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# Suing the SEC

Law Working Paper N° 913/2026
March 2026

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## Abstract

The United States Securities and Exchange Commission ("SEC") is being sued far more than in the past. This phenomenon raises underexplored questions of enduring importance. When is it rational for a market participant to sue its regulator? Why, in the case of the SEC in particular, has there been—until recently—so little litigation challenging the agency? What does the recent period of intense litigation mean for the future of the SEC as an institution? This Article uses a rational actor model to help answer these questions. The model identifies the costs and benefits to a market participant of choosing to bring a legal challenge against the SEC. While it can be generalized to apply to the decision of a market participant to sue any regulator, careful attention to institutional context reveals how the magnitude of the variables on both sides of the ledger have shifted in recent years as it concerns suing the SEC in particular. These shifts help to make sense of not only the current moment in the SEC's storied history, but also its relatively litigation-free past. The analysis leads to insights relevant to both predicting and shaping the SEC's future.

Keywords: securities regulation, securities and exchange commission, administrative law, supreme court, private markets

JEL Classifications: K2, K22, K23, K4

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**_Suing the SEC_**

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CONTENTS



## INTRODUCTION

The United States Securities and Exchange Commission ("SEC") is being sued far more than in the past. While the number of legal challenges directed at the agency spiked under the chairmanship of Gary Gensler and has subsided under the new and deregulatory leadership of Paul Atkins, the increase is part of a longer-term trend that began in the 2010s and has persisted across Republican and Democratic administrations.[1] The change is one not just of number, but also of kind, as recent litigation against the SEC extends beyond standard rulemaking challenges to encompass many challenges to longstanding agency practices. This phenomenon raises underexplored questions of enduring importance. When is it rational for a market actor to sue its regulator? Why, in the case of the SEC in particular, has there been—until recently—so *little* litigation challenging the agency? What does the recent period of intense litigation mean for the future of the SEC as an institution?

Eager readers likely already have one of two causal theories in mind to explain the recent uptick in litigation against the SEC, depending on their political leanings. Those who lean left are likely to view it as part of a broader "conservative crusade" to dismantle the administrative state—a movement emboldened by shifts on the Supreme Court during President Trump's first term and bent on disempowering not only the SEC but all federal agencies. Those who lean right will point

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[1] *See infra* notes 63-66 and accompanying text.

to the SEC's aggressive rulemaking and enforcement agenda under Chairman Gensler as the provocation, an agenda that like those of many Biden-era agencies veered beyond the agency's core mandate in pursuit of progressive causes. Albeit hyperbolic in tone, both explanations contain truths that help explain the SEC's most recent difficulties. But even taken together they paint an incomplete picture.

This Article seeks to provide a more nuanced account of what may be driving market actors' increased litigiousness toward the SEC. It begins with important context. The SEC is an immensely powerful regulator; through its chosen methods of regulation, it has amassed levers of control over the capital markets that allow it to micromanage market practices in ways that often elide APA accountability measures, and in ways at odds with the "Brandesian" narrative of the SEC as a hands-off regulator concerned primarily with disclosure and fraud prevention.[2] Part I provides an overview of the SEC's vast *de facto* power, which swells from, *inter alia*, its extensive reliance on safe harbors, non-legislative rules, and conditional exercise of its discretionary authority. The SEC's *de facto* power suggests that the bigger puzzle to be explained may not be why we have seen so much litigation directed at the SEC in recent years, but why the SEC was allowed to grow so mighty to begin with.

Existing literature offers a partial answer to the latter puzzle. Securities law scholars writing in the public choice tradition have theorized that the SEC is a rational utility maximizer whose regulatory products can be expected to favor the most effective rent-seekers—likely large public companies and repeat-player financial market intermediaries, including lawyers, investment banks and auditors.[3] This theory has been used to explain specific SEC policy choices, and posits that regulatory change can be expected when shifting conditions change the relative rent-seeking effectiveness of interest groups. It might also help explain structural choices that the SEC has made regarding its methods of regulating: as explained in Part II, financial market intermediaries have likely benefitted from the large swell of *de facto* power the SEC exercises over the marketplace, and it likely advantages large public companies relative to smaller firms and new entrants to the public capital markets.

While existing literature may explain the SEC's discrete regulatory products as well as its chosen methods of regulating, it does not answer why the SEC has faced so little legal challenge in the past. Clearly, market actors would lack incentive to legally disrupt the agency's work insofar as that work benefits them. But what about those whose interests are not reflected in SEC policy—the losers of the proverbial competition for regulatory rents? Why would they not more routinely seek to reverse their losses in court? Why would they not aggressively challenge methods of regulation that systematically disadvantage them?

This Article uses a rational actor model to help analyze that puzzle. The model, developed without formalism in Part III, identifies the costs and benefits to a market participant of choosing to bring a legal challenge against the SEC. While it can be generalized to apply to the decision of a market participant to sue any regulator, careful attention to institutional context reveals how the

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[2] *See* Alexander Platt, *The Administrative Origins of Mandatory Disclosure*, 49 J. CORP. L. 1143 (2024) (describing and casting doubt on the accuracy of this narrative).

[3] *See infra* Part II.

magnitude of the variables on both sides of the ledger have shifted in recent years as it concerns suing the SEC in particular. These shifts, detailed in Part IV, help to make sense of not only the current moment in the SEC's storied history, but also its relatively litigation-free past. The analysis leads to insights relevant to both predicting and shaping the SEC's future, which are explored in the Conclusion.

While public choice scholarship has extensively debated what it is that judges seek to maximize when presiding over litigation challenging regulation,[4] it has given less attention to the decision-making process of the would-be litigant determining whether to bring a challenge against a regulator in the first place,[5] and no scholarship has considered that process in the specific context of the SEC. This Article fills that void. The endeavor should interest a broader audience than public choice literature focused on the regulatory production process. There is much legitimate disagreement over the public choice premise that agencies act selfishly to maximize their own utility, and within the public choice tradition significant disagreement exists regarding how to understand an administrative agency's utility function. But regardless of what motivates the SEC to act,[6] most would likely agree that the results will inevitably disadvantage some market players. Under what conditions disappointed market players will attempt to legally disrupt their regulator is a question of broad significance, and approaching it using a rational actor model should be widely appealing: the assumption that market participants act as selfish rational utility maximizers is far stronger than any parallel assumption that might be made about administrative agencies, and there is greater consensus regarding what it is that market participants (as opposed to agencies) generally seek to maximize (*i.e.*, profits).

## I. A PRIMER ON THE SEC'S *DE FACTO* POWER

When students take their seats on the first day of my Securities Regulation course, they possess some general knowledge regarding how federal administrative agencies fit within our constitutional design. For example, they understand that a statutorily created federal agency acts consistently with principles of separation of powers only if its actions fall within the scope of

[4] For an introduction to this strand of scholarship, *see, e.g.,* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875 (1975); Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827; William F. Shughart II & Robert D. Tollison, *Interest Groups and the Courts*, 6 GEO. MASON L. REV. 953 (1998).

[5] For contributions focused on litigation as an alternative to rent-seeking through lobbying, *see* Paul H. Rubin, Christopher Curran and John F. Curran, *Litigation Versus Legislation: Forum Shopping by Rent Seekers*, 107 PUBLIC CHOICE 295 (2001); John M. De Figueiredo & Rui J. P. De Figueiredo, Jr., *The Allocation of Resources by Interest Groups: Lobbying, Litigation and Administrative Regulation*, 4 BUS. AND POLITICS 161 (2002). For an overview of a broader set of theories of disputing with relevance to parties in ongoing relationships, such as regulated and regulator, see Cary Coglianese, *Litigating within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 LAW & SOCIETY REV. 735, 737-39 (1996) (discussing sociolegal, game-theoretic and political science research contributions in this vein). For a volume focused on the decision by *government* whether to favor litigation as a policy tool over alternatives, see REGULATION VERSUS LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW (2010) (edited by Daniel P. Kessler).

[6] For one take, *see* Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 HARV. J.L. & PUB. POL'Y 639 (2010); for other possibilities, see Donald C. Langevoort, *The SEC as a Bureaucracy: Public Choice, Institutional Rhetoric, and the Process of Policy Formulation*, 47 WASH. & LEE L. REV. 527 (1990).

authority Congress has delegated to it under a validly enacted enabling statute. They understand that consistent with the Constitution, Congress can delegate to agencies the authority to enforce particular statutory provisions, as well as to promulgate binding rules on specified topics if Congress provides an intelligible guiding principle and the agency follows the requirements of the Administrative Procedures Act ("APA").[7] They understand that the APA establishes procedures for federal agencies to follow in rulemaking which are designed to, *inter alia*, help ensure transparency and accountability, and which include the prospect of judicial review. They further understand that these procedures do not apply when agencies merely issue guidance documents that are not legally binding on regulated parties. While students enter with this foundational knowledge, as securities regulation unfolds to them over the course of the semester, they are typically quite surprised to learn how it all actually works in practice. This is because the SEC's *real* power extends far beyond what a reading of our securities statutes and a casual understanding of administrative law principles might suggest to the uninitiated.

To their general knowledge of administrative law, students soon add securities law specifics. They learn about the key statutes that the SEC is tasked with enforcing and promulgating rules under. Particular attention is paid to Section 5 of the Securities Act of 1933 (the "1933 Act").[8] Absent an exemption, Section 5 prohibits, among other things, the "offer" of "any security" for sale unless a registration statement has been filed with the SEC. After the filing of a registration statement, Section 5 prohibits the use of a "prospectus" unless the prospectus complies with Section 10 of the 1933 Act. Students learn that a registration statement is an extensive disclosure document that is subject to extremely onerous private liability risk under Section 11 of the 1933 Act (a non-scienter-based provision which creates liability for misstatements and omissions that meet a fuzzy test of "materiality").[9] They also learn that conducting a Section 5 registered offering is one way to trigger reporting company status under the Securities Exchange Act of 1934,[10] a status that carries with it extensive ongoing disclosure obligations, heightened liability risk, and other regulatory burdens. Students learn that the two most important exemptions from Section 5's registration requirements are the exemptions in Section 4(a)(2) of the 1933 Act for "transactions by an issuer not involving any public offering" (the so-called "private offering exemption") and in Section 4(a)(1) for "transactions by any person other than an issuer underwriter, or dealer" (which frees up resale transactions).[11] They also learn that violations of Section 5 give rise to stringent liability under Section 12(a)(1) of the 1933 Act.[12]

The basic contours of the 1933 Act laid out above are straightforward and easy for astute law students to grasp. The devil lies in the details. What counts as a "security"? An "offer"? A "prospectus"? Under what circumstances does a transaction by an issuer not involve "a public offering"? Who counts as an "underwriter," unable to rely on the 4(a)(1) exemption? The statutory

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[7] Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551–706).

[8] 15 U.S.C. § 77e.

[9] 15 U.S.C. § 77k.

[10] 15 U.S.C. § 78o(d). The other triggers are having securities listed on national securities exchange and possessing certain minimum net assets and equity holders of record. *See* 15 U.S.C. § 78l.

[11] 15 U.S.C. § 77d(a).

[12] 15 U.S.C. § 77l(a)(1).

definitions for these terms are either non-existent or contain broad language and circular references.[13] When courts have been called upon to interpret the terms, the result has been the adoption of vague, often multi-factor, judicial tests that raise more questions than they answer.[14] Early SEC guidance focused on the outer boundaries of these critical terms took a similarly expansive approach. For example, in 1957 the SEC issued a release stating that the "offers" prohibited by Section 5 encompass any communications that might "condition the market" for a subsequent sale of securities.[15]

The heavy skewing of key securities law concepts by both the courts and the SEC toward the "standards" side of the "rules-standards" spectrum is by no means a phenomenon limited to the 1933 Act—it pervades all of the major securities statutes. It has often been defended on the ground that the securities laws must be flexible enough to adapt to changing market conditions as well to avoid the opportunistic evasion by market actors that brighter lines would invite. But the combination of fuzzy legal lines, on the one hand, and onerous liability repercussions for crossing those lines, on the other, risks chilling market behavior in profoundly undesirable ways. For example: companies keen to avoid a Section 5 violation might opt for total silence in the pre-filing period of a public offering to avoid being deemed to have made an illicit "offer" (to the detriment of, *inter alia*, companies' customers and pre-existing investors); companies might limit non-registered offerings to their executive officers to ensure the availability of the Section 4(a)(2) exemption (inequitably limiting valuable investment opportunities to insiders and severely restricting the ability of companies to raise needed capital); and investors might choose to delay reselling securities acquired in a non-registered offering for extended periods so as to securely avoid "underwriter" status and safely rely on the Section 4(a)(1) exemption (making investment in private offerings less attractive and in turn increasing the cost of capital for companies). These results would clearly subvert the agency's mission to protect investors and promote capital formation, and the SEC has not surprisingly taken action to avoid them.

The approaches it has used—across time and across Presidential administrations—have had important implications for the scope of the SEC's *de facto* power over the capital marketplace. Instead of defining more precisely what critical terms like "offer," "public offering," and "underwriter" mean, the SEC has addressed the problems created by these and other important

[13] The statutory definition for the term "security" includes reference to the opaque term "investment contract" (15 U.S.C. § 77b(a)(1)), which courts have defined by resort to multi-factor tests. *See SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946). The statutory definition for the term "offer" includes "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value." 15 U.S.C. § 77b(a)(3). A "prospectus" is in turn defined to include any written communication that "offers" a security for sale. *Id*. § 77b(a)(10). The 1933 Act nowhere defines the term "public offering" (or its converse, a "private offering"). It defines the term "underwriter" to include "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking," while designating the term "issuer" in the definition to include, "in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer." *Id*. § 77b(a)(11).

[14] *See, e.g.*, *Howey*, *supra* note 13; *SEC v. Ralston Purina Co.*, 346 U.S. 119 (1953).

[15] Securities Act Release No. 3844 (Oct. 8, 1957). Another SEC release, issued in 1935, instructs that whether an offering is "public" or "private" turns on a balancing of: the number of offerees; the relationship of the offerings to each other and to the issuer; the number of units offered; the size of the offering; and the manner of the offering. Securities Act Release No. 285 (Jan. 24, 1935).

terms' ambiguity using alternative regulatory techniques. The chosen techniques have had the effect of augmenting the SEC's authority to dictate market practices, while minimizing its accountability.

One important technique has been the use of safe harbors. Safe harbors do not purport to define what legal prohibitions capture but rather what they do *not* capture, assuming the safe harbor's specified criteria are met. For example, the SEC has adopted a series of safe harbors which protect communications that meet specified criteria from being deemed "offers" or "prospectuses," thus insulating them from Section 5's prohibitions; among other requirements, these safe harbors often mandate that eligible communications contain dictated boilerplate language and be filed with the SEC.[16] Another important example is Regulation D's Rule 506 safe harbor, which provides that offerings that meet its specific criteria do not to involve a "public offering"; reliance on the safe harbor requires, *inter alia*, the limitation of sales to persons who meet the SEC's definition of an "accredited investor" plus, if the ban on general solicitation is adhered to, up to 35 "sophisticated" non-accredited investors (so long as the latter are provided with specified disclosures).[17] Rule 144 is another important safe harbor that deems those engaged in resale transactions not "underwriters" if, *inter alia*, specified holding periods and disclosure requirements are met.[18]

Sometimes guidance documents have the effect of creating safe harbors, and as discussed further *infra* guidance documents are formally immune from judicial review. Other times safe harbors are created in APA compliant notice-and-comment rulemaking. The safe harbors just catalogued are examples of rules-based safe harbors, technically subject to judicial review. But even these sorts of safe harbors are not *practically* subject to judicial review, because market participants have no incentive (and perhaps no standing) to challenge a safe harbor once it is adopted.[19] As a formal matter, safe harbors prohibit nothing, they only benefit market participants by offering a path for the reduction of liability risk, leaving conduct outside the safe harbor to be judged by reference to the vague background standard. As Professor Susan Morse has aptly explained, however, the *real* effect of a safe harbor is often to cause regulated parties to treat behavior outside the safe harbor as illicit.[20]

It is certainly the case that market actors conform their behavior to qualify for SEC safe harbors, but the extent to which they avoid transactions that they would otherwise have engaged in if no safe harbor existed is unclear. It may be that most non-harbored behavior would have been chilled anyway in the absence of a safe harbor. But it is also possible that other forms of regulatory relief would have materialized in the absence of safe harbors, including the possibility of Congressional or agency action to more clearly delineate what the law affirmatively prohibits.

[16] *See generally* Securities Offering Reform, Securities Act Release No. 33-8591, 70 Fed. Reg. 44,722 (Dec. 1, 2005).

[17] 17 C.F.R. § 230.506.

[18] 17 C.F.R. § 230.144.

[19] By contrast, they have strong incentives to try to influence the safe harbor's contours during the notice and comment period.

[20] *See* Susan Morse, *Safe Harbors, Sure Shipwrecks*, 49 U.C. DAVIS L. REV. 1385 (2016); *see also* Susan Morse, *The Truth About Safe Harbors*, 92 TENN. L. REV. 783 (2025).

Whether this would have occurred, and whether it would have yielded more or less permissive regimes than the safe harbor regimes that exist today, is impossible to know. My point is not that regulated parties are, or are not, *better off* in a world with safe harbors than in a world without them; nor do I assert that social welfare is enhanced, or reduced, by their use. My point is subtly different: the SEC's use of safe harbors affects the nature and scope of the agency's *de facto* regulatory power.[21]

The SEC's use of safe harbors against the backdrop of vague statutory standards and high liability risk allows the agency, with little risk of judicial oversight, to effectively exercise the power to micromanage market practices in a way that Congress may have never contemplated when it originally adopted the securities laws—and in ways that always seem to surprise my law students. After all, section 5 prohibits pre-filing offers; it does not grant the SEC authority to dictate the specific form corporate communications must take in the pre-filing period of a registered public offering or to require that such communications be filed with the SEC (indeed, the constitutionality of such a grant of authority would be quite suspect). Section 4(a)(2) exempts private offerings from the ambit of Section 5; it does not grant the SEC authority to dictate the details of how such offerings must be marketed and to whom. Section 4(a)(1) is a broad exemption for resale transactions not involving, *inter alia*, an underwriter; it does not grant the SEC authority to condition resales of securities acquired in private offerings on compliance with prescriptive rules. Yet, the SEC effectively exercises all of this authority through the practical import of its effectively unreviewable safe harbor rules.

The SEC's actual reach over the capital marketplace extends beyond what a simple reading of its enabling statutes might suggest in other ways, as well—ways that, like the use of safe harbors, tend to expand the SEC's *de facto* power in a manner resistant to traditional accountability mechanisms. For example, in the many situations where no safe harbor offers protection and companies and other market actors are unsure of the securities law ramifications of their contemplated actions, they have the option of seeking a "no-action" letter from the SEC staff, which is a letter by the staff stating that it will not recommend enforcement action to the Commission if the actions detailed in the request are taken. As described on the SEC's website:

> Most no-action letters describe the request, analyze the particular facts and circumstances involved, discuss applicable laws and rules, and, if the staff grants the request for no action, concludes that the SEC staff would not recommend that the Commission take enforcement action against the requester based on the facts and representations described in the individual's or entity's request.[22]

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[21] This emphasis is different from the emphasis in Professor Morse's work on safe harbors; she emphasizes the capacity of safe harbors to impose collateral harm on people outside the safe harbor. *See supra* note 20. It is also different from the emphasis in Professor Coglianese et al.'s treatment of "unrules" (of which safe harbors are a species); while he and his co-authors recognize that regulators "could wield unrulemaking power in ways that enhance their power to impose obligations," the main point they emphasize is how unrules are deregulatory in nature and can therefore undermine the public interest. Cary Coglianese, Gabriel Scheffler & Daniel E. Walters, *Unrules*, 73 STAN. L. REV. 885, 892 n.31 (2021).

[22] *See* https://www.investor.gov/introduction-investing/investing-basics/glossary/no-action-letters.

No-action letters are technically non-binding on the Commission, but market participants in practice place tremendous weight on the provision, or non-provision, of such a letter.[23] This is true not only with respect to the market participant who directly solicits the letter, but also market participants more broadly: securities lawyers routinely rely on letters issued to others, which are publicly available in a topically organized database maintained by the SEC, just as they would judicial precedent in advising their clients.[24] Because no-action letters typically concur with the legality of a market participant's detailed approach to some transaction, they can operate like safe harbor rules—leading market participants to channel their behavior into approved formats and to avoid actions that fall outside the lines. But these letters are issued without any of the safeguards of APA rulemaking,[25] and they have long been treated as "non-final" orders immune from judicial review.[26]

As in my previous discussion of safe harbors, I offer no normative judgments about this practice; market participants undoubtedly value the opportunity to obtain no-action letters and to review the letters issued to others, and whether some other regulatory solution to the high-stakes legal uncertainty that motivates their use would be better or worse, for companies or society, I cannot say.[27] Rather my point is descriptive: through no-action letters, the SEC is able to strictly regulate market practices while maintaining maximal flexibility and minimal accountability.

Sometimes, instead of issuing a no-action letter, the SEC staff will respond to requests for clarifications of rules and regulations in the form of an interpretive letter. It also seeks to provide market participants with greater clarity as to the meaning of the securities laws through the issuance of other guidance documents. These communications have different labels—e.g., "Staff Accounting Bulletins," "Staff Legal Bulletins," "Corporation Finance Staff Guidance," "Compliance and Disclosure Interpretations," "Investment Management Frequently Asked Questions," "Trading and Markets Frequently Asked Questions." But they all share the characteristic that they are neither subject to the requirements of the APA nor typically subject to judicial review. But securities lawyers would be loath to advise clients to deviate from SEC guidance, so it functions *as if* it were binding. Some of the SEC's guidance is quite prescriptive,

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[23] *See* Donna Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 924-925 (1998); *Nat'l Ctr. for Pub. Pol'y Rsch. v. SEC*, 2025 U.S. App. LEXIS 19172, *21-26 (5th Cir. Nov. 14, 2024) (Jones, dissenting).

[24] No-action letters first became publicly available in 1970 (Nagy, *supra* note 23 at 949) and can be accessed today at https://www.sec.gov/rules-regulations/no-action-interpretive-exemptive-letters.

[25] *See* Nagy, *supra* note 23 at 962 (similarly observing that "the SEC is able to announce in no-action letters what are, in effect, new regulatory requirements or obligations without providing prior notice or the opportunity for public comments").

[26] *But see Clarke v. CFTC*, 74 F.4th 627 (5th Cir. 2023) (treating the rescission of a no-action letter by the CFTC as a final order). A no-action letter reviewed by the SEC's Commissioners might be treated as a final order, but typically such letters are issued by staff without Commission review. Nagy, *supra* note 23 at 945-946.

[27] *Cf.* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public*, 41 DUKE L.J. 1311 (1992) (broadly critiquing agencies' use of non-legislative rules to practically bind the public). For an introduction to the voluminous literature on the pros and cons of APA rulemaking procedures, *see* Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 67-68 nn.206 & 107-111 (2015).

providing another pathway for the SEC to micromanage market practices in a manner insulated from accountability mechanisms.

The use of guidance is often combined with no-action relief, mimicking—without the same accountability mechanisms—what might otherwise be formal rulemaking backed up by rulings in enforcement actions. This occurs when the SEC creates a guidance document that spells out the parameters of the SEC's interpretive position on some issue of regulatory importance and then issues or denies no-action relief by reference to the applicant's compliance with the guidance. The approach the SEC takes to Rule 14a-8 is illustrative.[28] That rule establishes circumstances under which companies must include shareholder proposals in their proxy statements and requires companies who claim a basis to exclude a proposal to report their intention to do so to the SEC in advance. The bases for exclusion in the rule have been interpreted to turn on fuzzy concepts, such as the social significance of the topic of the proposal.[29] Instead of amending Rule 14a-8 to clarify the meaning of these uncertain exclusions, the SEC has opted instead to issue staff guidance.[30] Companies, in turn, seek no-action relief whenever they intend to exclude a shareholder proposal, arguing for the propriety of the exclusion in terms of the guidance issued. Although a company always has the technical ability to seek a declaratory judgment from a court that it is correct in its interpretation of the rule, or to simply proceed by excluding a proposal and risk a lawsuit by the SEC or the disappointed proposal proponent, companies almost invariably seek no-action relief from the SEC staff before excluding a proposal.[31]

The true scope of the SEC's influence over the market cannot be understood without also understanding the explicit discretion the agency enjoys over decisions of extreme consequence to market participants. This discretion includes broad grants of exemptive authority. The Investment Company Act of 1940 has, since its inception, provided that the SEC

> by rules and regulations upon its own motion, or by order upon application, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this subchapter or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this subchapter.[32]

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[28] 17 C.F.R. § 240.14a-8.

[29] *See generally* Stephen M. Bainbridge, *Revitalizing SEC Rule 14a-8's Ordinary Business Exclusion: Preventing Shareholder Micromanagement by Proposal*, 85 FORDHAM L. REV. 705 (2016).

[30] For links to current and past SEC guidance regarding Rule 14a-8, visit https://www.sec.gov/rules-regulations/shareholder-proposals/rule14a-8-staff-legal-bulletins.

[31] Nagy, *supra* note 23 at 939. Exxon's choice in early 2024 to bypass the no-action letter process and seek declaratory relief regarding the legality of its decision to exclude shareholder proposals is a rare exception, and symbolic of the shift in litigiousness that is the focus of this Article. For Exxon's explanation for its actions, see Exxon Mobil, 2*024 Shareholder proposal lawsuit – Our responsibility to fight back* (February 29, 2024), *available at* https://corporate.exxonmobil.com/news/corporate-news/shareholder-proposal. The SEC recently announced that it was temporarily halting most no-action relief in the Rule 14a-8 context, a development that will be discussed further in the Conclusion. *See infra* note 174 and accompanying text.

[32] 15 U.S.C. § 80a-6(c); *see also* 15 U.S.C. § 80a-17(b); 17 C.F.R. § 270.17d-1; 17 C.F.R. § 270.0-5.

The SEC was granted similarly broad exemptive authority under the 1933 and 1934 Acts in 1996.[33] The SEC has sometimes used its exemptive authority as the basis for general rulemaking, occasionally in ways that seem to contradict more specific grants of rulemaking authority.[34] More often, though, it has used its exemptive authority to grant individualized relief. For many years the only way to get an ETF product to market, for example, was through approval of an individualized application for exemptive relief under the Investment Company Act.[35] Sometimes individual exemptive orders spell out generalized criteria that need to be followed to avoid some regulatory burden, which other market participants are invited to follow in order to get fairly automatic approval of their exemptive requests[36]; these sorts of exemptive orders operate like safe harbor rules.

The SEC has a variety of other forms of powerful discretion. For example, firms cannot commence sales of securities in a public offering until their registration statements become "effective"; the SEC has discretion to grant acceleration of the effective date of registration statements so as to allow firms to control the timing of this event.[37] The alternative to seeking acceleration—allowing one's registration statement to go automatically effective 20 days after its last amendment—is untenable for firms, so this gives the SEC great leverage. Indeed, it is what initially allowed the SEC to invent, without statutory foundation, a comment letter process that involves SEC pre-screening of the content of firms' registration statements. Only once the SEC feels the registrant has adequately responded to its comments will it grant acceleration. Alexander Platt has observed that the comment letter process stands in tension with the vision of "a Brandeisian regulatory system: a disclosure-based regime that left the primary organizing force in competition and markets, based around an adversarial relationship between government and business, abjuring oversized bureaucracy."[38] Its adoption, he asserts, fostered the "widespread belief–and occasionally the reality–that government was doing more than merely enforcing disclosure rules and was affirmatively engaged in economic planning, approving, and disapproving of particular corporate issuances on the merits."[39]

The comment letter process, combined with the power to deny acceleration, has indeed given the SEC the ability not only to ensure compliance with affirmative disclosure obligations, but also to influence substantive corporate policy. For example, although the SEC has no authority

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[33] 15 U.S.C. § 77z-3; 15 U.S.C. § 78mm; 17 C.F.R. § 240.0-12.

[34] *See, e.g.*, Andrew N. Vollmer & Brian Knight, DOES THE SEC HAVE LEGAL AUTHORITY TO EXCEED STATUTORY DOLLAR LIMITATIONS?, Mercatus Center (2020), *available at* https://www.mercatus.org/research/public-interest-comments/does-sec-have-legal-authority-exceed-statutory-dollar-limitations.

[35] The adoption of Rule 6c-11 in 2019 obviated the need for some ETF products to obtain exemptive relief. *See* Exchange-Traded Funds, SEC Release Nos. Nos. 33-10695; IC-33646 (Sept. 26, 2019).

[36] *See, e.g.,* Simpson Thatcher, *The Evolution of Co-Investment Exemptive Orders and Why They Should Become Extinct*, REGISTERED FUNDS ALERT (Oct. 2018), *available at* https://www.stblaw.com/about-us/publications/view/2018/10/15/the-evolution-of-co-investment-exemptive-orders-and-why-they-should-become-extinct; SEC Division of Investment Management Staff, *Staff statement regarding the risk legend used by non-transparent exchange-traded funds operating in reliance of an exemptive order under the Investment Company Act of 1940* (March 29, 2023), *available at* https://www.sec.gov/newsroom/speeches-statements/im-staff-statement-etf-032923#_ftn1.

[37] 15 U.S.C. § 77h(a); 17 C.F.R. § 230.461.

[38] Platt, *supra* note 2 at 1150.

[39] *Id*.

to ban clauses in public companies' charters requiring that shareholder claims be arbitrated,[40] it has successfully deterred the practice by refusing—until a recent change in position under Chair Atkins' leadership—to grant acceleration of IPO registration statements by companies with charters including such provisions.[41] In addition, until another recent change in position under Chair Atkins, "the SEC staff would not grant acceleration of a closed-end fund's registration statement without a commitment by the fund to impose [particular] restrictions during the disclosure comment process."[42] Specifically, the SEC staff refused to grant acceleration to closed-end funds that proposed to invest more than 15% of net assets in private funds unless the fund limited the sale of their shares to investors who qualify as "accredited investors," as defined in Regulation D, and whose initial investment was at least $25,000.[43] These requirements did not originate in "any statute or rule, nor were they published or memorialized in any formal SEC guidance but, instead, [had] been communicated to closed-end fund registrants during the registration statement disclosure review process."[44]

The SEC's enforcement discretion is another source of significant power. It not only strengthens the SEC's position in individual enforcement matters but also colors the way regulated parties view and interact with the SEC on a regular basis. Simply being under public investigation by the SEC can be very costly for market participants. It can weigh on a company's stock price and chill dealmaking.[45] Moreover, losing an enforcement action carries serious ramifications for market actors. For example, a company that is subject to certain types of court orders and SEC cease-and-desist orders is automatically disqualified from relying on valuable safe harbors, such

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[40] As part of the Dodd Frank Wall Street Reform and Consumer Protection Act of 2010, the SEC was granted the more limited authority (as yet unexercised) to ban pre-dispute arbitration clauses in contracts between a broker, dealer, or municipal securities dealer or investment adviser and their investor clients. *See* 15 U.S.C. §§ 78o(o) & 80b-5(f).

[41] SEC, *Policy Statement: Acceleration of Effectiveness of Registration Statements of Issuers with Certain Mandatory Arbitration Provisions*, Release Nos. 33-11389; 34-103988 (Sept. 17, 2025), *available at* https://www.sec.gov/files/rules/policy/33-11389.pdf.

[42] Dechert, *SEC Staff Opens Door to Expanded Retail Access to Private Funds* (May 22, 2025), *available at* https://www.dechert.com/knowledge/onpoint/2025/5/sec-staff-lifts-key-limit-on-retail-access-to-private-funds.html.

[43] *Id*.

[44] Ropes & Gray, *SEC Drops 15% Limit in Private Funds for Retail Closed-End Funds* (May 23, 2025), *available at* https://www.ropesgray.com/en/insights/alerts/2025/05/sec-drops-15-limit-in-private-funds-for-retail-closed-end-funds. *See also* Louis Loss et al., *Securities Regulation*, 1065–66 (6th Ed. 2019) (listing as other examples of SEC bases for denying acceleration: (1) "where [a] selling stockholder does not bear his equitable proportion of the expense of registration"; (2) where "the registration statement related to a preferred stock with a par or stated value substantially less than its liquidation preference . . . unless an agreement was made to restrict surplus"; and (3) where a company allowed indemnification of officers, directors, and control persons (or underwriters or their control persons) "against statutory liabilities, unless the indemnification is waived or a specific legend is included . . . to the effect that the SEC views the indemnification as unenforceable. . . and that [indemnification] will not be honored . . . without a judicial test").

[45] One recent empirical study finds that SEC investigations of targets in M&A deals "increase the likelihood of an acquirer withdrawing its bid or revising its offer downward" and that "deals involving investigations into targets take significantly longer to complete"; the authors find that these "costs persist even among investigations that do not lead to enforcement actions" and are higher in publicly disclosed investigations. James Blann and Phillip T. Lamoreaux, Economic Implications of SEC Investigations: Evidence From M&A Transactions 31 (May 31, 2023), *available at* SSRN: https://ssrn.com/abstract=4465319.

as Rule 506.[46] The SEC has the discretion to waive these repercussions if it chooses.[47] An adjudicated loss to the SEC could also have severe collateral consequences for a company in follow-on class action litigation.[48] The SEC has the discretion to allow a defendant to avoid this in settlement, by agreeing to the entry of an order in which the defendant does not admit to the allegations.[49] The SEC also has broad authority to impose career-ending bar orders on directors, officers, and securities professionals (including, since 2010, collateral bars across industries)[50] and "unguided discretion to impose extremely high civil penalty amounts."[51] From 2010 until the Supreme Court's 2024 decision in *SEC v. Jarkesy*,[52] the agency also had unfettered discretion to pursue these remedies in its in-house administrative forum rather federal court, which effectively allowed it to choose the extent of the procedural protections the defendant would be afforded.[53]

The leverage the SEC enjoys in enforcement matters, combined with the specter of private lawsuits, helps explain why market actors seek to stay away from fuzzy legal lines and instead to conform to SEC safe harbors, no-action letters and guidance documents, despite their technically non-binding nature. It also influences dynamics in particular enforcement matters, allowing the SEC to accomplish things through settlement that would otherwise seem to fall outside its authority—not unlike the use of its discretion to grant acceleration discussed above. For example, the SEC often requires companies to retain corporate monitors to implement governance reforms that seem more appropriately the purview of state corporate law.[54] The SEC also imposes terms that, outside the settlement context, would surely violate the First Amendment. For example, in

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[46] *See* Urska Velikonja, *Waiving Disqualification: When Do Securities Violators Receive a Reprieve?*, 103 CAL. L. R. 1081, 1089-93 (2015) (providing an overview of these disqualifications).

[47] *Id*. at 1093-94; *see also* Paul S. Atkins, *Statement on Simultaneous Commission Consideration of Settlement Offers and Related Waiver Requests* (Sept. 26, 2025), *available at* https://www.sec.gov/newsroom/speeches-statements/atkins-2025-simultaneous-consideration-settlement?utm_medium=email&utm_source=govdelivery.

[48] Lawrence J. Zweifach & Eric M. Creizman, *Defending Parallel Proceedings: Basic Principles & Tactical Considerations*, 7 SECS. LITIG. RPT. (Vol. 7) p. 11 & n. 105 (Feb. 2010).

[49] *Id*.

[50] For an overview of these remedies, and how they have expanded over time, see Mark T. Uyeda & Jaime Marinaro, *Beyond* Jarkesy*: Rethinking the Role of Administrative Law Judges in SEC Administrative Proceedings*, 30 FORDHAM J. CORP & FIN. L. 1, 3-10 (2025).

[51] Andrew Vollner, *Enforcement of Federal Securities Laws Should Be Vigorous but Fair*, Testimony before the Subcommittee on Capital Markets, Committee on Financial Services, U.S. House of Representatives (Hearing: SEC Enforcement: Balancing Deterrence with Due Process) (May 7, 2024), *available at* https://democrats-financialservices.house.gov/uploadedfiles/hhrg-118-ba16-wstate-vollmera-20240507.pdf.

[52] 603 U.S. 109 (2024).

[53] For criticisms of the SEC's use of this power, *see* Alexander Platt, *SEC Administrative Proceedings: Backlash and Reform*, 71 BUS. LAW. 1, 8-9 (2016). A sword of Damocles also hovers above the heads of lawyers and accountants whose livelihoods turns on preparing SEC-filed documents. Under SEC Rule of Practice 102(e), the SEC may "deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice and opportunity for hearing in the matter" not just to have violated the securities laws, but also to not "possess the requisite qualifications to represent others" or to "be lacking in character or integrity or to have engaged in unethical or improper professional conduct"—with improper professional conduct by an accountant including negligent behavior. *See* 17 C.F.R. § 201.102.

[54] *See, e.g.,* Jennifer O'Hare, *The Use of the Corporate Monitor in SEC Enforcement Actions*, 1 Brook. J. Corp. Fin. & Com. L. 89, 106-108 (2006) (noting how use of corporate monitors can facilitate SEC overreach into matters of state corporate law and that SEC use of corporate monitorships to further policy goals could be viewed as an attempt by the agency to make "an 'end run' around the notice and comment requirements of the APA").

its 2018 settlement of its action against Elon Musk and Tesla, the SEC required Musk to submit his future company-related tweets to preclearing by a Tesla attorney (a form of prior restraint)[55]; the SEC also has a general policy not to permit a defendant to consent to an order or judgment that imposes a sanction unless the defendant agrees not to deny the allegations, both at the time of settlement and at any time in the future (a content-based speech restriction).[56]

The SEC can also use the threat of litigation to shape industry-wide behavior. Like safe harbors, no-action letters, and the various sources of SEC guidance discussed earlier, enforcement is a way of clarifying the meaning of law that permits the SEC to elide APA accountability measures that apply to rulemaking. The tendency of the SEC to push novel legal theories in litigation, or through the expedient of a Section 21(a) Report of Investigation, when regulation would seem a fairer approach has long been a subject of critique.[57] It recently came under intense fire, as the SEC under Chair Gensler took this approach as it concerns the question of when cryptocurrencies and other digital assets fall within the legal definition of a security.[58]

A final source of *de facto* power warrants mention. The SEC has significant oversight powers as it concerns self-regulatory organizations ("SROs"), which include important market players like national stock exchanges and the Financial Industry Regulatory Authority (FINRA).[59] For example, SROs must seek and obtain SEC approval of their rules, with approval turning on the SEC's application of vague criteria.[60] The importance of SEC favor to SROs may lead SROs (and the agents who run them, over whom the SEC has significant authority) to do things that the agency would like to do itself, but cannot because of limitations on its authority. One notable example where SEC influence over SROs may have been in play concerns listed companies that adopt dual class equity structures after their IPO. The SEC attempted to ban this directly via rulemaking, but the rule was invalidated by the Court of Appeals for the D.C. Circuit as outside

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[55] Musk later unsuccessfully sought to invalidate the settlement. *See* David Michaels & Rebecca Elliott, *Elon Musk Seeks to Terminate 2018 Fraud Settlement With SEC*, WALL ST. J. (March 8, 2022).

[56] 17 C.F.R. § 202.5(e). The Ninth Circuit recently rejected a facial First Amendment challenge to this rule. *Powell v. SEC*, 149 F.4th 1029 (9th Cir. 2025); *see also* Mike Blankenship & Regina Maze, *A Look at Recent Challenges to SEC's Settlement 'Gag Rule'*, LAW360.COM (Apr. 3, 2024).

[57] *See, e.g.,* Roberta Karmel, REGULATION BY PROSECUTION: THE SECURITIES & EXCHANGE COMMISSION VS. CORPORATE AMERICA 95 (1982) ("it seems to me highly unfair to permit a quasi-criminal proceeding like an SEC disciplinary action, pursuant to which a person can be deprived of his right to pursue his profession, to be a test case for the enunciation of regulatory policy"); James J. Park, *Karmel's Dissent: The SEC's Use and Occassional Missue of Section 21(a) Reports of Investigation*, 16 BROOK. J. CORP. FIN. & COM. L. 9 (2021).

[58] Blockchain Association, *Chair Gensler's SEC "Regulation by Enforcement" Regime Cost Crypto Industry More Than 400 Million Dollars (and Counting): Immeasurable Loss of Jobs, Innovation, and U.S. Tech Investment* (Oct. 31, 2024)), *available at* https://theblockchainassociation.org/chair-genslers-sec-regulation-by-enforcement-regime-cost-crypto-industry-more-than-400-million-dollars-and-counting/. For a more neutral discussion of this regulatory approach, see Chris Brummer, Yesha Yadav, and David Zaring, *Regulation by Enforcement*, 96 S. CAL. L. REV. 1297 (2024).

[59] 15 U.S.C. § 78s; 17 C.F.R. § 201.700.

[60] Securities Act Amendments of 1975, Pub. L. No. 94-29, sec. 16, § 19(b), 89 Stat. 147-48 (codified at 15 U.S.C. § 78s(b)); *see also Grayscale Invs., LLC v. SEC*, 82 F.4th 1239, 1242-1243 (D.C. Cir. 2023) (explaining that the SEC has not promulgated a regulation interpreting and implementing the broad standards laid out in the Exchange Act for securities exchange rules, instead "approv[ing] rule changes on a case-by-case basis").

the scope of the SEC's authority[61]; after the rule's invalidation, the NYSE, NASDAQ, and AMEX each changed their listing standards to mimic the SEC's preferred policy.[62]

## II. Situating the Question to be Addressed

This Article's goal is not to render normative judgments about the SEC's vast power over the capital markets, or any particular manifestation of that power. Instead, the question to be explored is why market actors have tended to acquiesce to that power for so long, and why there seems to be less acquiescence in recent years than in the past.

That there is "less acquiescence" is admittedly an imprecise claim, but one with empirical support. In a working paper, Joseph Grundfest and co-authors compile a dataset of challenges to SEC rules from 1934 to 2024 using Lexis, Bloomberg, and Westlaw searches of appellate and district court opinions.[63] Despite defining challenges broadly to include not only formal challenges to rulemaking under the APA (including claims that non-rules should have been subject to the APA's notice-and-comment process) but also challenges to SEC and SEC-approved SRO rules reviewed by courts in enforcement actions, the authors find only 120 cases over the 90 year time period.[64] Though small in quantity overall, they find that the number of challenges has increased with time, "with a significant jump in the 2010s and the 2020s on track to outpace substantially the prior decade."[65] Professor John Coates similarly documents a rise in challenges brought against the SEC beginning in the early 2010s and spiking during the tenure of Chairman Gary Gensler.[66] After demonstrating that the number of rules adopted by the SEC during Gensler's first 1008 days in office was comparable to the number of rules adopted during the first 1008 days of the last three SEC's chairmanships (Jay Clayton (2017-2020), Mary Jo White (2013-2017), and Mary Schapiro (2009-2012)), Coates reports that Gensler's rules have attracted substantially more litigation. Specifically, "3 percent of the Schapiro SEC non-technical rules attracted lawsuits, a rate that slightly more than doubled under White and Clayton," whereas "Gensler's SEC has been sued 21 percent of the time for its non-technical final rules."[67] The Committee on Capital Markets Regulation, a think tank led by Professor Emeritus Hal Scott, similarly documented a sharp increase in litigation directed at SEC rules adopted during Chair Gensler's tenure relative to the three preceding chairs (specifically looking at the first 1,277 days of each term),[68] although the

[61] *Business Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990).
[62] Congressional Research Service, Dual Class Stock: Background and Policy Debate (Dec. 8, 2021), *available at* https://www.congress.gov/crs_external_products/IF/PDF/IF11992/IF11992.1.pdf.
[63] Joseph A. Grundfest, Yuliya Guseva, Irena Hutton, and A.C. Pritchard, An Empirical Analysis of Judicial Review of SEC Rulemaking 36 (June 28, 2025) (manuscript on file with author).
[64] *Id*. at 37.
[65] *Id*. at 38.
[66] John Coates, *SEC Rulemaking and Litigation in Chair Gensler's First 1000 Days*, CLS Blue Sky Blog (Feb. 14, 2024), *available at* https://clsbluesky.law.columbia.edu/2024/02/14/sec-rulemaking-and-litigation-in-chair-genslers-first-1000-days/.
[67] *Id*.
[68] Committee on Capital Markets Regulation, Rapid Pace of SEC Rulemakings Continues & Litigation Ramps Up to Historic Highs (October 30, 2024), *available at* https://capmktsreg.org/wp-content/uploads/2024/10/CCMR-Pace-of-SEC-Rulemaking-Unprecedented-Litigation-10-30-24-FINAL.pdf.

Committee disagrees with Professor Coate's assertion that the pace of Gensler's rulemaking was on par with that of his predecessors.[69]

Challenges are not only higher in number, but seem different in nature, too. They include not just more challenges of the familiar sort, such as those asserting standard APA rulemaking violations (although these are well represented),[70] but also frontal attacks on aspects of the SEC's power that have largely gone unquestioned in the past.[71] Some of the challenges have failed,[72] others have succeeded.[73] Some remain ongoing, while others the SEC has simply stopped defending.[74] Assuming these cases signify a broader trend of increased legal combativeness by market actors against the SEC, what might explain it?

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[69] *See* Committee on Capital Markets Regulation, SEC CHAIR GENSLER'S RULEMAKING PACE: A COMPARISON OF METHODOLOGIES (Nov. 14, 2024) (finding that "Chair Gensler's pace of final rulemakings exceeded the prior Chairs by 36% on average" and explaining methodological differences from Coates), *available at* https://capmktsreg.org/.

[70] For a list of SEC rulemakings challenged in litigation from Mary Shapiro's chairmanship through October 15, 2024, see Committee on Capital Markets Regulation, RAPID PACE OF SEC RULEMAKINGS CONTINUES & LITIGATION RAMPS UP TO HISTORIC HIGHS (October 30, 2024), Appendix 2, *available at* https://capmktsreg.org/wp-content/uploads/2024/10/CCMR-Pace-of-SEC-Rulemaking-Unprecedented-Litigation-10-30-24-FINAL.pdf.

[71] *See* Coglianese, *supra* note 5 (drawing a distinction between traditional rulemaking disputes and other disputes between a market actor and regulator that create greater "disturbance" in the relationship). Examples of the latter sort include challenges to the constitutionality of the SEC's in-house court system (*see, e.g.*, *SEC v. Jarkesy*, 603 U.S. 109 (2024); *Lucia v. SEC*, 585 U.S. 237 (2018)), the legality of its remedial powers (*see, e.g.*, *Liu v. SEC*, 591 U.S. 71 (2020); *Sripetch v. SEC*, S.Ct. Docket No. 25-466, *cert. granted* (Jan. 9, 2026)), the constitutionality of long-standing SEC practices related to settlement (*see, e.g.*, *Powell v. SEC*, 149 F.4th 1029 (9th Cir. 2025)), and the constitutionality of the SEC-SRO relationship (*Alpine Securities Corporation v. FINRA*, et al., S.Ct Docket No. 24-904, *petition for cert.* (Feb 20, 2025)).

[72] *See, e.g.*, *Chamber of Commerce v. SEC*, 85 F.4th 760 (5th Cir. 2023) (rejecting First Amendment challenge to Share Repurchase Disclosure Modernization, 88 Fed. Reg. 36002 (June 1, 2023)); *Powell v. SEC*, 149 F.4th 1029 (9th Cir. 2025) (rejecting facial First Amendment challenge to SEC Rule 202.5(e)).

[73] *See, e.g.*, *Am. Sec. Ass'n v. SEC*, 147 F.4th 1264 (11th Cir. 2025) (finding the SEC's 2023 SEC Funding Order related to its Consolidated Audit Trail arbitrary and capricious); *Nat'l Ass'n of Priv. Fund Managers v. SEC*, 151 F.4th 252 (5th Cir. 2025) (successful challenge to Reporting of Securities Loans, 88 Fed. Reg. 75644 (Nov. 3, 2023), and Short Position and Short Activity Reporting by Institutional Investment Managers, 88 Fed. Reg. 75100 (Nov. 1, 2023), based on SEC's failure to consider and quantify cumulative economic impact); *Institutional S'holder Servs. v. SEC*, 142 F.4th 757 (D.C. Cir. 2025) (successful challenge to Exemptions From the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55,082 (Sept. 3, 2020), based on SEC's definition of "proxy solicitation" exceeding statutory authority); *Nat'l Ass'n of Priv. Fund Managers v. SEC*, 103 F.4th 1097 (5th Cir. 2024) (successful challenge to Private Fund Advisors; Documentation of Registered Investment Adviser Compliance Reviews, 88 Fed. Reg. 63206 (Aug. 23, 2023), as in excess of the SEC's statutory authority); *All. for Fair Bd. Recruitment v. SEC*, 125 F.4th 159 (5th Cir. 2025) (en banc) (vacating the SEC order approving Nasdaq's Board Diversity Proposal as outside SEC's statutory authority); *Chamber of Commerce v. SEC*, 85 F.4th 760 (5th Cir. 2023) (successful challenge to Share Repurchase Disclosure Modernization, 88 Fed. Reg. 36002 (June 1, 2023), for failure to demonstrate reasoned decision making or substantiate costs and benefits).

[74] For example, the SEC has stopped defending its Climate Disclosure Rule (*see* SEC, Press Release: SEC Votes to End Defense of Climate Disclosure Rules (March 27, 2025), *available at* https://www.sec.gov/newsroom/press-releases/2025-58), with related litigation being held in abeyance as a result (*see State of Iowa, et al v. SEC*, Docket No. 24-01522 (8th Cir.)). The SEC under Chair Atkins also dropped most pending lawsuits brought against market actors in the crypto space, mooting the numerous challenges to SEC authority asserted by the defendants in those cases. Ben Protess, et al., *The S.E.C. Was Tough on Crypto. It Pulled Back After Trump Returned to Office*, N.Y. TIMES (Dec. 14, 2025).

Past scholarship has sought to explain SEC behavior using a variety of methodologies.[75] Beginning in the 1980s, the public choice lens became particularly popular.[76] This approach is adapted from the work of Stigler and Peltzman and focuses on the influence of market actors, presumed to act rationally and in their own self-interest, on presumed rational and self-interested regulators in a "political marketplace" where regulatory products are bought and sold.[77] Market actors are presumed to form interest groups, with the groups that supply the most support to regulators reaping the greatest regulatory benefits. Certain groups will be more effective at delivering support, and hence influencing regulatory products, due to, *inter alia*, resource advantages and better ability to mobilize. According to this view, changes in SEC policy are explained not by the public interest but by the changing strength of competing, well-organized special interests.[78] In the context of SEC regulation, repeat-player financial market intermediaries—including law firms, investment banks, and auditors—have been presumed to be the most effective "rent-seekers" and hence the largest beneficiaries of SEC regulation.[79] Investors and companies that interact with the SEC primarily to raise capital ("issuers"), by contrast, are more dispersed and thus assumed less effective at lobbying for regulation that benefits them. The largest issuers, however, are presumed to be more effective at mobilizing and thus to fare better than smaller issuers and new entrants to the public capital markets. Moreover, regardless of influence, large, well-established issuers are "better able to absorb the increased costs of regulation than are smaller, upstart firms," and thus may "view regulation as a means of protecting their market position by relying on regulatory costs to deter these smaller competitors from entering the market or going public."[80]

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[75] *See, e.g.*, Langevoort, *supra* note 6 at 531 (taking the lens of bureaucratic theory and explaining that the regulatory approaches the SEC has adopted "limit[] the opportunity for *post hoc* criticism based on the perception that, as a result of the particular line that it drew, the agency failed to prevent, if not encouraged, some activity that turned out to be socially harmful"); Karmel, *supra* note 57 at 15-98 (providing a political and historical account of changes in SEC regulation). For an overview of prominent theories of regulation, see Jodi L. Short, *The politics of regulatory enforcement and compliance: Theorizing and operationalizing political influences*, 15 REGULATION & GOVERNANCE 653, 655-659 (2021).

[76] *See, e.g.*, Langevoort, *supra* note 6 at 528 (referring to public choice as the theory that has gained the "most currency" in explaining SEC behavior).

[77] *See* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976).

[78] For early examples of this analytic approach, see Susan M. Phillips & J. Richard Zecher, THE SEC AND THE PUBLIC INTEREST (1981); Gregg Jarrell, *Change at the Exchange: The Causes and Effects of Deregulation*, 27 J.L. & ECON. 273 (1984); Jonathan R. Macey & David D. Haddock, *Shirking at the SEC: The Failure of the National Market System*, 1985 U. ILL. L. REV. 315, 316 (1985).

[79] *See, e.g.*, Phillips & Zecher, *supra* note 78 at 51 (arguing that the principal beneficiaries of the mandatory disclosure regime are those who profit from the work involved in drafting the necessary reports and financial professionals like securities analysts whose work mandatory disclosure subsidizes); Paul G. Mahoney, *The Political Economy of the Securities Act of 1933*, 30 J. LEG. STUD. 1, 31 (2001) (presenting empirical evidence that the Securities Act benefited "investment banks, particularly high-prestige investment banks, and likely raised costs to issuers and investors").

[80] Zachary Gubler, *Public Choice Theory and the Private Securities Market*, 91 N.C. L. REV. 745, 770 (2013); *see also id*. at 788 (observing that the prevailing equilibrium at the SEC has in the past been "dependent upon interests within the securities industry that benefit from increased disclosure regulation, including securities analysts and lawyers" but also "upon larger, more established companies that welcome higher regulatory costs" that operate to "protect the large companies' market position by erecting real barriers to entry for new, upstart firms with little or

Notably, the regulatory techniques outlined in Part I tend to increase the value of the services financial market intermediaries provide to their clients, and they have been widely recognized to augment opportunities for interest group influence. Susan Morse has warned that "[i]f public choice theory is correct that bureaucrats are captured by interest-group influence, then we should expect safe harbors to bring out the most extreme forms of rent-seeking cronyism," noting that this concern is "particularly strong if the safe harbors develop from informal and incremental guidance rather than full-fledged and fully public notice-and-comment rulemaking."[81] Donna Nagy has warned that "policymaking through the no-action letter process often involves a private negotiation between the SEC staff and the requestor (frequently a professional association or industry group lobbying on its membership's behalf)," substantially increasing "the likelihood of agency capture and special interest decisionmaking."[82] Professor Platt has observed that the development of the SEC's comment letter process gave "private lawyers, accountants, and bankers a seat at the rulemaking table—involving them in the development of disclosure policies" and provided the elite of this group "privileged access and information that they could sell at a premium to clients."[83] More generally, Cary Coglianese and co-authors warn that many of the regulatory techniques discussed in Part I—which fall under the authors' broad label of "unrules"—can "create incentives for undue influence by interest groups."[84]

Like the public choice literature analyzing the SEC's regulatory production process, the approach taken here assumes rational market actors seeking to maximize their utility. The focus of analysis, however, is on the choice of individual market actors to legally challenge (or not) SEC authority, rather than the combined, interactive influence of those actors on the regulatory products produced by the SEC. Those whose preferences are not well served by the equilibrium position of the SEC can go to court to challenge the SEC if they have a colorable legal basis to do so; there is an ever-present possibility of disrupting the equilibrium not just through market driven changes in influence over the agency itself, but also through legal challenge. To answer the question why we might be seeing more market actors bringing legal challenges in recent years than in the past requires we first think about the factors that would influence a rational market actor's decision to play the role of legal disruptor.

no effect on the large companies' bottom lines"); Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty*, 15 CARDOZO L. REV. 909, 914 (1994) ("regulation can protect existing firms by creating barriers to entry").

[81] Morse*, Safe Harbors, Sure Shipwrecks*, *supra* note 20 at 1428-29; *see also* Saul Levmore, *Interest Groups and the Problem with Incrementalism*, 158 U. PA. L. REV. 815, 822 (2010) (explaining how narrow interest groups benefit from incrementalist approaches to law development).

[82] Nagy, *supra* note 23 at 959

[83] Platt, *supra* note 2 at 1175; *see also id.* at 1180 (observing that the comment letter process "created an ongoing collaborative partnership between the agency staff charged with reviewing the disclosures and the elite 'gatekeeping' professions (lawyers, accountants, investment bankers) who helped businesses draft them"); *id*. at 1181 ("Any issuer would naturally prefer to hire someone familiar with the SEC's secretive process and would be willing to pay more for the privilege of doing so.").

[84] Coglianese, et al., *supra* note 21 at 918.

There is, of course, a feedback loop. Litigation manifests *ex post*, but it can be contemplated *ex ante*.[85] The equilibrium regulatory position of the SEC on any particular issue would therefore logically account for legal vulnerability.[86] *Ex ante* concern about litigation risk could affect regulatory products in a variety of ways. Most obviously, it could affect the substantive content of a rule, resulting in it being drawn narrower than it otherwise would. It could also affect the way in which the economic analysis supporting a rule is conducted, or the extent to which that analysis is discussed in the rule's proposing or final release.[87] Litigation risk could also incentivize agencies to avoid APA rulemaking procedures altogether, by invoking exemptions or opting to regulate using non-legislative rules.[88] Indeed, conjecture that this is happening has fueled debate over the "ossification" of rulemaking.[89] That there will be consideration of litigation risk in the regulatory production process does not mean, however, that the regulatory products that result from that process will be completely free of legal vulnerability. Legal vulnerability exists on a spectrum, and whatever their motivations regulators will need to balance legal risk and other costs against the benefits they value in crafting their policies.[90]

Instead of considering how interest group bargaining *ex ante* leads to the production of particular regulatory products, this Article takes an *ex post* view and considers the perspective of individual market actors burdened by some regulatory action. Such actors could simply capitulate to the action and incur the cost of the burden through compliance. But alternatives exist. Specifically, market actors could seek to reduce or eliminate the burden through: (1) litigation; (2) lobbying; or (3) avoidance (in the sense that a market actor could change its behavior to avoid the burden, such as by altering plans for capital raising or changing transaction design[91]). When deciding between these paths, only those with expected benefits in excess of costs would be considered, and among those the path (or combination of paths) with the highest expected net benefits would be chosen. The critical questions to be explored concern the first option of resorting to litigation: What are the costs and benefits to a rational market actor of taking an aggressive legal

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[85] For a game-theoretical analysis of the relationship between litigation risk and lobbying outcomes, see Figueiredo & Figueiredo, Jr., *supra* note 5.

[86] After all, dominant interest groups would discount the value of regulatory products that can easily be destroyed through litigation, and repeated losses in court might invite discipline by the regulator's legislative overseers, which in turn could reduce the political slack agencies require to strike deals with rent-seekers. Under a public interest or behavioral model of regulation, *ex ante* consideration of litigation risk is also to be expected.

[87] For an empirical exploration of the relationship between the quality of a rule's regulatory impact analysis, the agency's explanation of how the analysis influenced its rulemaking decisions, and whether the rule was overturned when challenged in court, see Carrigan C, Ellig J, Xie Z, *Regulatory Impact Analysis and Litigation Risk*, 16 JOURNAL OF BENEFIT-COST ANALYSIS 3 (2025).

[88] *See* Raso, *supra* note 27 (exploring the relationship between litigation risk and agencies' invocation of statutory exemptions to rulemaking procedures); Grundfest, et al., *supra* note 63 at 3 (observing that if the estimated costs associated with judicial rejection are too high, the SEC might "either lower its overall regulatory involvement or resort to alternatives to rulemaking such as enforcement actions and policy interpretation and guidance").

[89] *See generally* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Proces*s, 41 DUKE L. J. 1385, 1412 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995).

[90] Moreover, the legal vulnerability of regulatory products can change over time, sometimes in unexpected ways.

[91] Amanda M. Rose, *SPAC Mergers, IPOs, and the PSLRA's Safe Harbor: Unpacking Claims of Regulatory Arbitrage*, 64 WM. & MARY L. REV. 1757, 1765 (2023) (observing, that notwithstanding the formally mandatory nature of the federal securities laws, "in reality there is a large degree of optionality built in because companies can adjust their circumstances in a variety of ways to avoid the reach of particular rules").

stance against the SEC, and have the magnitude of those costs and benefits shifted over time in a manner that might help explain the increased level of litigiousness in recent years?

## III. To Sue or Not to Sue?

When agencies take actions that impose costs on market actors, market actors have a choice: bring a legal challenge to the agency's exertion of power, or do not. A rational market actor would decide to raise a challenge only if (1) the expected benefits of doing so outweigh the costs, and (2) the expected net benefits of mounting a legal challenge exceed the expected net benefits of alternative responses (*i.e.*, lobbying and avoidance). This part identifies, at a high level of abstraction, the variables that would be included on each side of the cost-benefit ledger by a market actor at step 1. It first considers how a fully informed principal would assess the variables. It then considers how the assessment would differ in a friction-filled world where imperfectly informed principals rely on agents for advice and assistance. The next Part examines how the magnitude of these costs and benefits have shifted in relation to the SEC in recent years, giving rise to insights about the future that are discussed in the Conclusion.

### A. *Benefits Assessment*

The expected benefit to a market actor of bringing a legal challenge against its regulator would be a product of the probability of achieving victory and the expected value to the market actor of victory. It is also possible that the act of litigating, regardless of outcome, might have beneficial effects if it influences in a positive way the future behavior of the regulator toward the litigant by demonstrating the litigant's willingness to fight. But as discussed in the next part, market actors are more likely to expect negative reputational consequences from suing the SEC. This possibility is therefore ignored in order to simplify exposition.[92]

#### 1. Value of Victory

The value of victory is treated as equal to the costs that the market actor expects to avoid by victory—the costs of the regulatory burdens successful litigation would relieve the market actor from bearing.[93] Two observations about the value of victory, thus conceived, are noteworthy. First, if agencies become more or less sensitive to the costs their actions impose on market actors, the attractiveness of litigation would—all else equal—also shift. This is an intuitive result: actions that impose greater costs create greater benefits when overturned and thus (again, all else equal) should invite more litigation. Second, an assessment of the expected value of the future costs avoided by victory would take into account the agency's likely response to defeat. This, too, is intuitive: if the agency is expected to pursue the same result through other means if it loses in court, or if an agency loss is expected to prompt validating legislative intervention, the costs avoided through victory would be short-lived.

It bears emphasis that different market actors will not make uniform assessments of the expected value of victory, because agency actions will not impose costs on regulated parties in

[92] For simplicity, the time value of money is also generally ignored.

[93] The baseline for calculating costs is a capitulation/compliance scenario, ignoring the possible impact of lobbying or avoidance.

equal fashion. If the public choice literature focused on SEC rulemaking is to be credited, as a general matter smaller issuers and new-entrants are likely to be most burdened by SEC rules, with larger issuers and repeat-player financial market intermediaries relatively less burdened. This is a product of the latter groups' assumed superior ability to rent-seek. These groups would for similar reasons predictably assign less value to victories overturning regulatory techniques that rely on SEC discretion, like those outlined in Part I: the costs of those techniques will naturally be less the more a would-be litigant believes it can influence the SEC's exercise of its discretion in matters involving it.[94] Moreover, as previously noted these techniques provide unique benefits to certain financial market intermediaries, by increasing the value of the services they provide.[95] It should further be noted that regulatory costs that decrease with scale naturally favor large over small firms.[96]

2. Probability of Victory

The probability of victory will depend on the legal vulnerability of the regulatory action to be challenged. The legal vulnerability of a regulator's actions may shift systematically over time. One reason such a shift could occur is if the regulator starts systematically taking more or less legally aggressive positions regarding the scope of its authority. Another reason such a shift could occur is if the regulator becomes systematically more or less sensitive to costs in the rulemaking process—either in actuality, by adopting more or less costly rules, or in how thoroughly it considers those costs or reflects its consideration of those costs in the written record—because this will affect the likelihood of a court finding its rules arbitrary and capricious.[97] (Less actual sensitivity to costs will also serve to increase the value of victory, as noted above.) Another reason the probability of success might shift systematically is if judicial precedent evolves in ways more or less tolerant of agency power, or if judges shift how they apply existing precedent in ways more or less tolerant of agency power.

B. *Costs Assessment*

A rational market actor determining whether to legally challenge its regulator would consider the standard costs associated with any decision to initiate litigation—these include direct costs, like legal fees, as well as potential business losses stemming from, *inter alia*, the distraction of management, bad publicity, and possible disruptions to business transactions. To these standard costs, other meaningful costs would be added.

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[94] *See supra* notes 83-84 and accompanying text.

[95] *See supra* notes 79-84 and accompanying text; *see also* Langevoort, *supra* note 6 at 531 (observing that "[l]awyers in private practice specializing in securities law—peers of the Commission's principal decisionmakers, as well (often enough) as their once and future employers—are direct beneficiaries" of what Homer Kripke has called the SEC's regulatory "theology": "an impenetrable admixture of highly technical securities law and unwritten lore, accessible only to the experts inside and outside of the agency").

[96] This is the logic behind the Regulatory Flexibility Act of 1980, which requires federal agencies to assess the impact of proposed regulations on small entities. *See* 5 U.S.C. §§ 601-612. Although the scholarly consensus is that the federal securities laws generally favor larger issues, there are numerous examples of targeted relief given to small issuers.

[97] Jerry Ellig, BETTER ECONOMIC ANALYSIS CAN REDUCE REGULATORS' LITIGATION RISKS (Dec. 2019), *available at* https://www.brookings.edu.

For example, a market actor who challenges its regulator risks losing the regulator's favor in future interactions—what this Article will refer to as "reputational costs."[98] To appreciate this category of costs in the context of the SEC requires a deep institutional understanding of the nature of the SEC's *de facto* power. As discussed in Part I, the SEC possesses tremendous discretion that can be used to help, or hinder, market actors. If a market actor believes that antagonizing the SEC through litigation risks negatively influencing how the agency will deploy discretion against it in the future, this category of costs could weigh quite heavy. Just how heavy reputational costs will weigh in a market actor's decision-making process will naturally turn on: (a) the value to the market actor of future opportunities that the regulator has the discretion to impede or facilitate; and (b) the market actor's perception of the likelihood that the regulator would choose in the future to exercise its discretion in a retributive way.

The discussion thus far has envisioned a market actor making a choice to initiate litigation with its regulator. A market actor might also find itself a defendant in an enforcement action brought by its regulator, forcing upon it the choice of what sort of defenses to assert. For example, should the market actor merely dispute the facts or the application of the law to the facts, or should it go further and challenge the very validity of the law it is asserted to have violated, or of the forum, or of the remedy sought? In this context, a rational market actor would consider as a reputational cost the possible negative implications of raising aggressive defenses on settlement dynamics.

A market actor who challenges their regulator also risks incurring what this Article will call "competitive costs," because successful litigation challenging regulatory authority will typically benefit other similarly situated market actors.[99] Litigating in this way presents classic collective action and free-rider problems.[100] How heavy competitive costs weigh will thus be influenced by the ability of market actors affected by the regulatory action to overcome these problems through coordinated efforts. The ability of market actors to do so will be affected by the same type of factors that affect their ability to effectively rent-seek.[101] When it comes to the SEC, large well-established firms and financial market intermediaries would predictably have an easier time coordinating efforts than smaller firms, new entrants, and other more dispersed market actors.[102] Notably, collective action not only ensures that the costs of litigating, like its benefits,

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[98] *See* Coglianese, *supra* note 5.

[99] Grundfest, et al., *supra* note 63 at 16 (observing that "rule-related litigation produces considerable externalities for numerous market participants in addition to the parties challenging SEC rules or enforcement actions").

[100] *See* Mancur Olson, THE LOGIC OF COLLECTIVE ACTION (2d ed. 1971).

[101] *Cf.* Frank Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355, 360-364 (1999) (observing that litigation "suffers the same Olsonian special interest problems as political action" and surveying literature in this vien).

[102] The ability of large firms and financial market intermediaries to effectively coordinate to overcome these costs is consistent with the observation that in litigation with the SEC large companies' interests are often represented (or supported in amicus briefs) by the Chamber of Commerce and Business Roundtable, and the interests of broker-dealers, investment banks, and asset managers by the Securities Industry and Financial Markets Association ("SIFMA"). The Business Roundtable's members are the CEOs of the largest U.S. companies. *See* https://www.businessroundtable.org/about-us. The majority of the Chamber's members are small firms, but "larger firms provide more of the organization's revenues (because dues are payable on a sliding scale) and have dominated its board of directors." Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 Yale L.J. 1521, 1564 n.120 (2005). SIFMA is the self-proclaimed "voice of the nation's securities industry,

will be shared amongst competitors, it may also reduce those costs in the aggregate insofar as collective action suppresses the likelihood of retribution, lowering reputational costs.

### C. *Frictions*

Litigation outcomes are risky, not certain, and they are likely far riskier than the outcomes of either lobbying or avoidance. Under an assumption of risk neutrality, this can be ignored in the analysis. But while it is reasonable to assume that firms' diversified equity holders have neutral risk preferences *vis-a-vis* litigation choices by the firms in their portfolios, the individual agents who run those firms are likely to be risk averse, as they will typically have undiversified human and financial capital investments in the firms they work for. Firm managers' incentives are misaligned with diversified equity holders not just as it concerns risk preferences; managers also share differently in the firms' returns, typically capturing a smaller fraction of the upside relative to the downside than other equity holders. All else equal, suing will therefore be less attractive from firm managers' perspective than from the perspective of diversified equity holders (as will asserting aggressive defenses versus settling when the firm is a defendant in an enforcement action). Given the complexity of the decision whether it is advantageous to legally challenge one's regulator, firm managers likely have ample room to substitute their preferences for those of shareholders. This may lead to situations where litigation strategies are not pursued, even though their pursuit would produce net benefits to the firm's residual claimants that outweigh the net benefits of alternative approaches.

Internal agency costs at the firm level are not the only, or even the most important, friction that may bias decisions by firms to litigate against their regulator. The same complexity that likely makes it difficult for shareholders to evaluate and monitor the wisdom of firm managers' litigation decisions likely makes it difficult for even faithful firm managers to engage in the analysis outlined above without assistance from others. Firm managers seeking to assess strategy related to the SEC rely heavily on their securities lawyers, investment bankers, and auditors. The less experienced firm management is with the SEC, the more reliant the firm will be on these advisors. Management at firms that interact with the SEC regularly are likely to have better information than management at firms that only episodically deal with the SEC, which would include smaller companies and new entrants to the public capital markets. According to public choice accounts, the latter, more reliant firms are also likely to be relatively more disadvantaged by SEC actions.

This group is also likely to have interests that diverge considerably from the interests of the financial market intermediaries upon whom they rely. The reputational costs of being associated with a client taking an adversarial position against the SEC are likely to be relatively large for intermediaries, because of the repeated and relational nature of their interactions with the SEC.[103] Those costs are also likely to be relatively larger for these firms' most lucrative clients (large public companies who interact with the SEC regularly). Not only will reputational costs likely be relatively higher, but the value of victory may be relatively lower—one does not have to

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bringing together the shared interests of hundreds of broker-dealers, investment banks, and asset managers." *See* https://www.sifma.org/about.

[103] *See also supra* notes 51-53 and accompanying text (discussing SEC Rule of Practice 102(e) as well as the SEC's authority to impose bar orders).

accept public choice accounts of how regulatory products are made to accept that the complicated and opaque ways that the SEC regulates the capital markets enhance the value of the services financial market intermediaries provide, and that large firms are less burdened by regulatory costs that decrease with scale relative to smaller firms and new entrants.

Thus, financial market intermediaries not only stand in a position to exploit information asymmetries with their most reliant clients to discourage legal challenges that may be in those clients' best interests, they also have structural incentives to do so.[104] Many have observed that financial market intermediaries, as well as large public companies, have outsized influence on the production of the SEC's regulatory products, but the point here is subtly different: the influence of these advisors (and indirectly their large public company clients, whom they presumably wish to please) may also serve to dampen the likelihood of legal disruption, leading to an endurance in the regulatory products produced (along with acceptance of regulatory approaches that place a premium on regulatory discretion).

One upshot of the above discussion is that, all else equal, systematic changes in the level of internal agency costs at firms, or in the reliance of firms on financial market intermediaries, might affect the amount of litigation directed by market actors at the SEC. Firms are not the only ones who stand in a position to assert legal challenges against the SEC, however. Individuals do, as well. The most common scenario in which an individual would consider challenging SEC authority is as a defendant in an enforcement action. Such individuals do not face the internal agency costs that may affect firm decision making, and they will typically be highly motivated to try to overcome information asymmetries in order to understand their defensive options. Moreover, the white-collar defense specialists they tend to hire may be less biased against aggressively challenging SEC authority than the members of the securities law bar who typically represent firms.

## IV. SHIFTING VARIABLES

With that basic framework in place, we can begin to assess whether the magnitude of the costs and benefits of suing the SEC have shifted in ways that might explain the recent uptick in litigation against the agency. Before embarking on this adventure, however, a few caveats are in order. First, the aim here is to explain, not to judge. This Article takes no position on how much litigation is ideal. The analysis assumes market actors, driven by their private interests and the private interests of their agents, and seeks to understand changes in those market actors' observed behavior toward the SEC. To judge whether the "right" amount of litigation exists now or in the past would require making many highly contestable assumptions about such things as the social value of the SEC's regulatory choices and the social desirability of litigation relative to other possible responses to government overreach. Second, the goal of the analysis is to gain insight into the broad forces that may have affected the level of litigation the SEC has faced in recent years. No attempt is made to explain individual litigation choices, each of which will of course be shaped by its own unique facts and circumstances. The focus is the forest, not the trees—with the

[104] For an in depth consideration of how the use of intermediaries in a variety of contexts may affect the way safe harbors operate in practice, see *Morse*, *The Truth About Safe Harbors*, *supra* note 20 at 777-792.

typical tradeoffs associated with such an approach. Finally, it should be recalled that ultimately a decision to litigate depends on a market actor not only determining that the benefits of doing so exceed the costs, but also that the net benefits of doing so exceed the net benefits of the alternatives of lobbying and avoidance. Some of the factors that affect the attractiveness of suing will also affect the attractiveness of the other paths, making drawing predictions about future litigation levels difficult. Doing so is further complicated by the dynamic feedback loop between litigation risk and regulatory behavior discussed in Part II. These are topics that will be returned to in the Conclusion.

A. *Higher Benefits*

There are strong reasons to believe that both the value and probability of successfully challenging SEC authority have systematically increased in recent years.

1. Value of Victory

Recall that the value of victory is equal to the costs successful litigation would allow the market actor to avoid. The costs imposed on market actors by SEC activities have likely systematically increased in time with the observed upticks in legal challenges against the agency in the 2010s and again in the 2020s.[105] This Article makes no attempt to prove this claim empirically—accurately measuring regulatory costs is exceedingly challenging.[106] But few who study the SEC or operate in markets under its supervision would seriously dispute it.[107] In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd Frank Act") became law; it is widely viewed as one of the costliest financial regulation statutes enacted in U.S. history.[108] Among other things, this major piece of legislation expanded the scope of the SEC's enforcement authority in significant ways and required the SEC to impose new burdens on market actors, in some cases on firms that had previously escaped SEC regulation almost entirely.[109] Chair Gensler's tenure began shortly after the 2020 election, marking another uptick in observed litigation challenging SEC actions. No knowledgeable observer would dispute that the actions the SEC took, or threatened to take, during Chair Gensler's tenure imposed, or threatened to impose, heightened costs on market actors.[110]

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[105] *See supra* notes 63-69 and accompanying text.

[106] *See generally* John C. Coates, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882 (2015); Jeff Gordon, *The Empty Call for Benefit-Cost Analysis in Financial Regulation*, 43 J. LEGAL STUD. 351 (2014). For a creative recent study focused on regulatory costs writ large, not limited to the SEC, see Francesco Trebbi, Francesco, Miao Ben Zhang, and Michael Simkovic, The Cost of Regulatory Compliance in the United States (January 15, 2023), *available at* https://ssrn.com/abstract=4331146.

[107] By contrast, there would be much disagreement over the question whether the social benefits of SEC regulation have risen sufficiently to justify these costs, but that is not relevant to the present analysis.

[108] Pub. L. No. 111-203.

[109] *See, e.g.*, Benjamin Bates, The Cost of Private Fund Regulation 8-16 (November 28, 2023), *available at* https://ssrn.com/abstract=4647209 (explaining how the Dodd Frank Act extended the SEC's reach over the private funds industry).

[110] One report, published by a center-right think tank, estimated that the SEC's rulemaking under Chair Gensler as of September 2023 "added at least $6 billion in increased annualized costs to industry and an additional 6 million compliance hours." *See* Thomas Kingsley, OVERREACH AT THE SEC (Sept. 26, 2023), *available at*

With respect to the Dodd Frank Act's impact, provisions in that statute expanding the SEC's enforcement authority in administrative proceedings are particularly noteworthy. For the first fifty years after the securities laws were adopted, the SEC had very limited authority in administrative proceedings. It could only pursue non-monetary remedies in the forum, and only against certain regulated entities, their members, and securities professionals like attorneys and accountants that practiced before the agency.[111] Although Congress expanded the SEC's enforcement authority in important ways in 1990 and again in 2002, it was not until the Dodd Frank Act that the SEC was given authority to pursue civil penalties against all alleged securities law violators, regardless of status, in administrative proceedings or federal court, at its choosing.[112]

The SEC's enforcement division embraced this new authority to seek penalties in administrative proceedings enthusiastically, much to the dismay of those who found themselves defendants in the agency's administrative tribunal (or feared they someday might).[113] Defendants in SEC enforcement actions face significant disadvantages when the action is brought administratively versus in federal court. For example, neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence apply; there is no right to a jury trial; far less time is given to prepare a defense; and the matter is presided over in the first instance by an SEC-appointed ALJ rather than an Article III judge.[114] Some reports indicated that the SEC's win rate administratively outstripped its win rate in federal court, fueling fears of bias,[115] and commentators accused the agency of using administrative proceedings to advance novel theories of liability that federal courts might not countenance and—given the pressure market actors face to settle when threatened with large penalties—would likely never get the chance to review.[116] These developments clearly increased the perceived costs associated with SEC enforcement discretion, and market actors, the securities law bar, and even renowned judges spoke out forcefully against them.[117] Defendants also began to raise constitutional defenses attacking the legitimacy of SEC administrative

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https://www.americanactionforum.org/insight/overreach-at-the-sec/. *See also* Committee on Capital Markets Regulation, *supra* note 70.

[111] For a discussion of this history, see Thomas Glassman, *Ice Skating Up Hill: Constitutional Challenges to SEC Administrative Proceedings*, 16 J. BUS. & SECS. LAW 47, 50-52 (2015). The Dodd Frank Act also granted "the SEC authority to impose so-called 'collateral bars'—i.e., bans on associating across the entire securities industry," a "form of penalty [that] is extremely severe, and [] has been described by some courts as 'the securities industry equivalent of capital punishment.'" Platt, *supra* note 53 at 7.

[112] *Id.*

[113] Platt, *supra* note 53 at 8-9.

[114] For a thorough discussion of the criticisms of administrative proceedings relative to federal court, see Joseph A. Grundfest, *Fair or Foul?: SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85 FORDHAM L. REV. 1143, 1156-67 (2016).

[115] *But see id.* at 1183 (urging "extreme caution in interpreting win-loss data and settlement statistics in the debate over the fairness of the Commission's administrative proceedings").

[116] Platt, *supra* note 53 at 25-29.

[117] *See, e.g.*, Hazel Bradford, *Firms oppose SEC's internal enforcement process*, Pensions & Investments (March 19, 2015), *available at* https://www.pionline.com/article/20150309; Keystone Address of Jed S. Rakoff at the PLI Securities Regulation Institute, Is the S.E.C. Becoming a Law Unto Itself? (Nov. 5, 2014), *available at* https://www.akingump.com/a/web/37251/Sec.Reg.Inst.final.pdf.

proceedings—including, but not limited to, arguments targeted at the administrative penalties Dodd Frank authorized.[118]

In addition to expanding the SEC's enforcement authority, the Dodd-Frank Act also imposed on the SEC the obligation to enact nearly 100 new rules, which it took the SEC the next decade to (almost) complete—spanning the tenures of Chairs Shapiro, White and Clayton.[119] The rules adopted during the tenure of these chairs also attracted legal challenges, but nothing wildly out of the ordinary, and nothing that compares to the litigation brought against Chair Gensler's rules.[120] One distinction is that Gensler's rules were mostly voluntary, as opposed to the rules of his predecessors which were mostly mandated by the Dodd Frank Act.[121] This suggests a greater eagerness to regulate, which is also reflected in the number and sheer scope of rulemakings during Chair Gensler's tenure. One commentator colorfully described Chair Gensler as "us[ing] the SEC to embark on the single most transformative agenda seen in the agency's history, reaching into every section of the economy and shaking it, seemingly just because he can."[122] While inflated to be sure, this statement is indicative of the sentiment that prevailed in many corners of the capital markets during Chair Gensler's tenure, and it is undoubtedly true that the rules adopted during that time threatened to impose significant new costs on many segments of the economy.

Notably, Gensler-era rules threatened to place heavy burdens on concentrated, well-organized groups that in the past may have had greater influence on the SEC's regulatory products.[123] If indeed their influence over the SEC waned during the Gensler years, it might not

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[118] *See* Platt, *supra* note 53 at 11 (observing that the "post-Dodd-Frank shift toward [administrative proceedings (APs)] has provoked backlash in the regulated industry and by its attorneys," leading "[t]argets of SEC prosecutions [to] file[] a series of constitutional challenges, attacking procedural features of APs"—including "broad assaults on familiar features of administrative adjudication like the use of ALJs, the comingling of prosecutorial and adjudicative functions, the availability of monetary penalties and other sanctions, and the use of procedures less protective than the Federal Rules of Civil Procedure"); Stephanie Russell-Kraft, *SEC's Admin Court Draws Fire From Every Angle*, LAW360 (March 2, 2015) *available at* http://www.law360.com/articles/625254/sec-s-admin-court-draws-fire-from-every-angle ("As the U.S. Securities and Exchange Commission shows no signs of letting up on its use of administrative proceedings, defendants around the country are taking their fight against the forum to federal court, using every strategy in the book in the hopes that, eventually, a judge might bite."); Glassman, *supra* note 111, at 63-78 (discussing cases); *cf.* David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155 (2016) (dismissing arguments against the constitutionality of the SEC's use of administrative adjudication). For an update on these challenges, *see* Uyeda & Marinaro, *supra* note 50 at 23-34.

[119] For a list of SEC rulemakings mandated by Dodd Frank that have been completed or are in progress, visit https://www.sec.gov/rules-regulations/implementing-dodd-frank-wall-street-reform-consumer-protection-act.

[120] *See supra* note 70 at *id*.

[121] *See id.* at 1 (reporting that, as of October 2024, "fully 82% of Gensler rulemakings were not statutorily mandated," with this incidence of voluntary rulemaking exceeding that of Gensler's three predecessors by 48% on average).

[122] Kingsley, *supra* note 110 at 6.

[123] *See infra* Part IV.B. For a visual depiction of the groups affected, see Committee on Capital Markets Regulation, *supra* note 70 at Appendix 1 (chart titled "Regulatory Incidence of SEC Proposed & Final Rulemakings (Gensler Chairmanship, Apr. 17, 2021 – Oct. 15, 2024)"); *see also id*. at 2 (explaining that the chart "depicts the market participants most directly and significantly affected by each rulemaking action, including public companies, audit firms, investment companies, broker-dealers, investment advisers, security-based swap dealers, exchanges, [and] custodians"); Declan Harty, *Gensler casts SEC agenda as attack on industry concentration*, POLITICOPRO (Oct. 24, 2022) (reporting that Chair Gensler signaled "that the agency will crack down on dominant exchanges, market makers and asset managers in stocks, cryptocurrency and other financial products"), *available at* https://subscriber.politicopro.com/article/2022/10/gensler-doubles-down-on-competition-focus-00063146.

only manifest in the promulgation of rules these groups disfavored, but also cause these groups to alter their perspective on the discretionary regulatory techniques discussed in Part I. As previously explained, the perceived costs of those techniques will depend on how much a market actor believes it can influence the SEC's exercise of its discretion in matters involving it.[124] Notably, during Chair Gensler's tenure the SEC relied heavily on one of these techniques, "regulation by enforcement," in how it approached the crypto space.[125] This triggered significant criticism of the regulatory approach—criticisms that likely resonated broadly given pre-existing concerns about the agency's enforcement choices in the wake of the Dodd Frank Act's expansion of the SEC's powers, discussed above.

There is another trend that may have caused market actors to perceive the regulatory techniques described in Part I as more costly in recent years than in the past. Market actors like predictability and consistency because it aids in business planning.[126] If the SEC exercises its swell of *de facto* power in a predictable and consistent way, geared toward the SEC's steady mission of investor protection and capital formation, market actors might view the techniques outlined in Part I as satisfactory ways for the SEC to operate—recall the important function that safe harbors, guidance, no-action letters and exemptive relief play in the face of the high-stakes legal uncertainty that pervades the securities laws. If, by contrast, the SEC is perceived to use that power in less consistent or predictable ways, tethered more to shifting political tides than the SEC's core purposes, those same techniques would be perceived as more costly. There are strong reasons to believe that certainty and predictability at the SEC have waned in recent years. Significant guidance flip flops have become commonplace. One example concerns the conditions under which shareholder proposals may be excluded pursuant to Rule 14a-8. During Chair Clayton's tenure Staff Legal Bulletins ("SLB") 14I, 14J, and 14K were released, providing guidance on this topic; these SLBs were quickly rescinded during Chair Genlser's tenure and replaced by SLB 14L, which in turn was rescinded in 2025 by interim Chair Uyeda.[127] Market actors have also experienced guidance whiplash on other topics,[128] and it is increasingly common for SEC rules to be rescinded or simply go unenforced in the wake of leadership changes.[129]

[124] *See supra* note 94 and accompanying text.

[125] *See supra* note 58 and accompanying text. For data on the SEC's crypto enforcement efforts, see SEC CRYPTOCURRENCY ENFORCEMENT, Cornerstone Research, https://www.cornerstone.com/wp-content/uploads/2025/01/SEC-Cryptocurrency-Enforcement-2024-Update.pdf.

[126] A desire for stability and predictability in capital markets regulation is reflected in the statutory requirement for political balance among SEC commissioners. *See* 15 U.S.C. § 78d(a) (requiring that not more than three of the five commissioners "shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable").

[127] These bulletins may be accessed at https://www.sec.gov/rules-regulations/staff-guidance/staff-legal-bulletins.

[128] *See, e.g.*, Sullivan & Cromwell, *SEC Reverses Aspects of Proxy Voting Advice Regulations* (July 21, 2022) (discussing rescission by Gensler of Clayton era rules and guidance related to proxy advisors), *available at* https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/sc-publication-sec-reverses-aspects-of-proxy-voting-advice-regulations.pdf; Sarah Wynn, *Days after Gensler leaves, SEC rescinds controversial crypto accounting guidance SAB 121* (Jan. 23, 2025), available at https://www.theblock.co/post/336761/days-after-gensler-leaves-sec-rescinds-controversial-crypto-accounting-guidance-sab-121.

[129] *See, e.g.*, Richard Satran, *SEC reverses curbs prior agency leadership placed on whistleblower awards*, FINANCIAL JOURNALIST (Aug. 30, 2022) (discussing Gensler reversal of rules adopted under Clayton); Kellie

This may be the result of the agency becoming more politically responsive in an increasingly polarized political environment. Political polarization amongst the American populace has been increasing since the 1980s,[130] but empirical studies suggest that partisanship at the SEC began to spike in the 2010s. A study by Professor Engelberg and co-authors shows that Commissioner dissents to rulemaking "have risen dramatically over the last 15 years, coinciding with [an] increase in the partisanship of SEC Commissioners' speech."[131] It has also been observed that the backgrounds of SEC Commissioners have changed over time, with former Congressional staffers being appointed more often than in the past,[132] providing a potential conduit for the transmission of heightened partisanship. Indeed, the study by Engelberg et al. suggests that the "significant increase in [the SEC's] partisanship in the 2010s relative to earlier decades" is "driven by more-partisan Commissioners replacing less-partisan ones."[133]

Increased political polarization may be linked to the value of litigation against the SEC in another way. Recall that if Congress is less likely to intervene if a regulator loses, or if the regulator is unlikely to attempt to repromulgate a rule due to, *inter alia*, shifting administrations, it makes victory in court more valuable.[134] Congressional deadlock makes legislative validation of SEC authority struck down in court far less likely. Changes in the American electorate also increase the likelihood of dramatic shifts in power between election cycles, making it likely that SEC leadership will change before the agency could react internally to judicial losses through new rulemaking. This means that victory in litigation against the SEC may prove more enduring and hence more valuable in the recent era.

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Mejdrich, *Gensler halts SEC's Trump-era restrictions on investor advisory firms* (June 1, 2021) (reporting on Gensler's decision to pause the enforcement of Clayton-era rules), *available at* https://subscriber.politicopro.com/article/2021/06/gensler-halts-secs-trump-era-restrictions-on-investor-advisory-firms-2058176; Carlton Fields, *One Fell Swoop: SEC Erases Ambitious Gensler-Era Rulemaking Agenda* (June 16, 2025) (discussing Atkins' announced withdrawal of 14 notices of proposed rulemaking issued under Gensler as well as the decision to stop defending Gensler's Climate Disclosure Rule), *available at* https://www.carltonfields.com/insights/publications/2025/one-fell-swoop-sec-erases-ambitious-gensler-era-rulemaking-agenda; Jessica Corso, *SEC Plans To Repeal Biden-Era Rule On ESG Fund Names*, Law306.com (February 18, 2026).

[130] *See generally* Levi Boxell, Matthew Gentzkow & Jesse M. Shapiro, *Cross-country trends in affective polarization*, 106 REV. ECON. STAT. 557 (2024).

[131] Joseph Engelberg, Matthew Henriksson, Asaf Manela, and Jared Williams, *The Partisanship of Financial Regulators*, 36 REV. FIN. STUDIES 4373 (2023).

[132] Brian D. Feinstein & M. Todd Henderson, *Congress's Commissioners*, 38 YALE J. ON REG. 175, 190 & 212 (2021) (documenting "a marked and sustained influx from Capitol Hill onto multimember independent agencies in the past fifteen years or so" and exploring this dynamic at the SEC). For a critical view of the increased politicization of the SEC, *see* Joel Seligman, John Coates, John C. Coffee, Jr., James D. Cox, Jill E. Fisch and Merritt B. Fox, *Shadow SEC: The Value of an Independent SEC*, CLS BLUE SKY BLOG (Feb. 24, 2025), *available at* https://clsbluesky.law.columbia.edu/2025/02/24/the-shadow-sec-the-value-of-an-independent-sec/. For a nuanced account of the potential consequences, *see* Feinstein & Henderson, *supra* at 214-241.

[133] Engelberg, et al., *supra* note 131 at 4413; *see also* Floyd Norris, *Independent Agencies, sometimes in name only*, N.Y. TIMES (Aug. 9, 2013) (observing that "the S.E.C. has in recent years splintered into factions far more than ever before" and attributing this to the decision by Presidents to defer to senior Senators for non-Chair commissioner appointments).

[134] *See supra* Part III.A.1.

2. Probability of Victory

The perceived likelihood of succeeding in litigation against the SEC has also likely increased systematically in recent years, for several distinct reasons.

First, the SEC's enforcement actions beginning in the 2010s, and its rulemakings under Chair Gensler in the early 2020s, arguably pushed the bounds of the SEC's authority more aggressively than SEC actions in earlier eras, rendering those activities more vulnerable to legal invalidation. Recall that in the Dodd Frank Act Congress for the first time granted the SEC authority to pursue civil penalties against any defendant in administrative proceedings, an authority that the SEC eagerly embraced. This teed up new, and nonfrivolous, questions about constitutionality of the SEC's use of its administrative forum.[135] Recall also that rulemakings under Chair Gensler were overwhelmingly voluntary, whereas rules promulgated under his immediate past chairs were largely pursuant to explicit statutory mandate.[136] This rendered his rules more vulnerable to arguments that the SEC had acted in excess of its authority, a vulnerability that was enhanced by both the nature and scope of some of those rules.[137]

Second, as previously discussed the costs of SEC regulation likely went up in the 2010s and early 2020s.[138] SEC actions that impose greater costs on market actors may be more vulnerable when subjected to judicial scrutiny—particularly rulemaking given the nature of arbitrary and capricious review. Apart from rules' actual costs, vulnerability under arbitrary and capricious review also turns on the thoroughness of the written record demonstrating that the costs were adequately considered. Chair Gensler rapidly sought to adopt numerous rules of broad significance to the marketplace during his tenure, subject to atypically short public comment periods[139]; it may be that the quality of the analysis and/or the written record suffered as a consequence, increasing legal vulnerability. Indeed, in an October 2022 report the SEC's Inspector General commented on the pace of the SEC's rulemaking activity[140] and noted that some SEC staff

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[135] *See supra* notes 111-118 and accompanying text.

[136] *See supra* note 121.

[137] *See, e.g.*, Foley & Lardner, *Fifth Circuit Rules SEC Exceeded Its Authority in Adopting Private Fund Advisers Rule* (June 7, 2024) (observing that "[p]roponents and detractors of the [Private Funds] Rule alike were in general agreement that it represented a significant expansion of the SEC's oversight across the entire private funds industry, upending well-settled business practices by providing a regulatory prescription traditionally resolved through the negotiation of legal agreements by private fund sponsors and private fund investors"), *available at* https://www.foley.com/insights/publications/2024/06/fifth-circuit-rules-sec-exceeded-authority-private-fund-advisers-rule/. For the view that the SEC's Climate Disclosure Rule, in its proposed form, exceeded the SEC's authority, see Hester Pierce, *We are Not the Securities and Environment Commission - At Least Not Yet* (March 21, 2022) (observing that the "proposal steps outside our statutory limits by using the disclosure framework to achieve objectives that are not ours to pursue and by pursuing those objectives by means of disclosure mandates that may not comport with First Amendment limitations on compelled speech"), *available at* https://www.sec.gov/newsroom/speeches-statements/peirce-climate-disclosure-20220321.

[138] *See supra* Part IV.A.1.

[139] *See* Jennifer J. Schulp & Nicholas Anthony, *The SEC Short-Changes Public Comment*, Cato Inst. (Jan. 14, 2022) (providing data on this trend and observing that the failure to provide adequate time for public comment "may hamstring the SEC in identifying the consequences of the proposed rules").

[140] *See* OIG, THE INSPECTOR GENERAL'S STATEMENT ON THE SEC'S MANAGEMENT AND PERFORMANCE CHALLENGES 2 (Oct. 2022) (observing that "[i]n only the first 8 months of 2022, the SEC proposed 26 new rules, which was more than twice as many new rules as proposed the preceding year and more than it had proposed in each

"believed that the more aggressive agenda—particularly as it relates to high-profile rules that significantly impact external stakeholders—potentially (1) limits the time available for staff research and analysis, and (2) increases litigation risk."[141]

Third, judicial precedent has clearly evolved in ways that increase the odds of victory in cases challenging SEC actions. The Supreme Court's 2024 decision in *Loper Bright Enterprises v. Raimondo*,[142] overturning *Chevron* deference, and its 2022 decision in *West Virginia v. EPA*,[143] embracing the major questions doctrine, are salient recent examples of cases that make authority-based challenges to SEC actions easier to win.[144] Claims that SEC rules are arbitrary and capricious got a boost back in 2011, with the D.C. Circuit's decision in *Business Roundtable v. SEC*.[145] *Business Roundtable* struck down the SEC's proxy access rule based on the SEC's failure to adequately justify its economic analysis and set an important new precedent for courts demanding stronger justification for SEC rules.[146] Recent developments in Supreme Court doctrine have also made claims possible today that would never have made it to federal court in the past. For example, in 2023 the Supreme Court decided *Axon Enterprise, Inc. v. FTC*,[147] which held that federal district courts have jurisdiction to hear constitutional challenges to the structure or existence of federal administrative agencies in the first instance, with no need for a challenger to first exhaust administrative remedies. This case removed what had been an important obstacle to the airing of constitutional claims attacking the legitimacy of SEC administrative proceedings, claims that as discussed above mushroomed in the wake of the Dodd Frank Act's expansion of the SEC's enforcement discretion.[148] Another example is the Supreme Court's 2024 decision in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*,[149] holding that the APA's six-year statute of limitations does not start ticking until the particular plaintiff is injured by the regulation, rather than when the regulation is first promulgated.

One last trend potentially affecting the probability of victory bears mention. It has been argued that dissents to agency rulemaking can increase the likelihood of successfully challenging the rulemaking in court, for a variety of plausible reasons.[150] As previously discussed, dissents to rulemaking at the SEC have risen dramatically over the past 15 years.[151]

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of the previous 5 years"), *available at* https://www.sec.gov/files/inspector-generals-statement-sec-mgmt-and-perf-challenges-october-2022.pdf.

[141] *Id*. at 3.

[142] 144 S.Ct. 2244 (2024).

[143] 142 S.Ct. 2587 (2022).

[144] For an empirical study reporting on *Chevron*'s effect on agency win rates, see Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017).

[145] 647 F.3d 1144 (D.C. Cir. 2011).

[146] For a discussion of the implications of this case and overview of scholarship both lamenting and applauding it, see Grundfest et al., *supra* note 63 at 25-27.

[147] 598 U.S. 175 (2023).

[148] *See supra* notes 111-118 and accompanying text.

[149] 603 U.S. 799 (2024).

[150] Eugene Scalia, *The Impact of Agency Commissioners' Dissents*, NAT'L L. J. (January 11, 2022).

[151] *See supra* note 131 and accompanying text.

## B. *Lower Costs*

Not only have the expected benefits of litigating against the SEC likely increased systematically in recent years, due to the combined increase in both the value and probability of victory, but there are reasons to believe that the costs of doing so have systematically decreased.

The recent *Axon* case, just noted, reduces the out-of-pocket costs associated with raising constitutional defenses in SEC enforcement actions by accelerating the point at which such defenses may be heard in federal courts. The savings are not trivial. Consider George Jarkesy, whose 7th amendment challenge to the SEC's use of its administrative forum to seek civil penalties for fraud was upheld by the Supreme Court in 2024.[152] The SEC filed its enforcement action against him in 2013, but exhaustion requirements meant he could not get his claim heard by a federal court until 2020; had *Axon* been the law at the time it would have accelerated the resolution of his challenge by a full *seven years*.[153]

Other costs associated with litigation have likely decreased, as well. As noted in Part III.B, challenging one's regulator can carry with it potentially heavy reputational costs, particularly when that regulator has a swell of *de facto* power like the SEC enjoys. How heavily this would weigh in a market actor's cost-benefit analysis depends on both the likelihood of retribution and the value to the market actor of the future opportunities that the agency has the discretion to impede or facilitate. Market actors have more ability today to avoid the SEC than in the past, limiting their dependence on the SEC's future favor. This is due to dramatic growth in the ability of companies to raise capital in private market transactions.[154] The ability to raise huge sums in private offerings allows pre-IPO companies to stay private longer than ever before, and it gives existing public companies the ability to limit interactions with the SEC by looking to the private markets for follow-on rounds of capital raising.

Competitive costs may be less today, as well. Recall that how heavy these costs will weigh in a market actor's calculus will turn on the market actor's ability to overcome them through collective action. This is something that large incumbent firms and financial market intermediaries have been able to do in the past by acting through organizations like the Chamber of Commerce, Business Roundtable and SIFMA, whereas smaller, newer entrants have traditionally been less able to act collectively.[155] In recent years, a new slew of representative organizations have become involved in challenges to SEC authority. These include the National Association of Private Fund Managers (NAPFM), the Alternative Investment Management Association (AIMA), the

[152] *SEC v. Jarkesy*, 603 U.S. 109, 119-120 (2024).

[153] *Id*. at

[154] While the causes of this are debated, along with the normative implications, there is no question that the amount of money raised in private offerings has steadily trended upward since 2009 and that companies are staying private longer than ever before. *See, e.g.,* SEC, REPORT TO CONGRESS ON REGULATION A / REGULATION D PERFORMANCE 41 (Aug. 2020), *available at* https://www.sec.gov/files/Report%20to%20Congress%20on%20Regulation%20A.pdf; Alexander Platt, *Unicorniphobia*, 13 HARV. BUS. LAW REV. 115 (2023).

[155] *See supra* note 102.

Blockchain Association, Crypto Freedom Alliance, the New Civil Liberties Alliance, and the Alliance for Fair Board Recruitment.[156]

C. *Reduced Frictions*

Broad shifts in the characteristics of public companies in recent years—shifts not unrelated to the growth in private markets discussed above—may also be operating to reduce frictions that discourage litigation. Firms are going public larger and more mature than in the past, often with strong leaders who retain significant skin in the game. Such leaders may have financial incentives that are more closely aligned with those of their firms' residual claimants. In some cases, they might also have risk preferences that dispose them more toward litigation than your average hired manager.[157] (That description certainly seems to fit Elon Musk, who has challenged the SEC's authority on multiple occasions in recent years.[158]) Relatedly, firms that go public larger, more mature, and run by managers with more skin in the game may be less reliant on traditional intermediaries and more prone to seek out information about their legal options from other sources.[159] Traditional intermediaries' incentives may also be less aligned with large incumbent firms than in the past, given that private companies provide a more lucrative source of business than in the past.

The SEC's legal vulnerabilities are also more salient today than they once were. This is in part due to the work of policy entrepreneurs eager to foster litigation that might lead to the curtailment of the powers of administrative agencies. Policy entrepreneurs may not only provide information to market actors about the SEC's legal vulnerabilities, they might also help market actors overcome competitive costs by creating collective organizations to bring or support litigation efforts. Some of the new organizations noted in Part IV.B, particularly the New Civil Liberties Alliance and Alliance for Fair Board Recruitment, likely fit this mold. This broader "war on the administrative state," as it is sometimes called, picked up considerable steam with conversative appointments to the Supreme Court during President Trump's first term. In a self-feeding cycle, high-profile victories challenging agency power—including high profile losses by the SEC[160]—make it more likely that market actors will think to consider litigation options when faced with regulatory burdens.

[156] How these groups came to exist and become involved in challenges to SEC authority is an interesting question (*see, e.g.*, Lydia Beyoud and Madlin Mekelburg, *Hedge Funds' Secret Weapon to Fight the SEC Lives in Texas*, BLOOMBERG (June 17, 2024) (reporting on the origins of the National Association of Private Fund Managers)), but beyond the scope of this Article.

[157] For an analysis of how venture capital funding arrangements may intentionally promote risk-seeking by founders, see Brian J. Broughman & Matthew Wansley, *Risk-Seeking Governance*, 76 VAND. L. REV. 1299 (2023).

[158] Alexa Mikhail, *Is the World's Richest Man Addicted to Risk Taking?*, FORTUNE (Sept. 16, 2023), *available at* https://fortune.com/well/2023/09/16/elon-musk-biography-risk-taking-behavior-addiction/.

[159] Elon Musk, notably, has shunned the traditional securities bar in his battles with the agency. *See* Dan Adler, *How Alex Spiro Became Elon Musk's (and Megan Thee Stallion's and Jay-Z's) Go-To Lawyer*, VANITY FAIR (March 6, 2023).

[160] *See, e.g.*, *SEC v. Jarkesy*, 603 U.S. 109 (2024); *Lucia v. SEC*, 585 U.S. 237 (2018); *supra* note 73; *cf. Liu v. SEC*, 591 U.S. 71 (2020) (upholding but limiting the SEC's authority to seek disgorgement remedies).

## CONCLUSION: INSIGHTS & IMPLICATIONS

What should one take away from the foregoing analysis? One lesson is that blaming the SEC's recent legal turmoil on either the heavy costs of Chair Gensler's rules or on broader forces seeking to dismantle the administrative state is, while not exactly wrong, very incomplete. The model developed in Part III identifies a broad set of variables that would influence the calculus of a rational market actor determining the net benefits, if any, of suing its regulator, and Part IV explains how many have shifted systematically in recent years in ways that make suing the SEC a more attractive prospect than in the past—by both increasing the expected benefits of suing (the value and probability of success) and by decreasing the perceived costs. The approach allows one to see relationships that have previously gone unnoticed between market actors' proclivity to sue the SEC and such things as shifting interest group dynamics, levels of political polarization in the American populace, the growth of private markets, and the dependency of firms on financial market intermediaries, among others.

What does the analysis allow us to conclude about the SEC's litigation landscape going forward? Unfortunately, it is impossible to conclude anything definite. Litigation, recall, is but one option market actors have available when faced with regulatory burdens; while litigation may have become a more attractive approach in recent years than it was in the past for the reasons developed in Part IV, the alternatives of lobbying and avoidance may become relatively more attractive in the future. Moreover, the recent bout of litigation activity could encourage lighter regulatory burdens in the future, reducing the attractiveness of all three approaches relative to the baseline of simple compliance.[161] That said, the forces identified in Part IV as having increased the net benefits of suing in recent years are subject to change. Setting aside the foregoing uncertainties, informed speculation about the likelihood and probable direction of such change allows for some tentative insights about the future.

The costs of rules, in actuality or in how they are considered in the rulemaking process or defended in the written record, are prone to change with changes in SEC leadership—with predictable effects on both the value and probability of victory. The probability of victory can also change quickly if the SEC changes how aggressively it asserts its authority. Few SEC-watchers would dispute that under Chair Atkins' leadership, new SEC rules are likely on average to impose fewer costs on market actors than the rules adopted under his predecessor, and that the SEC is likely to take a less aggressive view of the scope of its authority. This would suggest, all else equal, a reduction in the expected benefits of bringing legal challenges against the agency in the near future.[162]

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[161] Judicial victories against the SEC may serve to lighten such burdens directly (by striking down rules or paring back the SEC's regulatory authority in other ways). Such victories could also have the effect indirectly, to the extent that heightened litigation risk influences how the SEC crafts regulatory products. *See supra* notes 86-90 and accompanying text (discussing the feedback loop whereby concern about litigation risk affects the regulatory production process).

[162] D.O.G.E.-induced staffing reductions could undermine the thoroughness of the economic analysis that attends SEC rulemaking, rendering rules more vulnerable to invalidation as arbitrary and capricious, but this effect is likely to be offset by the lower number of rules the SEC is likely to consider under Chair Atkins, as well as the new

Other trends identified in Part IV are more enduring, however, suggesting that litigation may retain some heightened appeal (or bounce back quickly the next time a more pro-regulatory chair is appointed). For example, doctrinal developments which have raised the probability of victory in suits against the SEC are unlikely to be reversed in the foreseeable future (nor is *Axon*, which decreased the costs associated with structural constitutional challenges). The increased political polarization that has caused victories against the SEC to be more durable, and hence more valuable, is likely to be a feature of our political landscape for some time. Absent some major shift in either policy or macroeconomic conditions, the private markets appear poised to continue their ascent, keeping downward pressure on the reputational costs of challenging the SEC. The new groups that have emerged to overcome the collective action problem that market actors face when deciding to pursue litigation are likely to have staying power. The decreased reliance on financial market intermediaries by new entrants to the public markets is also something that may endure, eliminating frictions that may discourage litigation.

Moreover, in a self-feeding cycle, salient litigation victories against the SEC may continue to erode informational asymmetries and lead more market actors to recognize litigation as a potentially attractive option. Legal challenges against the SEC remain very much part of the mix presently, a year into Chair Atkin's tenure. Already in 2026, the Supreme Court granted *certiorari* in an important case challenging the scope of the SEC's disgorgement power[163] and Elon Musk raised constitutional challenges to a longstanding SEC disclosure rule as well as to the very structure of the agency itself.[164] In short, it may prove hard to put the litigation genie back into the bottle. It is notable in this regard that beginning in 2015 the SEC tried to address the backlash its aggressive use of administrative proceedings provoked in the wake of the Dodd Frank Act. It did so by increasing transparency around its forum selection decisions and proposing changes to its rules of practice to enhance defendants' procedural rights in administrative proceedings.[165] These efforts, however, were "too little, too late" to stem the rising tide of litigation.[166]

This Article will end by circling back to where it began—the SEC's vast *de facto* power over the capital markets described in Part I. Recall the various discretion-laden regulatory techniques that the SEC employs as a way of addressing what would otherwise be an intolerable level of legal uncertainty in the securities laws. These techniques, which afford the SEC maximal flexibility while exposing it to minimal accountability, have been around for many decades, in some cases since the very inception of federal securities regulation. This suggests that they have

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requirement that independent agencies submit rules to the Office of Information and Regulatory Affairs (OIRA) for review. *See* Executive Order 14215: Ensuring Accountability for All Agencies (February 18, 2025).

[163] *Sripetch v. SEC*, No. 25-466 (Jan. 9, 2026); Holland & Knight, *CERTainly Getting Interesting: Supreme Court Again to Address SEC's Power to Obtain Disgorgement* (Jan. 14, 2026), *available at* https://www.hklaw.com/en/insights/publications/2026/01/certainly-getting-interesting-supreme-court-again-to-address.

[164] Bill Alpert, *Elon Musk Says the SEC Is Unconstitutional*, BARRONS (Jan. 16, 2026). Musk contends that the SEC is unconstitutional because its commissioners are understood to enjoy for-cause removal protections. The outcome of his challenge will turn on the Supreme Court's resolution of *Trump v. Slaughter* (No. 25-5261 (argued Dec. 8, 2025)), a case that invites the reversal of *Humphrey's Executor v. United States,* 295 U.S. 602 (1935).

[165] Platt, *supra* note 53 at 39-40.

[166] *Id*. at 39.

in the past worked fairly effectively—or at least pleased dominant interest groups. The provocative question I would like to leave readers with is this: can they survive the forces described in Part IV?

Recall that decreased predictability and consistency, fueled by heightened partisanship, has likely caused market actors to view techniques that rely on SEC discretion as more costly. It is possible that future Presidents could use their influence over the agency to try to reverse this phenomenon, including importantly by prioritizing independence and nonpartisanship in the appointment selection process.[167] But many believe increased presidential control over administrative agencies will supercharge partisanship rather than reduce it. If the SEC does not regain a reputation as a stable capital markets regulator, through either a renewed Presidential commitment to fostering an independent, non-partisan SEC, or through some other mechanism, pushback to the regulatory techniques outlined in Part I may intensify. This, in turn, may necessitate a need to broadly rethink how the problem of high-stakes legal ambiguity that pervades our securities statutes is best approached.

Pushback to the SEC's *de facto* power could manifest in more successful legal challenges aimed at those techniques. Future losses in litigation, or the specter of such future losses, could force the SEC to abandon disfavored regulatory approaches.[168] Even if the approaches themselves are resistant to judicial invalidation, as many of them likely are,[169] market actors could stop treating non-binding SEC regulatory techniques as if they were binding by, for example, stepping outside regulatory safe harbors and choosing to ignore guidance that they disagree with. Given the liability backdrop, however, this will likely remain a disfavored approach, at least if declaratory relief is not realistically available to quell uncertainties. A rare example of a company taking this approach occurred in 2024, when Exxon chose to bypass SEC no-action relief and to instead seek a judicial declaration that its decision to exclude shareholder proposals from its upcoming proxy statement comported with Rule 14a-8.[170]

Market actors could also push back against the SEC's *de facto* power through avoidance and lobbying. Either approach could lead to changes in the SEC's behavior. Let us first consider the avoidance option. The spectacular growth in the private markets has already been discussed as a factor that decreases the reputational costs of litigating against the SEC by allowing market actors to limit their future interactions with the agency. It also of course makes it easier for companies to engage in avoidance. If companies increasingly choose to raise capital in the private markets to escape the SEC's increasingly dysfunctional regulatory techniques, it could lead the SEC to self-adjust in an effort to preserve its relevance. One response would be for the SEC to

[167] It has been argued that partisanship at the SEC began to rise when the President began ceding appointments of non-Chair commissioners to senior senators. *See* Norris, *supra* note 133. For other techniques that might foster agency behavior that is less political and more grounded in technocratic expertise, see Jill Fisch, *Overseeing the Administrative State*, 47 SEATTLE U. L. REV. 899, 923-926 (2024).
[168] *See, e.g.*, Platt, *supra* note 53 at 31 (contemplating potential APA-based challenges to "regulation by enforcement"); Gordon Todd, Brian Morrissey and Manuel Valle, *5th Circ. Ruling Will Spur Challenges To No-Action Letters* (August 10, 2023) (explaining that *Clark v. CFTC*, 74 F.4th 627 (5th Cir. 2023), invites litigation challenging subregulatory guidance), *available at* https://www.sidley.com/en/insights/publications/2023/08/5th-circ-ruling-will-spur-challenges-to-no-action-letters.
[169] Indeed, this is likely part of their appeal. *See supra* note 89 and accompanying text.
[170] *See supra* note 31.

make its regulation of the public markets more palatable to firms.[171] Another would be for the SEC to try to limit the ability of companies to avoid SEC regulation. This puts the SEC's efforts, during Chair Gensler's tenure, to increase its regulation of the private markets and to expand the trigger for reporting company status under Section 12(g) of the Securities Exchange Act of 1934 in an interesting light. These efforts would have limited opportunities for regulatory avoidance *and* decreased the likelihood of lawsuits challenging the agency by increasing associated reputational costs—shoring up the SEC's *de facto* power.

These efforts were not successful, thanks in part to litigation strategies.[172] Even if they had been, however, they might ultimately have been undone through lobbying. Lobbying is yet another way that market actors might attempt to overcome modes of regulation that they find increasingly burdensome. This was not an immediately effective way for disaffected market actors to thwart Chair Gensler's agenda, which likely made litigation a relatively more attractive strategy during his tenure, but one should not lose sight of the longer arc. Substantial sums were invested in the last election cycle by parties affected by SEC policies during Chair Gensler's tenure, particularly by the private fund and crypto industries. In light of election outcomes, lobbying today is likely a much more promising approach to achieving desired change.

Whether due to fear of litigation, a desire to forestall losing companies to private markets, lobbying pressure, or something else entirely, the SEC has begun making some noteworthy adjustments that clip at the edges of its *de facto* power. For example, the SEC has eschewed reliance on "regulation by enforcement" and is working, along with Congress, toward towards clear rules specifying the legal treatment of digital assets.[173] Chair Atkins has also expressed a preference for addressing ambiguities in Rule 14a-8 through rulemaking rather than through guidance, and he recently decided to pause the issuance of no-action letters related to certain Rule 14a-8 matters.[174] As alluded to in Part I, the SEC also recently cut back on the use of its acceleration authority as a way to make demands on issuers.[175] These developments go beyond the substantive policy shifts that market actors have come to expect with changes in the White

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[171] For a sophisticated consideration of factors that may discourage this path, see Gubler, *supra* note 80.

[172] The SEC's Private Funds Adviser rule struck down by the Fifth Circuit in *Nat'l Ass'n of Priv. Fund Managers v. SEC*, 103 F.4th 1097 (5th Cir. 2024). The SEC's effort to expand the Section 12(g) trigger never made it to the proposed rule phase. For an argument that expanding the Section 12(g) trigger administratively would be legally invalid, see Alexander I. Platt, *Legal Guardrails for a Unicorn Crackdown*, 120 MICH. L. REV. ONLINE 89 (2023).

[173] Michael Blankenship, et al., *SEC Chairman Atkins Signals Major Shift: Potential Token Taxonomy and Evolving Application of Howey Test to Crypto Assets* (Nov. 18, 2025), *available at* https://www.winston.com/en/blogs-and-podcasts/capital-markets-and-securities-law-watch/sec-chairman-atkins-signals-major-shift-potential-token-taxonomy-and-evolving-application-of-howey-test-to-crypto-assets. Chair Atkins has also taken steps to centralize enforcement decisions, for example limiting staff discretion to issue subpoenas. *See* Megan Barbero, et al., *Shakeup at the SEC: Recent Changes in Formal Investigative Authority, Regional Directors, and Reductions in Force* (April 29, 2025), *available at* https://www.venable.com/insights/publications/2025/04/shakeup-at-the-sec-recent-changes-in-formal. Changes to the SEC's investigative process have also been announced with the stated intent of leveling the playing field between the SEC and defendants in enforcement actions and promoting the "[r]ule of law and predictability." Courtney Hague Andrews, et al., *SEC chairman announces reforms to wells process and settlement procedures* (Oct. 27, 2025), *available at* https://www.whitecase.com/insight-alert/sec-chairman-announces-reforms-wells-process-and-settlement-procedures.

[174] SEC Division of Corporation Finance, *Statement Regarding the Division of Corporation Finance's Role in the Exchange Act Rule 14a-8 Process for the Current Proxy Season* (Nov. 17, 2025), *available at* https://sec.gov.

[175] *See supra* notes 41-44 and accompanying text.

House; they hint at more fundamental changes in the way the SEC plans to administer the securities laws going forward. It remains to be seen whether these actions will ward off the discontent of market actors or will—like the efforts of the SEC to correct course on its approach to administrative enforcement back in 2015—prove to be "too little, too late."[176] Stay tuned.

[176] One obvious weakness is that the SEC can easily revert to its old ways after the next election. One cautionary tale concerns Executive Order 13891, "Promoting the Rule of Law Through Improved Agency Guidance Documents," adopted during President Trump's first term. On January 20, 2021, President Biden issued Executive Order 13992, which, among other things, revoked Executive Order 13891. On January 20, 2025, Trump rescinded Biden's rescission.

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