Bloomberg Law 2024

Regulatory & Compliance

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Bloomberg Law 2024 – Regulatory & Compliance

This report includes a preview of the regulatory and compliance topics Bloomberg Law's legal analysts will be watching in 2024.

Find out where regulatory agendas and corporate practices are sure to clash, including ESG, labor relations, cryptocurrency, privacy, and pay transparency. Our analyses provide data-rich, actionable perspectives on the key issues shaping the legal landscape.

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ANALYSIS

Employers Face ULP Surge After Workplace Policy Ruling

by Francis Boustany
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Nov. 5, 2023

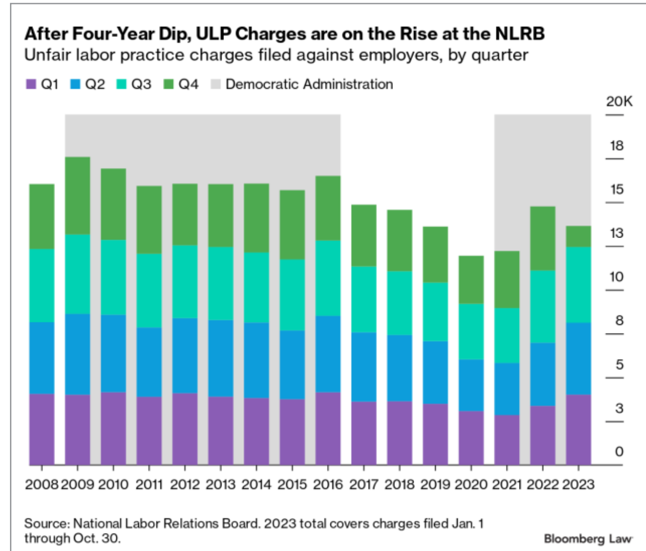
Employers can expect to face a dramatic increase in the number of unfair labor practice charges in 2024, due to a recent National Labor Relations Board decision that provides employees with an easier path to challenge workplace policies—even those that have nothing to do with unions.

Unfair labor practice charges are already on the upswing amid the current resurgence of labor activity. But the NLRB's *Stericycle* **decision** this past summer created a tough new standard under which the board will evaluate workplace policies, empowering employees to more easily prove that a policy violates their rights under Section 7 of the National Labor Relations Act. This decision will have wide-reaching impacts on employers in the years ahead, necessitating the auditing of policies and practices that used to pass NLRB muster under the board's previous standard in *Boeing*.

The *Stericycle* decision, added to current conditions such as **high levels** of public support for unions, increased unionization efforts, and a board comprised of **labor-friendly** members, means that unionized and nonunion employers alike will enter 2024 unable to ignore the realities that the US labor movement presents for their operations, employee relations, and bottom lines.

ULPs, Already Rising, Will Continue to Climb

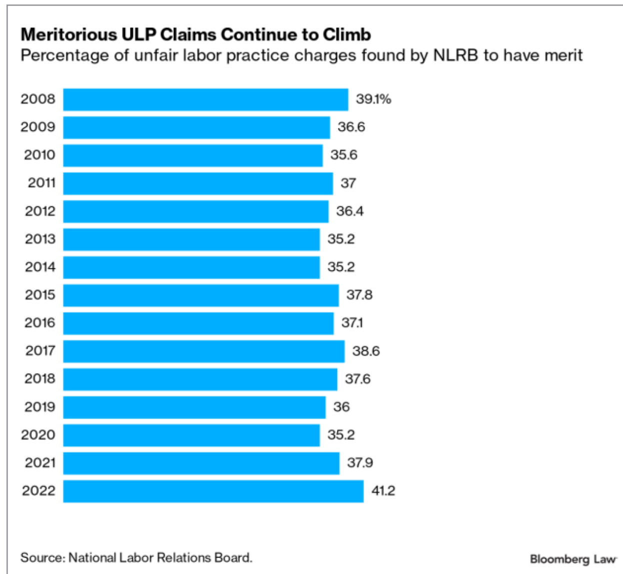
The overall number of ULP charges against employers is **up**, and that trend is likely to be magnified in the future. Through its first three quarters and part of its fourth, 2023 has already surpassed the full-year totals for 2020 and 2021—and it's on track to have one of the highest in a decade.



A comparison of ULP charge totals from the NLRB in the first three years of the Obama and Biden administrations shows that, although the Obama board oversaw more ULPs per year, the Biden board experienced greater growth during its first three years. The Obama board actually saw a decline in during this period.

Beyond the mere filing of ULP charges, those found by regional directors to have merit—which, absent settlement, essentially results in an issuance of complaint and allows a charge to move forward to a hearing with an NLRB administrative law judge—are already more prevalent under the Biden board than they were during any year of the Obama board.

The NLRB's annual **Performance and Accountability** data reports show that the percentage of ULP charges filed against employers that are found to have merit climbed to 41% in **2022**—the highest percentage since **2006** (43%).



Meritorious ULP Claims Continue to Climb
Percentage of unfair labor practice charges found by NLRB to have merit

Source: National Labor Relations Board.

The NLRB's statistics for meritorious ULP charges include those filed against unions as well as employers. But because the overwhelming majority of ULP charges filed are filed against employers, these figures do highlight the risks employers currently face.

What *Stericycle* Means for Workplace Policies

The NLRB's August decision in *Stericycle* could open the floodgates for even more ULPs in 2024.

In the *Stericycle* decision, the NLRB overruled ***Boeing***, a more employer-friendly standard put in place by the board under the Trump administration. It instead installed an augmented version of the standard before *Boeing* that the board set out in ***Lutheran Heritage Village-Livonia***.

In *Stericycle*, the board built upon the *Lutheran Heritage* standard in two important ways. It clarified that the board will analyze a rule from the perspective of an employee who is "economically dependent on the employer" and who "contemplates engaging in protected concerted activity." And it established that a rule will be presumptively unlawful if an employee from this perspective "could reasonably interpret" a facially neutral policy to restrict NLRA-protected activities. This is the case even if a policy could also be reasonably interpreted to not restrict or prohibit these activities—marking a noteworthy departure from the *Lutheran Heritage* standard, which used "would" rather than "could" when it came to policy interpretation.

The new standard provides employers with a defense: They "can rebut the presumption that a rule is unlawful by proving that it advances legitimate and substantial business interests that cannot be achieved by a more narrowly tailored rule," the NLRB wrote. Although this sounds like somewhat of a break for employers, it does not create an easy rebuttal argument unless each workplace policy is crafted and justified with *Stericycle* in mind.

The standard in *Stericycle* most likely boosts the odds of an increase in ULP charges related to workplace policies against employers and—at least in the short term, until employers respond by updating their policies to be narrower—an increase in those found to be meritorious.

All Employers—Even Nonunion Ones—at Risk

While nonunionized employers may think that the NLRB is less of a concern to them, this is not the case.

Section 7 rights are afforded to both unionized and nonunionized employees, and provide protections not just related to those supporting unions but to those engaging in concerted activities to improve and discuss working conditions and terms of employment.

This means that policies and procedures related to items like employee codes of conduct, conflicts of interest, social media use, confidentiality, solicitation and distribution, insubordination, and others have always been subject to Section 7, at least theoretically. But such policies are even more primed for challenges now, because the *Stericycle* standard makes it easier to argue that a policy is in violation of the NLRA—particularly when comparing the current standard to that of *Lutheran Heritage* or *Boeing*.

Risks of *Stericycle* Are Already Materializing

An unfair labor practice charge citing a workplace "civility policy" at **Starbucks** highlights the increased risks employers face under the new *Stericycle* standard.

In this ULP case, an NLRB ALJ in August ruled that Starbucks's "How We Communicate" policy—a policy that states that employees "are expected to communicate with other partners and customers in a professional and respectful manner at all times" and that the "use of vulgar or profane language is not acceptable"—violated employees' NLRA rights.

The ALJ reasoned that the policy was "overly broad, vague, and is susceptible to application against Section 7 activity," specifically calling out how requiring "professional" and "respectful" communications could be interpreted to prohibit concerted activities that are protected under Section 7. The ALJ's ruling, which ordered Starbucks to rescind the policy and inform employees that the former policy was illegal, can be appealed to the NLRB.

This decision, among **others** recently decided by NLRB judges and the full board itself, reminds employers that policies thought of as standard and legally sound in the pre-*Stericycle* era might not be as safe from legal challenges as once thought.

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ANALYSIS

US Employers Confront Pay Gap Following New EU Mandate

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Nov. 5, 2023

US multinational companies will soon have to comply with a wider international medley of pay equity laws, as European Union member states incorporate a new EU directive that requires greater transparency on gender-based pay issues than domestic state laws do.

Some forward-looking US states might feel pressure to broaden their own laws to keep up. But any change that does come on this side of the Atlantic will most likely be imposed by the companies themselves.

Despite efforts to narrow the gender pay gap, it still persists. Men earn 16% more than their female counterparts in the US, and 13% more in the EU.

The EU Pay Transparency Directive, which took effect in June, mandates broader pay disclosure obligations for both job applicants and existing employees at companies operating in any of the EU's 27 member states. In comparison, only 10 US states have pay transparency laws, and those that do primarily focus on disclosures during recruiting.

The directive covers companies of a certain size, including some US multinationals, who employ or hire EU citizens working in the EU. This directive does not apply to US companies who do not operate within the EU.

However, this push by the EU will have some rippling effects on the way US multinationals approach their compensation practices and policies. It might also drive non-covered employers to start to reevaluate how they determine compensation within their organizations.

EU Directive's Broad Obligations

The EU directive aims to combat gender pay discrimination in the EU by requiring companies to conduct joint pay assessments, an auditing process done with input from employee representative groups. These assessments will be familiar to US federal contractors who are required to conduct and submit similar audits of their compensation systems and practices to ensure nondiscriminatory pay practices (but without any required joint employee input).

Employers covered by the EU directive will be required to publicly report the annual compensation for both male and female employees and must take remedial measures if the gap between them exceeds 5%. The directive also includes provisions on restitution for victims of pay discrimination and penalties for non-compliant employers.

Covered employers will no longer be able to ask job candidates about their pay history. However, current employees are entitled to request information regarding salary information—broken down by sex, of employees doing the same work, or work of equal value, as well as the criteria used to determine pay and career progression—beyond what is publicly available in the company's gender pay gap report. The employer's criteria must be objective and gender neutral.

Unlike regulations, directives are not automatically binding, and all member states must transpose the directive into their national law by June 7, 2026. By then, covered US multinationals should have been given notice on how to comply with the relevant national laws of the member states they do business in.

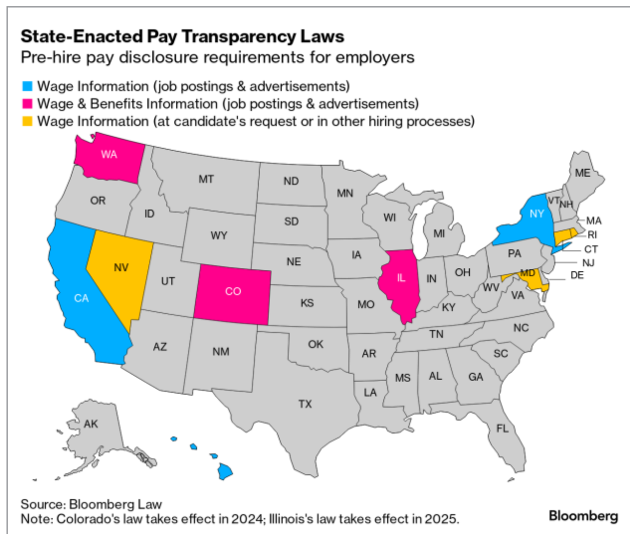
The actual requirements of these national laws will likely vary. EU member states may grant additional rights to their citizens, going beyond what is minimally required by the directive, so long as the national law does not directly conflict with the directive's requirements.

Influence on State Laws

The scope of the EU directive signals to legislators in pay transparency-friendly states how pay disclosure requirements could be broadened beyond the pre-employment process.

State lawmakers, especially those in progressive states, may see the EU pay disclosure demands as a more constructive and effective way to achieve gender-pay equity because salary disclosures are required prior to and during employment.

The 10 existing US pay transparency laws primarily focus on pre-employment pay disclosure. For example, some states compel employers to disclose the hourly rate or salary range in job listings and advertisements, while others go further, requiring employers to include other forms of compensation and a general description of benefits in their ads and job listings as well. And for some states, the wage disclosure requirement doesn't kick in until later in the process, after candidates make themselves known. These states require employers to provide pay information to candidates upon request or at certain stages in the application and hiring process.



US Gets Ahead of the Curve

The US may not be on pace with the EU on some aspects of pay equity, but some states are ahead of the EU directive's ban on asking job candidates about their pay history. Roughly **20 states** already have laws banning or restricting the use of salary history during the hiring process.

But unlike the EU, the US states steer clear of granting current employees the right to access certain company-wide pay information or requiring employers to conduct regular pay audits to determine gender-based pay disparities. Such mandates are absent from the 10 state pay transparency laws.

Voluntary Compliance and the 'Brussels Effect'

Even if US states place no additional pay transparency requirements on companies, multinational companies may opt to voluntarily implement these standards in their domestic operations.

At times, multinationals have voluntarily applied a high compliance standard required by EU law to their operations within the US, even when US regulations were much more relaxed or even non-existent. This phenomenon even has a name: the **Brussels Effect**.

Some multinationals are already considering, or actively implementing, measures required by the directive. This could be in part due to **pressure from shareholders** who have submitted 11 disclosure or reporting proposals relating to the gender pay gap in 2023 so far, compared to only five proposals in the same timeframe in 2022, according to Bloomberg data (accessible on the Bloomberg Terminal at BI PROXY <GO>).

Companies considering pay transparency initiatives as part of an ESG strategy should be aware of certain **SEC disclosure requirements**.

This shift toward a higher standard for pay transparency by multinationals across their operations in all jurisdictions will likely be precipitated by an effort to curb compliance costs coupled with social pressure.

Broadly implementing the EU standard will keep companies in compliance with all current US laws and give their employees and the public insight into their pay equity initiatives. A cost-benefit analysis could reveal that it would be less **expensive** to implement one compliance standard, rather than manage multiple in various jurisdictions.

Additionally, multinational companies operating in progressive US states may use this as an opportunity for them to prepare for what they perceive will be an inevitable shift in state law toward greater pay transparency requirements in the years to come.

More employers will take proactive steps to conduct pay equity analyses; document factors that contribute to compensation decisions (especially starting salaries); and preserve the evidence that supports non-discriminatory explanations for pay-gender disparities. The efforts will help mitigate compliance risks in the future.

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Bloomberg Law subscribers can find related content on our **In Focus: Pay Transparency** *page.*

ANALYSIS

For Crypto Tokens, More Certainty–and More Disclosure

by Benjamin Cooper
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Nov. 5, 2023

Blockchain and cryptocurrency industry participants often complain that the US lacks "regulatory certainty"; some companies **cite** it as a reason to move their business headquarters elsewhere. A key component of certainty is coming to digital assets, but not by Congress or the federal regulators. Yet.

There's been noticeable activity surrounding global token disclosure standards this year. Although most of the action was abroad, the similarities between California's and New York's efforts are harbingers that other state and federal efforts next year will follow the same pattern.

Flurry of Activity

The past few months have seen new crypto token regulations handed down across the globe.

- The European Union's **Market in Crypto Assets (MiCA) Regulation** entered into force in June, with a final consultation on Europe-wide regulations to be published early in 2024, and member state mandates taking effect in 2025.
- Hong Kong released new **guidelines** for virtual asset trading platform operators in June.
- Namibia passed its **Virtual Assets Act** in July, with regulations pending.
- This September, the New York Department of Financial Services (NYDFS) released **proposed updates** to its framework for token trading businesses to trade tokens and a **changed framework** for how it would put tokens on its "greenlist," which allows use by a licensed virtual currency business without approval of the token as a new business line.
- Also in September, Dubai's Virtual Assets Regulatory Authority released **regulations** on virtual asset activity.
- California Gov. Gavin Newsom **signed** the Digital Financial Assets Law in October, establishing a New York-like regulatory regime for crypto businesses.
- Also in October, the Australian Treasury released a **consultation** requesting comment on digital asset platform regulation including token listing standards.

New Rules Despite Legal Uncertainties

The question that often comes up regarding US regulatory certainty is whether a particular digital asset is a security requiring the full registration and reporting required of all securities. Legal classification as a security has been the chief point litigated in US enforcement and private actions—whether **Ripple Labs' XRP** utility token, **NBA Top Shot NFTs**, or **American CryptoFed DAO**'s governance and payment tokens.

Other jurisdictions currently have more comprehensive guidance as to when tokens aren't governed by securities regulation. For example, MiCA provides guidance by which tokens are subject to its requirements and not European securities regulation.

Can we expect to reach certainty in the US about securities status via litigation? Probably not, as appellate decisions centering on this issue are not expected until much later in 2024 at the earliest. But even when there's certainty for some tokens, there will always be fuzziness about newer tokens, **especially NFTs**, which may be used for a wider variety of transactions.

This focus on status as a security masks one of the key issues underlying the fight over securities status: the fact that, as the North American Securities Administrators Association pointed out in a 2018 **bulletin**, many tokens have been issued with little disclosure as to their underlying fundamentals. In the American CryptoFed DAO dispute, the decentralized asset organization (DAO) argued that providing financial information about the underlying project was irrelevant and unnecessary.

Formal Disclosures Are the Future

The debate over what is a security shouldn't obscure the global consensus that's building that, even if a token isn't a security, issuing a token will require securities-like (or "securities-lite") disclosures.

Without exception, jurisdictions issuing crypto regulations or proposals this year require either token creators to disclose information to an authority or exchanges handing digital assets to collect the same information that other jurisdictions would ask from token creators.

Disclosures Needed for New Tokens

	Who Registers a Token?	Where are Tokens Registered?	Disclosure Document	Key Items Disclosed
Australia	Issuers of financial products; no direct registration for other tokens but must meet exchange's listing criteria	Issuers of financial product tokens must have appropriate license to type of product; exchange must have information on token sufficient to meet listing criteria	Exchange provides public disclosure	For financial products, disclosure as per existing Australian regulation; for non-financial products, a description of the rights and obligations of the issuer and token-holder and "this is not an investment" disclaimer
California	Not directly registered; exchanges must make certifications about tokens before offering or listing	California Department of Financial Protection and Innovation	Exchange discloses on form provided by DFPI	Conflicts disclosure, comprehensive risk assessment including market, technology, fraud, theft, and malfeasance risks
Dubai	Issuer	Virtual Assets Regulatory Authority	Token issuer provides prospectus-like white paper	Identity of issuers, description and features, rights and obligations, what issuer will do with value received, structure of asset, terms and conditions, underlying technology, fees or charges, legal or regulatory considerations, and climate impact
European Union	Issuer	Member state's registration authority	Token issuer provides prospectus-like white paper	Issuer's principals, overall project, asset and its rights and obligations, underlying technology, risks disclosure, and climate impact of the token
Hong Kong	Issuer	Service provider's "token admission and review committee"	Token issuer must submit information to token admission and review committee; the service provider must provide links to any public white paper	Development team, regulatory status, financials, technical aspects, development, market and governance risks, legal risks, rights associated with token, AML and terror financing risks
Namibia	Issuer	Regulator designated by the Minister of Finance	Token issuer provides prospectus	"Full and accurate disclosure of information which would allow potential purchasers to make an informed decision"; regulations pending
New York	Issuers, dealers, and servicers of tokens apply for approval for a token's use with the NYDFS unless the token is already on a discretionary "greenlist" of pre-approved tokens	New York Department of Financial Services	Licensee issuing, dealing, or servicing token files with NMLS	Risk assessment including technology, cybersecurity, market and liquidity, illicit finance, legal, regulatory, and reputational risks

Sources: Bloomberg Law, regulator websites

Bloomberg Law

Wyoming, which allows but doesn't require registration, adopted regulations in October requiring Wyoming-registered digital assets to provide information on the asset's underlying technology and transfer restrictions.

The effect across jurisdictions is that, either upon the creation of the token or its listing on an exchange (which is the primary way most can purchase a new token), information about the token's rights, technology, risks, and principals needs to be disclosed. The effects of these disclosures are similar to coercing tokens to some form of federal securities exemption; MiCA is probably more akin to Regulation A, and California closer to Regulation D, in terms of volume of disclosure, but the new rules avoid having to force non-securities instruments into a securities format, but the substance will remain the same.

Even in the Ripple litigation over securities, Ripple Labs Inc.'s partial loss—where the judge found that the tech company needed to make a securities filing for its "institutional" token sales—mirrors this consensus. In the wake of *Ripple*, lawyers have advised token issuers to make Regulation D filings or other registered securities exemptions for new tokens.

Even if legislation like the Lummis-Gillibrand Responsible Financial Innovation Act passes, and places all non-securities tokens under Commodities Futures Trading Commission regulation, it's likely that CFTC regulations promulgated under Section 403 of Lummis-Gillibrand will contain some measure of these disclosure requirements as an industry standard.

This is probably the death knell for (metaphorically) crafting a crypto token in one's garage. It may also entrench existing market players, as there will be less regulatory friction to make blockchain services using NYDFS "greenlisted" tokens such as Bitcoin and Ether than there would be for something new.

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ANALYSIS

Three Ways the Supreme Court Could Nix the CFPB

by Web Arnold
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Nov. 5, 2023

How the federal government enforces consumer finance laws in the near future depends on whether the US Supreme Court invalidates the Consumer Financial Protection Bureau's funding structure in a **case** recently argued before the court.

If the bureau remains the flagship regulator in the consumer finance space, enforcement changes could be minimal. But if the court deems the bureau itself unconstitutional, the country could revert to a pre-Dodd-Frank regulatory landscape, where multiple agencies—none of which focuses primarily on consumer finance—enforce a disparate collection of consumer financial protection laws.

The Funding Structure

Under the **Consumer Financial Protection Act**, the bureau is funded through earnings from the Federal Reserve, which **finances** itself primarily through trading of government securities. The bureau may withdraw up to 12% of the Fed's annual earnings to pay its bills.

The Community Financial Services Association (CFSA) is a payday lender association that's challenging this method of agency financing. In ***CFPB v. CFSA***, the group argues that the funding structure violates the US Constitution's **appropriations clause**, which provides that only Congress can withdraw money from the US Department of the Treasury.

The CFSA argues that the clause implicitly limits agency funding to regular congressional appropriations. Because the bureau isn't funded this way, the CFSA contends that Congress circumvented this implicit limit. The federal government maintains that the appropriations clause imposes no limit on Congress's ability to devise other funding mechanisms. Last year, the Fifth Circuit agreed with the CFSA, holding that the bureau is fundamentally unconstitutional. The Supreme Court granted certiorari and heard oral arguments in early October.

When it decides the case later this term, the high court could adopt one or more theories to invalidate the bureau's funding structure. Each approach would require different industry adjustments and preparations.

Alternative 1: No Leftover Funds

The court may take issue with the bureau's flexibility regarding unspent funds. Under the current scheme, the bureau keeps any funds it withdraws from the Fed and doesn't spend. Agencies funded through regular appropriations don't have this flexibility: Any leftover funds are canceled. If the court imposes this requirement, the bureau may develop a "use it or lose it" approach. In turn, the bureau may be motivated to spend down its funds at the end of each fiscal year, as do other agencies—causing annual upticks in regulatory activities.

On its face, such a requirement would apply to other self-funded regulators, like the Fed, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation. Historically, the obligation to return unused funds has only applied to agencies funded through regular appropriations. Agencies funded through other means, like the prudential bank regulators, do not have this obligation.

Eliminating this flexibility would upset the broader financial regulatory landscape. Industry members would have a harder time evaluating enforcement risks, and consumers would be more exposed with weakened regulators. Because the impacts would reach beyond the bureau, the court, if it adopted this theory, would likely try to limit the case to its facts. But it is unclear how it would distinguish the bureau from other self-funding regulators.

Alternative 2: No Perpetual Funding

In a similar vein, the court could take issue with the perpetual nature of the bureau's funding. Another implicit limit contained in the appropriations clause, the CFSA argues, is that Congress must designate an end date for all spending. The bureau's funding structure imposes no time limits: It can continue withdrawing funds from the Fed indefinitely, provided that Congress doesn't say otherwise.

Like an obligation to return unspent funds, imposing funding time limits would implicate several other federal agencies. Here too—if the court adopted this theory—it would likely try to limit the case to the facts, explicitly stating that precedential effect is limited to the bureau alone. But, again, it is unclear how it would prevent subsequent litigants from invoking such a decision in a future case.

Alternative 3: No Double Insulation

The court is most likely to adopt a third theory, prohibiting the "double insulation" provided by the bureau's funding structure. The Fed is insulated from the regular appropriations process because it funds itself through securities holdings, and the bureau is then doubly insulated because it funds itself by withdrawals from the Fed.

The Supreme Court may favor this approach because it homes in on what makes the bureau unique: No other agency is doubly insulated this way. In ***Seila Law v. CFPB***, an earlier case challenging the bureau's constitutionality, the court concentrated on the bureau's unique leadership structure, holding that it was unconstitutional for Congress to limit the president's removal power over the bureau's sole director.

By focusing on the bureau's uniqueness again here, the holding would be limited to the bureau. Other federal programs wouldn't be implicated—unlike the theories against unspent funds and perpetual funding—and broader disruptions could be avoided.

If Unconstitutional, Then What?

Regardless of *how* the court determines the funding structure to be unconstitutional, it must decide what happens to the bureau until Congress addresses the defects.

If the court fully affirms the Fifth Circuit, the bureau would be defunct until Congress acts. There would be a reversion to a pre-Dodd-Frank regulatory landscape in which the prudential regulators enforce consumer finance laws pertaining to banks, the Federal Trade Commission pursues unfair and deceptive acts and practices, and so on. The Supreme Court will likely not take this route because of the uncertainty that would result.

Instead, it's more likely that the court will narrowly invalidate the structure and stay the effect of its opinion, giving Congress time to come up with a new scheme while keeping the bureau's regulatory powers largely intact. This approach is consistent with the practice of statutory severability, and would lessen the broader disruptions.

Of course, we will not know much more until the court hands down its opinion next summer. Prior to the oral argument, it appeared **likely** that the court would deem the funding structure unconstitutional. This is still the most likely outcome even though the bureau's odds may have **improved slightly** after several justices, including key members of the conservative bloc, seemed skeptical of the CFSA's argument. Regardless, the bureau's current form remains at existential risk.

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ANALYSIS

Stakeholders to Supplement Agency Greenwashing Efforts

by Abigail Gampher Takacs
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Nov. 5, 2023

Looking to understand the environmental impacts of your purchasing or investment decisions? If so, there's good news and bad news.

The good news: Companies are looking for ways to make their products or companies more appealing to environmentally conscious stakeholders.

The bad news: Many stakeholders fear that companies have gone too far with their eco-friendly representations.

Two pending federal actions could provide partial relief in the coming year regarding these concerns: the FTC's updates to the Green Guides and the SEC's proposed climate rule.

But these pending agency actions won't go far enough to produce the adaptable greenwashing regime stakeholders are looking for.

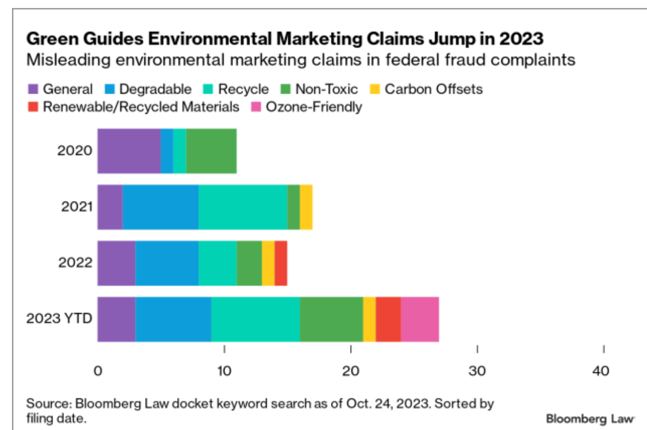
The realms of environmental marketing and disclosures are rapidly changing, as companies create new ways to promote their eco-friendly efforts. Stakeholders who can continuously adapt to evolving business models and marketing tactics—a feat that legal and procedural constraints often prevent regulators from achieving—will be the ones determining when company environmental representations step into the realm of greenwashing.

Consumers Bring Greenwashing Claims

The Green Guides aren't binding on the Federal Trade Commission or the public, but rather set forth the agency's position on environmental marketing to help companies avoid making representations that are unfair or deceptive under Section 5 of the Federal Trade Commission Act. The FTC is currently considering updates to the Green Guides, which it hasn't revised in over a decade.

Consumer-initiated greenwashing lawsuits are often brought under state laws that are modeled after provisions included in the Guides. According to keyword searches of Bloomberg Law dockets, there have been at least 27 environmental marketing claims involving terms covered by the Green Guides included in federal fraud complaints this year.

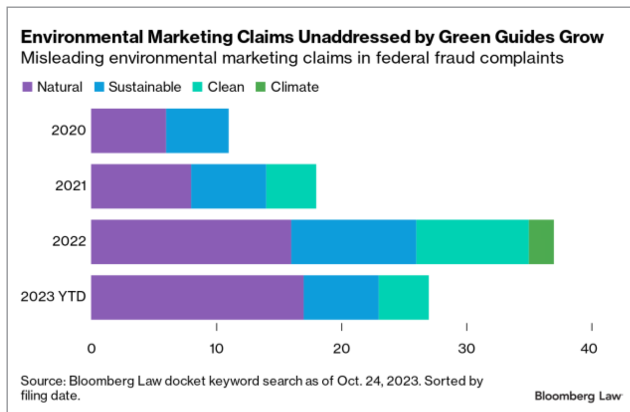
There have been no enforcement actions under the Guides so far this year, according to the FTC's website.



These federal cases indicate that in spite of the Guides and corresponding state laws, company environmental representations are still crossing the line into what stakeholders consider greenwashing.

A likely explanation for the recent bump in environmental marketing claims are the changes to company environmental marketing tactics over the past decade, which aren't captured by the Guides.

These tactical changes are reflected in the makeup of environmental marketing claims over the past few years: The number of claims alleging misleading natural, sustainable, clean, or climate-related environmental marketing representations has steadily increased over the last three years, increasing from 11 claims in 2020 to 37 in 2022.



The FTC considered natural and sustainable environmental marketing in its last rendition of the Guides in 2012, but the agency indicated that it lacked "sufficient evidence on which to base general guidance" for these representations.

The likely issue? Sustainability and natural marketing comes in many iterations. But while the FTC lacked sufficient evidence to include these terms in their 2012 guidance, stakeholders—at least in the last few years—have been ready to bring lawsuits alleging that certain sustainability and natural marketing phrases amount to misleading environmental representations.

Stakeholders are also increasingly taking issue with "clean" representations—particularly in the beauty industry (e.g., ***Boyd v. Target*** and ***Finster v. Sephora***)—and "climate positive" representations (e.g., ***Lizama v. Venus***).

Consumers Are Adaptable

Based on the consumer complaints from the last few years, one problem with FTC greenwashing guidance is certain: The current Green Guides don't address the entire scope of consumer concerns.

But even if the Guides are revised to eliminate this problem and to revisit the new ways existing terms are used, the Guides aren't updated frequently enough to keep up with changes in company marketing tactics. A perfect version of the Green Guides would need to be updated each time environmental marketing evolves—an impossible feat.

However, consumer litigation doesn't suffer from the same constraints. Consumers can bring a lawsuit when companies use new environmental terms (or old terms in new ways) in a manner that allegedly violates state competition, business, or marketing laws.

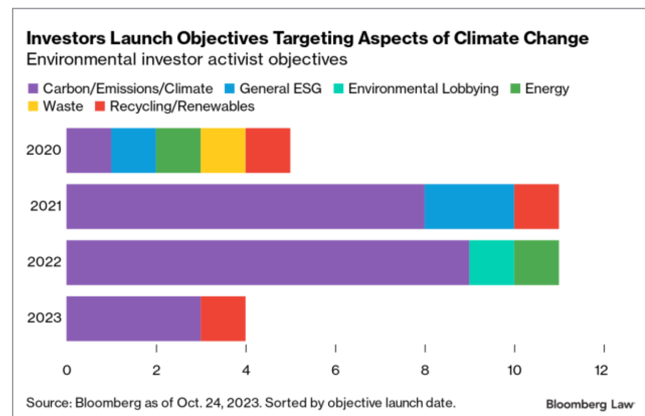
After the FTC updates its Green Guides, consumers may have more support for their legal claims, but they won't be relying on the FTC's enforcement power to ensure that companies are making accurate environmental marketing representations.

Investors Launch Environmental Objectives

In March 2022, the SEC released its **proposed rule** for climate-related disclosures, which aims to provide investors with information on climate-related risks and opportunities (including greenhouse gas emissions).

The rule was the result of a mandate in 2021 from former Acting SEC Chair Allison Heren Lee to the SEC's Division of Corporation Finance to reassess its **2010 disclosure guidance** on climate-related risks. The proposed rule received a staggering number of **comments** and has been **delayed** a number of times.

In the last two years, investor environmental objectives have focused largely on carbon, emissions, and climate efforts—but these efforts have been scaled back in 2023, a likely result of the continuously "imminent" SEC rule.



Investor activists will likely pivot after the SEC releases its final rule.

Investors Make Changes from Behind Company Walls

The SEC rule will ultimately enable investor activists to push for transparency on how companies plan to comply with the rule's mandates and to mitigate the risks of enhanced climate disclosures, but activists are also ready to bring broader environmental changes at target companies from within.

Activists can target misrepresentations and install governance structures internally to set the company on a course toward achieving environmental goals and preventing future misrepresentations.

Investor activists often seek board seats as part of their campaigns, which can be particularly crucial for environmental representations such as climate targets that take decades to achieve.

Once the SEC's proposed rule becomes finalized, activists will likely home in on the specific elements of public filings that pose greenwashing risks—in addition to revisiting familiar themes that were on pause while the SEC revisited climate disclosures—but won't be depending on SEC enforcement actions to combat all of their greenwashing concerns.

Stakeholders as the Driving Force in US

Consumers and activists approach the issue of greenwashing from distinct angles, but their relationships with the FTC and SEC, respectively, have some commonalities.

Both groups aim to pull back company representations when they run the risk of greenwashing. Both are willing to take costly measures to remedy greenwashing.

Neither is going to rely solely on agency action—either through enforcement or revised guidance and rules—to resolve greenwashing in 2024.

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Bloomberg Law subscribers can find related content on our **ESG Practice** *page,* **Practical Guidance: ESG Stakeholders, Frameworks & Regulation***, and* **Practical Guidance: Shareholders** *resources. Investor activism data accessible on the Bloomberg Terminal at BI ACT <GO>.*

ANALYSIS

SEC's Data Tagging Will Ensnare Companies Next Year

by Kate Azevedo
Legal Analyst, Bloomberg Law
Nov. 5, 2023

In 2024, the SEC will use investigative tools powered with artificial intelligence to better identify companies that violated disclosure requirements. Similar to speed cameras enhancing traffic control for police, this data tagging technology—known as **Inline XBRL**—will allow the Securities and Exchange Commission to more effectively analyze large quantities of corporate disclosures in support of the agency's enforcement activities.

As we approach 2024, the **extensive list** of corporate filings that are now required to be filed in the Inline XBRL format will continue to grow. As a result of the avalanche of **SEC rulemaking**, many public companies likely overlooked, or didn't fully appreciate, the seemingly simple data tagging provision stated in most of the recently finalized rules, such as the SEC's cybersecurity risk governance **rule** or its proposed climate change disclosure **rule**.

But this data tagging format on corporate filings will enhance the SEC's ability to initiate enforcement actions against public companies—which have already begun to increase in frequency since the amended Inline XBRL format was fully implemented.

Inline XBRL Explained

Formally known as the Inline eXtensible Business Reporting Language, Inline XBRL is a structured data language within the SEC's EDGAR system that allows companies to file their Form 10-Q, Form 10-K, and cover page of the Form 8-K in a single document that's both human-readable and machine-readable.

The Inline XBRL format differs from a standard corporate filing form because the XBRL filing includes specific **taxonomy codes** to classify the financial data. All companies were to file using this format by late 2021.

Inline XBRL will be instrumental to the SEC's investigative efforts in 2024. The SEC's Corporate Finance Division must **review** each public company's annual disclosures at least once every three years under the **Sarbanes-Oxley (SOX) Act**. The data tagging technology will allow for a faster and more in-depth review.

In its semi-annual **report** to Congress on XBRL data, the SEC said that about 75% of the information required from public companies contains the disclosures with machine-readable data. Without this XBRL data, the alleged disclosure violations would have been "significantly more difficult to detect and pursue in a cost-effective or timely manner," the report said.

The SEC used machine-readable data to make preliminary assessments of compliance with the recently adopted **Pay Versus Performance** rule, the report said.

Since 2021, SEC Filing Violations Have Increased

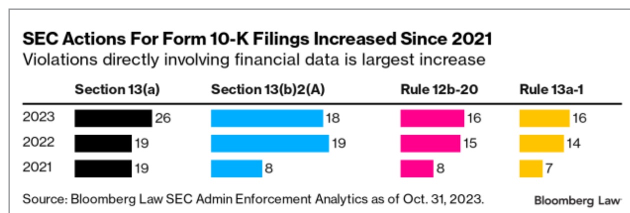
Bloomberg data shows that since the introduction of the Inline XBRL requirement, enforcement actions have increased.

A breakdown of the 217 SEC enforcement actions against public companies from Jan. 1, 2021 to Oct. 31, 2023 from the Bloomberg Law SEC Admin **Enforcement Analytics** tool by rule violation shows notable increases from 2021 to 2022, with 2023 on track to tie or overtake in some areas.

The actions pertained to the following sections of the **Securities Exchange Act (SEC Act)** and its underlying rules:

- **Section 13(a)**;
- **Section 13(b)2(A)**;
- **Rule 12b-20**; and
- **Rule 13a-1**.

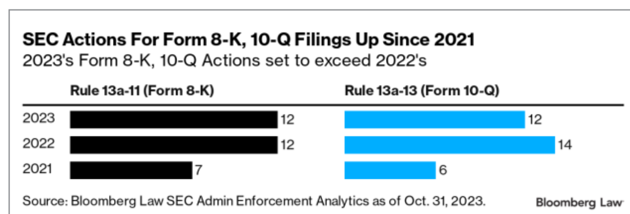
Enforcement actions for disclosure violations of Section 13(b)2(A)—which relies more heavily than other sections on the financial data and statements in the disclosure—stand out: They more than doubled from eight in 2021 to 19 in 2022. There have been 18 such actions this year, with likely a handful more before year's end.



Inline XBRL data tagging also exists on a public company's quarterly reports, Form 10-Q, and cover letter of Form 8-K.

SEC enforcement actions for these filings relate to the following SEC Act rules:

- Rule 13a-11; and
- Rule 13a-13.



SEC actions related to Form 10-Q and Form 8-K have increased over the past two years, indicating that the SEC staff is likely utilizing the XBRL data in its corporate investigations, even if the agency hasn't publicly disclosed this fact. Form 8-K and 10-Q related actions for 2023 will likely exceed 2022 totals.

SEC's Tagging: Insights for 2024

Attorneys can glean information about what data tags the SEC staff will prioritize for its 2024 investigations from the agency's standard taxonomies list for operating companies, which is publicly available and updated annually.

Based on the final 2023 XBRL taxonomies and proposed 2024 XBRL taxonomies releases, the SEC has created new taxonomy codes to data tag for the following rules:

- Insider Trading Arrangements and Related Disclosure Rule; and
- Listing Standards for Recovery of Erroneously Awarded Compensation.

In 2024, the SEC will continue its use of data tagging technology to more efficiently identify and process enforcement matters, with immediate targets on insider trading and executive pay clawback violations. Companies should be prepared for the SEC's data technology to continue to evolve and scrutinize the corporate disclosures that are required to incorporate it.

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