

Insights

CFTC'S ANNUAL ENFORCEMENT RESULTS: ANOTHER BLOCKBUSTER YEAR

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SUMMARY

The Commodity Futures Trading Commission ("CFTC") recently released its enforcement results for Fiscal Year 2023 ("FY 2023"), which ran from October 1, 2022, through September 30, 2023. In addition to detailing the imposition of over \$4.3 billion in penalties, restitution, and disgorgement, the published results also highlight a number of notable enforcement actions and trends, including a record-setting number of digital asset cases and two first-of-their-kind charges for "oracle manipulation" and "Pig-Butchering."

DIGITAL ASSETS

The enforcement results demonstrate that the CFTC continues to focus on cryptocurrency, with 47 of the 96 enforcement actions filed in FY 2023 – nearly 50% – involving digital assets.

Of the 47 actions involving digital assets, the CFTC specifically highlighted the following actions as worthy of note:

- Charged FTX, FTX Founder Samuel Bankman-Fried, FTX and Alameda Co-Founder Gary Wang, Alameda, Alameda Co-CEO Caroline Ellison, and, in a separate action, FTX Co-Owner Nishad Singh, for alleged fraud and material representations involving digital asset commodities, including misappropriation and the illegal offering of digital asset derivatives to U.S. customers, causing over \$8 billion of losses in FTX customer deposits.^[1]
- Charged Binance, its founder, and a former Chief Compliance Officer with operating and illegal digital asset derivatives exchange along with several violations relating to their willful evasion or attempts to evade numerous provisions of the Commodity Exchange Act and CFTC Regulations.^[2]

- Charged Celsius and its former CEO with fraud and material representations in connection with a commodity pool scheme involving digital asset commodities. Defendants allegedly falsely flaunted high profits and security to induce customers to deposit their digital asset commodities on the platform. The CFTC noted that this was the first time it brought charges against a digital asset lending platform for unlawfully operating as an unregistered commodity pool.^[3]
- Obtained orders requiring defendants in a fraud action to pay nearly \$1.8 billion in restitution to victims and another \$1.8 billion as a civil monetary penalty. The CFTC noted that this is the highest civil monetary penalty ever ordered in a CFTC case and was the Commission's largest fraud scheme case involving Bitcoin.^[4]
- Won a novel alternative service motion and subsequent default judgment order against the Ooki DAO, a decentralized autonomous organization that the CFTC charged with operating an illegal trading platform and unlawfully acting as a futures commission merchant. Most notably, the court held that the Ooki DAO, as an unincorporated association qualifies as a "person" under the CEA's definition of that term and, therefore, could be held liable for violating the law. The court further held that the Ooki DAO violated the law as charged.^[5]
- Obtained a default judgment granting a permanent injunction against an individual and his four companies that operated a digital asset trading platform known as Digitex Futures. Defendants had illegally offered futures transactions on a platform other than a designated contract market and attempted to manipulate the price of the Digitex Futures native token (a commodity in interstate commerce), among other violations. Defendant was also ordered to pay over \$15 million in disgorgement and civil monetary penalties.^[6]
- Charged its first "oracle manipulation" case against Avraham Eisenberg for a fraudulent and manipulative scheme to unlawfully obtain over \$110 million in digital assets from Mango Markets, a purported decentralized digital asset exchange. The CFTC noted that it would "use all available enforcement tools to aggressively pursue fraud and manipulation regardless of the technology that is utilized," and reiterated that the Commodity Exchange Act "prohibits deception and swap manipulation, whether on a registered swap execution facility or on a decentralized blockchain-based trading platform."^[7]
- Filed and settled charges against operators of three digital asset decentralized finance protocols for offering illegal digital asset derivatives trading. The CFTC emphasized that although the DeFi space is novel and complex, the CFTC was evolving with it and would "aggressively pursue those who operate unregistered platforms that allow U.S. persons to trade digital asset derivatives."^[8]

- Charged 14 entities for fraudulently claiming to be registered with the CFTC as futures commissions merchants and retail foreign exchange dealers.^[9]

MANIPULATIVE AND DECEPTIVE CONDUCT AND SPOOFING

The CFTC brought five enforcement actions related to manipulative and deceptive conduct and spoofing. All five were included in its press release, apparently signaling the CFTC's continued focus on preventing activities characterized as undermining market integrity.

- Filed and settled charges against HSBC Bank USA, N.A., ordering it to pay a \$45 million penalty for engaging in manipulative and deceptive trading related to swaps with bond issuers, spoofing, and supervision and mobile device recordkeeping failures over an approximately eight-year period.^[10]
- Charged two commodity pool operators and their Co-Founder and Co-Chief Investment Officer with deception and manipulation in connection with swaps and supervision failures. Specifically, defendants were charged with engaging in a \$30 million scheme to illegally trigger payouts on two large binary option contracts that were swaps.^[11]
- Filed and settled charges against a major futures commission merchant, ordering it to pay a \$3 million dollar penalty for failure to maintain adequate supervisory systems and controls to ensure its customers' trading was not disruptive and for making material omissions in a letter to the CFTC's Division of Enforcement.^[12]
- Filed and settled charges against a registered commodity pool operator and commodity trading advisor for spoofing by a former trader in soybean futures, soybean meal futures, and soybean oil futures contracts on the Chicago Board of Trade.^[13]
- Charged a registered commodity trading advisor/commodity pool operator and its head trader with spoofing, engaging in manipulative and deceptive conduct, and failing to supervise in a scheme involving crude oil and natural gas futures contracts—specifically, calendar spread contracts—traded on CME and ICE Futures Europe. Notably, the CFTC had previously entered an order against these same defendants for similar supervision failures relating to an employee's spoofing, so defendants were also charged with violating the prior CFTC order.^[14]

REPORTING, RISK MANAGEMENT, ADEQUATE COMPLIANCE PROGRAMS AND BUSINESS PRACTICES

The CFTC seeks to ensure proper registration, recordkeeping, and reporting. Further, the CFTC oversees entities' compliance with the requirement to implement proper risk management, maintain

adequate compliance programs, and engage in proper business practices. Actions filed related to the above-mentioned functions include:

- Filed and settled charges with three large swap dealers, ordering them to pay over \$50 million for a variety of swap dealer activities, including failures related to swap data reporting and, in one case, failures related to the disclosure of Pre-Trade Mid-Market Marks. The CFTC DOE Director emphasized the need for swap dealers to ensure they are in full compliance with the CEA and CFTC regulations.^[15]
- Filed and settled charges with a registered derivatives clearing organization, requiring it to pay \$5 million for its failure to establish, implement, maintain and enforce policies and procedures reasonably designed to manage its operational risks relating to its automated systems.^[16]
- Filed and settled charges against a provisionally registered swap dealer, ordering it to pay \$15 million for failing to satisfy the CFTC's Business Conduct Standards. The CFTC specifically found that the swap dealer failed to disclose pre-trade-mid-market-marks and failed to communicate in a fair and balanced manner when soliciting U.S.-based clients to trade certain equity index swaps.^[17]
- Filed and settled charges against a swap dealer, ordering it to pay \$1 million for various recordkeeping violations. Specifically, the CFTC found that the dealer failed to properly record and retain certain audio files as required under CFTC regulations and violated the cease-and-desist provision of a prior order, which involved similar recordkeeping violations and had imposed a \$5.5 million penalty. Notably, this failure was found to be a result of a software glitch that prevented the dealer's system from recording audio. The DOE had opened an unrelated investigation into the dealer and requested certain audio recording that the dealer was therefore unable to produce, which resulted in a finding that the dealer impeded the DOE's investigation.^[18]
- Filed and settled charges against several CFTC registrants, including the swap dealer and futures commission merchant affiliates of financial institutions, ordering them to pay a combined \$325 million for recordkeeping and supervision violations. The CFTC specifically found that the institutions had, for several years, failed to stop their employees, even those at senior levels, from communicating both internally and externally using unapproved communication methods. The CFTC notes that since FY 2022, it has imposed a total of \$1.117 billion in penalties on 20 financial institutions for similar recordkeeping failures.^[19]

MISCONDUCT INVOLVING CONFIDENTIAL INFORMATION

The CFTC brought two actions related to misconduct involving confidential information:

- Settled charges against a Texas energy broker, its owners, and affiliated trading firms, ordering defendants to pay nearly \$500,000 in disgorgement and a \$2.5 million penalty for fraud, trading against customers without their consent, and failure to supervise customer commodity interest accounts.^[20]
- Charged a trader with running a fraudulent scheme in which he misused knowledge of his employer's trading in feeder cattle futures and options to trade for his own benefit.^[21]

PROTECTING CUSTOMERS

The CFTC highlighted several of its significant litigation victories in FY 2023 relating to protecting customers in commodity and derivatives markets from fraud and other abuse. In particular, the CFTC noted the following cases:

- Obtained an order imposing \$33 million in restitution and \$5 million in civil monetary penalties against precious metals firm Monex Deposit Company and its affiliated companies and principals for fraud and illegal off-exchange transactions. This order ended a years-long case that was litigated in both the district court and the Ninth Circuit Court of Appeals. The district court had dismissed the case, holding that the CFTC lacked authority over the alleged fraud because defendants made “actual delivery” of precious metals to customers, and that the CEA does not prohibit fraud in connection with a contract of sale of a commodity in interstate commerce unless the defendant has also attempted to commit market manipulation. The Ninth Circuit disagreed, holding that “actual delivery” under the CEA requires the transfer of some degree of possession or control to customers, and the complaint alleged that defendants’ delivery of metal to its customers “amount[ed] to sham delivery, not actual delivery.” And more broadly, the Court held that the CEA prohibits fraud regardless of whether there was also market manipulation, and that the CFTC can bring an enforcement action when such fraud occurs. The CFTC emphasized that this decision served to reinforce the broad anti-fraud authority Congress granted it under the Dodd-Frank Act.^[22]
- Obtained a preliminary injunction in an enforcement action for fraud, misappropriation, and registration violations in connection with a \$58 million fraudulent forex scheme.^[23]
- Filed a civil action alleging that the defendants fraudulently solicited customers to trade leveraged, margined, or financed retail foreign exchange, and leveraged retail commodity transactions. The CFTC noted that the defendant’s program had signed up more than 135,000 customers and obtained approximately \$310 million dollars in fees from its customers since 2021.^[24]

The CFTC also highlighted that it brought its first case involving a romance scam, commonly known as “Pig Butchering,” a type of fraud the CFTC asserts is growing in popularity. The CFTC

describes the scheme as follows: “The fraudsters cultivate a friendly or romantic relationship with a potential customer, ‘fatten’ them up with falsehoods, before soliciting the customer to participate in a fraudulent financial opportunity.” The CFTC’s complaint alleged that defendants used this scheme to misappropriate over \$1.3 million from at least 29 customers.^[25]

The CFTC also noted several of its cases involving charges against precious metals dealers targeting elderly persons:

- Brought charges in two cases against precious metals dealers, alleging that they targeted elderly and retirement-aged persons and fraudulently soliciting millions of dollars from hundreds of customers by convincing them to either purchase precious metals in self-directed individual retirement accounts and subsequently misappropriating customer funds and assets, or encouraging them to invest in gold and silver coins worth much less than defendants led the victims to believe.^[26]
- Obtained an order requiring defendants to pay \$112.7 million in restitution along with a \$33 million civil monetary penalty for misappropriating tens of millions of dollars and making fraudulent misrepresentations to customers in connection with the purchase and sale of precious materials.^[27]
- Obtained an order requiring a Swiss company to pay over \$200,000 after it illegally offered transactions in leveraged gold, silver, and forex to retail customers in the United States. It did so without registering as an FCM, without conducting metal transactions on a registered exchange, and without supervising its employees in the handling of customer accounts, specifically in its failure to establish adequate anti-money-laundering procedures.^[28]
- Filed action against eight entities for offering services to their customers involving a variety of trading products, including futures, options, forex, and other digital assets, without being registered as an FCM or RFED with the CFTC.^[29]

COOPERATIVE ENFORCEMENT MATTERS

The CFTC emphasized its efforts to collaborate with other criminal and regulatory authorities, including self-regulatory organizations, and state, federal, and international authorities.

- Worked alongside regulators in California and Hawaii to file action against a precious metals dealer and other executives for perpetrating a fraudulent scheme valued at \$61.8 million. In this matter, the CFTC worked with the California Department of Financial Protection and Innovation (DFPT) and the Hawaii Department of Commerce and Consumer Affairs (DCCA).^[30]
- Brought, along with the California Department of Financial Protection and Innovation, a charge against a precious metals dealer alleging misappropriation of more than \$21 million dollars.

[31]

The CFTC continued providing relief through its Whistleblower Program with approximately \$16 million in awards granted to individuals who voluntarily provided information that led to successful enforcement actions. Through FY 2023, the CFTC has provided awards totaling almost \$350 million to 41 individuals through the Whistleblower Program. Further, the sanctions for enforcement actions related to whistleblowers has surpassed \$3 billion.

Finally, the CFTC summarized its commitment to “ensure consistency, identify best practices, and develop new approaches and ideas based on lessons learned.” During FY 2023, the CFTC established two new task forces—The Cybersecurity and Emerging Technologies Task Force and The Environmental Fraud Task Force.

WHAT CAN WE EXPECT IN FY 2024?

Fraud cases, always a mainstay of the CFTC Enforcement Division’s work, continued to dominate the Division’s docket. New fraud cases hit their highest level since 2018. The number of fraud cases was bolstered by the continuing focus on digital assets. Almost all of CFTC’s enforcement actions involving digital assets include allegations of fraud. Digital asset cases will likely continue to be a focus for the CFTC Enforcement Division given the rampant levels of fraud found in that sector.

With the announcement in June 2023 of Division task force to concentrate on Environmental Fraud, the Division’s FY 2024 fraud caseload will likely only be further buoyed by enforcement cases involving “greenwashing,” such as the fraudulent sale of carbon credits in the voluntary carbon markets. With leading market participants predicting voluntary carbon markets growing five to six times their current size by 2030,^[32] and articles casting doubt on significant carbon offset projects,^[33] the Division’s Environmental Fraud Task Force looks well placed to start policing these markets.

Finally, the Division’s new task force on Cybersecurity and Emerging Technologies will likely have an impact on the Division’s FY 2024 docket. Fiscal Years 2021 and 2023 both saw new cases involving systems safeguards at registered entities. With significant cybersecurity incidents this year affecting vital derivatives back-office systems^[34] and causing a primary dealer to not be able to process trades in the critical market for U.S. Treasury securities,^[35] the FY 2024 enforcement program will likely develop even more of a focus on systems safeguards. Claims around investments related to, or involving use of, artificial intelligence will also possibly further buttress the Division’s fraud docket.

NUMBER OF ACTIONS IN EACH CATEGORY (I.E. FRAUD, FAILURE TO REGISTER, ETC.)

MANIPULATIVE CONDUCT, FALSE REPORTING, SPOOFING

- 2018 - 26
- 2019 - 16
- 2020 - 16
- 2021 - 6
- 2022 - 7
- 2023 - 5

FRAUD

- 2018 - 30
- 2019 - 25
- 2020 - 56
- 2021 - 25
- 2022 - 31
- 2023 - 59

MISAPPROPRIATION OF CONFIDENTIAL INFORMATION, TRADE ALLOCATION SCHEMES, MISMARKING

- 2018 - 2
- 2019 - 4
- 2020 - 1
- 2021 - 4
- 2022 - 3
- 2023 - 2

SUPERVISION, FINANCIAL INTEGRITY, BUSINESS CONDUCT

- 2018 - 6

- 2019 - 6
- 2020 - 24
- 2021 - 1
- 2022 - 7
- 2023 - 9

REGISTERED ENTITY VIOLATIONS (INCLUDES SYSTEM SAFEGUARDS, REPORTING, AND OTHER REGULATORY)

- 2018 - n/a
- 2019 - n/a
- 2020 - n/a
- 2021 - 4
- 2022 - n/a
- 2023 - 3

SWAP DATA REPORTING

- 2018 - n/a
- 2019 - 7
- 2020 - n/a
- 2021 - 3
- 2022 - n/a
- 2023 - n/a

ILLEGAL OFF-EXCHANGE CONTRACTS, FAILURE TO REGISTER

- 2018 - 11
- 2019 - 1
- 2020 - 9

- 2021 - 12
- 2022 - 12
- 2023 - 2

TRADE PRACTICE VIOLATIONS (INCLUDES WASH TRADES, FICTITIOUS TRADES, POSITION LIMITS)

- 2018 - 5
- 2019 - 4
- 2020 - 2
- 2021 - 3
- 2022 - 2
- 2023 - 3

REPORTING, RECORDKEEPING

- 2018 - 3
- 2019 - 3
- 2020 - 3
- 2021 - 14
- 2022 - 18
- 2023 - 12

FALSE INFORMATION TO CFTC OR SRO, VIOLATION OF PRIOR ORDER

- 2018 - n/a
- 2019 - 3
- 2020 - 1
- 2021 - 1
- 2022 - 1

- 2023 - n/a

STATUTORY DISQUALIFICATION

- 2018 - n/a
- 2019 - n/a
- 2020 - 1
- 2021 - 1
- 2022 - 1
- 2023 - 1

FOOTNOTES

[1] *CFTC v. Samuel Bankman-Fried, FTX Trading LTD D/B/A FTX.com, and Alameda Research, LLC*, No. 1:22-cv-10503 (S.D.N.Y., complaint filed 12/13/2022).

[2] *CFTC v. Changpeng Zhao, Binance Holdings Limited, Binance Holdings (IE) Limited, Binance (Services) Holdings Limited, and Samuel Lim*, No. 1:23-cv-01887 (N.D. Ill., filed 12/27/2023).

[3] *CFTC v. Celsius Network, LLC and Alexander Mashinsky*, No. 1:23-cv-6008 (S.D.N.Y., filed 7/13/2023).

[4] *CFTC v. Mirror Trading Int'l Propriety Ltd., and Cornelius Johannes Steynberg*, No. 1:22-cv-635-LY (W.D. Tex., 9/6/2023).

[5] *CFTC v. Ooki Dao*, No. 3:22-cv-05416-WHO (N.D. Cal., 6/8/2023).

[6] *CFTC v. Adam Todd, et al.*, No. 22-cv-23174-ALTMAN/Reid (S.D., Fla., 7/5/2023).

[7] *CFTC v. Avraham Eisenberg*, No. 23-cv-00173 (S.D.N.Y, filed 1/9/2023).

[8] All three orders.

[9] All fourteen complaints.

[10] *CFTC v. HSBC Bank USA N.A.*, CFTC Dkt. No. 23-26 (CFTC, consent order filed 5/12/2023).

[11] *CFTC v. Logista Advisors LLC and Andrew Serotta*, No. 1:23-cv-07485 (N.D. Ill., complaint filed 9/7/2023).

[12] *In the Matter of: Goldman Sachs & Co. LLC*, CFTC Dkt. No. 23-60 (filed 9/29/2023).

- [13] *In the Matter of: Walleye Capital LLC*, CFTC Dkt. No. 23-04 (filed 12/12/2022).
- [14] *CFTC v. Logista Advisors LLC and Andrew Harris Serotta*, No. 1:23-cv-07485 (N.D. Ill., filed 9/7/2023).
- [15] All three orders.
- [16] *In the Matter of: The Options Clearing Corporation*, CFTC Dkt. No. 23-06 (2/16/2023).
- [17] *In the Matter of: Goldman Sachs & Co., LLC*, CFTC Dkt. No. 23-09 (4/10/2023).
- [18] *In the Matter of: Goldman Sachs & Co. LLC*, CFTC Dkt. No. 23-39 (8/29/2023).
- [19] *In the Matter of: The Bank of Nova Scotia and Scotia Capital USA Inc.*, CFTC Dkt. No. 23-25 (5/11/2023); *In the Matter of HSBC Bank USA, N.A., HSBC Securities (USA) Inc., and HSBC Bank plc*, CFTC Dkt. No. 23-27 (5/12/2023); *In the Matter of: Interactive Brokers Corp., and Interactive Brokers, LLC*, CFTC Dkt. No. 23-56 (9/29/2023); *orders against four other institutions*.
- [20] *CFTC v. Coquest Inc., Buttonwood LLC, Weva Properties Ltd., Dennis Weinmann, and John Vassallo*, No. 3:21-cv-2599 (N.D. Ill. 3/7/2023).
- [21] *CFTC v. Dichao Xie*, No. 1:23-cv-01947 (N.D. Ill. 3/28/2023).
- [22] *CFTC v. Monex Deposit Co., Monex Credit Co., Newport Service Corp., Michael Carabini, and Louis Carabini*, No. 8:17-cv-01868-JVS-DFM, consent order.
- [23] *CFTC v. Notus LLC d/b/a ROFX, et al.*, No. 1 :22-cv-20291-GAYLES (S.D. Fla. 9/22/2023).
- [24] *CFTC v. Traders Global Group, Inc. et al.*, No. 3:23-cv-11808 (D.N.J., 8/29/2023).
- [25] *CFTC v. Cunwen Zhu and Justby Int'l Auctions*, No. 2:23-cv-4937 (C.D. Cal., 6/22/2023).
- [26] *CFTC v. Damien Moran; Crown Bullion, Inc., Bright Future Financial, LLC*, No. 3:23-CV-2077-L (N.D. Tex., 9/20/2023); *CFTC v. Fisher Capital LLC, AMS Consulting Solutions LLC, and Alexander Overlie*, No. 23-CV-3121 (E.D.N.Y., 4/25/2023).
- [27] *CFTC v. First State Depository Co. et al.*, No. 1:22-cv-1266-RGA (D.Del., 6/20/2023).
- [28] *In the Matter of: LYFE S.A.*, CFTC Dkt. No. 23-57 (9/29/2023).
- [29] Complaints against each entity.
- [30] *CFTC, Cal. Dep't of Fin. Protection & Innovation, State of Hawaii, Dep't of Com. Consumer Affairs v. Red Rock Secured, LLC et al.*, No. 2:23-CV-03680 (C.D. Cal. 5/15/2023).

[31] *CFTC & Cal. Dep't of Fin. Protection & Innovation v. Regal Assets LLC*, No. 2:23-cv-8078 (C.D. Cal., 9/27/2023).

[32] S. Varadhan, *Voluntary carbon markets set to become at least five times bigger by 2030 – Shell* (Reuters Jan. 19, 2023).

[33] S. Twidale, *Carbon Offset firm South Pole cuts ties with Zimbabwe forest project* (Reuters Oct. 27, 2023).

[34] J. Surane & K. Doherty, *Hack of ION Derivatives System Prompts Caution in Other Markets* (Feb. 3, 2023).

[35] A. Harris, *Treasury Settlement Delays Continue in Wake of ICBC Hack* (Bloomberg Nov. 10, 2023).

RELATED PRACTICE AREAS

- White Collar
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MEET THE TEAM



Katherine Cooper

New York

katherine.cooper@bcplaw.com

[+1 212 541 1141](tel:+12125411141)

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