity security during a restricted period and then purchasing the same security in the offering during the restricted period, absent an exception. According to the SEC, the investment adviser violated Rule 105 by participating in three follow-on offerings occurring in December 2019, June 2020, and April 2021, respectively, after it had engaged in short sales of the same securities during the restricted period.

To settle the SEC’s claims, the investment adviser agreed to pay disgorgement of \$2,469,109.11, prejudgment interest of \$261,285.20, and a civil penalty of \$600,000.

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

## SEC settles claims for mischaracterized investments

### **In the Matter of Blackrock Advisors, LLC (A.P. Oct. 24, 2023, settled)**

The SEC brought and settled claims against an investment adviser for alleged failure to accurately describe investments that comprised a significant portion of a publicly traded fund it advised. Specifically, as a registered investment adviser to a closed-end management investment company, the investment adviser provided details about the company’s investment positions that were included in the company’s financial reporting. According to the SEC, these reports described one of the largest investments as a company engaged in “Diversified Financial Services” when the company was actually in the business of developing print and advertising plans for films. The SEC also alleged that the reports inaccurately reflected the coupon rate to be paid by the invested-in company.

The investment adviser agreed to pay a \$2.5 million penalty to settle the claims. The SEC’s order details the investment adviser’s proactive update to its disclosures upon discovery of the error and prior to the SEC’s investigation, voluntary coverage of losses associated with the investment, and its cooperation with the SEC’s investigation by voluntarily providing witnesses, documents, and analysis.

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

## CFTC actions

### **CFTC settles market manipulation claims with oat manufacturer**

#### **In the Matter of Ceres Global Ag. Corp. (A.P. Oct. 23, 2023, settled)**

The CFTC brought and settled claims against one of the largest merchandisers of oats in the United States for allegedly attempting to artificially inflate oat futures prices through market manipulation. According to the CFTC, the Company attempted to manipulate the price of oats futures on two occasions by obtaining higher quality oats at lower delivery prices using the futures delivery process. To affect oats futures prices, the Company allegedly built large long positions at or close to the spot month speculative limits, held those long positions into the delivery period, and then took delivery of oats. The CFTC also alleged that senior personnel at the Company directed and facilitated the attempted manipulation.

The Company agreed to pay a \$3 million civil penalty to resolve the claims in the CFTC's order, which recognizes the Company's significant remedial steps, including engagement of third parties to review its compliance policies, procedures, and training and designation of a Chief Compliance Officer.

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

## SEC, CFTC announcements

### SEC Division of Examinations announces 2024 priorities

The SEC Division of Examinations released its 2024 examination priorities. As previously discussed in a [client update](#), the Exam Priorities fall into the following seven categories: (1) Investment Advisers; (2) Investment Companies; (3) Broker Dealers; (4) Self-Regulatory Organizations; (5) Clearing Agencies; (6) Other Market Participants; and (7) Risk Areas Impacting Various Market Participants.

[SEC press release](#) | [2024 priorities](#) | [Davis Polk client update](#)

### CFTC awards whistleblower award of over \$18 million

The CFTC announced an award to a whistleblower who provided information and assistance in connection to a CFTC enforcement action and in a related action by another agency.

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

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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