



Securities 2023: New Rules (Non Broker or Investment Adviser) and Enforcement Action Trends

December 7, 2023

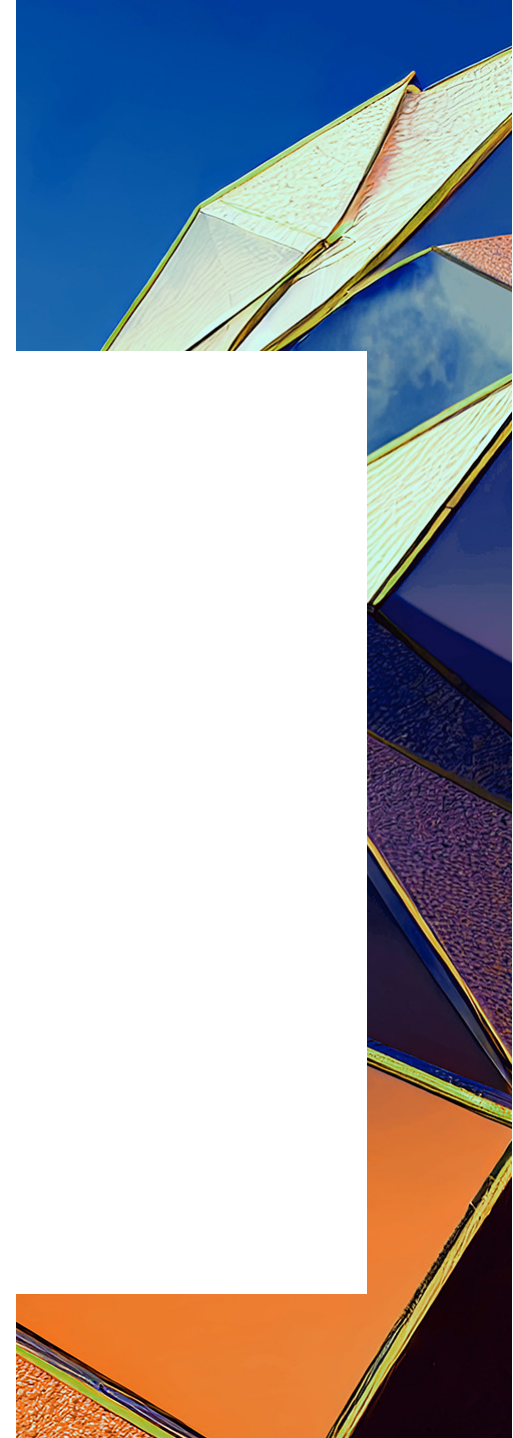
FOLEY.COM

Presenter



Clyde Tinnen
Partner | Milwaukee

T: 414.297.5026
E: ctinnen@foley.com



SEC Flex Agenda (last updated Spring 2023)

| Rule Stage | Description |
|------------|---|
| Proposed | Amendments to Requirements for Filer Validation and Access to the EDGAR Filing System |
| Proposed | Incentive-Based Compensation Arrangements |
| Proposed | Corporate Board Diversity |
| Proposed | Disclosure of Payments by Resource Extraction Issuers |
| Proposed | Rule 144 Holding Period |
| Proposed | Human Capital Management Disclosure |
| Proposed | Regulation D and Form D Improvements |
| Proposed | Revisions to the Definition of Securities Held of Record |
| Proposed | Fund Fee Disclosure and Reform |
| Proposed | Prohibition of Conflicted Practices for Investment Advisers That Use Certain Covered Technologies |
| Proposed | Registration for Index-Linked Annuities |
| Proposed | Registration for Internet Advisers |
| Proposed | Exchange-Traded Products |
| Proposed | Prohibition of Conflicted Practices for Broker-Dealers That Use Certain Covered Technologies |

SEC Flex Agenda (Cont'd)

| Rule Stage | Description |
|------------|--|
| Proposed | Regulation ATS Modernization |
| Proposed | Clearing Agency Recovery and Wind-Down |
| Proposed | Amendments to Rule 15c3-3 |
| Proposed | Volume-Based Exchange Transaction Pricing |
| Final | Privacy Act Amendments |
| Final | Prohibition Against Conflicts of Interest in Certain Securitizations |
| Final | Climate Change Disclosure |
| Final | Cybersecurity Risk Governance |
| Final | Special Purpose Acquisition Companies |
| Final | Rule 14a-8 Amendments |
| Final | Modernization of Beneficial Ownership Reporting |
| Final | Safeguarding Advisory Client Assets |
| Final | Investment Company Names |

SEC Flex Agenda (Cont'd)

| Rule Stage | Description |
|------------|---|
| Final | Amendments to Form PF to Require Current Reporting and Amend Reporting Requirements for Large Private Equity Advisers and Large Liquidity Fund Advisers |
| Final | Money Market Fund Reforms |
| Final | Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices |
| Final | Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT Reporting |
| Final | Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews |
| Final | Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies |
| Final | Form PF; Reporting Requirements for All Filers and Large Hedge Fund Advisers |
| Final | Outsourcing by Investment Advisers |
| Final | Regulation S P: Privacy of Consumer Financial Information and Safeguarding Customer Information |

SEC Flex Agenda (Cont'd)

| Rule Stage | Description |
|------------|--|
| Final | Clearing Agency Governance |
| Final | Prohibition Against Fraud, Manipulation, and Deception in Connection With Security-Based Swaps; Prohibition Against Undue Influence Over Chief Compliance Officers |
| Final | Rules Relating to Security-Based Swap Execution and Registration and Regulation of Security-Based Swap Execution Facilities |
| Final | Removal of References to Credit Ratings From Regulation M |
| Final | Electronic Submission of Certain Materials Under the Securities Exchange Act of 1934; Amendments Regarding FOCUS Report |
| Final | Short Sale Disclosure Reforms |
| Final | Amendments to Exchange Act Rule 3b-16 re Definition of "Exchange"; Regulation ATS and Regulation SCI for ATSS That Trade U.S. Government Securities, NMS Stocks and Other Securities |
| Final | Order Competition Rule |
| Final | Amendments to NMS Plan for the Consolidated Audit Trail-Data Security |
| Final | Loan or Borrowing of Securities |

SEC Flex Agenda (Cont'd)

| Rule Stage | Description |
|------------|--|
| Final | Standards for Covered Clearing Agencies for U.S. Treasury Securities and Application of the Broker-Dealer Customer Protection Rule With Respect to U.S. Treasury Securities |
| Final | Further Definition of Dealers |
| Final | Cybersecurity Risk Management Rules for Broker-Dealers, Clearing Agencies, MSBSPs, the MSRB, National Securities Associations, National Securities Exchanges, SBSDRs, SBS Dealers, and Transfer Agents |
| Final | Narrowing Exemption for Certain Exchange Members |
| Final | Disclosure of Order Execution Information |
| Final | Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders |
| Final | Regulation Best Execution |
| Final | Regulation Systems Compliance and Integrity |
| Final | Reporting of Security-Based Swap Positions |

Selected Proposed Rule Stage Agenda Items

Human Capital Management Disclosure

- Expansion of registrant disclosures regarding human capital management

Corporate Board Diversity

- Expansion of registrant disclosures about the diversity of board members and nominees

Regulation D and Form D Improvements

- Updates to the accredited investor definition, and Form D to improve protections for investors

Revisions to the Definition of Securities Held of Record

- Amendments to the "held of record" definition for purposes of section 12(g) of the Exchange Act

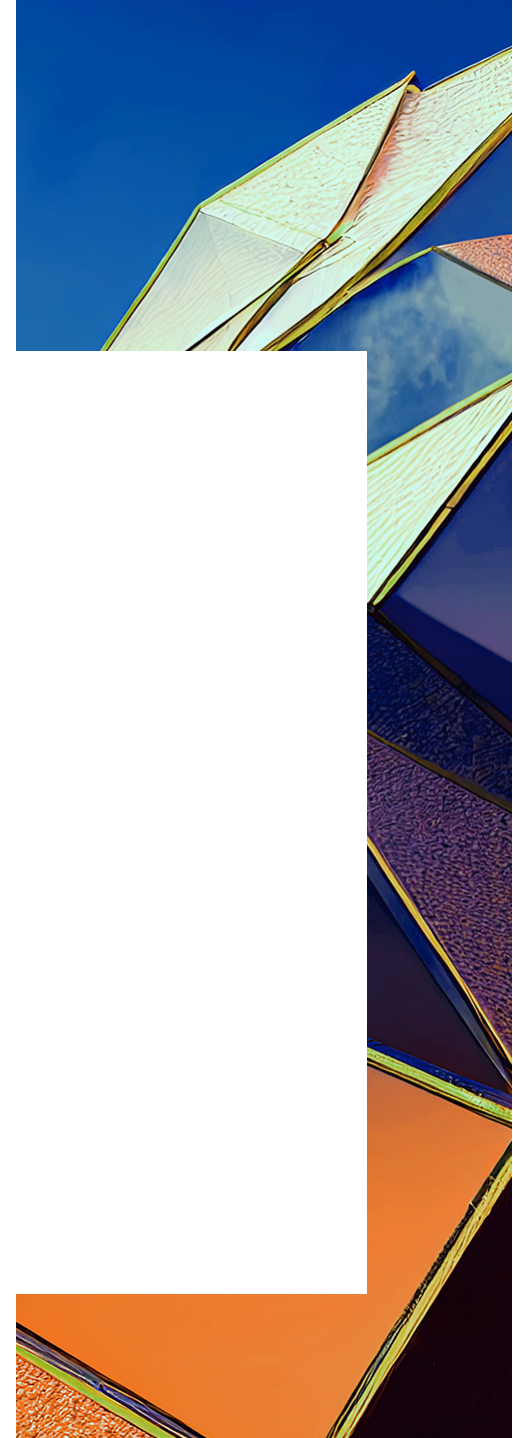
Selected Proposed Rule Stage Agenda Items (Cont'd)

Disclosure of Payments by Resource Extraction Issuers

- Amendments to the rules under section 1504 of the Dodd-Frank Act

Prohibition of Conflicted Practices for Investment Advisers That Use Certain Covered Technologies

- New rules related to investment adviser use of predictive data analytics, artificial intelligence, machine learning, and similar technologies in connection with certain investor interactions



Final Rules or Soon to be Finalized Rules

Share Repurchase Disclosure

Companies must:

- Disclose daily repurchase activity quarterly or semiannually
- Check a box indicating if certain directors or officers traded in the relevant securities within four business days before or after the public announcement of an issuer's repurchase plan or program
- Provide narrative disclosure about the issuer's repurchase programs and practices in its periodic reports
- Provide quarterly disclosure in Forms 10-K and 10-Q related to an issuer's adoption and termination of 10b5-1 trading arrangements
 - total number of shares purchased on the open market
 - shares purchased that are intended to qualify for the safe harbor in Rule 10b-18 and separately shares purchased pursuant to a Rule 10b5-1(c) plan
 - objectives or rationales for share repurchases and the process or criteria used to determine the amount of repurchases
 - policies and procedures relating to purchases and sales of shares during a repurchase program by officers and directors, including any restriction on such transactions
- SEC Issue Date May 3, 2023
- Effective Date July 31, 2023

Public Company Cybersecurity Disclosures

- Companies must determine the materiality of an incident without unreasonable delay following discovery and, if the incident is determined material, file an Item 1.05 Form 8-K within four business days of such determination
- Disclosure of the nature, scope, and timing of the incident, and the material impact of the incident on the company, its financial condition and results of operations
- Delays allowed if U.S. Attorney General determines that disclosure poses national security risk
- New Regulation S-K Item 106 requires companies to describe their processes for assessing, identifying, and managing material risks from cybersecurity threats, and board of directors' oversight of risks from cybersecurity threats and management's role and expertise in assessing and managing material risks from cybersecurity threats
- SEC Issue Date July 26, 2023
- Effective Date September 5, 2023

Beneficial Ownership Reporting

- For Schedule 13D, shortens the initial filing deadline from ten days to five business days and requires that amendments be filed within two business days
- For certain Schedule 13G filers (i.e., qualified institutional investors and exempt investors), shortens the initial filing deadline from 45 days after the end of a calendar year to 45 days after the end of the calendar quarter in which the investor crosses 5% ownership
- For other Schedule 13G filers (i.e., passive investors), shortens the initial filing deadline from ten days to five business days
- For all Schedule 13G filers, requires amendments to be filed 45 days after the calendar quarter in which a material change occurred rather than 45 days after the calendar year
- Accelerates Schedule 13G amendments obligations for qualified institutional investors and passive investors crossing 10% or increases or decreases by 5%
- Provides guidance that a person is required to disclose interests in all derivative securities (including cash-settled derivative securities) that use the issuer's equity security as a reference security
- Clarifies two or more persons can be found to be acting as a group without an express agreement if facts and circumstances suggest concerted actions
- SEC Issue Date October 10, 2023
- Effective Date February 5, 2024

The Enhancement and Standardization of Climate-Related Disclosures for Investors

Background:

- The Amendments add new climate-related disclosure requirements, which are primarily designed to better inform investors about a registrant's risk management, strategy, and governance in a standardized and consistent manner.

What are the Key Elements of the Proposed Rule?

- **Content to be Disclosed:** Rules would require disclosure of the following:
 - Any climate-related risks identified and reasonably likely to have a material impact on the company's business and consolidated financial statements, which may manifest over the short, medium, or long-term
 - How any identified and potential material climate-change risks would impact or have impacted the company's strategy, business model, and outlook
 - The governance and oversight of climate-related risks by directors and management

The Enhancement and Standardization of Climate-Related Disclosures for Investors (cont'd)

What are the Key Elements of the Proposed Rule? (cont'd)

Content to be Disclosed: Rules would require disclosure of the following: (cont'd)

- Processes for identifying, assessing, and managing climate-related risks, including whether they are integrated with overall risk management systems or processes
- Various climate-related financial statement metrics, including the impact of climate-related events on line items
- Data on the company's direct GHG emissions that occur from sources owned or controlled by the company (Scope 1) and indirect GHG emissions from the generation of electricity and energy purchased and consumed by the company (Scope 2)
- Indirect emissions from upstream and downstream activities in the company's value chain (Scope 3), if the emissions are material or if the company has set a greenhouse gas emissions reduction target that includes such emissions

The Enhancement and Standardization of Climate-Related Disclosures for Investors (cont'd)

What are the Key Elements of the Proposed Rule? (cont'd)

Content to be Disclosed: Rules would require disclosure of the following: (cont'd)

- Climate-related targets and goals, if applicable:
 - If the company has adopted a transition plan for its risk management strategy, a description of the plan and relevant metrics and targets used to identify and manage risks
 - If the company uses scenario analysis to assess the resilience of its business strategy against climate threats, a description of the scenarios used, parameters, assumptions, analytical choices, and projected principal financial impacts
 - If the registrant uses an internal carbon price, information about the price and how it is set

The Enhancement and Standardization of Climate-Related Disclosures for Investors (cont'd)

Presentation of Disclosures and Attestation:

- Companies would need to provide the disclosures in their registration statements and Exchange Act annual reports (i.e., must file, not furnish, climate-related disclosures)
 - Disclosures are subject to potential liability under Section 11 of the '33 Act and Section 18 of the '34 Act
- The mandated disclosures on climate-related financial statement metrics and related disclosures must be provided in a note to the audited financial statements
- If the absolute value of negative and positive impacts for climate-related events and transition activities exceeds 1 percent of a related line item, companies must separately disclose all such impacts
- For accelerated or large accelerated filers, there must be an attestation report from an independent attestation service provider covering Scopes 1 and 2 emissions disclosure

The Enhancement and Standardization of Climate-Related Disclosures for Investors (cont'd)

- **Phase-In Periods, Safe Harbors, and Exemptions:**

- There will be a phase-in period for all registrants, with the compliance date dependent on the registrant's filer status, and a phase-in period for the assurance requirement and level of assurance required for accelerated and large accelerated filers.
- There will be a safe harbor for forward-looking statements and certain forms of liability for Scope 3 emissions disclosure.
 - The SEC recognizes that information about Scope 3 emissions is outside a company's control and may be difficult for a company to verify
 - A scope 3 emissions disclosure will not be a fraudulent statement unless it is shown that it was made or reaffirmed without a reasonable basis or was disclosed other than in good faith
 - For forward-looking statements, the existing safe harbor under the '33 Act and the '34 Act will apply.
- Smaller reporting companies do not have to report Scope 3 emissions.

SEC Enforcement Actions

- SEC filed 784 enforcement actions, obtained orders for nearly US\$5 billion in financial remedies, and distributed nearly US\$1 billion to harmed investors
- Financial remedies comprised of US\$3.369 billion in disgorgement and prejudgment interest and US\$1.580 billion in civil penalties
- SEC also filed 162 "follow-on" administrative proceedings seeking to bar or suspend individuals from certain functions in the securities markets based on criminal convictions, civil injunctions, or other orders and 121 actions against issuers who were allegedly delinquent in making required filings with the SEC
- SEC also obtained orders barring 133 individuals from serving as officers and directors of public companies
- SEC issued whistleblower awards totaling nearly US\$600 million, US\$279 million awarded to one whistleblower
- 18,000 whistleblower tips in fiscal year 2023

Selected Enforcement Actions

- Charter Communications to Pay US\$25 million Penalty for Stock Buyback Controls Violations
- SEC Charges Royal Bank of Canada with Internal Accounting Controls Violations
- SEC Charges SolarWinds and Chief Information Security Officer with Fraud, Internal Control Failures
- SEC Charges International Accounting Firm Prager Metis with Hundreds of Auditor Independence Violations
- SEC Charges D. E. Shaw with Violating Whistleblower Protection Rule
- Albemarle Corp. to Pay SEC More Than US\$103 million to Settle FCPA Violations
- SEC Charges Exelon, its Subsidiary Commonwealth Edison, and Subsidiary's Former CEO Anne Pramaggiore with Fraud in Connection with Political Corruption Scheme
- SEC Charges Corporate Insiders for Failing to Timely Report Transactions and Holdings
- SEC Charges Global Transportation Company Greenbrier and Former CEO for Failing to Disclose Perks and Payments
- SEC Charges McDonald's Former CEO for Misrepresentations About His Termination

Thank you!

A special thank you to our Associates, Bryn Allen and Alex Karnopp for preparation of this presentation.

- Questions?

