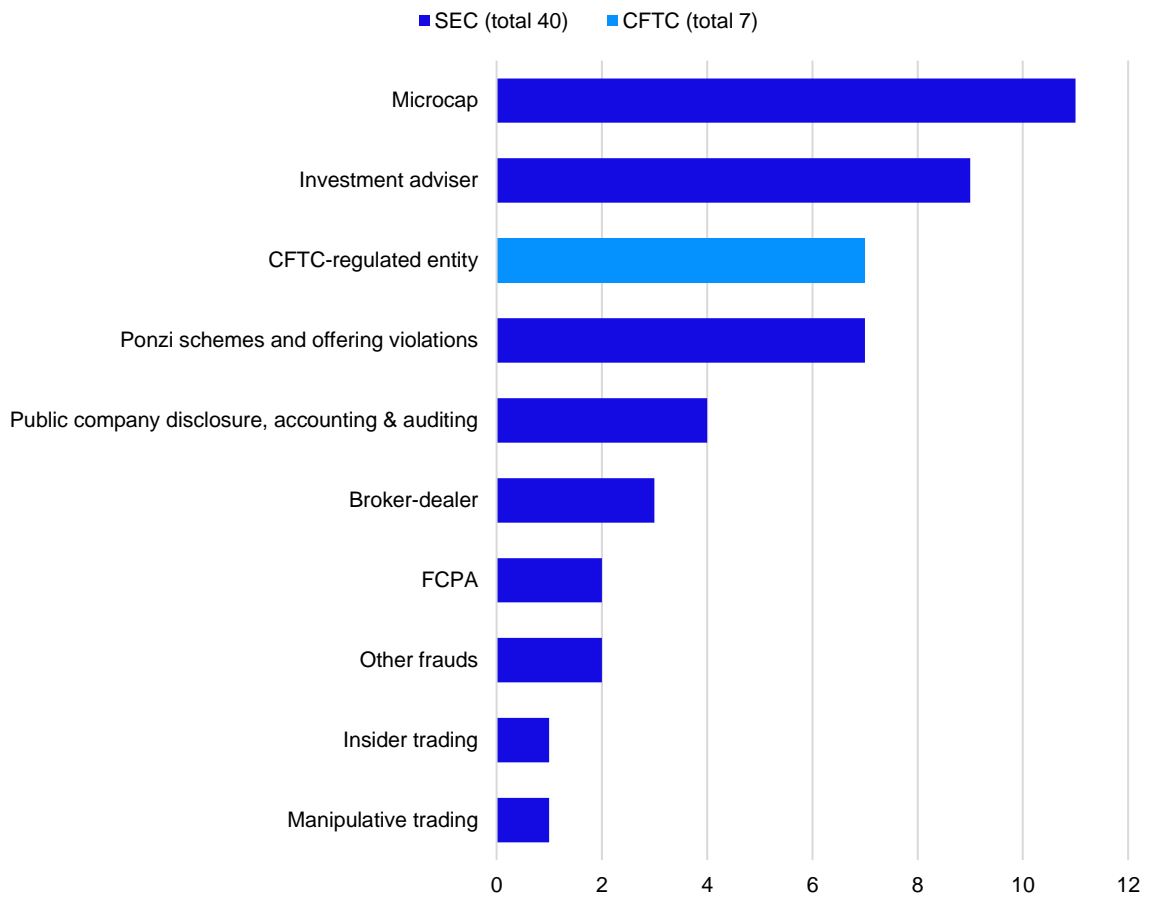


May 2023

In May 2023, the SEC filed 40 actions and the CFTC filed seven, against a combined total of 72 defendants and respondents. (These figures exclude follow-on actions, bars and suspensions.) The actions include matters related to broker-dealers and investment advisers, among others.

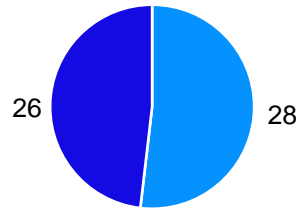
Actions initiated by the SEC and CFTC in May 2023

Number of actions, by matter type

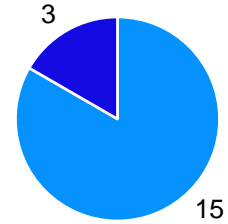


Types of defendants/respondents

SEC (total 54)



CFTC (total 18)



■ Individuals ■ Corporate entities

Broker-dealers

SEC, CFTC give cooperation credit in two off-channel communications settlements

- In the Matter of HSBC Securities (USA) Inc. (A.P. May 11, 2023, settled)**
- In the Matter of Scotia Capital (USA) Inc. (A.P. May 11, 2023, settled)**
- In the Matter of HSBC Bank USA, N.A. et al. (A.P. May 11, 2023, settled)**
- In the Matter of The Bank of Nova Scotia et al. (A.P. May 11, 2023, settled)**

The SEC brought and settled separate actions against two broker-dealers for alleged recordkeeping violations involving off-channel communications. According to the SEC, employees at both firms, including senior management, used personal devices and online messaging platforms to discuss securities business matters. The SEC alleged that these communication practices violated Exchange Act recordkeeping requirements and the firms’ policies because the communications were neither monitored nor archived.

The cases followed an earlier series of settlements involving similar violations. In the most recent settlements, the SEC awarded cooperation credit to both firms for self-reporting the conduct. HSBC agreed to pay \$15 million while Scotia Capital agreed to pay \$7.5 million.

The CFTC announced parallel settlements with the firms and affiliated entities for similar conduct, alleging violations of the CFTC’s recordkeeping requirements and failure to supervise. The HSBC affiliates agreed to pay a \$30 million penalty to the CFTC while the BNS affiliates agreed to pay a \$15 million penalty.

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

SEC settled claims related to a South African bribery scheme

In the Matter of Gartner, Inc. (A.P. May 26, 2023, settled)

The SEC brought and settled claims against a technology research and consulting company for its alleged role in an arrangement with a private South African company that violated the anti-bribery, books and records, and internal accounting controls provisions of the Foreign Corrupt Practices Act. According to the SEC, a manager of one of the Company's business segments authorized the Company to enter into subcontracts with a South African IT consulting company. The manager allegedly authorized these subcontracts despite knowing or consciously disregarding the possibility that funds paid to the South African consultants would be used to induce officials to award the Company sole-source contracts. The SEC also alleged that the Company failed to make and maintain accurate books and records and lacked adequate internal accounting controls.

The Company agreed to pay \$856,764 in disgorgement and prejudgment interest and a \$1,600,000 civil penalty to settle the action.

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

Global health technology product manufacturer settles FCPA claims

In the Matter of Koninklijke Philips N.V. (A.P. May 11, 2023, settled)

The SEC brought and settled FCPA claims against a health technology product manufacturer over allegations that two of its subsidiaries based in China engaged in improper bidding practices. The SEC alleged that the subsidiaries engaged in bidding practices to influence the likelihood that they would be awarded public tenders to sell medical equipment to government-owned hospitals. For example, the SEC alleged that the subsidiaries made a payment to a hospital director in exchange for the director's assistance in the tender bid process, including discussions regarding the specifications to be included in the bid. The SEC also alleged that the subsidiaries worked with hospital directors to tailor a tender's technical specifications so that only a few manufacturers, including the subsidiaries, would qualify. Further, the subsidiaries allegedly provided special price discounts to distributors, creating risk that distributor margins could be used to fund improper payments to officials. Finally, the SEC alleged that the subsidiaries had insufficient internal accounting and books and records controls because it did not enforce certain of their due diligence and training procedures for engaged distributors or conduct adequate testing in high-risk areas.

The manufacturer agreed to pay \$15 million in civil penalties and more than \$47 million in disgorgement and prejudgment interest to settle the claims.

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

SEC files first-ever complaint under the Liquidity Rule

SEC v. Pinnacle Advisors, LLC et al. (N.D.N.Y. May 5, 2023, contested)
In the Matter of Pinnacle Investments, LLC (A.P. May 5, 2023, settled)
In the Matter of Joseph Masella (A.P. May 5, 2023, settled)

In its first-ever case enforcing the Liquidity Rule, the SEC brought contested claims against an investment adviser for aiding and abetting violations of Rule 22e-4 of the Investment Company Act (“Liquidity Rule”) by a fund it advised and whose Liquidity Risk Management Program (“LRMP”) it administered. The SEC also filed claims against two officers of the adviser and fund and two independent trustees of the fund over allegations that they aided and abetted violations of the Liquidity Rule. The Liquidity Rule requires open-end funds to manage liquidity risk by, among other things, establishing a LRMP and complying with a 15% limit on illiquid investments, with reporting requirements for 15% overages.

According to the SEC, the fund held approximately 21 to 26% of its net assets in illiquid investments for nearly a year but did not report the overages and present its board with a required remediation plan. The SEC also alleges that the parties improperly classified the shares as a “less illiquid” investment instead of an “illiquid investment” and made misleading statements to SEC Staff regarding the basis for their classification. The SEC also alleges that the two independent trustees failed to exercise reasonable oversight over the fund’s program and Liquidity Rule compliance.

The SEC seeks permanent injunctions and civil money penalties against all five parties. A third independent trustee settled the claims against him, agreed to pay a civil penalty of \$20,000, and agreed to a 6-month bar.

In a different action, the SEC announced and settled claims against an affiliate dually registered as an investment adviser and broker-dealer for alleged violations of the Investment Advisers Act. These alleged violations include failure to disclose certain conflicts of interests in connection with outside business activities and compensation arrangements and making misleading statements regarding reviews of advisory client accounts. The affiliate investment adviser/broker-dealer agreed to pay a civil penalty of \$393,381 and disgorgement and prejudgment interest totaling \$95,336 and engage a compliance consultant.

Davis Polk’s November 2022 [client update](#) outlines the Liquidity Rule, along with other Rule 22e-4 requirements.

[SEC press release](#) | [SEC complaint](#) | [SEC order 1](#) | [SEC order 2](#) | [DPW client update](#)

SEC brought and settled actions against ten microcap companies

In the Matter of CW Petroleum Corp. (A.P. May 16, 2023, settled)

In the Matter of DNA Brands Inc. (A.P. May 16, 2023, settled)

In the Matter of Graystone Company Inc. (A.P. May 16, 2023, settled)

In the Matter of Green Stream Holdings Inc. (A.P. May 16, 2023, settled)

In the Matter of Hemp Naturals Inc. (A.P. May 16, 2023, settled)

In the Matter of LiveWire Ergogenics Inc. (A.P. May 16, 2023, settled)

In the Matter of Principal Solar Inc. (A.P. May 16, 2023, settled)

In the Matter of SFLMaven Corp. (A.P. May 16, 2023, settled)

In the Matter of The Marquie Group Inc. (A.P. May 16, 2023, settled)

In the Matter of Verdie Bio Holdings Inc. (A.P. May 16, 2023, settled)

A significant percentage of the enforcement actions that the SEC brought in May were settled actions against ten microcap companies for offering and selling securities in unregistered offerings. The SEC alleged that each of the companies initially obtained qualifications to offer securities using Regulation A; however, the companies later made significant changes to their offerings without meeting the requirements of the Regulation A exemption, resulting in unregistered offerings. To settle the actions, the 10 companies each agreed to pay civil penalties, which collectively totaled \$380,000.

[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](#) | [SEC order 9](#) | [SEC order 10](#)

Public company disclosures

SEC brought an action against a company for overstating subscribers and whistleblower retaliation

In the Matter of Gaia, Inc., et al. (A.P. May 23, 2023, contested)

The SEC brought and settled claims against an online streaming company and its Chief Financial Officer for allegedly overstating the number of paying subscribers in an earnings call and Form 8-K as well as for alleged whistleblower retaliation and interference. According to the SEC, the number of paying subscribers disclosed by the Company included approximately 15,000 subscribers that had either received a free membership or who were not successfully charged for the service because their credit cards were declined. The SEC alleged that this allowed the Company to hit a previously disclosed estimate. The SEC further alleged that the Company fired a whistleblower in retaliation for reporting the subscriber count issue internally and to the SEC. Finally, the SEC alleged that the Company violated Rule 21F-17 by including language in severance agreements that required waiver of the individuals' rights to whistleblower awards.

The Company agreed to a \$2 million civil penalty and the CFO agreed to a \$50,000 civil penalty to settle the action. The Company also agreed to an undertaking to provide employees who entered severance agreements with information explaining that it does not prohibit former employees from accepting whistleblower awards

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

SEC settles earlier action against bank executive for misleading statements

SEC v. Carrie L. Tolstedt (filed N.D. Cal. Nov. 11, 2020, settled May 30, 2023)

The SEC announced that it settled an action it brought in November 2020 against the former head of community banking at a publicly traded financial services company. The SEC alleged that the Company utilized a “cross-sell metric” as a means of measuring financial success despite this metric being inflated. The SEC further alleged that the former head made misleading statements about the cross-sell metric during investor conferences and signed inaccurate sub-certifications as to the accuracy of the Company’s SEC filings, which included the cross-sell metric.

To settle the claims, the former head agreed to an officer-and-director bar and to pay \$1,459,076 in disgorgement, \$447,874 in prejudgment interest, and \$3 million in civil penalties. The SEC previously brought and settled charges against the Company and its former CEO and Chairman.

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

Other fraud

SEC settles claims against reinsurance company for false statements

SEC v. IRB Brasil Resseguros S.A. (S.D.N.Y. May 9, 2023, settled)

The SEC settled claims against a publicly traded Brazilian reinsurance company over allegations that a former senior executive made misleading statements about purported investments. The SEC alleged that after the company’s stock prices began to decline, the senior executive fabricated claims that a well-known multinational company had made a substantial investment in the company and directed the company’s communication manager to “leak” the falsified investment to a journalist. According to the SEC, the former executive circulated forged documents to actual company investors, including a fake shareholder list and a fabricated email between the company and the purported investor. The SEC alleged that the company’s stock price rose by 6% as a result of the former executive’s actions and subsequently dropped by more than 40% after the purported investor publicly denied that it had ever invested, or intended to invest, in the company.

To settle the claims, the company consented to the entry of a final judgment, subject to court approval. The SEC did not impose a penalty because of the company’s cooperation and remediation efforts during the investigation, including conducting a thorough investigation and sharing the results with SEC Staff, replacing senior management, replacing and expanding its Board, and implementing additional controls.

In April 2023, the SEC brought a separate action against the senior executive for allegedly violating the antifraud provisions of the Exchange Act and is seeking civil monetary penalties, as well as an officer-and-director bar, against him.

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

CFTC settles manipulative trading claims against swap dealer**In the Matter of HSBC Bank USA, N.A. (A.P. May 12, 2023, settled)**

The CFTC brought and settled claims against a provisionally registered swap dealer over allegations that it engaged in manipulative and deceptive trading related to interest rate swaps with bond issuers and spoofing. According to the order, traders engaged in unfair dealing practices such as using counterparties' confidential information about the timing and pricing of issuer swaps in a way that was materially adverse to the counterparties, and communicating with counterparties about issuer swaps without disclosing that its traders would trade, or had traded, to move prices in a direction that favored the swap dealer. The CFTC alleged that the swap dealer failed to establish and maintain a system of supervision to detect and prevent these practices. Finally, the CFTC alleged that the swap dealer failed to comply with CFTC recordkeeping requirements because it failed to make and keep required recordings of mobile phone calls between March and July 2020.

The Company agreed to pay a \$45 million civil monetary penalty to settle the claims.

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

SEC, CFTC announcements**SEC database controls failure more widespread than initially reported**

Following the SEC's announcement in April 2022 that Enforcement Staff had improper access to materials reserved for its administrative adjudication division in two matters, the Commission announced that its internal review revealed the controls issue to be more widespread than initially reported. Specifically, the SEC announced that its internal review team discovered that Enforcement Staff accessed the adjudication material of 28 other matters, as well as memoranda that broadly implicated 61 additional matters. On remediation, the Commission resolved to dismiss certain affected matters and implement more effective data control systems.

[SEC June 2023 statement](#) | [SEC April 2022 Statement](#)

SEC names new Division of Corporation Finance Deputy Director for Legal and Regulation Policy

The SEC announced that Mellissa Campbell Duru has been named the new Deputy Director for Legal and Regulation Policy for the Division of Corporation Finance

[SEC press release](#)

SEC announces largest-ever whistleblower award

The SEC announced an award of \$279 million – the largest award to date – to a whistleblower whose information and assistance led to the successful enforcement of SEC and related actions.

[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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