

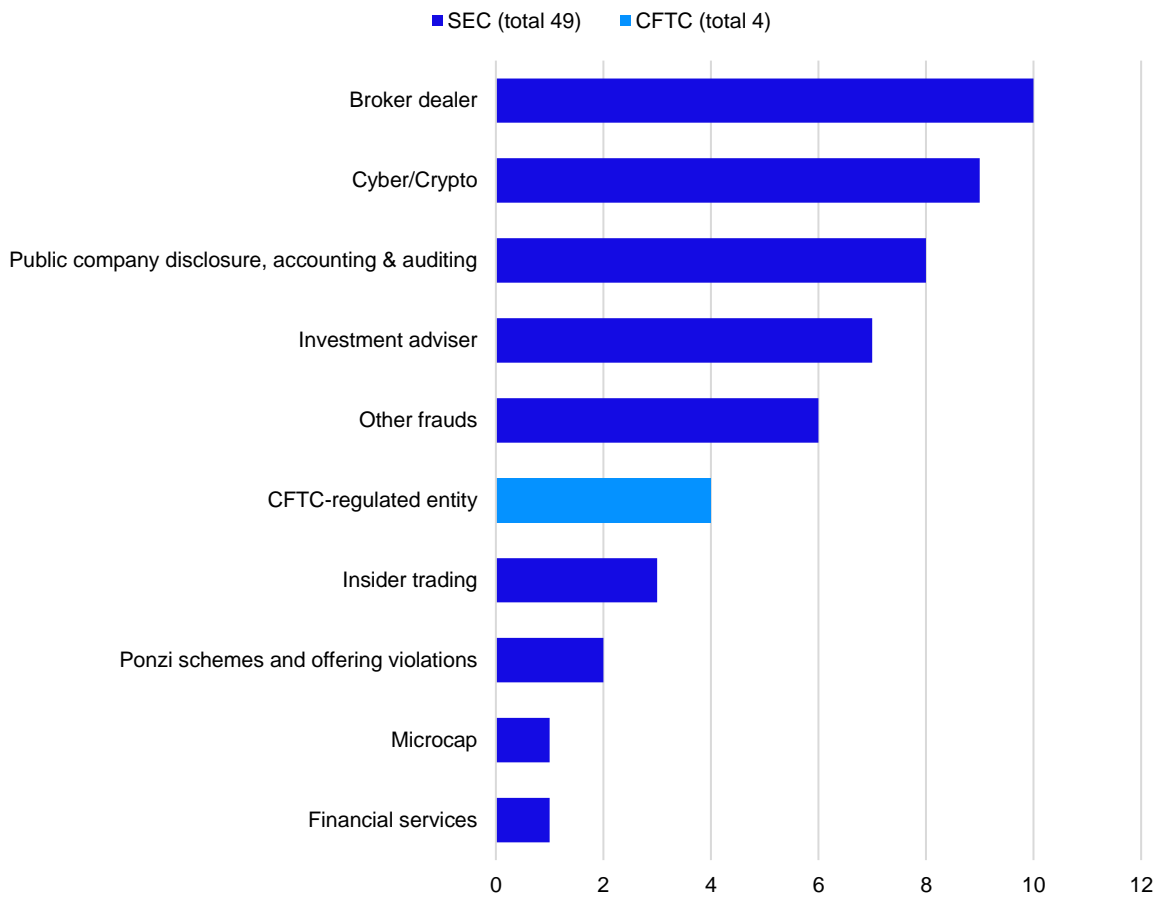
# SEC & CFTC Enforcement Update

March 2023

In March 2023, the SEC filed 49 actions and the CFTC filed 4, against a combined total of 109 defendants and respondents. (These figures exclude follow-on actions, bars and suspensions.) The actions include crypto, insider trading, and disclosure matters, among others.

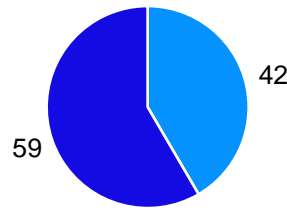
## Actions initiated by the SEC and CFTC in March 2023

Number of actions, by matter type

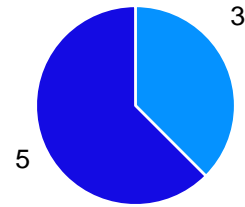


Types of defendants/respondents

SEC (total 101)



CFTC (total 8)



■ Individuals    ■ Corporate entities

## Proposed cyber rules

### SEC proposes amendments to its cybersecurity rules

As summarized in a Davis Polk [client update](#), the SEC proposed a broad suite of new cybersecurity rules for several market participants, including policies and procedures to address cybersecurity risk, written incident response programs, public disclosure, new types of SEC filings, and extension of Regulation SCI to large broker-dealers and other types of firms. The SEC also reopened the comment period for new cybersecurity rules for investment advisers and investment companies. According to the SEC, the proposed amendments are intended to strengthen investors’ ability to evaluate public companies’ cybersecurity practices and incident reporting processes. As we explain in the client update, the rules also will increase enforcement risk if adopted.

[SEC press release 1](#) | [SEC press release 2](#) | [SEC press release 3](#) | [SEC press release 4](#) | [SEC proposed rule 1](#) | [SEC proposed rule 2](#) | [SEC proposed rule 3](#) | | [SEC reopening of comment period](#) | [Davis Polk client update](#)

## Accounting disclosures

### SEC brings claims against three executives for accounting fraud scheme

**SEC v. Craig D. Perciavalle, et al. (S.D. Ala. Mar. 31, 2023, contested)**

The SEC filed a contested action against three executives at a shipbuilder for allegedly reducing cost estimates for completing projects arbitrarily, which had the effect of allowing the parent company to meet or exceed analyst expectations. The change in cost estimates, according to the SEC, caused the shipbuilder to prematurely recognize revenue and exceed its earnings before interest and tax (“EBIT”) in reports to the parent company. The SEC alleges the parent company’s shares rose in value at the time of the misstatements and later declined when the Company disclosed the conduct. The Commission seeks disgorgement, civil money penalties, and officer and director bars against the executives.

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

### SEC settles disclosures claims related to non-GAAP financial performance

**In the Matter of DXC Technology Company (A.P. Mar. 14, 2023, settled)**

The SEC settled claims against an IT management provider for alleged misleading disclosures related to its non-GAAP financial performance. The Company stated that it excluded transaction, separation, and integration-related (“TSI”) costs from its non-GAAP net income, non-GAAP EPS, and other non-GAAP measures, and that it believed that these non-GAAP measures would better allow investors to understand the financial performance of the Company. However, as alleged by the SEC, the Company had no formal guidance for employees to determine what costs to classify as TSI and ensure that such costs were appropriate to exclude from its non-GAAP measures. The SEC also alleged that the Company did not have sufficient disclosure controls or procedures concerning the review, approval, and classification of TSI costs. According to the SEC, the Company materially overstated its non-GAAP net income in three fiscal quarters because it misclassified the TSI costs.

The Company agreed to pay an \$8 million penalty and to develop and implement appropriate non-GAAP policies, disclosure controls and procedures.

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

## Cyber disclosure

### SEC settles claims over disclosures related to ransomware attack

**In the Matter of Blackbaud, Inc. (A.P. Mar. 9, 2023, settled)**

The SEC settled claims against a donor management software company for alleged misleading disclosures related to a 2020 ransomware attack that impacted more than 13,000 customers. Following the cyberattack, the Company announced that the attacker had not accessed bank account information or social security numbers. As alleged by the SEC, certain personnel at the Company subsequently became aware that bank account information and social security numbers had in fact been accessed and exfiltrated. Further, the SEC alleged that the Company had inadequate disclosure controls because it did not have policies or procedures in place designed to ensure that this discovery was communicated to senior management responsible for disclosures. As a result, the Company’s August 2020 quarterly statement did not accurately detail the full scope of the cyberattack.

The Company agreed to pay a \$3 million penalty to settle the claims.

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

## Insider trading

### SEC brings Rule 10b5-1 suit against executive chairman for insider trading

**SEC v. Terren S. Peizer, et al. (C.D. Cal. Mar. 1, 2023, contested)**

The SEC filed a contested action alleging insider trading against the executive chairman of a healthcare treatment company and his LLC. Specifically, the SEC alleged that the executive chairman created and executed two Rule 10b5-1 trading plans, both in the name of his LLC, upon learning that the Company’s contract with its largest customer was near termination. Notable in light of the SEC’s new rules requiring longer cooling off periods for 10b5-1 plans for individuals (see our client memo [here](#)), the SEC alleged that the individual declined to open a plan through a broker-dealer that required a cooling off period, and instead used a broker-dealer that allowed trading to begin the day after the plan was adopted. According to the complaint, the executive chairman avoided more than \$12.7 million in losses by trading in advance of the announced contract termination.

## Crypto

### SEC brings action against crypto trading platform for various violations

#### **SEC v. Beaxy Digital, Ltd., et al. (N.D. Ill. Mar. 29, 2023, partially settled)**

The SEC brought suit against a crypto asset trading platform and its affiliates for various securities violations. According to the SEC, the platform and its founder offered and sold crypto assets in unregistered transactions for at least one year, purportedly raising over \$8 million in proceeds through the transactions. The SEC also alleged that, once the founder resigned after allegedly misappropriating nearly \$900,000 in investment proceeds, the two managers who assumed control of the platform continued to operate it as an unregistered exchange. The SEC also alleged that at least one manager was not registered with the Commission as a broker or a clearing agency and that the platform's market makers similarly failed to register as dealers.

The managers and market makers agreed to settle the claims and pay a total of \$165,800 in civil penalties and \$62,779 in disgorgement and prejudgment interest. The action against the platform and its founder is ongoing.

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

### CFTC brings action against leading crypto exchange platform

#### **CFTC v. Changpeng Zhao, et al. (N.D. Ill. Mar. 27, 2023, contested)**

The CFTC brought an action against a digital asset exchange company, two executive officers, and two related entities over allegations that they violated CFTC regulations and the Commodity Exchange Act. Principally, the CFTC alleged that the Company allowed U.S.-based customers to trade on the exchange platform without registering the platform with the CFTC.

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

### SEC brings actions against crypto asset entrepreneur and eight celebrities

#### **SEC v. Justin Sun, et al. (S.D.N.Y. Mar. 22, 2023, contested)**

#### **In the Matter of Lindsay Dee Lohan (A.P. Marc. 22, 2023, settled)**

#### **In the Matter of Michele Anne Mason (A.P. Marc. 22, 2023, settled)**

#### **In the Matter of Miles Parks McCollum (A.P. Marc. 22, 2023, settled)**

#### **In the Matter of Jake Joseph Paul (A.P. Marc. 22, 2023, settled)**

#### **In the Matter of Shaffer Chimere Smith (A.P. Marc. 22, 2023, settled)**

#### **In the Matter of Aliaune Damala Badara Akon Thiam (A.P. Marc. 22, 2023, settled)**

The SEC brought actions against a cryptocurrency entrepreneur and his three wholly owned companies for allegedly offering and selling unregistered crypto assets. The SEC alleged that the companies used various crypto campaigns, like airdrop distributions and "bounty programs," to incentivize and recruit potential investors, and also engaged in wash trading. The SEC also alleged that the companies, in connection with online promotional campaigns, violated disclosure requirements by failing to direct paid celebrity spokespersons to disclose their compensation.

In a series of related orders, the SEC brought and settled claims against all but two of the celebrities allegedly involved in the companies' promotional campaign. Together, the orders require payment of more than \$400,000 in disgorgement, prejudgment interest, and civil penalties. The action against the cryptocurrency entrepreneur and his companies is ongoing.

## Pre-IPO broker-dealer activity

### SEC settles unregistered broker-dealer claims related to pre-IPO funds

**In the Matter of Daniel J. Mackle, Sr., et al. (A.P. Mar. 3, 2023, settled)**  
**In the Matter of Scott Esposito (A.P. Mar. 3, 2023, settled)**  
**In the Matter of Equity Acquisition Company Ltd., et al. (A.P. Mar. 3, 2023, settled)**  
**In the Matter of Richard Konopka (A.P. Mar. 3, 2023, settled)**  
**In the Matter of Dave Nicolas (A.P. Mar. 3, 2023, settled)**  
**In the Matter of Robert Daniel Louis (A.P. Mar. 3, 2023, settled)**  
**In the Matter of Daniel Valentino (A.P. Mar. 3, 2023, settled)**  
**In the Matter of Joshua Simmons (A.P. Mar. 3, 2023, settled)**

The SEC settled claims against two companies, their respective owners, and the sales staff of one of the companies for unregistered broker-dealer activity. Specifically, the SEC alleged that the first company, its owner and six salespeople sold interests in two “pre-IPO” funds, which were set up as series LLCs and supported by shares of companies that were expected to undertake an IPO or other liquidity event within two to five years. Collectively, the Company, the owner, and the six salespeople allegedly raised more than \$65 million from soliciting accredited investors without registering as brokers. The SEC also alleged that the second company, along with its founder, acted as unregistered dealers by obtaining pre-IPO shares and offering them for sale to various pre-IPO funds, including to the first company.

To settle the claims, the first company and its owner agreed to pay disgorgement and prejudgment interest of more than \$2.5 million and a civil penalty of \$975,000, in addition to an industry and penny stock bar. The second company and its founder agreed to pay disgorgement and prejudgment interest of more than \$3.6 million and a civil penalty of \$269,360. The six salespeople agreed to pay civil penalties ranging from \$61,000 to \$124,320, and to industry and penny stock bars.

[SEC press release](#) | [SEC order 1](#) | [SEC order 2](#) | [SEC order 3](#) | [SEC order 4](#) | [SEC order 5](#) | [SEC order 6](#) | [SEC order 7](#) | [SEC order 8](#)

## Foreign Corrupt Practices Act

### SEC settles FCPA claim over Guinean bribery scheme

**In the Matter of Rio Tinto plc (A.P. Mar. 6, 2023, settled)**

The SEC settled claims against a global mining and metals company for an alleged bribery scheme in Guinea. The SEC alleged the company hired a French investment banker as a consultant to help it retain mining rights in Guinea. According to the SEC, the consultant offered and attempted to pay approximately \$822,000 to benefit a Guinean government official. The SEC alleged that the company failed to implement sufficient internal controls to detect and prevent the misconduct. The Company’s accounting was also allegedly deficient because its payments to the consultant were not accurately reflected in the Company’s books and records and it failed to execute a written agreement with the consultant that defined the scope of his services.

The Company agreed to pay a \$15 million civil penalty to settle the claims.

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

## CFTC enforcement action

## **CFTC settles failure to supervise claims against commodity pool operator**

**In the Matter of BBL Commodities LP (A.P. Mar. 28, 2023, settled)**

The CFTC settled claims against a commodity pool operator in connection to the Company's alleged failure to maintain an adequate supervisory system related to disruptive trading. Specifically, the CFTC alleged that the Company's compliance policies did not address potentially disruptive trading. This lack of guidance allegedly resulted in a 2017 employee trade that a foreign board of trade determined to be disruptive, reckless, and disorderly.

The Company agreed to pay a \$400,000 civil monetary penalty to settle the action.

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

## **SEC, CFTC announcements**

### **CFTC announces new Director of Enforcement**

The CFTC announced that Ian McGinley will serve as the agency's new Director of Enforcement. McGinley previously worked as a federal prosecutor in the U.S. Attorney's Office for the Southern District of New York for more than a decade.

[CFTC press release](#)

### **SEC awards more than \$12 million to two whistleblowers**

The SEC announced that it awarded over \$12 million to two whistleblowers who provided information and assistance in a successful SEC enforcement action.

[SEC press release](#) | [SEC 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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