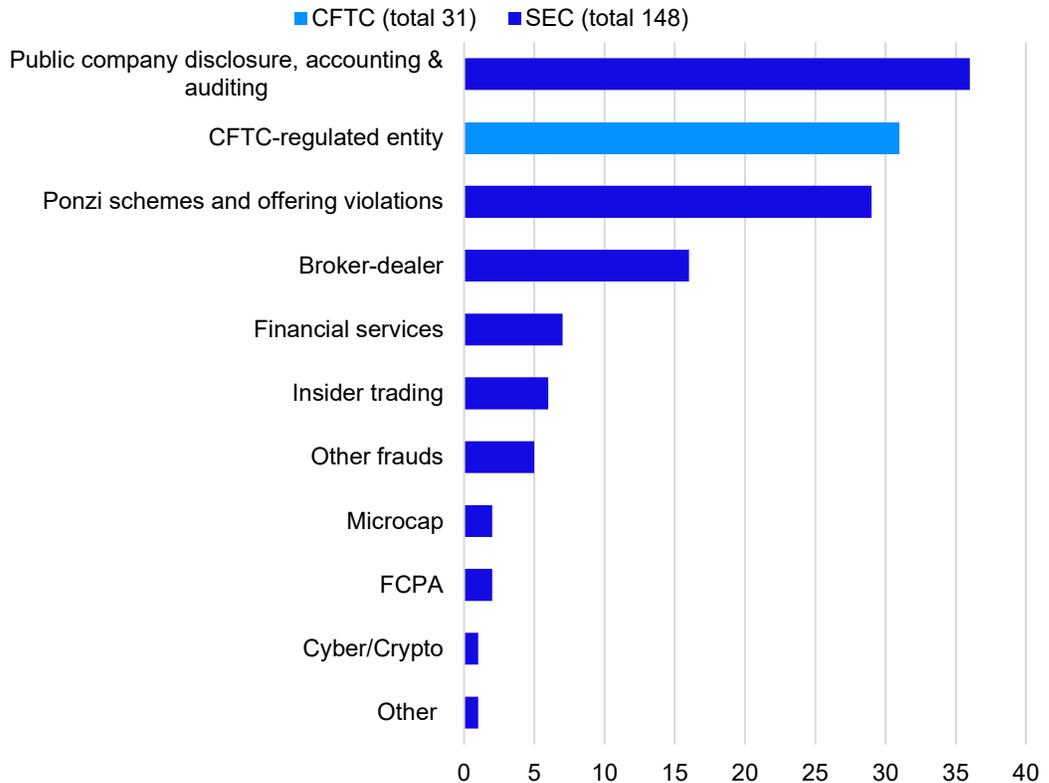


September 2023

In this edition of the newsletter, we discuss enforcement developments at the agencies in September 2023. Consistent with it being the end of the agencies’ fiscal year, the SEC filed 148 actions and the CFTC filed 31, against a combined total of 285 defendants and respondents. (These figures exclude follow-on actions, bars and suspensions.) The actions include public company disclosures, FCPA violations and swap dealer reporting requirements, among others.

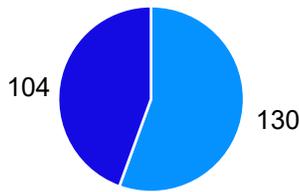
## Actions initiated by the SEC and CFTC in September 2023

Number of actions, by matter type

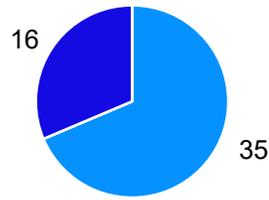


Types of defendants/respondents

SEC (total 234)



CFTC (total 51)



■ Individuals    ■ Corporate entities

Public company disclosures

Rideshare company pays \$10 million for undisclosed pre-IPO stock transaction

In the Matter of Lyft, Inc. (A.P. Sept. 18, 2023, settled)

The SEC settled claims with a ridesharing company for failure to disclose that a board member had profited from a \$424 million pre-initial public offering (IPO) stock transaction.

According to the SEC, a shareholder, who had appointed a director to the Company’s Board of Directors to represent his interests, declared his interest in selling a portion of his shares in advance of the Company’s 2019 IPO. The Company initially rejected the Shareholder’s request due to concerns that MNPI learned by the Director could be imputed to the Shareholder. To cure this issue, the Company approved the Shareholder’s request to sell his shares if he sold to the Director or an affiliate of the Director. According to the SEC, the Director arranged to have the Shareholder sell his shares to an unaffiliated investor via a special purpose vehicle that was set up by an investment adviser affiliated with the Director. Under the arrangement, the Director allegedly received compensation for structuring and negotiating the deal, which he did not disclose to the Company. According to the SEC, the Company, which approved the sale and secured a number of terms in the agreement, was a participant in the transaction and violated Regulation S-K Items 404(a) when it failed to disclose the related-person sale of the Shareholder’s stake and the Director’s material interest in the sale.

The Company agreed to pay a \$10 million civil penalty to settle the SEC’s claims.

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

Company settles for misleading investors on non-GAAP financial measures

In the Matter of Newell Brands Inc et al (A.P. Sept. 29, 2023, settled)

The SEC settled claims with a Georgia-based consumer products company and its former CEO for allegedly misleading investors about non-GAAP financial measures used to explain underlying sales trends that it referred to as “core sales growth” and “core sales.”

According to the SEC, the Company and former CEO took actions that increased the Company’s publicly disclosed core sales growth in ways that were inconsistent with the Company’s actual, undisclosed sales trends.

To settle the claims, the Company agreed to pay civil penalties of \$12.5 million civil penalty and \$110,000, respectively.

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

## SEC brings action against former executives for fraudulent revenue recognition practices

**SEC v. Edward O'Donnell et al. (S.D.N.Y. Sept. 28, 2023, contested)**  
**In the Matter of Stanley Stefanski, CPA (A.P. Sept. 28, 2023, settled)**

The SEC brought claims against three former executives of a New York-based telecommunications company for allegedly engaging in fraudulent revenue recognition practices. The Company previously settled accounting and disclosure fraud charges with the SEC in 2021 and filed for bankruptcy in 2022.

According to the SEC, the former Chief Financial Officer, former Chief Commercial Officer and former Controller engaged in a fraudulent scheme to recognize revenue from customers' nonbinding purchase orders for SIM card services even though the customers had not yet committed to paying for the services. The Company allegedly improperly recognized revenue for these purchase orders before the SIM cards were shipped to the customers, causing the Company to materially overstate its revenue by 60 percent for fiscal year 2018 and by 91 percent for the first and second quarters of 2019.

The former CFO and CCO have not agreed to resolve the SEC's claims. The former Controller agreed to an officer and director bar, and a bar on appearing or practicing before the Commission as an accountant, and will be subject to additional proceedings to determine any monetary relief.

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

## Broker dealer

### SEC brings action for disclosures relating to information barriers

**SEC v. Virtu Financial Inc. et al. (S.D.N.Y. Sept. 12, 2023, contested)**

The SEC brought an action against a broker-dealer and its parent company for alleged materially false and misleading statements and omissions related to its use of information barriers.

The SEC alleges that the broker-dealer and its affiliates operated two businesses—an order execution service for large institutional customers and a propriety trading business. According to the SEC, the Company told customers that the two business were walled off from each other and represented that only employees with a need to see customers' post-execution trade data could do so. The SEC alleges that the Company failed to implement adequate controls to safeguard a database that contained all post-trade information generated from customer orders routed to and executed by the Company, including customer identifying information and other MNPI, because the database could be accessed using two sets of generic usernames and passwords that were widely known and frequently shared within the Company.

The Company released a statement, saying that it was unable to reach an "acceptable" settlement with the SEC and that the SEC's complaint "does not allege, and there is no evidence to indicate, that any data was ever accessed or used in an inappropriate manner."

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

**Private equity firm pays \$20.5 million for failure to disclose brokerage fees conflict of interest****In the Matter of Prime Group Holdings, LLC (A.P. Sept. 5, 2023, settled)**

The SEC brought and settled claims against a New York-based private equity firm for failure to disclose that it had been paying real estate brokerage fees to a firm owned by its CEO.

According to the SEC, in 2017 the private equity firm launched an investment fund to purchase self-storage facilities. To find and purchase these facilities, the Fund allegedly relied on employees and independent contractors who were partially compensated from a brokerage fee that the Fund paid on acquisitions. Between 2017 and 2021, the Fund allegedly paid nearly \$18 million in brokerage fees to an affiliate real estate brokerage firm wholly owned by the Firm's CEO, and these broker fees were used to fund the Firm's operations and compensate employees. According to the SEC, this fee structure was not adequately disclosed in the Firm's offering materials, and the Firm's offering and marketing materials contained misleading statements and omissions concerning fees and potential conflicts of interests.

The Firm agreed to pay a \$6.5 million civil penalty and more than \$14 million in disgorgement and prejudgment interest to settle the charges.

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

**SEC settles Marketing Rule violations with nine investment advisers**

**In the Matter of Banorte Asset Management (A.P. Sept. 11, 2023, settled)**

**In the Matter of BTS Asset Management Inc. (A.P. Sept. 11, 2023, settled)**

**In the Matter of Elm Partners Management LLC (A.P. Sept. 11, 2023, settled)**

**In the Matter of Hansen and Associates Financial Group Inc. (A.P. Sept. 11, 2023, settled)**

**In the Matter of Linden Thomas Advisory Services LLC (A.P. Sept. 11, 2023, settled)**

**In the Matter of Macroclimate LLC (A.P. Sept. 11, 2023, settled)**

**In the Matter of McElhenny Sheffield Capital Management LLC (A.P. Sept. 11, 2023, settled)**

**In the Matter of MRA Advisory Group (A.P. Sept. 11, 2023, settled)**

**In the Matter of Trowbridge Capital Partners LLC (A.P. Sept. 11, 2023, settled)**

The SEC brought and settled claims with nine registered investment advisers for failing to comply with the SEC's Marketing Rule. The Marketing Rule prohibits advisers from displaying performance results in advertisements, unless certain requirements are satisfied.

According to the SEC, the investment advisers advertised hypothetical investment performances to the general public on their websites without adopting and implementing policies and procedures reasonably designed to ensure the hypothetical performances were relevant to the likely financial situation and investment objectives of the intended audience, as required by the Marketing Rule. In addition, the SEC alleged that two of the advisers failed to maintain required copies of their advertisements.

To settle the SEC's claims, the advisers agreed to pay civil penalties ranging from \$50,000 to \$175,000.

[SEC press release](#) | [SEC Banorte order](#) | [SEC BTS order](#) | [SEC Elm order](#) | [SEC Hansen order](#) | [SEC Linden order](#) | [SEC Macroclimate order](#) | [SEC McElhenny order](#) | [SEC MRA order](#) | [SEC Trowbridge order](#)

## Investment bank subsidiary settles AML and ESG claims

**In the Matter of DWS Investment Management Americas, Inc. (A.P. Sept. 25, 2023, settled)**  
**In the Matter of DWS Investment Management Americas, Inc. (A.P. Sept. 25, 2023, settled)**

The New York-based subsidiary of a multinational investment bank and financial services company settled two separate enforcement actions related to its Anti-Money Laundering (AML) program and its Environmental, Social and Governance (ESG) investment processes.

In the AML order, the SEC alleged that the subsidiary failed to ensure that the mutual funds it advised had adopted adequate AML policies in accordance with the Bank Secrecy Act (BSA). According to the order, from at least January 2017 until December 2021, the subsidiary adopted its parent companies' AML compliance program, which was not specific to the subsidiary's mutual fund business structure. As a result, the SEC alleged that the subsidiary's AML program was not appropriately tailored to the money laundering risks and vulnerabilities posed by mutual funds.

In a separate order, the SEC alleged that the subsidiary made misleading statements about its controls for incorporating ESG factors into research and investment recommendations. Specifically, as alleged by the SEC, the subsidiary stated on its website that it adhered to specific policies for integrating ESG considerations into its investments when, in fact, from August 2018 until late 2021, the subsidiary had not adequately implemented certain provisions of the policy. The SEC further alleged that the subsidiary did not adopt adequate procedures designed to ensure the representations it made concerning its ESG integration process were not misleading.

To settle the SEC's claims, the subsidiary agreed to pay \$6 million in the AML action and \$19 million in the ESG misstatements action.

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

## Foreign Corrupt Practices Act

### SEC settles claims related to China-based bribery scheme

**In the Matter of Clear Channel Outdoor Holdings, Inc. (A.P. Sept. 28, 2023, settled)**

The SEC settled claims with a company in the out-of-home advertising industry for the conduct of its former indirect, majority-owned Chinese subsidiary. Specifically, the SEC alleged that the Subsidiary paid bribes to Chinese government officials, both directly and through third parties, to obtain concession contracts required to sell advertising services to public and private sector clients. These advertising services included displays on public bus stops, street furniture, and billboards.

The SEC further alleged that the Subsidiary utilized sham intermediaries and false invoices to generate cash that it used to hire off-book consultants to win advertising business from government and private customers. The improper payments were falsely characterized as legitimate entertainment, cleaning and maintenance, and customer development expenses in the Company's books and records.

To settle the charges, the Company agreed to pay disgorgement of \$16,355,567, prejudgment interest of \$3,760,920 and a civil monetary penalty in the amount of \$6,000,000.

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

## **SEC settles claims for bribery scheme in Vietnam, India, and Indonesia**

**In the Matter of Albemarle Corporation (A.P. Sept. 29, 2023, settled)**

The SEC settled claims with a global chemicals company for its involvement in a foreign bribery scheme, including failing to maintain accurate books and records and having inadequate internal controls to detect and prevent the misconduct. Specifically, the SEC alleged that the Company retained intermediaries despite significant red flags that indicated a high probability of bribery. These intermediaries paid bribes to obtain sales of catalysts to public-sector oil refineries in Vietnam, India, and Indonesia and to private-sector oil refineries in India.

The SEC also alleged that the Company failed to implement sufficient internal accounting controls to provide reasonable assurances that payments made to agents in Vietnam, Indonesia, India, China and the United Arab Emirates were for legitimate services.

To settle the charges, the Company agreed to pay disgorgement of \$81,856,863 and prejudgment interest of \$21,761,447.

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

## **Other**

### **Firm pays \$375,000 to settle violation of Whistleblower Protection Rule**

**In the Matter of CBRE, Inc. (A.P. Sept. 19, 2023, settled)**

The SEC brought and settled claims against a Texas-based real estate Company for using employee release agreements that violated the SEC's whistleblower protection rule.

From 2011 to 2022, the Firm required employees to sign a General Release Agreement as a condition for receiving severance pay, which included a section requiring employees to attest that they had not filed a complaint against the Firm with any federal agency. According to the SEC, by conditioning separation pay on employees' signing the release, the Company impeded potential whistleblowers from reporting complaints to the Commission, in violation of the whistleblower protection rule.

The Firm agreed to pay \$375,000 to settle the SEC's claims, which the SEC stated reflects the Firm's cooperation and remediation efforts. Specifically, the SEC noted that upon learning of the investigation, the Firm took extensive remedial action, including, but not limited to, revising all versions of the GRA, plus similar agreements, for compliance with the whistleblower protection rule, training more than 50 members of the compliance team on the revised language in the agreement, and contacting more than 800 employees who had signed the GRA between 2021 and 2022 to advise them of the protections afforded them under the whistleblower protection rule.

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

## **CFTC actions**

### **CFTC settles supervision failure claims with registered merchant**

**In the Matter of Advantage Futures LLC (A.P. Sept. 20, 2023, settled)**

The CFTC settled claims against a Chicago-based registered futures commission merchant for alleged failure to diligently supervise the handling of commodity interest accounts, resulting in inadequate surveillance of customers' trading activity for disruptive trading over four years.

According to the CFTC, the Company's policies and procedures specified that the customer trades it cleared would be surveilled for disorderly trading using trade analysis software. During the relevant period, the

Company allegedly failed to fully adhere to its own policies and procedures and did not surveil all of its customers' order and execution data on exchanges that it cleared for disruptive trading. As alleged by the CFTC, the Company failed to process and surveil three distinct sets of customer order and execution data. This oversight allegedly caused over 12.8 million cleared contracts to not be processed or surveilled between July 2018 and June 2022.

The Company agreed to pay a \$395,000 civil monetary penalty to settle the CFTC's claims and committed to instituting certain remedial measures, including retaining a new surveillance vendor.

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

## Other SEC, CFTC actions and announcements

### CFTC awards whistleblowers combined awards of over \$15.3 million

The CFTC announced awards to whistleblowers whose information and assistance led to CFTC enforcement actions. The first whistleblower award was for \$15 million to two whistleblowers and the second award was for \$300,000 to one whistleblower.

[CFTC press release 1](#) | [CFTC press release 2](#) | [CFTC order 1](#) | [CFTC order 2](#) | [CFTC order 3](#)

### The SEC appoints George Botic to the Public Company Accounting Oversight Board

The SEC announced the appointment of George Botic, CPA, to a term as a board member on the Public Company Accounting Oversight Board.

[SEC 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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