

SEC top five

What public companies, boards and investors should watch for in 2024

Introduction

Under the leadership of Chair Gary Gensler, the U.S. Securities Exchange Commission (SEC or Commission) has pursued a robust agenda touching all corners of the US capital markets; this agenda is expected to continue and perhaps accelerate in the year ahead. Gensler's stated priorities have included promoting transparency, comparability and consistency in the markets and adapting SEC regulation to evolving markets, technologies and investor needs.

SEC rulemaking is a primary tool through which Gensler has sought to address these priorities. In 2023, the SEC finalized more rules than were proposed for the first time under Gensler's tenure, bringing new requirements in areas ranging from cybersecurity disclosures to US Treasury securities clearing to private fund transparency. The SEC plans to finalize a number of rules in 2024 as well, as reflected in its recently updated rulemaking agenda.¹ This includes potential rulemakings that would impact disclosures, shareholder proposals and private issuers.

SEC rulemaking has attracted both support and criticism from capital market stakeholders. In 2023, many of the final rules were approved by a nonunanimous Commission vote, and several rules have been challenged in court. For 2024, litigation will create some uncertainty as market

participants seek to implement new rules. In addition, the impending US elections and planned SEC activity in high-profile areas, such as rulemaking on climate-related disclosures, mean that stakeholder engagement – including from lawmakers, market participants and investor groups – may increase.

The SEC priorities for 2024 also include technology-related topics. The SEC is expected to continue to take steps to address the role of new technologies in the capital markets, including crypto assets and artificial intelligence (AI), drawing on all of the agency's tools.

An active enforcement program also will continue to be a hallmark of the Gensler SEC, which includes a heightened focus on gatekeepers. As [reported](#) in November, the SEC enforcement program last year brought actions against market participants and imposed financial penalties in numbers higher than for most recent years.

Below, we explore five areas of SEC activity in 2024 that may be of interest to investors, board members and issuers: disclosure rulemaking, shareholder proposals, private company rulemaking, technology and enforcement. Given the extent of SEC-related activity in these and other areas, market participants should consider closely monitoring developments throughout the year.



1. Disclosure rulemaking

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Market integrity and disclosure help protect investors and build trust in capital markets. Such trust helps lower the cost of capital for issuers and enhance returns for investors.

Chair Gensler, [Testimony Before the United States House of Representatives Committee on Financial Services \(September 2023\)](#)

The SEC’s disclosure rulemaking under Gensler seeks to increase the types of information available to meet evolving investor needs as well as to increase transparency and comparability. These objectives have been welcomed by many, particularly in the [investor community](#), although some [others](#) have expressed

concern about the extent, cost and feasibility of the proposals. Certain stakeholders also have raised concerns about the process followed by the SEC to propose and incorporate feedback from the public on rule proposals, including “too-short” comment periods. Some market participants also have expressed concern about overlapping rule proposals issued at different times, making it hard to provide input on the collective impact of the proposals. The Commission has sought to address process concerns by, for example, making sure that market participants have at least 45 days to provide comments on rule proposals and reopening comment periods when a subsequent rule proposal or other development could impact commenters’ views on an earlier rulemaking.

Expected activity in 2024: Final rules

Climate: In 2024, the SEC is expected to finalize perhaps its most highly anticipated rule under Gensler’s leadership, which would require public companies to disclose climate-related information. The [proposal](#) seeks to enhance and standardize disclosures that public companies make about climate-related risks, their climate-related targets and

goals, their greenhouse gas (GHG) emissions, and how the board of directors and management oversee climate-related risks. The proposal would also require companies to quantify the effects of certain climate-related events and transition activities in their audited financial statements. In discussing the proposal, Gensler has [noted](#) that many companies already provide – and investors use – this type of information.

Public comments on the proposal show significant support for certain mandatory climate-related disclosures. However, perspectives differ drastically on some specific elements of the proposal, such as the disclosure of Scope 3 GHG emissions (defined as all indirect emissions in a company's value chain not included in Scope 1 or Scope 2 emissions),² financial statement disclosure and the time frame for implementation. Republican Commissioners [Hester Peirce](#) and [Mark Uyeda](#) have voiced concerns about the proposal, including that it is overly prescriptive and would require disclosure of immaterial information. They also have challenged whether the proposal would provide benefits, such as comparable, consistent and reliable disclosures. Gensler has indicated that the SEC staff is seeking to address concerns raised by commenters and members of Congress, including how to shield small businesses from being indirectly subject to the proposal's Scope 3 GHG disclosures because of their work with public companies.

According to the SEC Regulatory Flexibility Agenda, the final rule is expected to be considered by April 2024. The date has been moved on several occasions, though, so this timing is uncertain. In the meantime, the SEC staff is expected to continue to ask questions about issuers' climate-related disclosures in [comment letters](#) to issuers along the lines of the staff's sample [comment letter](#).

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The SEC has no role as to climate risk itself. But we do have an important role in helping to ensure that public companies make full, fair, and truthful disclosure about the material risks they face.

Chair Gensler, [Testimony Before the United States House of Representatives Committee on Financial Services \(September 2023\)](#)

California and EU climate disclosure rules

California and the European Union (EU) are two jurisdictions that have already finalized climate-related disclosure legislation that is expected to impact many US companies. In both cases, the related requirements will begin to take effect after a period of rulemaking to implement the legislation. The California and EU requirements are similar to some of those proposed by the SEC but also contain important differences. It is not yet clear whether the California and EU legislation will impact the SEC's rulemaking process.

- ▶ The EU Corporate Sustainability Reporting Directive (CSRD) includes a mandate to disclose sustainability information that applies to a wide range of entities operating in the EU, including subsidiaries of non-EU entities and non-EU subsidiaries of EU holding companies. Refer to the EY [Technical Line](#) for additional information on non-EU entities that may be impacted by the CSRD.

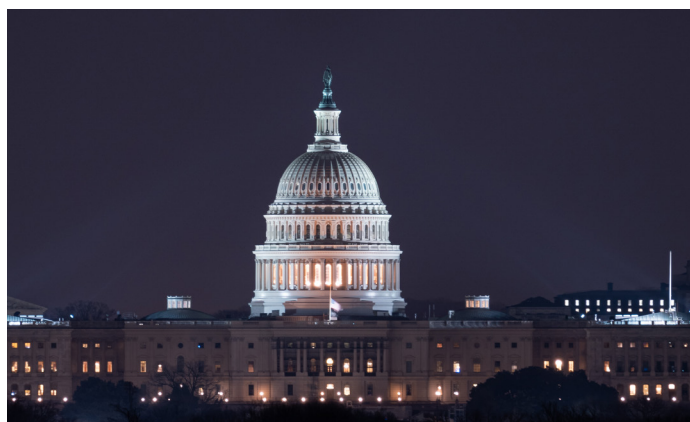
- ▶ California's governor signed two bills in 2023 (the [Climate Corporate Data Accountability Act \(SB-253\)](#) and the Greenhouse gases: climate-related financial risk law (SB-261)) that will require both public and private entities doing business in the state that exceed certain revenue thresholds to disclose GHG emissions, information recommended by the Task Force on Climate-Related Financial Disclosures and measures adopted to reduce and adapt to identified climate-related risks. A third law ([AB-1305](#)) will require companies that have made commitments to reduce GHG emissions via carbon offsets – as well as companies that provide those offsets – to make related disclosures. Refer to the EY [Technical Line](#) for additional information on the California climate-related reporting developments.

SPACs: In January 2024, the SEC [finalized](#) disclosure rules for special purpose acquisition companies (SPACs). In discussing the final rule, Gensler [stated](#) that SPACs function as alternative initial public offerings (IPOs) and that the final rule is intended to provide the same investor protections available for a traditional IPO. For example, the final rule removes the safe harbor protections for projections and other forward-looking information. The final rule requires new disclosures when a SPAC conducts an IPO and when it combines with a private operating company in what is known as a de-SPAC transaction, among other changes. The disclosures include information about SPAC sponsor compensation, conflicts of interest, shareholder dilution and the target company.

Expected activity in 2024: Proposed rules

Proposed disclosure rules relating to human capital remain on the SEC's agenda for 2024, including with respect to human capital management and corporate board diversity.

- ▶ **Human capital management:** According to its regulatory agenda, the Commission intends to release a proposal on human capital management disclosure by April 2024. However, Gensler has [indicated](#) that the timing depends on an SEC staff review of the impact of a [2020 human capital disclosure rule](#); this rule requires disclosure of material human capital management measures used to manage the business. Democratic Commissioner Jaime Lizárraga has supported issuing a proposal to require additional disclosures, [noting](#) that many companies derive high value from human capital but few provide information about labor costs.
- ▶ **Corporate board diversity:** A rule proposal on corporate board diversity disclosures is also on the SEC's regulatory agenda for consideration by October 2024, although no details about this proposal have been provided.



Notable actions in 2023: The SEC issued two major final disclosure rules in 2023 that may indicate the approach the Commission will take in future [final rules](#) as well as the challenges facing SEC rulemaking.

- ▶ **Cybersecurity risk governance disclosure rule:** The SEC issued [final rules](#) requiring companies to disclose information about material cybersecurity incidents on Form 8-K within four business days of determining that an incident is material, with a delay only when the US attorney general concludes that disclosure would pose a substantial risk to national security or public safety. The rules also require disclosures about cybersecurity risk management, strategy and governance in annual reports. Most issuers (other than smaller reporting companies (SRCs)) were required to begin reporting cybersecurity incidents as of December 18, 2023, and all issuers must provide the other information in 2023 annual reports. SRCs must report cybersecurity incidents starting on June 15, 2024. Refer to the [EY To the Point](#) and [Technical Line](#) publications for additional information.

Implications for future rulemaking: The final rule eliminated the nonmaterial disclosure requirements that had been in the rule proposal. In addition, the final rule does not require disclosure regarding board expertise in cybersecurity. The SEC may take a similar approach in its proposed climate-related disclosure rule, which has both of those elements.

- ▶ **Share repurchase modernization:** In May 2023, the SEC [adopted](#) amendments to require most issuers to disclose daily quantitative share repurchase information on a quarterly basis. The rule called for issuers to provide, for each day on which a repurchase was conducted, the number of shares repurchased and the average price paid per share, among other information

Implications for future rulemaking: The rule has since been [vacated](#) by the Fifth Circuit Court of Appeals after several business associations requested a review of the rule. The court held that the SEC acted arbitrarily and capriciously, including by failing to conduct a proper cost-benefit analysis. However, the court rejected an argument that the rule's disclosure requirements would have violated issuers' First Amendment rights. As the SEC considers how to avoid similar challenges for future rulemaking, these issues are expected to be raised in challenges of other new SEC rules. (See "Litigation relating to SEC rules and authority" for more information.)



Litigation relating to SEC rules and authority

The SEC is engaged in litigation on several fronts that could significantly impact its rulemaking and enforcement proceedings. In 2024, cases expected to advance through the courts would look at issues, including:

- ▶ **SEC v. Jarkesy**: The Supreme Court is currently considering the constitutionality of the SEC's use of administrative law judges (ALJs) rather than federal courts to decide certain enforcement matters. ALJs are used by some federal agencies, so the decision could have implications well beyond the SEC.
- ▶ Various associations representing private funds have **sued** to halt implementation of the SEC's new rules relating to **short-sale disclosures and securities lending**. Issues raised include inadequate calculation of the financial impact of the rule as required by the Administrative Procedure Act.
- ▶ The Fifth Circuit is considering³ whether to review a panel decision in favor of the SEC in **Alliance for Fair Board Recruitment v. SEC**. The panel held that the agency has authority to approve a Nasdaq rule imposing certain board diversity requirements for its listed companies on a comply-or-explain basis.
- ▶ Several cases⁴ have been brought against the SEC to challenge its authority to regulate crypto assets in light of the 2022 Supreme Court decision in **West Virginia v. EPA**, which is viewed as narrowing federal agencies' rulemaking authority under the "major questions" doctrine. It is anticipated that this argument may be used in litigation against the expected final SEC rule requiring climate-related disclosures, once issued.

2. Shareholder proposals

During Gensler's tenure, the SEC has taken several actions relating to shareholder proposals and the proxy process that have been priorities for the investor community but generally opposed by issuers. These actions include finalization of a **universal proxy rule**, modification of rules that apply to **proxy advisory firms** and changes to a **staff legal bulletin** on whether certain shareholder proposals can be excluded from proxy statements under Rule 14a-8. In 2024, the SEC plans to finalize a rule on shareholder proposals and faces litigation relating to its proxy advisory rule.

Expected activity in 2024:

Final amendments to Rule 14a-8: The SEC is scheduled to consider a final rule that would amend Exchange Act Rule 14a-8, which generally requires companies to include shareholder proposals in their proxy statements absent a basis for exclusion. The **proposed amendments** would clarify and narrow certain substantive bases within the rule that permit companies to exclude shareholder proposals from proxy statements. The investor and issuer communities were divided in their views on the proposal, which is estimated to be finalized by April 2024.

Supporters of the amendments have cited benefits for shareholder democracy and increased accountability of company leadership to shareholders, while **opponents** highlight concerns, such as interference with the roles of management and the board and higher costs, including for non-petitioning investors.

The 14a-8 amendments were originally scheduled to be finalized in 2023. The delay may have given the SEC staff the opportunity to gather additional data to address

another concern [expressed](#) by commenters as well as Commissioners [Peirce](#) and [Uyeda](#); that concern is that Rule 14a-8 had recently been modified (in 2020) and insufficient time had passed to assess the impact of those rules to determine whether further change is needed.

Court challenge to amended proxy voting advice

rule: The SEC is facing two court challenges over 2022 [amendments](#) to a rule on proxy voting advice. The amendments removed some conditions that proxy advisory firms were required to meet to qualify for exemptions from SEC proxy solicitation rules upon which these firms typically rely. The conditions had been established in a 2020 [rule](#) finalized under former SEC Chairman Jay Clayton, but the SEC did not require proxy advisors to meet the conditions before the rule was amended.

The 2022 amendments were [supported](#) by investors and other stakeholders as lowering obstacles to obtaining useful, timely advice on proxy voting. Many in the issuer community strongly objected to the changes, however, because of concerns about unfair treatment of issuers by proxy advisory firms. The timing of the amended rule also was criticized, as the changes were made before the impact of the 2020 rule could be evaluated. Business associations brought two separate court cases against the SEC to halt the amended rule, asserting that the SEC did not adequately justify the rule change and citing procedural concerns, such as insufficient time to comment. After the lower courts rejected the challenges, the business associations appealed the decisions to the Fifth⁵ and Sixth⁶ Circuit Courts – decisions that are still pending as of the date of this publication.

3. Potential rulemaking impacting private companies

A topic that may become more active in 2024 relates to private companies. The securities laws provide exemptions from most disclosure requirements to companies if they meet certain thresholds relating to the number and financial sophistication of their shareholders. One aim of the exemptions is to help smaller, higher-risk companies raise capital from parties that can understand and bear that risk.



In recent years, the number and size of companies taking advantage of these exemptions has increased, and the amount of money flowing into private capital markets now greatly exceeds that going into public markets. This has sparked debate among commissioners and other stakeholders about whether the exemptions appropriately balance the investor protections and transparency available in the public capital market vs. the potential for higher investment returns and innovation in the private capital market. Expressing the view that more investor protection is needed, Democratic Commissioner Caroline Crenshaw has [stated](#), “Increasing access to certain investments should not come at the expense of decreasing the basic investment protections that should be available to all investors.” Commissioner Peirce has [supported](#) maintaining or expanding the exemptions, saying, “Enhanced access to private capital is a positive development not only for companies, but for investors. Having a robust private market contributes to the health of our economy, and we should not look to impose public-market-style regulations on private markets. We instead should look for ways to reduce the costs companies face in going and staying public.”



Expected activity in 2024:

The SEC has two rule proposals on its agenda for 2024 that would impact private companies by changing the thresholds for companies to qualify for exemptions from registration with the SEC and its disclosure rules. The proposals would do this by revising certain definitions. One [rule proposal](#) would amend the “held of record” definition for purposes of the Securities Exchange Act of 1934. The [other](#) would modify Regulation D, including the definition of “accredited investor.” SEC officials have not provided recent views on what these rules could look like, although the SEC staff sought public input on possible changes to the accredited investor definition in a December 2023 [research report](#), which could help shape how proposed rules are drafted. The SEC’s [Investor Advisory](#) and [Small Business Capital Formation](#) committees also discussed the exemptions in 2023 and may provide recommendations to the Commission on next steps.

Notable actions in 2023:

In 2023, the Commission increased transparency requirements for private funds and advisers, another set of market participants that had been largely exempt from SEC disclosures. [One](#) of these rules requires new current reporting by large hedge fund advisers and advisers to private equity funds of events that cause significant stress, among other information. Another final rule [requires](#) private fund advisers to provide investors with quarterly statements detailing information about private fund performance, fees and expenses. It also prohibits private fund advisers from providing preferential treatment to certain clients unless disclosed. The Fifth Circuit Court of Appeals is considering a petition filed by several industry groups to halt this rule on the grounds that the SEC acted arbitrarily and capriciously and exceeded its authority in requiring this information.⁷

4. Technology

Chair Gensler has articulated the need for the SEC to keep up with market developments, including with respect to the role of new technologies in the capital markets. He has asserted that the use of technologies, such as crypto assets and AI, should be governed by existing securities laws and regulations, rather than requiring a separate regulatory framework. We expect this approach to continue into 2024.

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We are blessed with the largest, most sophisticated, and most innovative capital markets in the world. But we cannot take this for granted. Even a gold medalist must keep training. ... That’s why we’re updating our rules for the technology and business models of the 2020s. We’re updating our rules to promote the efficiency, integrity, and resiliency of the markets. We do so with an eye toward investors and issuers alike, to ensure the markets work for them and not the other way around.

Chair Gensler, [Statement on the Fall 2023 Regulatory Agenda \(December 2023\)](#)



Crypto assets

Since taking the chair's seat, Gensler has asserted that most digital assets are securities and should be treated in the same way under US laws and regulations. In December 2023, the SEC affirmed that approach by voting to [deny](#) a rulemaking petition from crypto market participants to establish a regulatory framework specifically for crypto assets. In the letter communicating the decision, the SEC disagreed with the petitioner's assertion that the current securities regulatory framework is unworkable for crypto assets and pointed to SEC rulemakings that apply to crypto assets and other market participants. The decision, as well as Gensler's accompanying [statement](#), also highlighted the importance of SEC discretion over its rulemaking priorities. Commissioners Peirce and Uyeda [disagreed](#) with this position, arguing instead for the SEC to hold public roundtables and otherwise collect public input to have more information to determine the SEC's approach. Gensler also has not hidden his negative views about crypto assets. While Gensler voted with Peirce and Uyeda to approve some spot bitcoin exchange traded products (ETPs) in January 2024, his accompanying [statement](#) highlighted potential risks: "While [the Commission] approved the listing and trading of certain spot bitcoin ETP shares today, we did not approve or endorse bitcoin. Investors should remain cautious about the myriad risks associated with bitcoin and products whose value is tied to crypto."

Expected activity in 2024:

The SEC is planning to address crypto assets in final amendments to a rule on [safeguarding](#) advisory client assets by April 2024. This rule, aimed at preventing client assets from being stolen or lost through bankruptcy of an

investment adviser, addresses all types of assets held by an investment advisor and contains explicit provisions on how an investment adviser should protect client crypto assets in its custody. In his related [statement](#), Gensler noted that many crypto assets already were covered by the existing rule and that the proposal seeks to make sure all crypto assets are covered.

The Third Circuit Court of Appeals may review the SEC's rejection of the rulemaking petition to establish a crypto asset regulatory framework mentioned above, which the petitioners have challenged in court.⁸

Going into 2024, the SEC also is expected to maintain its enforcement focus on matters related to crypto assets. (See the section "Enforcement" for additional details.)

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The law is clear. If you're a securities exchange, clearinghouse, broker, or dealer, you must come into compliance, register with us, and deal with conflicts of interest and disclose important information. For 90 years, these laws have helped protect investors like you.

Chair Gensler, "Office Hours" video (April 2023)⁹



AI

The SEC approach to AI may intensify in 2024 as the use and impacts of AI grow more widespread. Gensler has [called](#) AI “the most transformative technology of our time,” referring to both its opportunities and risks. In recent months, he has increasingly called attention to the latter, such as hidden biases in AI used by market participants, opportunities for fraud, and loss of privacy and intellectual property. More broadly, he expressed concern about AI as a potential threat to financial stability. He also stated that these issues “are not necessarily new to AI but are accentuated by it,” suggesting that the SEC may not seek to address AI on a stand-alone basis.

Expected activity in 2024:

Looking ahead, the SEC is expected to approach AI in several ways in 2024. Gensler has signaled that SEC staff will scrutinize the accuracy of company disclosures relating to AI use and has warned companies not to “AI wash” by making untrue claims about their use of AI to raise their profiles.¹⁰ In addition, the SEC Division of Examination plans to look at the use of AI by the entities it examines. In 2023, the division reportedly conducted sweeps of investment advisers and private funds to gather

information about their use of AI, which could be used to consider future guidance or rulemaking.¹¹

The SEC also plans to finalize a rule [proposed](#) in July 2023 that is intended to address conflicts of interest associated with the use of advanced technologies, including predictive data analytics and AI, by broker-dealers and investment advisers. The rule would require these entities to identify and neutralize or eliminate conflicts of interest related to their use of certain technologies, including AI, in investor interactions. This rule has garnered significant [opposition](#), including criticism due to concerns about the breadth of technologies covered and the requirement to address conflicts of interest by neutralizing or eliminating them, rather than by disclosing them. Opponents such as [Peirce](#) and [Uyeda](#) also expressed the view that new rules are not needed because broker-dealers and investment advisers already are subject to rules governing conflicts of interest. The proposal’s supporters have cited the need for stronger investor protections against conflicts of interest in light of the lack of transparency about how new technologies may influence investor behavior, among other concerns.

PCAOB

One of the SEC's responsibilities is to oversee the Public Company Accounting Oversight Board (PCAOB or Board), which oversees the audits and auditors of public companies and SEC-registered broker-dealers. The PCAOB under Chair Erica Williams has pursued an agenda similar to that of the SEC under Gensler and is expected to continue doing so in 2024, covering matters that include:

- ▶ **Standard setting:** The PCAOB took action on more proposed and final standards in 2023 than it has in any year since the Board first established its regulatory framework in the early 2000s, with many more actions [planned](#) for 2024. Some of the standards on the docket for completion in 2024 would modify requirements relating to [audit firm quality controls](#) and the auditor's responsibilities relating to [noncompliance with laws and regulations \(NOCLAR\)](#). The Board also plans to propose a number of new and amended standards, including ones on going concern and firm and engagement performance metrics.
- ▶ The PCAOB plans to hold a public roundtable in 2024 on its NOCLAR proposal, which has drawn [significant attention](#) from audit firms, issuers, investors and policymakers due to its scope. The proposal would increase requirements for auditors to proactively seek out and evaluate whether or not "likely" noncompliance with laws or regulations (including fraud) has occurred to improve investor protection. Many [stakeholders](#) have noted concerns about significant cost increases, overlap with work carried out by issuers and a substantial change in the role and responsibilities of the auditor. Critics include then-Board Member [Duane DesParte](#) and Board Member [Christina Ho](#) – both of whom are CPAs. DesParte and Ho voted against the proposal – a highly rare occurrence.
- ▶ **Inspection priorities:** The PCAOB inspects audit firms to assess their quality control systems and certain audit engagements to review audit quality and compliance with PCAOB and SEC standards and regulations. The Board's [inspection priorities](#) for 2024 include a review of audit firm culture and how firms address overall risk in the business environment. The staff expects to select audit engagements based on factors, including M&A activities, and industries and sectors that have specialized accounting, as well as those experiencing volatility and uncertainty. In light of the 2023 risk environment, two priority sectors will be regional banks and information technology companies.
- ▶ **Transparency:** The PCAOB is expected to continue to seek ways to publicize its inspection reports of audit firms as well as expand the information in them. The Board has [encouraged](#) audit committees and investors to use these inspection reports to assess audit quality and to hold auditors accountable if the reports indicate a high level of deficiencies.
- ▶ **Timeliness:** Another PCAOB aim is to improve the timeliness of its inspection reports.
- ▶ **Enforcement:** According to [Williams](#), the PCAOB is strengthening its Division of Enforcement to "ensure accountability, promote deterrence, and protect investors." The PCAOB enforcement program has been quite active under Williams: 2023 is the second consecutive record-breaking year in terms of the total financial penalties imposed by the PCAOB. This approach likely will continue into 2024.



5. Enforcement

Enforcement remains a key priority for the Commission and its staff. In FY23, the Commission [filed](#) a total of 784 enforcement actions – a 3% increase over the prior year. In addition, nearly \$5 billion in financial remedies was ordered by the SEC last year, including civil penalties and disgorgement – the second highest amount in SEC history, after the record-setting amount ordered in FY22. The SEC also obtained orders barring 133 individuals from serving as officers and directors of public companies, the highest number of officer and director bars obtained in a decade.

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The investing public benefits from the Division of Enforcement’s work as a cop on the beat. Last fiscal year’s results demonstrate yet again the Division’s effectiveness — working alongside colleagues throughout the agency — in following the facts and the law wherever they lead to hold wrongdoers accountable.

Chair Gensler, [SEC press release \(November 2023\)](#)

Gensler has continued to [emphasize](#) five principles he expects the Division of Enforcement to consider as it investigates misconduct and makes recommendations to the Commission:

- ▶ **Economic realities:** Subject similar economic activities to consistent regulation, even if offered by different types of entities or provided through different technologies or business models. Gensler has stated, “[W]e don’t enforce the securities laws based on a product’s label. Rather, we look to the underlying economic realities.”
- ▶ **Accountability:** Leverage “all of the tools in [the SEC’s] toolkit” to promote accountability, including bars, penalties, injunctions, undertakings and litigation where appropriate. The SEC’s approach also increasingly seeks to hold individuals accountable – two-thirds of the enforcement matters the SEC brought in FY23 charged individuals.
- ▶ **High-impact cases:** Pursue high-impact cases – and high penalties – to promote behavioral change and deter future misconduct. Gensler has stated that these cases “help change behavior and bring greater compliance with the law.”
- ▶ **Process:** Focus on the timeliness of enforcement matters, collaboration with other law enforcement agencies and incentivizing self-reporting and other “meaningful cooperation.”
- ▶ **Positions of trust:** Emphasize the responsibility of gatekeepers, such as lawyers and accountants, in protecting investors. Gensler has stated that “[w]hen we hold accountable those in positions of trust, that builds trust in the markets.”

Restoration of public trust was a theme Gurbir Grewal, Director of the Division of Enforcement, continued to [discuss](#) in 2023 public remarks. In particular, Grewal has appealed to gatekeepers and compliance professionals to work together to create “a culture of proactive compliance,” which he has said involves:

- ▶ **Education:** He has emphasized how important it is for entities to carefully review relevant SEC enforcement decisions and consider whether and how they should be applied internally.
- ▶ **Engagement:** Compliance professionals should engage with company personnel to learn about all parts of the business and “their activities, strategies, risks, financial incentives, counterparties, and sources of revenues and profits.”
- ▶ **Execution:** Compliance professionals should seek to make sure that company policies are implemented “through leadership, training, constant oversight and the right tone at the top ...”

As has been the case in recent years, the SEC [continues](#) to use its whistleblower program to further its enforcement agenda. FY23 was a record-breaking year for the SEC’s whistleblower program, including the highest amount of whistleblower awards in a single year – as well as a record-breaking number of whistleblower tips in 2023. Indicating the importance of the whistleblower program, the SEC also pursued enforcement actions against companies for seeking to limit employees’ ability to communicate concerns about potential securities law violations with the SEC.

Expected activity in 2024:

The agency’s FY23 enforcement actions covered a range of topics and market participants. Some of the areas of particular focus were financial fraud and issuer disclosure, gatekeepers (such as auditors and lawyers), crypto assets, cybersecurity compliance, and environmental, social and governance (ESG) issues. Areas to watch in 2024 include:

- ▶ **Cybersecurity:** The SEC brought significant enforcement actions in 2023 that highlighted cybersecurity failures by companies and officers to comply with obligations around record-keeping and safeguarding customer information. Grewal has observed the need to take steps to address known weaknesses, including through strong internal controls and appropriate disclosure to investors.



Investor protection and enhancing public trust in our markets requires that we work with a sense of urgency, using all the tools in our toolkit. As [the SEC’s FY23 enforcement] results make clear, that’s precisely what the Enforcement Division did in fiscal year 2023.

SEC Enforcement Director Grewal, [SEC press release \(November 2023\)](#)

- ▶ **Crypto assets:** The SEC took numerous actions in 2023 relating to crypto assets, including matters involving failure to register offers and sales of crypto lending products, fraudulent crypto pyramid and Ponzi schemes, and insider trading. Crypto-related enforcement is expected to be a continuing area of high focus by the SEC.
- ▶ **ESG:** The Commission is expected to continue scrutinizing market participants’ claims around ESG matters to make sure that these are consistent with companies’ actions. In 2023, the SEC pursued cases where companies did not implement policies and procedures that would allow them to achieve ESG-related goals. The Commission also focused on the adequacy of disclosure controls on ESG-related matters and the accuracy of governance-related disclosures.
- ▶ **Record-keeping:** The SEC is expected to continue scrutinizing broker-dealers and investment advisers and their employees to make sure that they maintain and preserve electronic communications and do not use so-called “off-channel communications” in the conduct of securities business matters. As Gensler recently [noted](#), “Since December 2021, in part through an ongoing sweep for potential violations, we have brought cases against 40 firms, required significant undertakings, and ordered more than \$1.5 billion in penalties. In the last fiscal year alone, we settled recordkeeping-related charges with 23 firms.”

Conclusion

The SEC will continue to pursue an active agenda on a variety of issues for public and private companies alike in 2024. In addition to the items mentioned above, significant SEC rulemaking that would impact other parts of the capital markets is expected. These include new climate-related disclosure requirements for investment advisers and funds; new cybersecurity risk management requirements for broker-dealers, investment advisers and funds and other SEC-registered entities; and changes to various market structure rules. In addition to the SEC's planned activities, litigation relating to SEC actions and authority as well as election-year politics will contribute to uncertainty around the capital market regulatory framework. Market participants should monitor developments closely and prepare for change.



1. The dates for rulemaking activity in this document are based on the SEC's Fall 2023 Regulatory Flexibility Agenda, the statutorily required semiannual publication that reflects "only the priorities of the Chair" for the coming year. The agenda was compiled by SEC staff on August 22, 2023, and made publicly available on December 6, 2023. However, the SEC may advance these rulemaking activities before or after these dates; therefore, the dates should not be considered fixed deadlines, but rather general guideposts for agency action.
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5. *National Association of Manufacturers v. SEC*, 5th Cir., No. 22-51069.
6. *US Chamber of Commerce v. SEC*, 6th Cir., No. 23-05409.
7. *National Association of Private Fund Managers v. SEC*, 5th Cir., No. 23-60471.
8. Bultman, Matthew, "Coinbase Challenges SEC Refusal to Issue Digital Asset Rules (2)," *Bloomberg Law*, December 16, 2023.
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Contacts

Bridget Neill

EY Americas Vice Chair, Public Policy
Ernst & Young LLP
bridget.neill@ey.com
+1 202 327 6297

Shauna Steele

Director, Public Policy
Ernst & Young LLP
shauna.steele@ey.com
+1 202 327 6118

Steven Jacobs

EY Americas Director, SEC Regulatory Matters
and Capital Markets Leader
Ernst & Young LLP
steven.jacobs1@ey.com
+1 202 327 6070

Mark Kronforst

Partner, Professional Practice
Ernst & Young LLP
mark.kronforst@ey.com
+1 202 327 6082

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