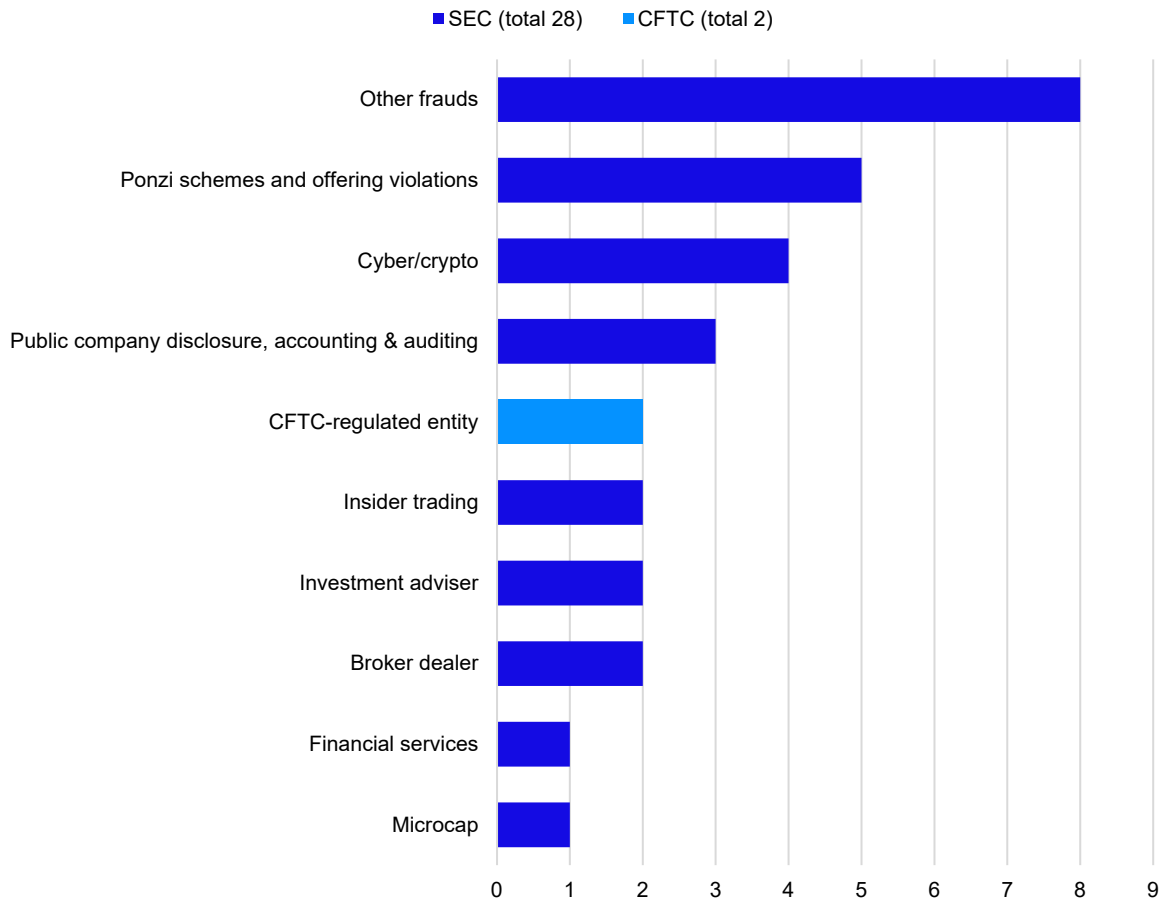


January 2023

In January 2023, the SEC filed 28 actions and the CFTC filed 2, against a combined total of 51 defendants and respondents. (These figures exclude follow-on actions, bars and suspensions.) The actions included crypto matters, accounting, and disclosure controls, among others.

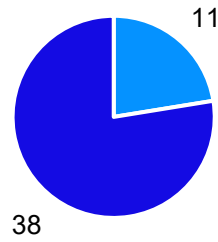
Actions initiated by the SEC and CFTC in January 2023

Number of actions, by matter type

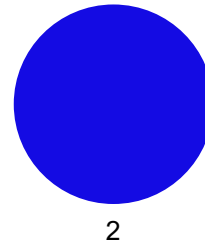


Types of defendants/respondents

SEC (total 49)



CFTC (total 2)



■ Individuals ■ Corporate entities

Accounting & disclosure

SEC settles with quick-service restaurant company over alleged misleading statements

In re Stephen J. Easterbrook et al. (A.P. Jan. 9, 2023, settled)

The SEC brought and settled claims against a quick-service restaurant company and its former CEO for allegedly making false and misleading statements about the reasons for his termination. Specifically, the SEC alleged that during an internal investigation against him, the former CEO withheld information about company policy violations that the SEC alleged were relevant to both his eventual termination and to the company’s decision to treat the termination as “without cause.” The SEC also alleged that the company failed to disclose to investors that it had exercised its discretion to treat the executive’s termination as “without cause,” which allowed him to retain equity compensation that otherwise would have been forfeited. The SEC alleged violations of the Exchange Act Section 14(a) and Rule 14a-3 for failure to disclose all material elements of compensation of named executive officers under Item 402(b) of Regulation S-K. To settle the claims against him without admitting or denying the findings, the former CEO agreed to a five-year officer and director bar, to pay a \$400,000 penalty, and to disgorgement and prejudgment interest of more than \$52 million (which was deemed satisfied by compensation clawed back by the company). The SEC did not fine the company, citing its cooperation and remedial measures as well as steps it took to claw back compensation. In their dissent, Commissioners Peirce and Uyeda criticized the SEC’s claims against the company, characterizing the action as a novel interpretation of the SEC’s executive compensation disclosure requirements inconsistent with well-established industry practice, and regulatory expansion through enforcement.

[SEC press release](#) | [SEC order](#) | [Statement of Commissioners Peirce and Uyeda](#)

Crypto

SEC brings suit over alleged unregistered interest-based crypto asset

In re Nexo Capital Inc. (A.P. Jan. 19, 2023, settled)

The SEC brought and settled claims for the alleged unregistered offer and sale of a retail crypto asset lending product. According to the SEC, the product allowed U.S. investors to tender their crypto assets to the company in exchange for its promise to pay interest. The SEC alleged that the company marketed the crypto asset as a way for investors to earn interest, and the company used its discretion to generate income for the company and to fund interest payments to other investors. Accordingly, the SEC alleged that the crypto asset was a security and that its offering should have been registered. The company agreed to pay a \$22.5 million penalty. The SEC recognized the company’s voluntary remediation and cooperation in the SEC’s investigation. In parallel actions brought by state regulatory authorities, the company also agreed to pay \$22.5 million in fines.

SEC, CFTC bring suits for digital asset manipulation and theft

SEC v. Avraham Eisenberg (S.D.N.Y. Jan. 20, 2023, contested)

CFTC v. Avraham Eisenberg (S.D.N.Y. Jan. 9, 2023, contested)

The SEC and the CFTC each brought a case against an individual for allegedly manipulating the price of a digital asset and then using that increased value to borrow and withdraw assets from the platform. According to the agencies, the individual used an account to sell a large number of perpetual futures for the token, and then used a separate account on the same platform to purchase the same perpetual futures. The agencies further alleged that the individual then engaged in a series of purchases in the thinly-traded token to artificially raise its price. The agencies alleged that the individual next used the value of the inflated position to borrow and withdraw somewhere between \$110 and \$116 million, effectively draining all available assets from the platform. Parallel criminal charges have been brought in the Southern District of New York.

This is the CFTC's first enforcement action for a fraudulent or manipulative scheme involving "oracle manipulation," which refers to the data feed used to determine the value of swap positions. It is also the CFTC's first enforcement action in connection with trading on a supposed decentralized digital asset platform.

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

Investment advisor

SEC settles with former portfolio manager over alleged undisclosed conflict

In re Randy Robertson (A.P. Jan. 5, 2023, settled)

The SEC brought and settled claims against a former investment portfolio manager for alleged failure to disclose a personal conflict of interest. According to the SEC, the portfolio manager co-managed a closed end publicly traded fund. The SEC alleged that over the course of several years, the manager was primarily responsible for the fund's continued investment in a film distribution company whose founder allegedly helped advance the acting career of the manager's daughter. The SEC claimed that the portfolio manager brought his daughter to various business investment meetings with the distribution company, and that the distribution company helped secure an acting role for her. The SEC further alleged that the manager did not disclose the conflict to the fund's board of trustees or to the investment company's legal or compliance team. To settle the claims, the manager agreed to pay a \$250,000 penalty.

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

Financial services

SEC settles with pricing service for alleged misleading disclosures

In re Bloomberg Finance L.P. (A.P. Jan. 23, 2023, settled)

The SEC settled a claim against a company for alleged misleading disclosures related to its paid pricing subscription service, which provides daily price valuations for fixed income securities to financial services entities. Specifically, the SEC alleged that the company violated Section 17(a)(2) of the Securities Act by failing to disclose that its valuations could be based on methodologies that varied from those it had previously disclosed. The company agreed to pay a \$5 million penalty. Dissenting Commissioners Peirce and Uyeda argued the SEC should not have brought the action, noting that the misstatements at issue were not made in the offer or sale of any securities, as required by Section 17(a) and suggesting that this enforcement action is "not the right way to make regulatory policy."

[SEC press release](#) | [SEC order](#) | [Statement of Commissioners Peirce and Uyeda](#)

DavisPolk SEC announcements

SEC awards whistleblower awards

In January 2022, the SEC announced five sets of whistleblower awards, with six individuals receiving a total of \$51 million.

[SEC press release 1](#) | [SEC press release 2](#) | [SEC press release 3](#)

SEC announces personnel and organizational changes

A number of notable SEC-related personnel and organizational changes were announced recently:

- Dan Berkovitz left the SEC, with Megan Barbero to replace him as General Counsel.
[SEC press release](#)
- Erik Gerdling was named to replace Renee Jones as Director of the Division of Corporation Finance.
[SEC press release](#)
- Paul Munter was named Chief Accountant.
[SEC press release](#)
- Antonia Apps was named Regional Director of the New York Regional Office.
[SEC press release](#)
- Silvestre Fontes was named Regional Director of the Boston Regional Office.
[SEC press release](#)

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