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## Regulatory Monitor

### SEC Update

By Gary O. Cohen

#### SEC Budget Request Seeks 400 New Staff; More than Half for Enforcement and Examinations

The Securities and Exchange Commission (SEC) has submitted to Congress a budget request<sup>1</sup> for fiscal year (FY) 2023, which begins October 1, 2022. The request totals \$2.149 billion, “an increase of about \$197 million relative to the agency’s FY 2021 obligations of \$1.952 billion.”<sup>2</sup>

The budget request is noteworthy in requesting 400 additional Staff members.<sup>3</sup> More than half would be for enforcement and examinations. Forty-seven would be, at least part-time, for rulewriting, and rule implementation.

The SEC explains<sup>4</sup> that, at the end of 2016, the SEC had 4,650 Staff members, but that number decreased by about 3 percent by the end of 2021. The SEC says that its budget request is to “close this gap.”<sup>5</sup> However, that decrease of 3 percent would account for only 139 Staff members. So, in seeking an additional 400 Staff members, the SEC wants to do more than get back to even.

The SEC claims that it needs “to bring in new personnel with skills and expertise to address critical needs”<sup>6</sup> regarding the:

- wave of traditional initial public offerings;
- unprecedented surge in non-traditional initial public offerings by special purpose acquisition companies;

- growing size and number of private equity and venture capital funds;
- significant growth in crypto-assets;
- rise of financial technology and predictive data analytics; and
- increased regulation of security-based swaps.<sup>7</sup>

The SEC reminds Congress, as early as the third sentence of its request, that the “SEC’s funding is deficit-neutral, with any amount appropriated to the agency offset by transaction fees.”<sup>8</sup> The SEC supports its budget request by emphasizing that it is self-financed and need not draw from taxpayer monies.

#### New Staff Allocation

Of the 400 additional Staff, 215 would go to the Divisions of Enforcement and Examinations. An additional four in the Division of Investment Management would work part-time examining investment advisers.

The SEC would allocate its 400 new Staff members by Division and function, as set out below.

#### Division of Enforcement

The Division of Enforcement<sup>9</sup> is seeking the largest number of new Staff members—125. Forty-four would increase “capacity to investigate

misconduct and accelerate enforcement actions”; 34 would support litigation; 33 would bolster the cyber unit; and 14 would support accounting and operations.

The SEC points to heightening enforcement activity as follows: “it is expected that the number of litigated cases will continue to *rise* as ENF [that is, the Division of Enforcement] *increasingly* holds wrongdoers accountable for their misconduct with more meaningful and, in some instances, *escalating* sanctions. ENF requires additional resources to ensure that it has an adequate number of attorneys to staff the *increasing* number of litigated cases.”<sup>10</sup>

### Division of Examinations

The next largest request for new Staff members is from the Division of Examinations<sup>11</sup> for 90 persons.

Eighty-four would be for “oversight/exam activities,” broken out as follows: investment advisers (34); broker-dealers with a focus on Regulation Best Interest (25); new registrants in swap markets (20); and cybersecurity and market infrastructure (5). Six additional Staff members would support oversight of the Financial Industry Regulatory Authority and Municipal Securities Rulemaking Board oversight, data analytics, outreach, and industry education.

### Division of Corporation Finance

The Division of Corporation Finance<sup>12</sup> requests 65 new Staff members. Fifty-eight would be reviewers of increased initial public offerings (IPO) and special purpose acquisition companies (SPACs). Seven would work in rulewriting to strengthen capital markets, increase transparency, and safeguard investors.

Part of the SEC’s justification<sup>13</sup> is that IPOs have increased from over 700 in 2020 to over 2,000 in 2021— a 177 percent increase. Many of these IPOs involve SPACs. As many as 500 SPACs currently are searching for a target.

### Division of Trading and Markets

The Division of Trading and Markets<sup>14</sup> requests 20 new Staff members. Fifteen would work on implementing rules under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),<sup>15</sup> processing public inquiries, National Market System initiatives and their implementation, oversight of security-based swaps, and analysis of Consolidated Audit Trail (CAT) data. Five would support oversight of security-based swaps and analysis of CAT data.

### Division of Investment Management

The Division of Investment Management<sup>16</sup> (IM Division) requests 13 new Staff members. Four would work in rulemaking and conduct more frequent Form ADV reviews. Three would give informal Staff guidance on regulatory requirements. Three would perform rapid, detailed analysis of market and regulatory data. Three would review increased filings.

Part of the SEC’s justification is that, while the IM Division is “small,”<sup>17</sup> it is responsible for:

- over 14,000 SEC-registered funds holding assets of approximately \$33 trillion;
- over 14,500 SEC-registered investment advisers with assets of more than \$110 trillion under management; and
- nearly 5,000 SEC-exempt reporting advisers advising over 23,000 private funds with assets of over \$5 trillion.<sup>18</sup>

The SEC tells Congress that the IM Division is working on three “reforms”:<sup>19</sup>

1. augmented requirements for funds and investment advisers relating to environmental, social, and governance investment strategies;
2. enhanced reporting and disclosure and other reforms for private funds; and
3. tailored fund shareholder reports.

The SEC also tells Congress that the IM Division will continue to review existing rules regarding:

- asset managers' use of technology;
- money market funds regarding Covid-19 market disruption; and
- implementation of new rules regarding investment adviser marketing, fund valuation practices, and funds' use of derivatives.<sup>20</sup>

## Enforcement

The budget request shows that the SEC, under Chair Gary Gensler, will place heavy emphasis on enforcement of the federal securities laws and the related area of disclosure review.

The SEC budget request would allow the SEC to address what it sees as “several key priority areas”<sup>21</sup> involving enforcement and disclosure review, most prominently:

- the “wave in traditional IPOs, along with the unprecedented surge in SPACs,”<sup>22</sup> with “emerging issues” in “climate-related risk disclosures, supply chain and other pandemic-related issues, and legal and accounting issues presented by registrants engaged in crypto-asset businesses”;<sup>23</sup>
- “significant growth in the number of private funds managed by SEC-registered investment advisers, in particular private equity and venture capital funds,”<sup>24</sup> requiring the SEC to “review disclosures of investment risks and conflicts of interest, fees and expenses, liquidity, valuation of assets, and controls around material non-public information” and to handle “additional enforcement and examination staff to identify and address violative conduct across a larger industry”;<sup>25</sup> and
- the “crypto token asset class . . . is prone to fraud, scams, and abuse in certain applications, and in many cases, investors are unable to get the complete information they deserve”; “[m]any tokens may be securities, and they are

sometimes offered or sold without required registration, disclosures, or market oversight”; and trading platforms for crypto assets “present significant challenges for investor protection and market integrity.”<sup>26</sup>

## Rulewriting

The SEC's regulatory flexibility agenda<sup>27</sup> shows that the SEC has 54 rules under consideration.

The SEC requests 47 new Staff members for rulewriting and implementation. The Division of Corporation Finance would have seven full-time Staff members for rulewriting. The IM Division would have four Staff members, and the Division of Economic and Risk Analysis would have 21 Staff members, for *part-time* rulewriting. The Division of Trading & Markets would have 15 Staff members for part-time implementation of the SEC's rules adopted to implement the Dodd-Frank Act.

## Conclusion

The SEC seeks 400 new Staff members, more than half of whom would work in enforcement and examinations. Many of the other new Staff members would work in rulewriting and implementation. Part of the SEC's justification for the large number of new Staff members is that some would replace those lost under the previous administration.

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views expressed are those of Mr. Cohen and do not necessarily reflect the views of his firm, its lawyers, or its clients.

#### NOTES

- <sup>1</sup> SEC, FISCAL YEAR 2023 Congressional Budget Justification Annual Performance Plan (Mar. 28, 2022), available at [https://www.sec.gov/files/FY%202023%20Congressional%20Budget%20Justification%20Annual%20Performance%20Plan\\_FINAL.pdf](https://www.sec.gov/files/FY%202023%20Congressional%20Budget%20Justification%20Annual%20Performance%20Plan_FINAL.pdf). The document states, on the inside front cover, 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) 2023 and the Annual Performance Report (APR) for FY 2021, focusing on the agency’s strategic goals and performance results. This report provides information that satisfies requirements contained in [listed] laws and regulations . . . .” This article, which speaks as of April 27, 2022, focuses on the SEC’s budget request for its operating divisions and, consequently, does not cover all of the SEC’s budget request or justification or the SEC’s performance plan and report.
- <sup>2</sup> *Id.* at 114. The abbreviation “FY” stands for “fiscal year.” All references to years are to fiscal years beginning October 1 of that year.
- <sup>3</sup> *Id.* at 6.
- <sup>4</sup> *Id.* at 2.
- <sup>5</sup> *Id.*

- <sup>6</sup> *Id.*
- <sup>7</sup> *Id.*
- <sup>8</sup> *Id.*
- <sup>9</sup> All information in this paragraph is from *id.* at 6.
- <sup>10</sup> *Id.* at 25 (emphasis added).
- <sup>11</sup> All information in this subsection is from *id.* at 6.
- <sup>12</sup> All information in this paragraph is from *id.* at 6.
- <sup>13</sup> All information in this paragraph is from *id.* at 3.
- <sup>14</sup> All information in this paragraph is from *id.* at 6.
- <sup>15</sup> Pub. L. No. 111-203, 124 Stat. 1376 (2010).
- <sup>16</sup> All information in this paragraph is from *id.* at 6.
- <sup>17</sup> *Id.* at 37.
- <sup>18</sup> *Id.* at 36.
- <sup>19</sup> *Id.*
- <sup>20</sup> *Id.*
- <sup>21</sup> *Id.* at 3.
- <sup>22</sup> *Id.*
- <sup>23</sup> *Id.*
- <sup>24</sup> *Id.*
- <sup>25</sup> *Id.* at 4.
- <sup>26</sup> *Id.*
- <sup>27</sup> SEC, Fall 2021 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 2021, available at [https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION\\_GET\\_AGENCY\\_RULE\\_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=3235&srftoken=7CE97CC2D49C9B6B70868F7B2752E582C86F1945A4A46F34426C18AF1ABE101E611318F64B67159C3A36E7556BD0FB872C8F](https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=3235&srftoken=7CE97CC2D49C9B6B70868F7B2752E582C86F1945A4A46F34426C18AF1ABE101E611318F64B67159C3A36E7556BD0FB872C8F).

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