

Alert | Securities Litigation/ White Collar Defense & Investigations



October 2023

Assessment of the SEC’s Progress on Its 2023 Rulemaking Agenda

Go-To Guide:

- The SEC’s Spring 2023 Rulemaking Agenda forecast 55 final and proposed rules set for adoption by October 2023.
- The SEC has recently adopted significant new rules on cybersecurity and public fund names.
- Highly anticipated climate-change disclosure rules remain outstanding.

The Securities and Exchange Commission (SEC)’s **Spring 2023 Unified Agenda of Regulatory and Deregulatory Actions** (the Agenda) forecast a busy fall for the regulator, with many of the 55 final and proposed rules set for adoption or promulgation by October 2023. With October 2023 well underway, business leaders—who have been critical of both the amount and the anticipated impact of the rules in the Agenda—have an opportunity to assess the SEC’s progress and look to remaining rules with target dates through April 2024.

Adoption of Final Rules

The Agenda includes 37 final rules pending SEC adoption. Of these, the SEC has adopted the following final proposed rules:

- Prohibition Against Fraud, Manipulation, and Deception in Connection with Security-Based Swaps;
- Prevent Undue Influence Over the Chief Compliance Officer of Security-Based Swap Dealers and Major Security-Based Swap Participants;
- Removal of References to Credit Ratings From Regulation M;
- Amendments to Form PF and Reporting Requirements for All Filers and Large Hedge Fund Advisers;
- Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies;
- Amendments to NMS Plan for the Consolidated Audit Trail-Data Security;
- Rule Enhancements to Prevent Misleading or Deceptive Investment Fund Names; and
- Amendments to the Privacy Act Rule.

GT analyzed the adoption of the rules regarding [credit ratings from Regulation M](#) and [cybersecurity measures](#) in previous GT Alerts. Significant outstanding rules with October 2023 target dates include the following:

Climate Change Disclosure Rules

While the Sept. 20, 2023, rule enhancements advanced the SEC’s environmental goals by limiting fund names referring to environmental, social, and governance (ESG) in an effort to avoid “greenwashing”—i.e., misleading consumers about the environmental benefits of a product—the core environmental reform efforts set forth in the Agenda have yet to be adopted. GT covered the SEC’s climate-change disclosure proposal in a [March 2022 Alert](#). If the SEC’s rule enhancements are adopted, the SEC would require certain disclosures about climate risks and a company’s climate change mitigation strategies.

Since the SEC announced its proposed rule on climate change disclosure in March 2022, the rule has sparked debate and warnings about future litigation to forestall the rule’s implementation.¹ However, recent developments may impact even the adoption of the rule, including the continued possibility of a government shutdown, which may delay or detract from the SEC’s efforts. The scope of the SEC’s rule-making authority may also be curbed by the U.S. Supreme Court’s recent jurisprudence limiting government action in the environmental space in *West Virginia v. EPA*, 597 U.S. ____ (2022), and the Court’s possible overruling of the *Chevron* doctrine, which provides judicial deference to administrative agency decisions, in the upcoming October 2023 term in *Loper Bright Enterprises v. Raimondo*, No. 22-451. For businesses, however, the more immediate considerations are the recent California and the European Union climate change disclosure rules, [which advance the timeline for compliance in this space](#).

Special Purpose Acquisition Companies (SPACs)

In recent years, SPACs have become increasingly popular tools for raising capital. As their popularity grew, SPACs attracted the attention of the SEC. [The SEC states that its final rule on SPACs is designed to “strengthen disclosure, marketing standards, and gatekeeper and issuer obligations by market participants in SPACs, helping ensure that investors in these vehicles get protections similar to those when investing in traditional initial public offerings \(IPOs\).”](#) GT covered the rule in a [May 2022 Alert](#). If

¹ See e.g., “The SEC May Be Overstepping Its Authority In ESG/ Climate Related Disclosure Standards,” *Forbes*, Aug. 30, 2023; “SEC Considers Easing Climate-Disclosure Rules After Investor Pushback,” *The Wall Street Journal*, Feb. 3, 2023.

the changes are adopted as proposed, private securities litigation and enforcement actions involving SPACs may increase, and capital markets practices for issuers and underwriters may be impacted.

Promulgation of Proposed Rules

The Agenda also lists rules the SEC expects to propose by October 2023 or through April 2024. The SEC issued a proposal on July 26, 2023, regarding **conflicts of interest that arise when broker-dealers use certain covered technologies** such as “predictive data analytics” to include artificial intelligence that firms could use to influence investors’ behavior. The proposal broadly defines “covered technologies” and “conflict of interest,” which may generate industry pushback.

Takeaways

The SEC’s 2023 spring Agenda marked a continuation of its active rulemaking efforts in recent years and a focus on topics heating up in many areas of the law, including environmental, emerging technology, and cybersecurity. While the SEC has adopted significant changes regarding cybersecurity and public fund names, the fate of the changes expected regarding climate change disclosures remains uncertain.

While keeping an eye on additional changes, companies should consider assessing their compliance with the newly adopted rules and taking action where needed, including updating or creating disclosure checklists to incorporate new disclosure requirements, assessing public fund names, and ensuring adequate board oversight regarding newly prohibited conduct. For the SEC’s new cybersecurity requirements, which apply to both publicly traded and regulated entities, companies should consider updating their incident response plans to include the four business-day requirement for filing an 8-K after identifying a material cybersecurity incident, assigning oversight of cybersecurity risks to an existing board committee, and developing a vendor management program designed to mitigate the risks posed by the use of third-party vendors.

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