

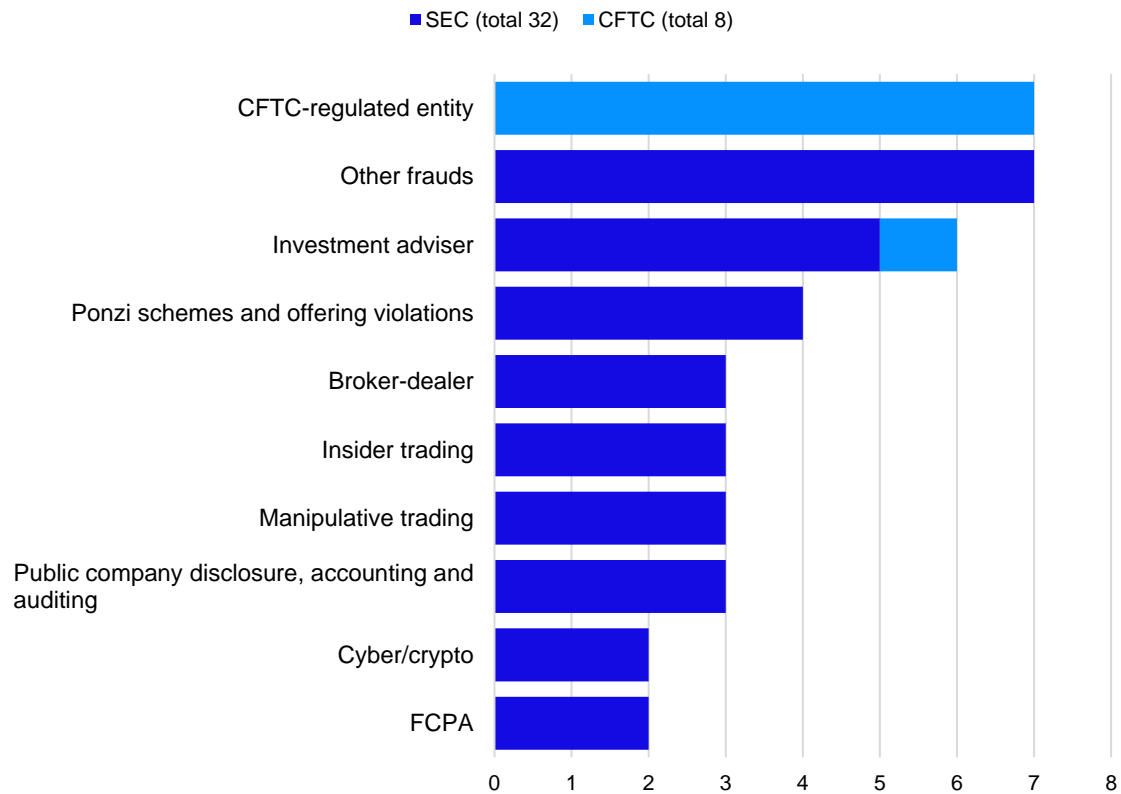
# SEC & CFTC Enforcement Update

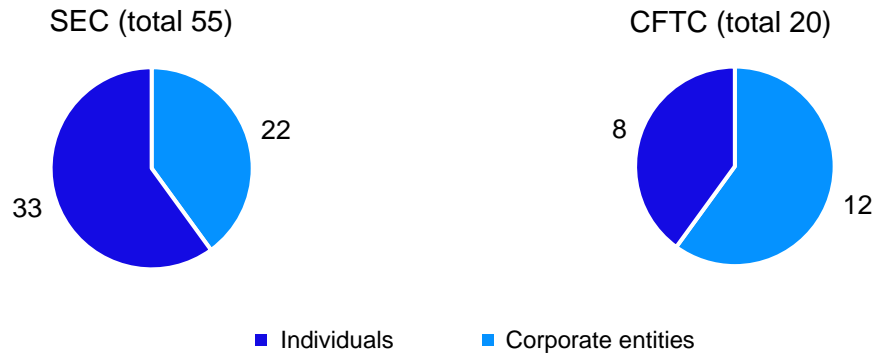
October and November 2021

The SEC and CFTC filed fewer cases in both October and November than in September, as is typical for the start of a fiscal year. The SEC filed 32 actions and the CFTC filed 8 (excluding follow-on actions, bars and suspensions) against a combined total of 75 defendants and respondents. The SEC’s actions spanned numerous case types, including investment adviser, broker dealer, and other frauds cases. The CFTC’s actions included various actions concerning fraud and failure to retain documents.

## Actions initiated by the SEC and CFTC in October and November 2021

*Number of actions, by matter type*





## Key cases and developments

### SEC reviews its enforcement results for FY 2021

The SEC in November announced its enforcements results for fiscal year 2021, which included 434 standalone enforcement actions—a seven percent increase from fiscal year 2020. These actions spanned the breadth of the securities market, including areas that the SEC has labeled as priorities such as the regulation of cryptocurrency, public company accounting and disclosure violations, gatekeepers, improper conduct of investment professionals, market integrity and manipulation, insider trading, the Foreign Corrupt Practices Act, and offering violations. The SEC emphasized its focus on holding individuals accountable—70% of the new actions from the year involved at least one individual defendant or respondent. Additionally, the SEC’s whistleblower program had a record year, awarding the highest awards in the program’s history and passing the \$1 billion mark in total awards given by the program.

This year resulted in almost \$2.4 billion in disgorgement and \$1.4 billion in penalties; these numbers were a 33% decrease and 33% increase, respectively, from FY 2020.

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

### SEC enforcement director discusses corporate enforcement priorities

On October 13, the SEC’s new Director of Enforcement, Gurbir Grewal, made remarks at the annual SEC Speaks conference in which he discussed philosophical and procedural changes at the Division of Enforcement. In addition to highlighting the Enforcement Division’s “first in kind” cases involving digital assets, Regulation Crowdfunding, and alternative data providers, Grewal outlined four areas of focus for SEC Enforcement going forward: corporate responsibility, gatekeeper responsibility, crafting appropriate remedies, and trusting and empowering the SEC Staff.

With respect to corporate responsibility, Grewal said that the SEC will focus on addressing misconduct that occurs in the course of an investigation, and that there will be consequences for failing to appropriately preserve records. He noted that regulated entities have statute and rule-based recordkeeping obligations and that, for other entities, the SEC could seek an adverse inference in litigation if it believes evidence was spoliated. On gatekeepers, Grewal said that attorneys and audit partners will remain a significant focus. With respect to remedies, Grewal said that the Enforcement Division would return to a practice began under Chair Mary Jo White by seeking admissions where “heightened accountability and acceptance of responsibility are in the public interest.” Grewal also noted that the Division will “recommend aggressive use” of prophylactic tools such as officer and director bars, conduct based injunctions, and undertakings. Finally, with respect to empowering SEC Staff, Grewal announced that in some cases not presenting novel legal issues or particular factual disagreements, the Director or Deputy Director of Enforcement will not participate in Wells meetings. Instead, Grewal stated that an Associate Director or appropriate Unit Chief will handle those meetings.

[SEC press release](#)

## **SEC issues \$18 million fine for compliance failures**

**In re MIO Partners, Inc. (November 19, 2021, settled)**

The SEC issued an order for an investment adviser firm to pay an \$18 million penalty for compliance failures relating to the handling of material nonpublic information (“MNPI”). According to the SEC, the firm, which provides advice exclusively to employees of its parent company, allowed individuals with access to MNPI to direct investments via positions on the Investments Committee. The SEC alleged that the organizational structure of the firm presented an ongoing risk of the misuse of MNPI and that the firm did not have reasonable policies and procedures in place to mitigate this risk. The SEC cited several examples of instances when the firm invested in companies about which members of the Investment Committee possessed or could have possessed MNPI.

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

## **SEC settles case with company, former CEO over executive perks**

**In re ProPetro Holding Corp. et al. (A.P. November 22, 2021, settled)**

The SEC reached a settlement with an oilfield services company and its former CEO and founder for alleged failure to disclose executive perks and stock pledges. According to the SEC, the former CEO spent over \$380,000 of company money in personal expenses unrelated to his CEO role. The SEC further alleged that the former CEO did not disclose to the company his pledging of company stock in private real estate transactions. Further, the SEC’s order stated that the company did not disclose an additional \$47,591 in perks it paid to its former CEO, leading to misstatements in its public filings. The SEC noted the company’s cooperation and remedial efforts in its order and the former CEO agreed to pay a \$195,046 penalty.

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

## **SEC settles case against public company for accounting violations**

**In re Amyris, Inc. (A.P. October 15, 2021, settled)**

The SEC settled a case against a chemical products company for alleged internal accounting control failures that led to material overstatements of royalty revenues. According to the SEC, the company’s executives received updates from a manufacturer that would significantly impact estimated royalty payments, but failed to share this information with the company’s accounting department. This resulted in the company filing inaccurate financial statements in the first and second quarters of 2018. The SEC also alleged that the company failure to implement adequate internal accounting controls or provide sufficient resources to its finance and accounting departments, and the SEC’s order noted that the company remediated these issues by hiring a more experienced CFO and retaining an external consultant. The company agreed to pay a civil penalty of \$300,000.

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

## **CFTC sues energy broker for trading and supervision violations**

**CFTC v. Coquest Inc. et al. (N.D. TX, October 20, 2021, contested)**

The CFTC brought a case against an introducing broker, its owner, and two trading firms for allegedly misappropriating customer block trade orders. The CFTC’s complaint alleges that, without customers’ knowledge or consent, the introducing broker brokered more than 2,000 trades in which its owner, who had access to information regarding the prices at which customers were willing to buy or sell, traded on the opposite side. The CFTC further alleges that customers were intentionally offered unfavorable prices so that the trading firms could garner arbitrage profits. Finally, the CFTC alleges that the principal firm failed to implement adequate policies to prevent misappropriation of customer information or trading against customers without prior consent.

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

## **SEC fines clearing agency for risk management failures**

**In re Fixed Income Clearing Corporation (A.P. October 29, 2021, settled)**

The SEC reached a settlement with a clearing agency for failure to maintain reasonably-designed risk management policies. According to the SEC, the agency did not have reasonably designed policies for holding sufficient liquidity to cover a large participant if it failed, including by conducting due diligence on liquidity providers or analyzing the reliability of liquidity providers. The SEC also alleged that the agency failed to implement policies related to maintaining and periodically reviewing margin coverage, including because it failed to address two errors in its back-testing system that resulted in inflated coverage, and which were allegedly identified as deficiencies by the SEC's Division of Examinations. The agency agreed to pay an \$8 million civil penalty and to retain an independent compliance consultant for a period of two years.

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

## **SEC sues individual for Twitter-based manipulative trading scheme**

**SEC v. Steven M. Gallagher (S.D.N.Y. October 26, 2021, Contested)**

The SEC brought a case against an individual for allegedly conducting a scalping scheme via Twitter. According to the SEC, the individual would buy millions of microcap stocks, coordinate with associates to urge Twitter users to invest in the same securities, and sell his stocks once increased activity raised the price of the stocks. He allegedly also marked the close on these stocks, placing multiple buy orders at the end of the trading day. The SEC estimated that the individual amassed more than 70,000 Twitter followers and made at least \$3.39 million in profits from the scheme. The SEC obtained an emergency injunction against the individual, freezing up to \$6.9 million in assets.

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

## **SEC and CFTC bring parallel actions against barred investment adviser**

**SEC v. Swapnil J. Rege et al. (D.N.J. October 26, 2021, contested)**

**CFTC v. Swapnil J. Rege et al. (D.N.J. October 26, 2021, contested)**

The SEC and CFTC each brought charges against an individual and his company for improperly soliciting investment advisory clients and raising over \$10 million while subject to agency bars on his participation in investment advisory activities and commodity trading. The agencies allege that this individual fraudulently induced investments with the false promise of high returns and then used the clients' money to pay back other clients and cover the personal expenses. According to the CFTC, the individual also used these funds to trade commodity interests through his personal accounts.

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

## **CFTC sues commodity pool operator, broker for fraud, misappropriation**

**CFTC v. Purvesh Mankad et al. (D. Ariz. October 8, 2021, contested)**

**In re Paul C. Ohanian et al. (A.P. October 8, 2021, settled)**

The CFTC brought cases against an individual, a CFTC-registered commodity pool operator, and a CFTC-registered introducing broker (each controlled by the same individual) alleging fraudulent solicitation and misappropriation of pool participant funds. According to the CFTC, the individual and his commodity pool operator represented to pool participants that only registered Commodity Trading Advisors (CTAs) would trade funds in the commodity pool. However, the individual (who was not a registered CTA) engaged in much of the trading. The CFTC also alleged that the individual and the introducing broker misappropriated pool funds and that, after the individual's reckless trading led to a loss of 89% of pool assets, the individual concealed the losses from pool participants and falsified emails sent to the National Futures Association (NFA) in connection with an NFA audit.

The CFTC separately agreed to a settlement with an individual registered as an associated person of the introducing broker and his wealth management planning company. According to the CFTC, the individual steered clients to participate in the pool without disclosing his relationship to the pool operator and other relevant facts. The settlement includes a four-year bar and requires payment of \$338,000 in restitution and

a \$169,000 civil monetary penalty. The settlement also prohibits them from trading in commodity interests, registering with the CFTC, or engaging in activity requiring such registration for four years.

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

## **SEC brings suit against individual for multi-million dollar scheme**

**SEC v. James David O'Brien (S.D.N.Y. November 18, 2021, contested)**

The SEC brought an action against an individual for an alleged market manipulation scheme that spanned years and raised nearly \$10 million. The SEC alleges that over five years, the individual made coordinated trades between 18 different accounts at 14 different brokerage firms to influence the prices of over 2,000 different securities. According to the complaint, the individual made these coordinated trades over 18,000 times.

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

## **CFTC and SEC settle with commodity pool operator**

**In re United States Commodity Fund, LLC (A.P., November 8, 2021, settled)**

**In re United States Commodity Fund, LLC et al (A.P., November 8, 2021, settled)**

The CFTC and SEC simultaneously brought and settled allegations against a commodity pool operator ("CPO") for failure to fully disclose position limits on the commodity pool it managed. The CFTC alleged that the CPO failed to disclose that its only Futures Commission Merchant had imposed certain position limits on the CPO that would render the CPO unable to purchase additional futures contracts in connection with new ETF shares. The SEC also reached a settlement with the CPO and its Exchange-Traded Product.

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

## **SEC brings suit against promoter for conducting cryptocurrency investment scams**

**SEC v. Ryan Ginster (C.D. CA, November 18, 2021, contested)**

The SEC brought a suit against an individual for conducting two unregistered and fraudulent securities offerings and misappropriating funds during a period from 2018 to 2021. The SEC alleged that the individual raised approximately \$3.6 million in Bitcoin through two online platforms that promised high rates of return by falsely claiming returns through, amongst other activities, purported "cryptocurrency trading and advertising arbitrage." The SEC also alleged that the individual misappropriated at least \$1 million dollars to pay personal expenses.

[SEC Press Release](#) | [SEC Complaint](#)

## **SEC halts registration of two digital tokens**

**In re American CryptoFed DAO LLC (A.P., November 10, 2021, contested)**

The SEC issued an order halting the registration of two digital tokens on the basis of inadequate disclosure and improper filing. The SEC alleges that the would-be issuer filed a materially deficient and misleading registration on Form 10 that would have registered the tokens as equity securities. Specifically, the SEC alleges that the form omitted certain required information about the two tokens as well as about the organization's business, management, and financial condition, including audited financial statements.

[SEC Press Release](#) | [SEC Order](#)

## SEC appoints new chairperson, board members to PCAOB

The SEC in November appointed Erica Y. Williams as Chairperson of the Public Company Accounting Oversight Board (“PCAOB”). She joins from Kirkland & Ellis LLP, where she is currently a litigation partner, and she previously worked at the SEC. Additionally, the SEC appointed three new Board members to the PCAOB—Christina Ho, former SEC Commissioner Kara M. Stein, and Anthony C. Thompson. Outgoing Chairperson Duane DesParte will remain on the PCAOB as a Board member after Williams enters her role.

[SEC Press Release](#)

## Whistleblower awards

In November, the SEC awarded more than \$25 million in whistleblower awards to several individuals who provided information leading to enforcement actions.

The SEC announced two sets of whistleblower awards in October, with three individuals receiving over \$40.2 million in whistleblower payments.

The CFTC announced in October the largest payment to a single whistleblower in its history, awarding almost \$200 million to an individual whose contributions led to successful enforcement actions by the CFTC, a U.S. federal regulator, and a foreign regulator.

[SEC whistleblower page](#) | [CFTC press release](#)

## Personnel and organizational changes

The SEC announced notable personnel and organizational changes in November:

- Haoxiang Zhu was appointed Director of the SEC Division of Trading and Markets.

[SEC press release](#)

- Daniel R. Gregus was named Director of the SEC Chicago Regional Office.

[SEC press release](#)

- Nicole Creola Kelly was named Chief of the SEC’s Office of the Whistleblower.

[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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