

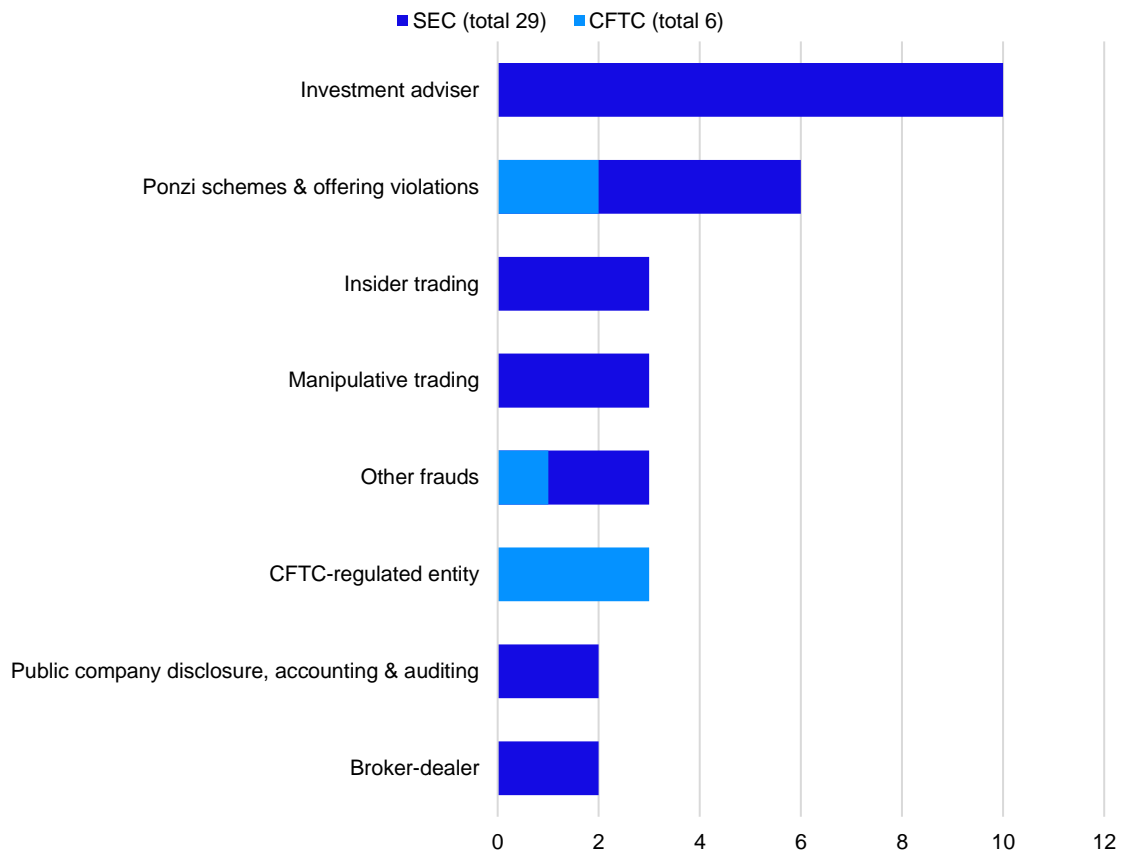
# SEC & CFTC Enforcement Update

May 2022

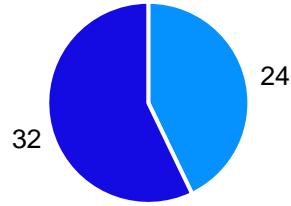
In May 2022, the SEC filed 29 actions and the CFTC filed six, against a combined total of 70 defendants and respondents. (These figures exclude follow-on actions, bars and suspensions.) The SEC’s actions included Ponzi schemes, insider trading, and manipulative trading, among others. The CFTC’s actions concerned Ponzi schemes and fraud.

## Actions initiated by the SEC and CFTC in May 2022

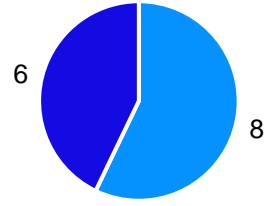
Number of actions, by matter type



SEC (total 56)



CFTC (total 14)



■ Individuals    ■ Corporate entities

## Key cases and developments

### Supreme Court will hear appeal on SEC in-house tribunals

On May 16, 2022, the U.S. Supreme Court agreed to hear the SEC’s appeal in its efforts to block a constitutional challenge to its use of in-house judges. In 2017, an SEC ALJ determined that a public accountant failed to comply with auditing standards in her audits of publicly traded companies, thereby violating the Securities Exchange Act. The ALJ fined the accountant and imposed a five year bar, which the SEC adopted as its final order. The accountant objected, but before the SEC could consider her objection, a 2018 Supreme Court ruling in *Lucia v. SEC* regarding the ALJ appointment process required the SEC to remand all of its pending cases—including this one—to properly appointed ALJs. Before the SEC’s process was complete, the accountant sought to enjoin the enforcement action in court. In her suit, she argued that the SEC’s in-house judges have job protections that unlawfully shield them from the President’s power over executive branch officers under Article II of the U.S. Constitution. A district court originally rejected the accountant’s challenge for jurisdictional reasons, as the SEC’s enforcement process was not yet complete, but the Fifth Circuit reversed, holding that federal courts have jurisdiction to evaluate the issue. The SEC appealed to the Supreme Court, which has taken certiorari.

[News coverage](#)

### Fifth Circuit rules SEC’s administrative adjudications are unconstitutional

On May 18, 2022, the Fifth Circuit held that the SEC’s existing administrative proceedings are unconstitutional on three separate grounds. First, the court held that the SEC’s proceedings violate the Seventh Amendment guarantee to a jury trial because they involve private rights similar to common law fraud actions. Second, the court ruled that Congress’s delegation of legislative power to the SEC was unconstitutional because it failed to provide the SEC with an “intelligible principle” with which to guide its decisions on whether to handle cases internally in administrative proceedings or externally in federal courts. Lastly, the court held that the ALJs’ statutory removal restrictions are unconstitutional because they are doubly insulated from the President’s removal power. This last holding aligns with the accountant’s primary argument in the above case, which was also decided—albeit on jurisdictional grounds—by the Fifth Circuit.

[DPW client update](#)

### SEC expands Crypto Assets and Cyber Unit

The SEC announced at the beginning of the month that it had created 20 new positions in the newly renamed Crypto Assets and Cyber Unit. This will nearly double the size of the unit, originally established in 2017 and formerly known as the Cyber Unit. In announcing the expansion, Chair Gary Gensler emphasized that the unit will bring actions in connection with crypto markets while also focusing on cybersecurity disclosure and controls.

[SEC press release](#)

## **SEC proposes and extends comment periods for new rulemaking proposals**

In May, the SEC proposed and extended public comment periods for sweeping new rules that, if adopted, could lead to significant new enforcement risk. For instance, SEC announced proposed amendments to the Commission's existing rules on environmental, social and governance ("ESG") disclosures for certain advisers and companies. Specifically, the proposed rules would require certain funds and advisers to make more specific disclosures about their ESG strategies in annual reports, prospectuses, and adviser brochures. The SEC also announced at the beginning of the month that it has extended the period of public comment for proposed rulemaking on the enhancement and standardization of climate-related disclosures for investors, and for proposed rulemaking on enhancing private fund investor protections and cybersecurity.

[SEC comment period press release](#) | [SEC ESG disclosure press release](#) | [Client update](#)

## **SEC brings suit against investment adviser for alleged ESG misstatements**

**In re BNY Mellon Investment Adviser, Inc. (A.P. May 23, 2022, settled)**

The SEC settled with an investment adviser for its alleged misstatements and omissions regarding ESG factors it considers when making investment decisions for certain of its mutual funds. According to the SEC, the adviser represented to investors that all investments in the mutual funds at issue had undergone an ESG quality review. The SEC alleged that this representation was not always accurate and that certain investments did not have ESG quality review scores at the time of the investment. The adviser agreed to pay \$1.5 million in penalties.

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

## **SEC brings suit against two individuals for alleged insider trading scheme**

**SEC v. David Stone and John Robson (S.D.N.Y. May 3, 2022, contested)**

The SEC brought suit against two individuals for an alleged insider trading scheme that generated over \$12 million. According to the SEC, since November 2020, one of the individuals was obtaining pre-release access to stock picks by two of The Motley Fool's subscription stock picking services. The SEC contends that, since January 2021, the individual started sharing the stock picks with a friend several days before each pick announcement. The two would allegedly purchase aggressive positions in the picked issuers' securities prior to the announcement, wait for The Motley Fool's announcement to cause the stock price to rise, and immediately sell their securities for a profit. The two individuals allegedly received roughly \$7 million in profits and four friends and family members, named as relief defendants, allegedly collected \$5 million as a result of the scheme.

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

## **SEC brings suit to stop alleged cryptomining and trading operation**

**SEC v. MCC International, et al. (S.D. Fla. April 7, 2022, contested)**

On May 6, 2022, the SEC announced that, in April 2022, it brought suit against a cryptomining company, its founders, and two related entities for their allegedly unauthorized offerings and sales of crypto investment plans. This lawsuit was initially temporarily sealed pending the Commission's attempts to freeze assets of the relevant parties. The SEC contends that, starting in at least January 2018, the company sold cryptomining packages to tens of thousands of investors with a promise of at least 1 percent in daily returns to be paid weekly. The SEC also contends that the company and its founders misrepresented that these daily returns were earned through the company's cryptomining, stock trading, and foreign exchange activities. Further, the SEC asserts that investors were promised returns in Bitcoin but were later required to accept the company's personal crypto asset. The company and its founders allegedly received over \$8 million in mining package sales and over \$3 million in investor initiation fees.

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

## **SEC reaches billion-dollar settlement over alleged fraud scheme**

**In re Allianz Global Investors U.S. LLC (A.P. May 17, 2022, settled)**  
**In re Trevor L. Taylor (A.P. May 17, 2022, settled)**  
**In re Stephen G. Bond-Nelson (A.P. May 17, 2022, settled)**  
**SEC v. Tournant et al (S.D.N.Y. May 17, 2022, contested)**

The SEC brought suit against a U.S. company and three of its former senior portfolio managers for an alleged scheme that concealed the risks of an options trading strategy. The SEC alleged that the company marketed and sold this strategy to over 100 institutional investors. According to the SEC, the company “smoothed” the data that it sent to investors describing the strategy’s risk levels, at times providing investors with inaccurate numbers of losses in a given day. In March 2020, the market volatility that resulted from the COVID-19 pandemic revealed that the company and its portfolio managers had misled investors about the level of risk involved, resulting in billions of dollars in losses for the investors. The SEC alleged that the portfolio managers attempted to conceal their misconduct from the SEC after this point, including by providing false testimony. The company agreed to pay a \$1 billion penalty and over \$5 billion in restitution.

[SEC press release](#) | [Allianz order](#) | [Taylor order](#) | [Bond-Nelson order](#) | [SEC complaint](#)

## **SEC brings suit against technology company over cryptomining disclosures**

**In re NVIDIA Corp. (A.P. May 6, 2022, settled)**

The SEC settled with a technology company for its alleged failure to make required disclosures about the impact of cryptomining on the company’s gaming business. According to the SEC, the company’s sale of graphic processing units in 2018, which customers used for cryptomining, represented a significant portion of the company’s revenue growth. The SEC alleged that, despite knowing this information at the time, the company did not disclose in two of its 2018 Forms 10-Q that its earnings were tied to a volatile business even though investors were allegedly routinely asking senior management about the impact of cryptomining. The company agreed to pay \$5.5 million in penalties.

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

## **SEC initiates first-ever enforcement proceeding under Section 11 of the Investment Company Act**

**In re RiverSource Distributors, Inc. (A.P. May 25, 2022, settled)**

The SEC settled with a registered broker-dealer for alleged improper switching or replacement of variable annuities in the Commission’s first-ever enforcement proceeding pursuant to Section 11 of the Investment Company Act of 1940. Section 11 bars any principal underwriter from making or causing to be made an offer to exchange securities of registered unit investment trusts—including variable annuities—unless the offer’s terms have been approved by the SEC or fall within a delineated exception. According to the SEC, the broker-dealer offered and sold variable annuities to investors via an affiliated investment adviser. The order alleged that some of the broker-dealer’s employees engaged in practices that caused exchange offers to be made to variable annuities holders to switch from one variable annuity to another. The SEC alleged that this increased the employees’ sales commissions and the broker-dealer’s revenue. The broker-dealer agreed to pay a \$5 million civil penalty.

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

## **SEC brings insider trading suit against executive compensation consultant**

**SEC v. Frank B. Glassner (S.D.N.Y. May 24, 2022, contested)**

The SEC alleges that an executive compensation consultant engaged in insider trading before one of his clients announced a corporate acquisition. According to the SEC, the consultant learned that one of his long-time clients was to be acquired by a global biopharmaceutical company. Allegedly, within thirty minutes of

learning of the acquisition, he reactivated his dormant brokerage account and purchased stock and call options of his client. The SEC's complaint states that he profited over \$400,000 due to this activity.

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

## SEC brings insider trading action despite small alleged profits

**SEC v. Hugues Pierre Joublin (S.D.N.Y. May 27, 2022, settled)**

The SEC brought an action against an individual for alleged insider trading despite the fact that his alleged profits totaled only \$4,995. The SEC's complaint alleges that the individual, a former AstraZeneca employee, learned that his company had entered into a global development and commercialization agreement with another company. In advance of the public announcement of this relationship, the individual allegedly purchased 500 shares of the other company. The individual agreed to an entry of final judgment that would impose a civil penalty of over \$10,000—more than double his alleged profit from the trading.

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

## CFTC brings suit to end alleged Ponzi-like scheme

**CFTC v. Eddy Alexandre and Eminifx, Inc. (S.D.N.Y. May 12, 2022, contested)**

The CFTC brought suit against a New York resident and his company for an alleged solicitation and misrepresentation scheme intended to financially benefit the parties. According to the CFTC, the parties solicited roughly \$59 million from individuals on the promise that such funds would be used to trade forex, cryptocurrencies, futures, and options in an investment club. The parties allegedly misrepresented to customers that they would be guaranteed a weekly 5 percent return. In reality, according to the CFTC, the parties only invested \$9 million of customers' funds, roughly 70 percent of which were lost to unprofitable investments. The CFTC also alleges that the parties used a large portion of the remaining funds to pay other customers and finance personal expenses. A parallel criminal action by the U.S. Attorney's Office is pending in the Southern District of New York.

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

## Whistleblower awards

The SEC announced an award of nearly \$3.5 million to four whistleblowers who provided information relevant to a single covered action.

[SEC press release](#)

## Personnel and organizational changes

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

- The SEC has appointed Richard R. Best as Director of the Division of Examinations.

[SEC press release](#)

- Investor Advocate Rick A. Fleming will leave his position at the SEC effective July 1, 2022.

[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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