

# The securities trends of 2024 so far

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The first three quarters of 2024 have seen both notable litigation decisions as well as more gradually growing trends in the securities industry. Some of the former have included:

- The SEC’s decision on April 4 to voluntarily delay the implementation of its hotly contested climate disclosure rules in response to a variety of petitions against these rules pending in the 8th U.S. Circuit Court of Appeals (<https://bit.ly/3vWySer>).
- The Supreme Court’s decision issued on April 12 in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, — a case deciding whether a party’s failure to provide a disclosure required under Item 303 of Regulation S-K can give rise to a private right of action under Section 10b, even without an otherwise misleading statement. SCOTUS found that, in this context, a “pure omission” (i.e., when a subject matter is completely left out of a disclosure) is not actionable under Rule 10b-5.
- The Supreme Court’s decision issued on June 28 in *Loper Bright Enterprises v. Raimondo* which overturned the long-held “Chevron deference” doctrine which had historically allowed for judicial deference to federal agencies when interpreting an ambiguous or silent statute.

It will be interesting to see the interplay between these decisions. Recently, in a brief filed on Sept. 17 (*Liberty Energy and Nomad Proppant Services v. SEC*) two of the parties suing the Securities and Exchange Commission (SEC) over the above-mentioned climate disclosure rules cited the *Loper Bright* decision. The petitioners argued that the SEC was citing its own regulations in order to claim authority to compel broad climate disclosures, but that an “agency’s interpretation of a statute is not entitled to deference.”

Beyond these hot-button decisions, there have also been some more gradual securities trends that have manifested in 2024 as well:

## The rise in artificial intelligence-related suits

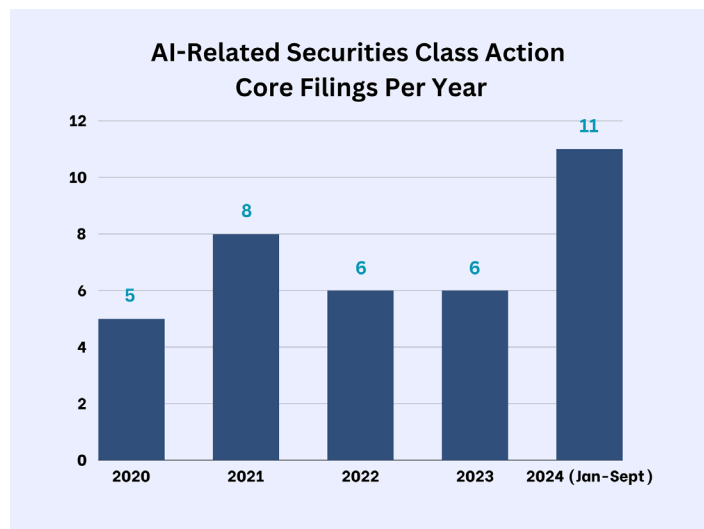
The Stanford Law School Securities Class Action Clearinghouse in collaboration with Cornerstone Research (<https://bit.ly/4eMp5bx>) provides a database that keeps track of various class action securities filings. In its mid-year assessment, the clearinghouse reported that the filing of securities class actions increased in the first half of 2024 relative to the second half of 2023, moving from 103 to 112 filings — an increase of about 8.7%. However, the first half of 2024 was on par with the first half of 2023, which saw

113 of these filings. Additionally, the total number of 2024 filings is currently on track to be the highest since 2020.

The clearinghouse, which keeps track of filing trends by certain subject matter, projects that COVID-19-related filings are on track to increase, while filings related to data breaches, special purpose acquisition companies (SPACs), cryptocurrency, cannabis, and the 2023 banking turbulence are projected to decrease.

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The clearinghouse also began scrutinizing AI-related core filings this year (with ‘core filings’ being all state 1933 Act class actions and all federal securities class actions excluding those defined as M&A filings). In 2024, there have been 11 such filings as of the time of this writing, six of which were filed in the first half of 2024 and five of which have been filed since. This number has already well exceeded the number of AI-related filings in years past.



Graphic created by the author’s firm based on data produced by the Stanford Law School Securities Class Action Clearinghouse website.

This is not surprising considering the rate at which AI technology has grown in 2024 alone. Just as we saw an uptick in greenwashing-related suits as the tenets of ESG and environmental consciousness became more mainstream in the business world, some companies eager to hop on the “AI train” and tout their capabilities in this area are finding themselves at the center of these suits. Many of these companies have been accused by investors of overrepresenting the effectiveness, accuracy, and/or capabilities of new AI technologies.

### The continued crackdown on electronic recordkeeping lapses

The SEC began its crackdown on financial institutions’ electronic recordkeeping oversights in late 2021 and has continued to do so through 2024.

Under Rule 17a-4(b)(4) of the Securities and Exchange Act of 1934, companies operating as broker-dealers must preserve all business communications — sent and received — for a designated period of time. Under Rule 204-2(a)(7) of the Investment Advisers Act of 1940, companies operating as investment advisors are held to similar recordkeeping rules.

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Lapses to these rules often occur when employees use private, unofficial channels — such as personal messaging platforms — to communicate about business matters. SEC-regulated institutions are required to keep records of business communications for the protection of individual investors and as a resource in the event of an investigation into alleged wrongdoing.

The SEC has continued to conduct probes and levy fines against institutions in the financial industry for failing to keep adequate records of pertinent electronic communications. According to the press releases on SEC.gov, the Commission has charged at least 74 companies in the financial industry with recordkeeping violations this year and has collected over \$525 million in fines.

### About the author



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The entities that have been penalized include broker-dealers; investment advisors; dually registered broker-dealers and investment advisors; municipal advisors; and nationally recognized statistical rating organizations (NRSROs).

### Expanded interpretation of insider trading

2024 also saw the expansion of what can be considered insider trading in a court of law.

In April 2024, the SEC won a civil case involving what some considered to be a novel theory of “shadow trading.” In *SEC v. Panuwat*, the SEC accused an executive at Medivation (a pharmaceutical company) of using material non-public information (MNPI) of Medivation’s impending acquisition to purchase stock options in Incyte Corp., another pharmaceutical company.

The SEC argued that while Panuwat didn’t sell his own company’s stock based off MNPI, the information of the acquisition had a “market connection” to Incyte — a comparable company similarly situated in the market — and Panuwat therefore misappropriated information material to the future of Incyte.

While the SEC maintains that there was no novel legal theory at play here and argued the case under the misappropriation theory of insider trading, this is the first insider trading case of its kind and effectively expands the scope of misappropriation. However, the future applicability of this legal theory, which involves using MNPI of one company to trade the securities of another, will depend largely on how economically interconnected the two entities in question are — a determination that could be highly subjective.

In light of this recently expanded liability framework, companies will likely have to increase their protections against insider trading allegations. This could potentially come in the form of revised company insider trading policies and more scrutiny towards what types of similar companies might also be affected by an issuer’s MNPI. It’s also feasible that 10b5-1 plans, which allow company insiders to trade securities using a predetermined trading schedule, could eventually be extended to include the stock of other companies with market ties.

*Roger E. Barton is a regular contributing columnist on securities regulation and litigation for Reuters Legal News and Westlaw Today.*