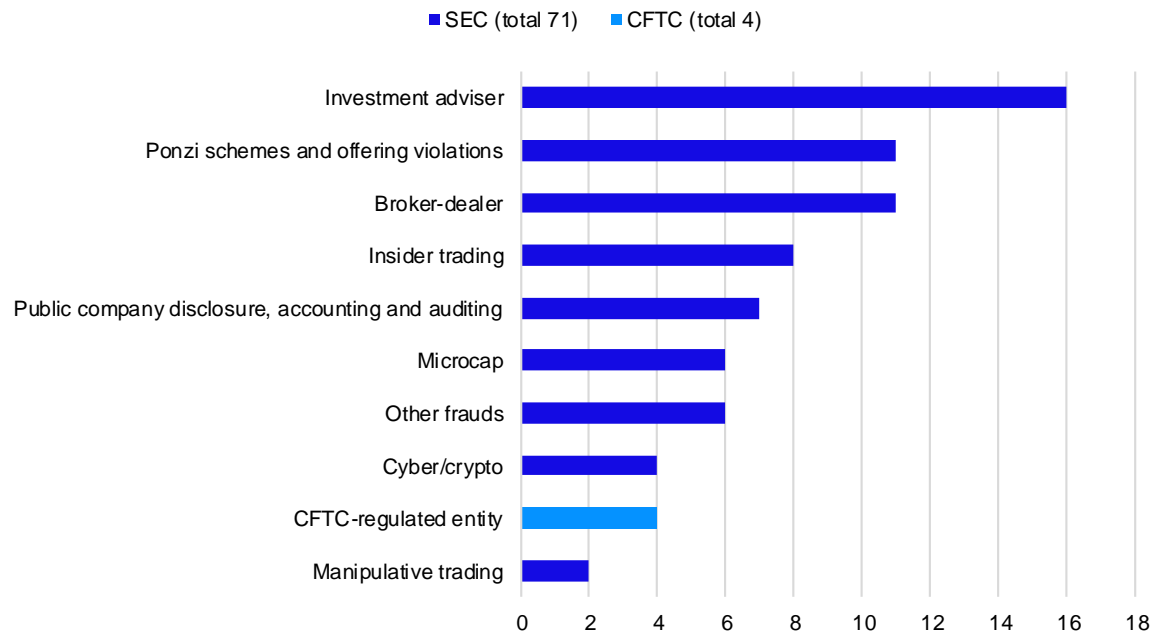


August 2021

August was the most active month for enforcement since September 2020. The SEC filed 71 actions and the CFTC filed four, against a combined total of 148 defendants and respondents. (This tally excludes follow-on actions, bars and suspensions.) The SEC’s 71 actions spanned numerous case types, including Ponzi scheme and offering violations, investment adviser, broker-dealer and insider trading cases. Three of the CFTC’s four actions concerned commodity pool fraud.

Actions initiated by the SEC and CFTC in August 2021

Number of actions, by matter type



Actions initiated by the SEC and CFTC in August 2021

Types of defendants/respondents



Key cases and developments

SEC brings latest case in EPS initiative

In re Healthcare Services Group, Inc. et al. (A.P. August 24, 2021, settled)

In the third case coming from the SEC’s EPS initiative, the SEC settled a case against a healthcare facilities service provider, its former CFO, and its Controller for alleged violations of accounting and disclosure requirements. According to the SEC, the company did not accrue loss contingencies related to a number of employee class and collective action suits, as required under general accepted accounting principles. Failure to register these contingencies allegedly allowed the company to report earnings per share (EPS) that met research analyst predictions, but did not accurately reflect the company’s income. The company agree to pay a civil money penalty of \$50,000, and the CFO agreed to a suspension of at least two years.

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

SEC files series of cybersecurity-related enforcement cases

SEC v. Pearson plc (A.P. August 16, 2021, settled)

In re Cetera Advisor Networks LLC (A.P. August 30, 2021, settled); In re Cambridge Investment Research, Inc. (A.P. August 30, 2021, settled); In re KMS Financial Services, Inc. (A.P. August 30, 2021, settled)

The SEC filed several cases this month involving cybersecurity issues. First, the SEC reached a settlement with a public company—a multinational educational services company—for alleged material misstatements regarding the company’s cybersecurity risks. We discussed the case in this [client update](#). The SEC’s order indicated that the company disclosed a risk factor that it “could” suffer a data beach when it knew it *had* experienced a breach. This is an important takeaway for public companies—the SEC may investigate discloses that are worded as hypotheticals when the company already has experienced an incident. The SEC also alleged that both the company’s disclosure, which it only made after a media inquiry, and its statement to the media about the breach were misleading. The company agreed to pay a civil penalty of \$1 million to settle the case.

Second, the SEC brought three actions for alleged violations of the Safeguards Rule, its first such actions since 2018. We discussed the cases in this [client update](#). The Safeguards Rule requires broker-dealers and investment advisers to adopt policies and procedures reasonably designed to safeguard customer data, and protect against anticipated threats including unauthorized access to customer information. The SEC found fault with each company's response to incidents in which accounts were improperly accessed by threat actors using compromised credentials. Each order identified multi-factor authentication as an important cybersecurity safeguard, and also found that the firms did not apply lessons learned from the incidents in a timely manner. The firms agreed to pay penalties ranging from \$200,000 to \$300,000.

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

[SEC press release](#) | [Cetera order](#) | [Cambridge order](#) | [KMS order](#)

SEC brings case for insider trading of third party company's stock

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

The SEC announced a case against a former executive of a biopharmaceutical company for alleged insider trading violations. According to the SEC's complaint, the executive relied on confidential information regarding the imminent acquisition of his company to trade in the stock of another biopharmaceutical company, on the belief that the acquisition would cause that company's value to increase. The executive reportedly earned over \$100,000 by executing this trade ahead of the acquisition announcement. The case, which is contested, raises the novel question of whether employees have a duty not to use information about their own company to trade the stock of a different company.

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

Cryptocurrency trading platform agrees to pay the CFTC \$100 million

CFTC v. HDR Global Trading Limited, et al. (S.D.N.Y. October 1, 2020, settled)

The CFTC agreed to a consent order resolving civil charges against five entities engaged in running BitMEX, the world's largest platform for peer-to-peer trading of cryptocurrency derivatives. The U.S. District Court for the Southern District of New York found that the platform, which was not registered with the CFTC, failed to implement adequate supervisory and due diligence measures for customer identification and the prevention of money laundering. The consent order requires the entities to pay a civil fine of \$100 million, subject to certain potential offsets, and enjoins the entities from engaging in any future transactions that would violate CFTC rules.

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

SEC settles case against unregistered cryptocurrency exchange

In re Poloniex (A.P. July 14, 2021, settled)

The SEC settled a case against the operator of a Poloniex, a web-based digital asset trading platform, for allegedly functioning as an unregistered exchange. The exchange had a policy of not listing tokens that resemble securities, and required that applicants for listing provide a legal opinion as to whether the digital asset could be considered a security under the *SEC v. W.J. Howey Co.* standard. However, the SEC found that the platform initially took an aggressive approach to offering trading of new digital assets, and even following the adoption of more stringent screening measures continued to support trading of digital assets classified as medium risk of being considered securities. The operator agreed to pay a total of more than \$10 million, including disgorgement and a \$1.5 million civil penalty to settle the case.

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

DeFi platform settles with the SEC for selling unregistered securities

In re Blockchain Credit Partners et al. (A.P. August 6, 2021, settled)

In a case that the SEC promoted as its first concerning decentralized finance (“DeFi”) technology, the SEC reached a settlement with a company and its two principals for allegedly selling more than \$30 million in unregistered securities based on false statements. The company operated a DeFi money market, in which investors could either buy tokens that would reportedly either be invested in real world assets and provide a set return, or buy tokens that would grant to holders voting rights over excess profits generated through the enterprise. However, according to the SEC, the company identified, but attempted to conceal, the likelihood that income generated through appreciation of real world assets could be insufficient to cover appreciation of the investors’ principal in digital assets. As part of the settlement, the company agreed to pay disgorgement of approximately \$12.8 million, and the principals agreed to pay penalties of \$125,000 each.

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

SEC chair issues remarks on cryptocurrency enforcement

In conjunction with the announcement of several significant enforcement actions against cryptocurrency platforms this month, SEC Chair Gary Gensler discussed the Commission’s enforcement approach to digital assets and DeFi. Mr. Gensler said that many of today’s digital assets constitute investment contracts, and thus should be subject to oversight and disclosure requirements. He also emphasized that any platform offering digital assets qualifying as securities falls under SEC jurisdiction, including DeFi platforms that claim to operate in a decentralized manner. Mr. Gensler also said that gaps remain in the regulation of digital assets that should be addressed through both legislation and Commission rulemaking.

[Aspen Security Forum remarks](#) | [Wall Street Journal remarks](#)

Founder of “unicorn” startup faces SEC fraud case

SEC v. Manish Lachwani (N.D. Cal. August 25, 2021, contested)

The SEC brought a case against an individual for allegedly defrauding investors of the startup technology company that he founded and where he previously served as CEO. The SEC’s complaint indicates that the former CEO doctored the company’s customer and financial data, inducing millions of dollars of investment and driving the company’s valuation to over \$1 billion. According to the SEC, the former CEO also benefitted personally from the sale of approximately \$2.5 million worth of his stock in the company. After an internal investigation by the company’s Board of Directors uncovered the purported fraud, the company’s valuation was revised to \$300 million. However, the company itself, which is privately held, was not charged and remains operational according to the SEC’s complaint.

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

Whistleblower awards

The SEC announced four sets of whistleblower awards this month, with 14 individuals receiving a total of \$16.1 in whistleblower payments.

SEC Chair Gary Gensler also announced that the Commission would revisit two amendments to whistleblower rules adopted during the Trump administration, over concerns that the amendments could discourage whistleblowers from coming forward. One of the amendments would restrict awards to whistleblowers eligible for payment under other agency’s whistleblower programs, and the other allows for limitations on the absolute size of future awards.

[SEC whistleblower page](#) | [SEC whistleblower statement](#)

Personnel and organizational changes

The SEC announced notable personnel and organizational changes this month:

- Sanjay Wadhwa was named Deputy Director of the Division of Enforcement.

[SEC press release](#)

- Joe Brenner retired as Chief Counsel of the Division of Enforcement.

[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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