Compliance Year in Review: 2024

FAIRVIEW

2024 was a busy year for investment advisers, who had to keep one eye on legal challenges and another on compliance deadlines. With a number of proposed rules still in the air and the political pendulum swinging to a new administration, 2025 looks to be even more interesting.

Here are some highlights from 2024. Be on the lookout for our SEC- and compliance-related predictions in 2025.

A Year of Legal Challenges For Federal Agencies

The Securities and Exchange Commission, the Department of Labor, and the Department of the Treasury all faced legal setbacks in 2024.

- **Fifth Circuit Vacates Private Fund Adviser Rules –** On June 5th, the Fifth U.S. Circuit Court of Appeals vacated the Private Fund Adviser Rules, citing a lack of statutory authority. This ended compliance efforts for the sweeping package of rules aimed at private fund advisers and gave the SEC a stumbling block for efforts to police private fund activities deemed contrary to the public interest.
- **The Supreme Court Overturns Chevron Deference –** Later in June, the U.S. Supreme Court issued a landmark ruling overturning Chevron deference in the Loper decision. Chevron deference required courts to defer to federal agency interpretations of ambiguous regulations. Losing that deferential treatment opens the door to more legal challenges against the actions of federal agencies.
- **The Jaresky Decision and Limiting Administrative Proceedings –** June also brought the Jaresky decision, which held that a jury trial is required when federal agencies seek civil penalties. Prior to Jaresky, federal agencies could rely on administrative proceedings, "in-house" enforcement actions, to seek civil penalties. Now agencies will have to go through the time and effort of filing a suit in federal court.
- **DOL Fiduciary Rule Stayed –** On July 26th, a U.S. District Court in Texas stayed the Department of Labor's ("DOL's") fourth attempt to create a fiduciary rule since 2010. The DOL appealed this decision on September 20th, setting the stage for prolonged litigation.
- **Corporate Transparency Act Blocked –** On December 3rd, a U.S. District Court in Texas issued a preliminary injunction against the enforcement of the Corporate Transparency Act (CTA) and its reporting of Beneficial Ownership Information to the Treasury Department. Again, firms are left to decide how best to prepare for rules that will likely be held up in extended litigation.

Enforcement Actions Old and New

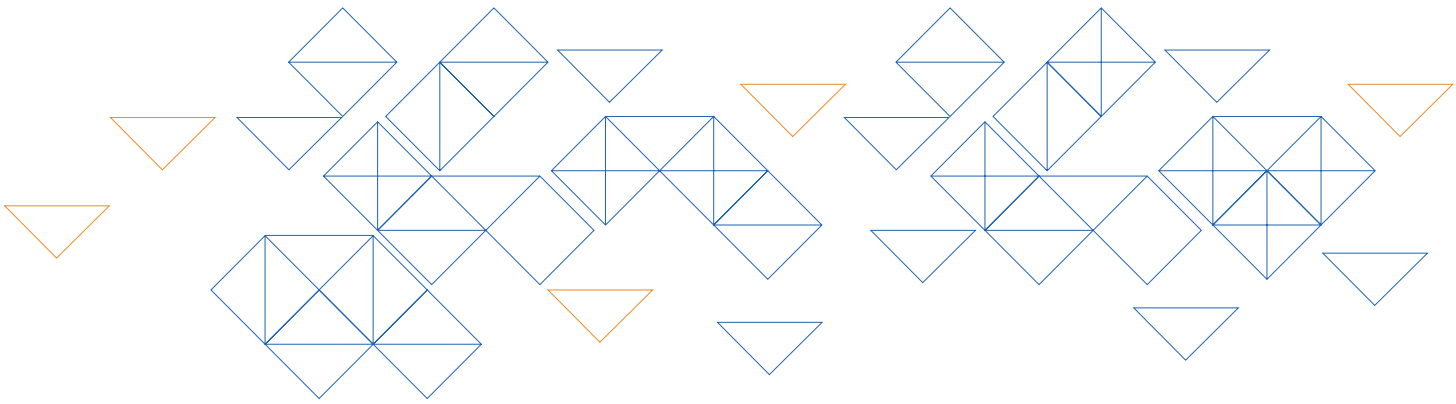
Although total enforcement actions declined compared to the 2023 fiscal year, the Division of Enforcement obtained orders of $8.2 billion in financial remedies. This is the highest amount in SEC history. Enforcement actions touched on familiar issues, like hypothetical performance and off-channel communication, along with new areas like "AI washing."

- **Marketing Rule Compliance –** Advisers continued to fall short of complying with the new Marketing Rule in 2024. In April, settled charges against five advisers were due to advertising hypothetical performance to the general public in violation of the Marketing Rule. These charges followed similar enforcement actions from the prior year. In September, we saw the first enforcement actions for untrue or unsubstantiated statements and third-party promotion, in the form of testimonials, endorsements, and third-party ratings. A few weeks later, an enforcement action citing failures on presenting both hypothetical performance and endorsements would indicate that old and new issues under the Marketing Rule will continue to be investigated. The Division of Examinations also released a Risk Alert this year outlining its observations on Marketing Rule compliance, and the Division of Investment Management added another question answered in the Marketing Rule FAQ to clarify the need for net performance calculation methodology to match that of gross performance, specifically when it comes to private funds presenting gross and net internal rate of return ("IRR").

- **Off-Channel Communication –** The Division of Enforcement continued to charge firms for failure to maintain records of off-channel business communications. In February, charges were announced for a mix of five broker-dealers, seven dual registrants, and four investment advisers. April brought an enforcement action against Senvest Management, LLC, the first time a stand-alone registered investment adviser was charged. In August, settled charges for another 26 broker-dealers, dual registrants, and investment advisers were announced, putting total monetary penalties over $2 billion since the start of enforcement actions under the Books and Records Rule for off-channel communication.

- **"AI-Washing" –** In March, the first charges for "AI-washing" were brought against two registered investment advisers for making false and misleading statements about their purported use of artificial intelligence. This new term is similar to past "green-washing" enforcement actions where a firm's public statements about the use of ESG factors did not match the firm's actual practices. Green-washing still appeared in 2024 enforcement actions. Do what you say and say what you do, continues to be a good motto for those in compliance and marketing.

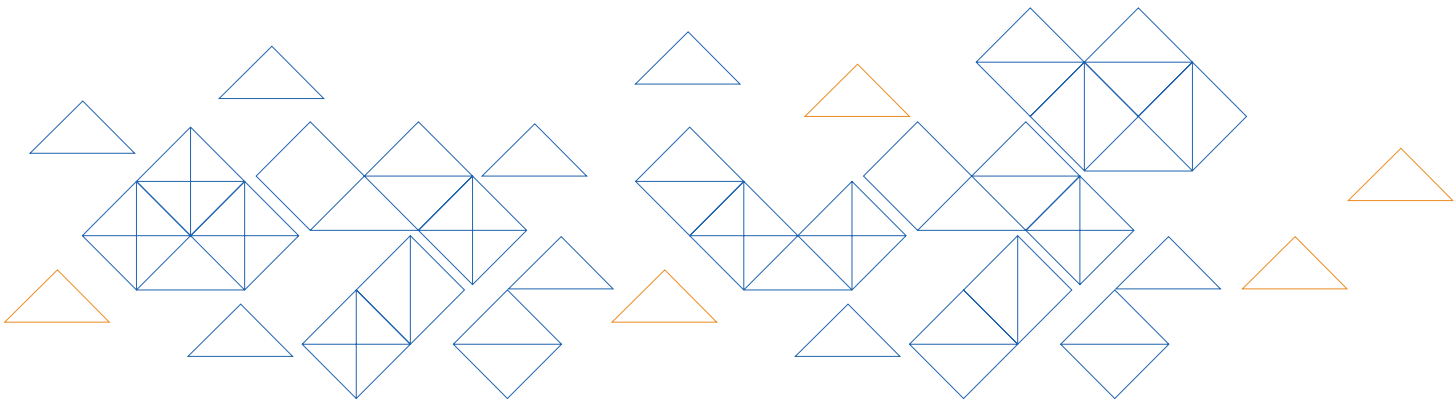
- **Failure to Distribute Private Fund Audits –** In September, a firm was charged for failing to timely distribute Audited Financial Statements for pooled investment vehicles as required by the Custody Rule. Audit completion and delivery is a common review area in SEC exams and part of regular reporting in the ADV. While the SEC lost the Private Fund Adviser Rules in court, private fund advisers will still face SEC scrutiny of audits, filings, and compliance with the Custody Rule.



Looking Back at 2024 Compliance Deadlines:

In a year marked by successful legal challenges, a number of new requirements still reached their compliance deadlines in 2024.

- **T+1 The Shortened Settlement Cycle –** On May 28, 2024, the settlement cycle for most transactions in US securities shortened to one business day, and advisers faced new recordkeeping requirements for each order confirmation, any allocation sent or received, and each affirmation sent or received. This deadline was preceded by a Risk Alert and succeeded by Examination requests surveying compliance efforts by advisers.
- **Form PF Enhancements –** June 11, 2024, was the compliance deadline for amended Section 4 Large Private Equity Fund Adviser reporting in Form PF. These changes came six months after the deadline for Section 5 and 6 changes for current reporting events and private equity event reports, respectively.
- **Form N-PX –** By August 31, 2024, filers of Form 13F had to file Form N-PX to report on "say on pay" proxy votes. The amended requirements created the first Form N-PX filing requirement for many advisers.
- **QPAM Amendments –** By September 15, 2024, Qualified Professional Asset Managers ("QPAMs") had to notify the DOL of their reliance on the exemption as part of the amendments to the Prohibited Transaction Class Exemption 84-14 (the "QPAM Exemption"). This notification requirement created an affirmative step needed to claim QPAM status and appear on the DOL's public list of QPAMs.
- **Amendments to Beneficial Ownership Reporting Schedules 13D and 13G –** The compliance deadline for amended Schedule 13D instructions took place on September 30, 2024, and the compliance deadline for the amended Schedule 13G instructions fell on November 14, 2024. This shortened how long advisers could take to make required Schedule 13D and 13G amendments among other changes.
- **Rule 13f-2 and Form SHO –** Rule 13f-2 became effective on January 2, 2024, and has a compliance date of January 2, 2025. January will be the first month where firms must monitor their short-selling activity for Rule 13f-2 thresholds. Firms will have 14 calendar days from month end to file Form SHO to report on any short positions that crossed a threshold. The first filing for any such positions will be due on February 14, 2025.



Looking Ahead to 2025

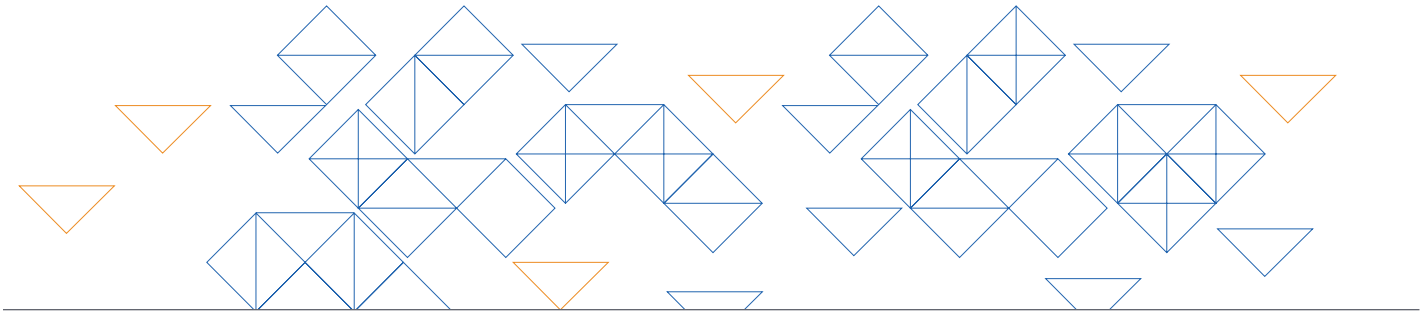
2025 will mark the end of Chairman Gensler's tenure at the SEC. Be on the lookout for our predictions and guidance for a year full of change. Below are a few of these upcoming changes to be aware of.

- **Additional Amendments to Form PF –** More changes to Form PF will arrive on March 12, 2025.
- **Reg S-P –** Amendments to Regulation S-P were finalized and will require covered institutions to implement a Vendor Management Program and an Incident Response Program, among other policies and procedures. Larger entities have a compliance deadline of December 3, 2025, and smaller entities have a deadline of June 3, 2026.
- **The Names Rule –** The Investment Company Act "Names Rule" will require portfolios of registered investment companies and business development companies to align with the investments suggested by the fund's name. The compliance deadline for entities with net assets over $1 billion is December 11, 2025, and for smaller entities, the compliance deadline is June 11, 2026.
- **FinCEN AML/CFT –** The compliance deadline for anti-money laundering and countering the financing of terrorism requirements is January 1, 2026.
- **Joint FinCEN and SEC proposal on CIP –** The joint proposal may be finalized in 2025, creating the need for additional procedures and a customer identification program ("CIP").

What does this mean for me?

This past year had a little of everything. Some new requirements came into play, while others were taken off the board. If you have any questions about shoring up your implementation for 2024 compliance issues or about how to prepare for upcoming compliance deadlines in 2025 and beyond, our team of regulatory experts can help.

Contact us today if you're interested in learning more.



About Fairview

Founded in 2005, Fairview®, LLC provides a full range of back-office support services for investment advisers and other financial institutions.
For more information, visit FairviewInvest.com.

FAIRVIEW