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SEC Update

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SEC Budget Request Seeks 170 New Staff Mainly for Enforcement and Rulemaking

The Securities and Exchange Commission (SEC) has submitted to Congress a budget request justification[1] for fiscal year (FY)[2] 2024, which begins October 1, 2023.

The budget request totals $2.436 billion,[3] compared with the current budget of $2.190 billion.[4] So, the SEC is requesting an increase of $246 million or an 11 plus percent increase.

Enforcement and Rulemaking

The SEC requests 170 additional Staff.[5] This is a 3 percent increase[6] that would bring the SEC's total workforce up to 5,473.[7] A large number of additional Staff would be for enforcement.

Of the 170 new Staff members requested, 50 are for the Division of Enforcement and 20 for the Division of Examinations.[8] Moreover, the SEC is requesting four new Staff members for the Division of Investment Management to "perform examinations of asset management industry participants."[9] So, 74 Staff—almost 44 percent of those requested—would be involved in enforcement.

Another large number of additional Staff would be for rulemaking. The SEC's current rulemaking agenda[10] specifies 52 rules in the works. The SEC requests 31 new Staff for rulemaking, including four for the Division of Corporation Finance,[11] four for the Division of Trading and Markets,[12] five for the Division of Investment Management,[13] up to 10 for the Division of Economic Risk Analysis,[14] three for the Office of International Affairs,[15] one for the Office of the Investor Advocate,[16] one for the Office of Municipal Securities,[17] one for the Office of the Chief Operating Officer (Front Office),[18] and two for the EDGAR Business Office.[19] The high number and wide disbursement of the requested new rulemaking Staff bears out the SEC's description of its rulemaking agenda as being "robust."[20]

Justification for Additional Staff

The justification for the SEC's request for additional Staff seems to be fourfold. First, SEC Chair Gary Gensler, in his Executive Summary,[21] says that the SEC is currently adding Staff lost in past years and needs additional Staff because of additional challenges. He explains:

> From FY 2016 to FY 2020, the SEC shrank by 3 percent. This occurred as the size, scale, and complexity of our capital markets grew—and with it, the demands on our talented staff. With the help of Congress, by the end of FY 2023, the SEC will have returned to slightly above (by 3 percent) our staffing levels in FY 2016. It will take

> more, however, than the resource levels of the mid-2010s to face the market challenges of the mid-2020s.[22]

The second justification is the sheer growth and present number of "more than 30,000 registered entities" that the SEC oversees, including among others:

- "approximately 16,000 registered funds";
- "more than 15,300 investment advisers";
- "more than 3,500 broker-dealers";
- "24 national securities exchanges";
- "101 alternative trading systems";
- "10 credit rating agencies";
- "33 self-regulatory organizations"; and
- "7 active registered clearing agencies."[23]

A possible, but unstated, third justification is the fact that the SEC has been losing senior and attorney Staff at an unusually high rate. A 2022 statement of the SEC's Inspector General reported:

> [T]he SEC has seen a significant increase in attrition over the last few years, from 3.8 percent in FY 2020 to an estimated 6.4 percent in FY 2022 (as of September 20, 2022)—the highest attrition rate in 10 years. Most concerning is the increased attrition in Senior Officer and attorney positions, expected to be about 20.8 percent and about 8.4 percent for FY 2022, respectively.[24]

The Inspector General reported that certain Staff related the increase in attrition to the SEC's rulemaking agenda, as follows:

> We [the Inspector General's office] met with managers from the SEC's divisions of Trading and Markets, Investment Management, Corporation Finance, and Economic and Risk Analysis, some of whom raised concerns about increased risks and difficulties managing resources and other mission-related work because of the *increase in the SEC's rulemaking activities*. For example, some reported an *overall increase in attrition* . . . and difficulties hiring individuals with rulemaking experience.[25]

Certain Staff complained that: there was a lack of "feedback during the rulemaking process, either as a result of shortened timelines during the drafting process or because of shortened public comment periods"; "the more aggressive [rulemaking] agenda . . .(1) limits the time available for staff research and analysis, and (2) increases litigation risk"; and "fewer resources have been available to complete other mission-related work, as rulemaking teams have borrowed staff from other organizational areas to assist with rulemaking activities."[26]

The fourth justification is that taxpayers pay not a penny of the SEC's budget. Chair Gensler reminds Congress that "[a]s the SEC's funding is deficit-neutral, any amount appropriated to the agency will be offset by transaction fees."[27]

Staff Allocation

The SEC would allocate the additional Staff to the five regulatory divisions as set out below.

Division of Enforcement

The Division of Enforcement (ENF) would receive 50 additional Staff, the largest number of the regulatory divisions.

The SEC does not break down that number in terms of specific functions. Instead, the SEC states that the additional Staff "will enhance ENF's ability to timely pursue the wide variety of misconduct within the SEC's remit,"[28] singling out:

- new and emerging issues raised by crypto assets and cybersecurity,
- market surveillance,
- the Office of the Whistleblower, and
- operations support.[29]

Division of Examinations

The Division of Examinations would receive 20 additional Staff, the next largest number after the Division of Enforcement.

The SEC states that the additional Staff would "help to achieve the following":

- "[s]trengthen the division's ability to address critical and evolving risks such as those associated with emerging technologies (for example, crypto assets), cyber and information security, and the resiliency of critical market infrastructure";
- "[a]ddress new regulatory responsibilities in the security-based swap market . . . now [that the division] has examination and monitoring responsibilities for several new categories of registrants, including security-based swap dealers, security-based swap data repositories, and security-based swap execution facilities"; and
- "[f]urther address the disparity between the number of exam staff and the growing number, size, and complexity of SEC-registered firms," focusing "on conducting examinations of key market participants interacting with a rapidly growing retail sector" with "a continued emphasis on the population of investment advisers that has seen tremendous growth over the last several years (population increase over 20 percent in just the last five years)." [30]

Division of Corporation Finance

The Division of Corporation Finance would receive eight additional Staff, as follows:

- "[t]wo attorney and accountant positions to support continued enhancements and innovations in the Disclosure Review program," which would "allow the division to continue its rigorous examination of offering documents and periodic reports, elicit enhanced disclosures and other key metrics for investors on important and developing topics, and publish sample disclosures to underscore emerging risks that are likely to have a material impact on the business, results of operations, or financial condition of market participants";
- "[f]our attorney positions to meet its goals and to enhance its ongoing efforts to protect investors and facilitate capital formation," which would "allow CF to better support and advance key rulemaking priorities being considered for recommendation including: climate-related disclosures, human capital disclosure, special purpose acquisition companies, and cybersecurity"; and
- "[t]wo data analysts to support training initiatives and improvements to infrastructure, data architecture, project management and other mission supporting innovations designed to support and improve efficiencies in the Disclosure Review program," which "positions are critical to the division's effort to support the agency's broader undertaking to initialize and integrate machine-learning and artificial intelligence-supporting technology, with the ultimate goal to innovate and develop usable tools for the staff that deploy predictive and information visualization models to create data analytics efficiencies, particularly in the rulemaking context, where the staff routinely receives significant and diffuse feedback from market participants during open comment periods."[31]

Division of Trading and Markets

The Division of Trading and Markets would receive seven additional Staff, as follows:

- "three attorney adviser positions to help advance the Commission's rulemaking agenda and provide additional oversight of rulemaking and interpretive inquiries";
- "one financial analyst to continue with in-depth analysis of crypto data and other market monitoring functions";

- "two attorney adviser positions to assist with alternative trading system filing review"; and
- "one attorney adviser to support Regulation Systems Compliance and Integrity (SCI) regime and other cyber-related rulemaking."[32]

The SEC tells Congress that "[t]hese positions will strengthen TM's ability to meet its FY 2024 priorities to":

- "further rulemaking initiatives that cut across a diverse and disparate range of registrants";
- "implement recently adopted or planned rules";
- "conduct risk oversight of broker-dealers and clearing agencies";
- "focus on issues and trends specific to the systemically important clearance and settlement registrants";
- "review SRO rule filings, advance notices, and NMS plans";
- "support market monitoring and market responses activities"; and
- "review internal rulemaking."[33]

Division of Investment Management

The Division of Investment Management would receive 13 additional Staff, as follows:

- "five would support priority agency rulemakings";
- "four would support the division's need for rapid, detailed analysis of market and regulatory data and perform examinations of asset management industry participants"; and
- "four would support disclosure review and accounting work resulting from increased filings and substantially more complex products, as well as support to ensure that IM has the technical capacity to effectively perform its mission".[34]

The SEC tells Congress that the Division is considering the following "reforms":

- "cybersecurity requirements for investment advisers and funds";
- "requirements for fund names";
- "requirements for funds and investment advisers related to environmental, social, and governance factors, as these investment strategies rapidly increase";
- "enhanced reporting and disclosure about private funds";
- "requirements for investment advisers who outsource certain functions";
- "money market fund reform"; and
- "enhancements to the open-end fund liquidity framework."[35]

The SEC also tells Congress that the Division of Investment Management will:

- "continue to review existing rules and evaluate their efficacy at providing appropriate protections in light of market trends and developments," such as "consider potential reforms for asset managers to improve and modernize the regulations around the custody of investments of clients by investment advisers";
- "monitor implementation of recently adopted regulatory changes, including the enhanced frameworks for investment adviser marketing, fund valuation practices, and funds' use of derivatives";
- "continue to review and comment on the thousands of prospectuses, proxy statements, and other disclosure documents filed by registered investment companies and business development companies (BDC) each year, with a focus on filings by new funds, novel and complex funds, and principal strategy and risk disclosures";
- "focus on ensuring appropriate protections when reviewing new investment products, such

as single stock ETFs and funds seeking investments in a limited set of crypto-related assets"; and

- "continue to provide legal guidance to other parts of the agency, other regulators, and market participants, consider requests for exemptions from certain regulatory requirements, and engage with international regulators on issues important to the US asset management industry."[36]

Conclusion

The SEC's 2024 budget requests 170 additional Staff, 74 of which would be for enforcement and up to 31 for rulemaking. The SEC seems to have four principal justifications for the additional Staff: overcoming the loss of personnel in past years, the sheer growth and number of registered entities to be overseen, a recent high rate of attrition of senior officers and attorneys, and the fact that the entire budget amount is paid for by transaction fees.

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NOTES

1 SEC, FISCAL YEAR 2024 congressional budget justification annual performance plan FISCAL YEAR 2022 annual performance report [sic] (Mar. 13, 2023) [hereinafter SEC Budget Justification], available at *https://www.sec.gov/files/fy-2024-congressional-budget-justification_final-3-10.pdf.* This document states, on the unnumbered page following the table of contents, as follows:

> The Congressional Budget Justification (CBJ) is the annual presentation to Congress that justifies the U.S. Securities and Exchange Commission's (SEC) budget request. This report also includes the Annual Performance Plan (APP) for fiscal year (FY) 2024 and the Annual Performance Report (APR) for FY 2022, focusing on the agency's strategic goals and performance results. This report provides information that satisfies requirements contained in the following laws and regulations . . . .

This article, which speaks as of April 3, 2023, focuses on the SEC's budget request for its five regulatory divisions. Consequently, it does not cover all of the SEC's FY 2024 budget request justification, *id.* at 11, the FY 2024 annual performance plan, *id.* at 107, and the FY 2022 annual performance report, *id.* at 127.

2 In this article, all references to years are to fiscal, rather than calendar, years, beginning on October 1 of the previous calendar year, and the abbreviation "FY" stands for "fiscal year."

3 SEC Budget Justification, *supra* n.1, at 3, 15.

4 *Id*. at 15.

5 *Id*.

6 *Id*. at 3.

7 *Id*. at 12.

8 *See id*.

9 *Id*. at 32. The Division of Investment Management has an examination mandate separate from the SEC's Division of Examinations. *See* Section 4(h)(2) of the Securities Exchange Act of 1934.

10 SEC, Fall 2022 Unified Agenda of Regulatory and Deregulatory Actions, Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President, Agency Rule List –

Fall 2022, available at *https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=3235&csrf_token=B84769ED867C82798A79D3D78583BE7945D62265DF7CB17B06C0887DD2EF75E4A6ABE534A2394CE6F373A66C866022DC7722.*

11 SEC Budget Justification, *supra* n.1, at 24 (including "regulatory interpretations and compliance").

12 *Id*. at 26 (including "additional oversight of rulemaking and interpretive inquiries").

13 *Id*. at 32.

14 *Id*. at 36.

15 *Id*. at 46 (including "focus on crypto assets regulation and policy, Financial Stability Board/International Organization of Securities Commissions (FSB/IOSCO) work streams, supervisory cooperation matters, SEC rulemaking, and foreign engagements").

16 *Id*. at 49 (for "existing and future demand for investor testing related to rulemaking initiatives").

17 *Id*. at 52 (to "effectively monitor the market, particularly with respect to longstanding and emerging issues with market structures and practices that negatively affect investors and municipal governments. This position will also assist in reviewing SEC and MSRB rulemakings and provide guidance in the municipal securities market").

18 *Id*. at 66 (to "support the SEC's implementation of [one of] the Financial Data Transparency Act of 2022 . . . . requirement[s] that the Commission and other covered agencies jointly issue proposed rules for public comment that establish data standards for the collection of information reported to each covered agency by financial entities and on behalf of the Financial Stability Oversight Council").

19 *Id.* at 78 (to "focus on (1) EDGAR development given the SEC's increase in rulemakings for implementation in EDGAR, and (2) legal support given, *inter alia*, the increase in rulemakings for implementation in EDGAR to be reviewed and increased filer issues that require application of delegated authority under rule").

20 *Id.* at 26.

21 *Id.* at 3.

22 *Id.*

23 *Id.* at 4.

24 SEC, Office of Inspector General, The Inspector General's Statement on the SEC's Management and Performance Challenges 21 (Oct. 13, 2022), available at *https://www.sec.gov/files/inspector-generals-statement-sec-mgmt-and-perf-challenges-october-2022.pdf.*

25 *Id.* at 3 (emphasis added).

26 *Id.*

27 SEC Budget Justification, *supra* n.1, at 3.

28 *Id.* at 19.

29 *Id.*

30 *Id.* at 21.

31 *Id.* at 24.

32 *Id.* at 26.

33 *Id.*

34 *Id.* at 32.

35 *Id.* at 31.

36 *Id.* at 31-32.