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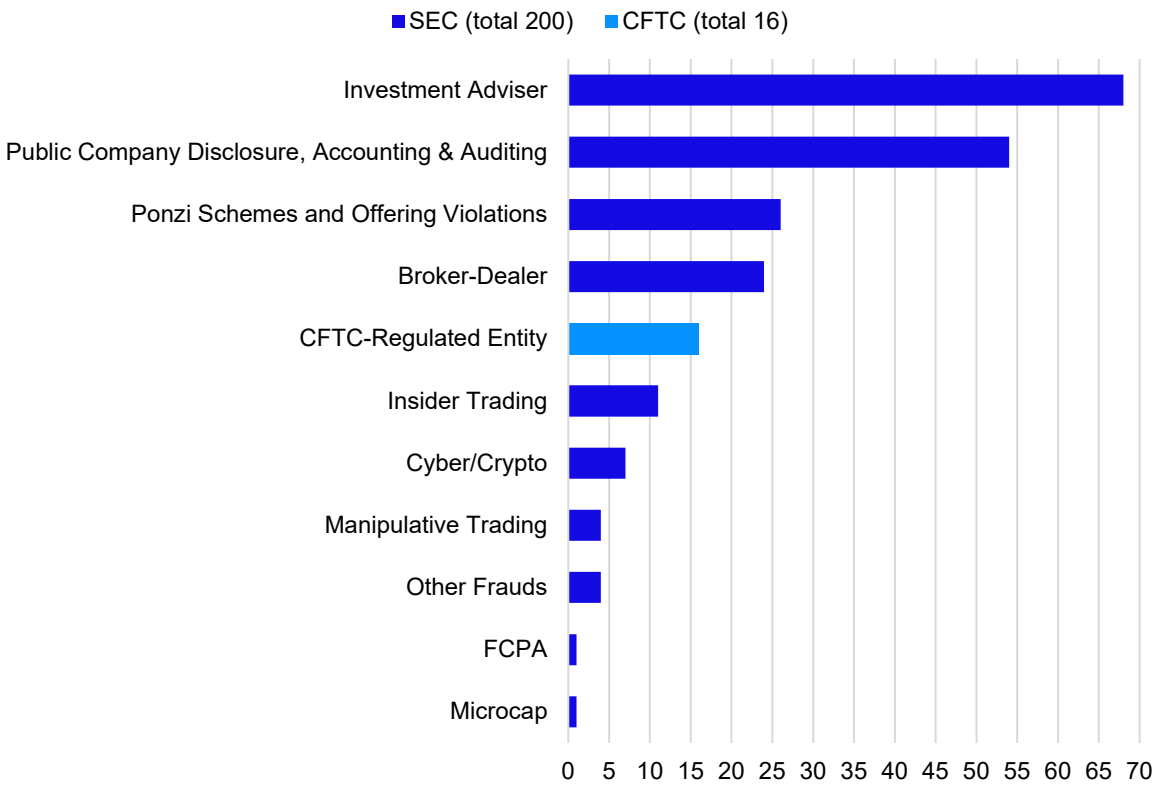
SEC & CFTC Enforcement Update

September 2024

In this edition of the newsletter, we discuss enforcement developments at the agencies in September 2024. The SEC filed 200 actions and the CFTC filed 16, against a combined total of 321 defendants and respondents. (These figures exclude follow-on actions, bars and suspensions.) The SEC actions include investment adviser violations, broker-dealer violations, and public company disclosures.

Actions initiated by the SEC and CFTC in September 2024

Number of actions, by matter type



Insights

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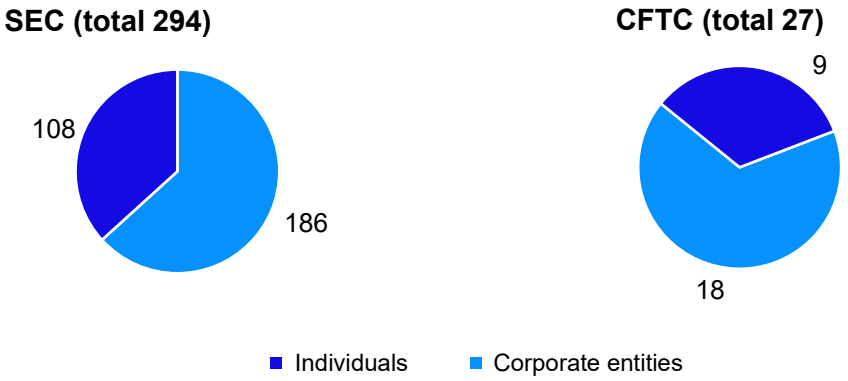
Types of defendants/respondents



Public company disclosure

SEC brings claims against beverage company for recyclability claims

In the Matter of Keurig Dr Pepper Inc. (A.P. Sept. 10, 2024, settled)

The SEC brought and settled claims against a publicly traded beverage company for making inaccurate statements about the recyclability of its products.

According to the SEC, the company stated in its annual reports that its single use beverage pods had been tested and could be effectively recycled. The SEC alleges that the company's disclosure was incomplete because it did not also disclose that two of the largest recycling companies, operating more than one-third of recycling facilities in the United States, expressed concerns regarding the commercial feasibility of recycling the product and did not intend to accept the product for recycling at that time.

The company agreed to pay a civil penalty of $1.5 million to settle the claims.

SEC press release | SEC order

SEC settles beneficial ownership and insider transaction filing cases with 23 stockholders and two public companies

September 25, 2024

As detailed in our recent memo, the SEC brought and settled claims against 23 entities and individuals in a "sweep" of enforcement actions for failure to timely report information about their holdings and transactions in violation of Sections 13 and 16 of the Exchange Act. In addition, two public companies settled claims for contributing to their insiders' filing failures and not disclosing their insiders' filing delinquencies.

Two of the settling entities were issuers, whom the SEC alleged contributed to filing failures by the issuers' insiders and also failed to report delinquencies as required by Item 405 of Regulation S-K. The two issuers agreed to assist their insiders with the preparation and filing of beneficial ownership reports and, according to the SEC, acted negligently when the insiders failed to timely report equity transactions. In addition to these issuers, thirteen companies settled violations of the beneficial ownership reporting requirements related to their ownership of other public companies and, according to the SEC, were frequently late in reporting their beneficial ownership. Finally, ten insiders settled claims related to delinquent transaction reporting, with delinquencies ranging from less than one week to eight months.

The issuers and stockholders agreed to pay more than $3.8 million in civil penalties to settle the claims. The penalties ranged from $10,000 to $200,000 for individuals and $40,000 to $750,000 for public companies.

SEC press release | SEC press release 2

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SEC settles claims against pharmaceutical company and former executives for fraudulent misstatements relating to Alzheimer's drug development

SEC v. Cassava Sciences, Inc., Remi Barbier, Lindsay Burns (W.D. Tex. Sept. 26, 2024, settlement pending court approval)
In the Matter of Hoau-Yan Wang (A.P. Sept. 26, 2024, settled)

The SEC brought and settled claims against a U.S. pharmaceutical company and two former executives for making misleading statements regarding the results of a clinical trial for a potential therapy for Alzheimer's disease. The SEC also settled claims in a related action against a consultant of the company, a university professor and the therapeutic's co-developer, for manipulating clinical trial results.

According to the SEC, the company employed a consultant who, based on information provided by one of the former executives, was able to manipulate data in a purportedly blind study to make it appear that the therapy being studied resulted in key improvements related to the treatment of Alzheimer's disease. They allegedly did so knowing that the information would be publicized and put in an investor deck. The company allegedly told investors that the company's therapeutic significantly improved patient cognition, concealing the full set of data demonstrating no measurable improvement and the consultant's role.

The company agreed to pay a civil penalty of $40 million. The two former executives agreed to pay civil penalties of $175,000 and $85,000, respectively, and the consultant agreed to pay $50,000. The former executives also agreed to officer-and-director bars.

SEC press release | SEC complaint | SEC order

SEC settles selective disclosure action against publicly traded online sports betting company

In the Matter of DraftKings, Inc, (A.P., Sept. 26, 2024, settled)

The SEC brought and settled claims against a publicly traded online sports betting company for selective disclosures of material, non-public information by the company's CEO on social media.

According to the SEC, the company's CEO posted on his personal X account about growth in certain states. This was shortly before the company's quarterly financial results were to be released, and the information had not been previously released elsewhere. A similar statement was posted to the CEO's LinkedIn account. The SEC alleged that these statements, which were made without a prompt public disclosure of the information to the general public, violated Regulation Fair Disclosure (Reg FD), because some but not all of the company's shareholders follow its CEO on social media.

The company agreed to require that its employees participate in a training on corporate communications and compliance with Reg FD and the company's Reg FD policy, and to pay a civil penalty of $200,000.

SEC press release | SEC order

SEC settles charges against individual for failure to disclose relationship with company executive

SEC v. James R. Craigie (S.D.N.Y., Sep. 30, 2024, settled)

The SEC brought and settled claims against a former CEO, Chairman, and board member of a consumer-packaged goods manufacturing company for violating proxy disclosure rules by standing for election as an independent director without informing the board that he had a close personal friendship with a high-level company executive. According to the SEC, this omission caused the company's proxy statements to be materially misleading.

According to the SEC's complaint, the former CEO maintained a close friendship with the company executive, which he did not disclose to the company and which he also allegedly encouraged the company executive to conceal. As a result, the company's proxy statements identified the former CEO as an independent director. The SEC further alleged that when the company began its CEO succession process, the former CEO allegedly shared confidential information about the process with the company executive to better position the

executive for future succession. When the company learned of the former CEO and executive's relationship, it was determined that he was not an independent director.

To settle the claims, the former CEO agreed to a civil penalty of $175,000 and a five-year officer-and-director bar.

SEC press release | SEC complaint

Broker-dealer

SEC settles action against registered broker-dealer for violation of Reg BI

In the Matter of First Horizon Advisors, Inc. (A.P., Sept. 18, 2024, settled)

The SEC brought and settled claims against a registered broker-dealer for failing to maintain and enforce policies and procedures reasonably designed to achieve compliance with Regulation Best Interest ("Reg BI").

According to the SEC, the broker-dealer migrated approximately 5,000 customer brokerage accounts to its system after a merger with another broker-dealer. The two companies' systems were not compatible, and, as a result, the broker-dealer did not have: (1) accurate customer information necessary to review structured note recommendations for compliance with the broker-dealer's Reg BI policies and procedures; or (2) access to its exception reporting site to review structured notes transactions that had been identified as non-compliant. The SEC alleges that this led to the broker-dealer approving structured note recommendations without the documentation required by its own Reg BI policies and procedures.

The company agreed to pay a civil penalty of $325,000.

SEC press release | SEC order

Investment adviser

SEC settles Marketing Rule violations cases

September 9, 2024

The SEC brought and settled claims against nine registered investment advisers for violations of the Marketing Rule.

The conduct differed at each investment adviser, but generally included the alleged dissemination of advertisements that included untrue or unsubstantiated statements of material fact or testimonials, endorsements, or third-party ratings without required disclosures. According to the SEC, the advertisements included a claim of membership to an organization that did not exist, claims to provide conflict-free advisory services that could not be substantiated, testimonials that did not come from current clients, and other violations.

The firms agreed to pay more than $1.24 million in combined penalties, which ranged from $60,000 to $325,000 in individual penalties, to settle the claims.

SEC press release

SEC settles MNPI controls case against investment adviser

In the Matter of Marathon Asset Management, L.P. (A.P. Sep 30, Settled)

The SEC brought and settled claims against an investment adviser for alleged failure to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information (MNPI) regarding its participation on ad hoc creditors' committees, in violation of Sections 204A and 206(4) and Rule 206(4)-7 of the Advisers Act.

The investment adviser regularly participated in ad hoc creditors' committees for issuers in distress where participants may receive MNPI. According to the SEC, the investment adviser failed to establish, maintain, and enforce policies and procedures that sufficiently addressed the particular risks associated with receiving this information – including by engagement and interaction with financial advisers or consultants who analyze debtors' MNPI.

To settle the claims, the investment adviser agreed to pay a $1.5 million civil penalty.

SEC press release | SEC order

Recordkeeping and accounting failures

SEC settles recordkeeping actions with credit rating agencies

September 3, 2024

The SEC brought and settled claims against six nationally recognized statistical rating organizations ("NRSROs") for alleged failures to maintain and preserve electronic communications.

While the alleged conduct varied at each NRSRO, it generally included the NRSROs' employees communicating using personal mobile devices by text message, WhatsApp, and other messaging applications regarding initiating, determining, maintaining, monitoring, changing, or withdrawing a credit rating.

The firms agreed to pay more than $49 million to settle the claims. The firms also agreed to implement certain remedial measures, and four of the six firms are required to retain a compliance consultant. The SEC recognized the two firms that do not have to retain a consultant for their substantial efforts to comply with the recordkeeping requirements earlier than the other firms, as well as their cooperation in the SEC's investigation.

SEC press release

SEC brings claims against a technology manufacturer and its former director of finance for accounting fraud and related accounting controls violations

In the Matter of Circor International, Inc. (A.P. Sept. 5, 2024, settled)
SEC v. Nicholas Bowerman (D. Mass Sept. 5, 2024, contested)

The SEC brought claims against a technology manufacturer's former director of finance for making misleading statements about the company's financial performance, and against the company for accounting controls violations.

According to the SEC, the director of finance manipulated the company's internal accounting records by falsifying the results of a company subsidiary before they were incorporated into the company's results. As a result, the company overstated its operating income by $7.2 million in 2019 and understated its operating loss by $34.5 million in 2020. While the director of finance concealed his conduct, the SEC alleges that the company failed to devise and maintain internal accounting controls to prevent fraud.

Because the company self-reported the violations, promptly implemented remedial measures, and provided substantial cooperation to the SEC after discovering the issue, it was able to settle the claims without any monetary penalty.

SEC press release | SEC order | SEC complaint

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SEC settles recordkeeping actions with municipal advisers, investment advisers, and broker-dealers

September 17, 2024

The SEC brought and settled claims against 12 municipal advisers and 11 registered broker-dealers and investment advisers for failures to maintain and preserve electronic communications.

The conduct differed at each firm, but generally included employees, including those at a senior level, communicating using personal mobile devices by text message, WhatsApp, and other messaging applications regarding municipal advisory activities, investment adviser business, or broker-dealer business, in violation of the firms' policies and procedures.

The municipal advisers agreed to pay more than $1.3 million to settle the claims.

The broker-dealers and investment advisers agreed to pay more than $88 million to settle the claims, though one of the firms was not required to pay a penalty after the firm self-reported, cooperated with the SEC's investigation, and demonstrated substantial efforts at compliance. The SEC also noted that two other firms paid significantly lower civil penalties than they otherwise would have because they self-reported. Ten of the 11 firms were required to retain a compliance consultant.

SEC press release 1 | SEC press release 2

SEC settles insider filing cases with institutional investment managers

September 17, 2024

The SEC brought and settled claims against 11 institutional investment managers for alleged failures to report certain securities holdings on Form 13F. Each firm allegedly failed to file Form 13F, which was required because they had discretion over more than $100 million in certain securities. According to the SEC, two of the firms also failed to file Forms 13H as required for large traders who trade significant amounts of exchange-listed securities.

Nine of the firms agreed to pay more than $3.4 million combined to settle the claims. Two of the firms were not ordered to pay civil penalties because they self-reported and cooperated with the SEC, and one of the firms that failed to file Forms 13H was not ordered to pay a civil penalty for those violations because it self-reported and cooperated with the SEC.

SEC press release

FCPA

SEC settles FCPA action against agricultural machinery manufacturer

In the Matter of Deere & Company (A.P., Sept. 10, 2024, settled)

The SEC brought and settled claims against an agricultural machinery manufacturer for an alleged bribery scheme carried out by a wholly-owned Thai subsidiary and related books and records and accounting control violations.

Employees of the company's Thai subsidiary allegedly paid bribes to Thai government officials with the Royal Thai Air Force, Department of Highways, and Department of Rural Roads to secure contracts for machinery. The company allegedly reported the improper payments as legitimate business expenses. According to the SEC, the company failed to timely integrate the Thai subsidiary into its existing compliance and controls for

several years after acquisition, resulting in its failure to devise and maintain controls sufficient to detect and prevent the improper payments.

The company agreed to pay disgorgement and prejudgment interest totaling approximately $5.4 million and a civil penalty of $4.5 million.

SEC press release | SEC order

Crypto

SEC settles action against crypto trading platform for acting as an unregistered broker and clearing agency

In the Matter of eToro USA LLC (A.P., Sept. 12, 2024, settled)

The SEC brought and settled claims against a crypto trading platform for acting as an unregistered broker and clearing agency.

According to the SEC, the company provided U.S. customers the ability to trade crypto assets. Some of these assets had been deemed securities, but the company did not seek to register as a broker or clearing agency. The company agreed to a settlement that limits the crypto assets on its platform to Bitcoin, Bitcoin Cash, and Ether, which are not considered securities by the SEC. Then-Director of the Division of Enforcement Gurbir Grewal praised this resolution as a "pathway for other crypto intermediaries" to continue operating without violating securities laws.

The company agreed to pay a penalty of $1.5 million.

SEC press release | SEC order

Whistleblower protections

SEC settles actions for violation of whistleblower protections against seven companies

September 9, 2024

The SEC brought and settled claims against seven companies for violating Rule 21F-17, which prohibits impediments to potential whistleblowers' ability to report misconduct to the SEC.

According to the SEC, each of the seven companies entered into employment agreements that in some way restricted the rights of their employees or contractors to recover whistleblower awards. The level of alleged misconduct varied significantly between these companies. For example, one included this language in only two separation agreements, while another included similar language in agreements with ninety-eight different employees.

The seven firms agreed to pay penalties ranging between $19,500 and $1.4 million, totaling more than $3 million collectively.

SEC press release | SEC order 1 | SEC order 2 | SEC order 3 | SEC order 4 | SEC order 5 | SEC order 6 | SEC order 7

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CFTC actions

CFTC settles action for recordkeeping and supervision failures related to off-channel communications

In the Matter of Piper Sandler Hedging Services LLC (A.P. Sept. 23, 2024, settled)

The CFTC brought and settled claims against a U.S. introducing broker for failure to maintain and preserve required records and failure to diligently supervise matters related to its business as a CFTC registrant.

According to the CFTC, employees used off-channel communication methods, such as text messaging, for business discussions in violation of the firm's policies and procedures. The CFTC alleges that the firm did not maintain or preserve these communications, failed to maintain adequate internal controls in connection with unapproved communication methods, and failed to diligently supervise its employees.

The firm agreed to pay $2 million in penalties to settle the claims. Two Commissioners made dissenting statements. CFTC Commissioner Caroline Pham criticized the action for "double-dipping on SEC violations," noting a lack of evidence to support claims related specifically to commodities rather than securities. CFTC Commissioner Summer Mersinger issued comments criticizing the action for not being individually tailored to the facts of this case and instead using generic terms that do not explain the kind of record that serves as a basis for the alleged violations.

CFTC press release | CFTC order | Dissenting Statement of Commissioner Mersinger | Dissenting Statement of Commissioner Pham

CFTC settles action for position limit violations

In the Matter of Merrill Lynch Commodities, Inc. (A.P. Sept. 25, 2024, settled)

The CFTC brought and settled claims against a registered swap dealer for exceeding position limits in natural gas futures contracts traded on the New York Mercantile Exchange and related monitoring failures.

The CFTC has established limits for speculative positions in certain physical-delivery referenced contracts, including natural gas. The CFTC alleged that, on certain trading days, the swap dealer held positions that were up to 50% above the limit and had not been granted an exemption to do so. The CFTC further alleged that the swap dealer did not establish and enforce policies and procedures reasonably designed to monitor and prevent violations of these limit rules. According to the CFTC, the swap dealer also failed to supervise employees because it did not maintain an early warning system or written policies and procedures to alert senior management when position limits were about to be breached.

The swap dealer agreed to pay $1.5 million in penalties to settle the claims. The CFTC acknowledged the swap dealer's cooperation and representations regarding remediation.

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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