

Enforcement Activity Involving Auditors – 2024 Mid-Year Update

SEC & PCAOB ENFORCEMENT ACTIONS BROUGHT AGAINST PUBLIC ACCOUNTING FIRMS & ASSOCIATED INDIVIDUALS

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Brattle

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I. Executive Summary

In January 2024, we issued the report “[2023 Enforcement Activity Involving Auditors](#),” in which we analyzed enforcement activity brought against auditors by the US Securities and Exchange Commission (SEC) and the Public Company Accounting Oversight Board (PCAOB) during 2018–2023. Our analysis featured enforcement trends and a comparison of activity under the SEC’s and PCAOB’s current leadership to activity under the prior administrations.¹ We also made five predictions about enforcement activity against auditors in 2024 and beyond.

In this mid-year update, we examine how each of our five predictions has fared in the first half of 2024 (H1 2024).

PREDICTION 1	HOW DID WE DO?
Overall enforcement activity will remain elevated.	<input checked="" type="checkbox"/> PCAOB in H1 2024 <input type="checkbox"/> SEC in H1 2024

PREDICTION 2	HOW DID WE DO?
Enforcement activity involving PCAOB-registered firms in the People’s Republic of China (PRC) and Hong Kong will increase.	<input type="checkbox"/> PCAOB in H1 2024 <input checked="" type="checkbox"/> SEC in H1 2024

¹ As discussed in our report, “[2023 Enforcement Activity Involving Auditors](#),” 2022 was the first full year of enforcement under the PCAOB’s and SEC’s current administrations. 2018–2021 is used as a proxy for the regulators’ prior administrations.

PREDICTION 3

Heightened focus on “audit firm culture” may drive increased enforcement pertaining to systems of quality control, independence, and ethics.

HOW DID WE DO?

✓ PCAOB in H1 2024

✓ SEC in H1 2024

PREDICTION 4

PCAOB and SEC enforcement activity will increasingly focus on critical audit matters (CAMs).

HOW DID WE DO?

✓ PCAOB in H1 2024

✗ SEC in H1 2024

PREDICTION 5

We may see more joint actions brought by both the PCAOB and SEC.

HOW DID WE DO?

✗ in H1 2024

We also discuss two other developments in H1 2024 that have the potential to profoundly affect enforcement activity against auditors:

- The implications of the Supreme Court’s *SEC v. Jarkesy* decision, and
- Amendments to PCAOB Rule 3502 governing contributory liability.

Finally, we comment on the SEC’s settlement with BF Borgers and the unprecedented impact on hundreds of the firm’s audit clients.

II. Data Analyzed

This report discusses the level of enforcement activity brought by the PCAOB and SEC against public accounting firms (“firms”) and professionals employed by public accounting firms (“individuals”) during 2018 through H1 2024.

Analyses of the level of *enforcement activity* are based on the date an action is initiated, regardless of when it was finalized. As required by the Sarbanes-Oxley Act (SOX), PCAOB investigations and disciplinary proceedings are [confidential and non-public](#) until finalized. As a result, actions are considered to be **initiated** and **finalized** at the same time. SEC actions, however, can be initiated and disclosed on a given date but finalized (settled, adjudicated, or dismissed) later.

Analyses of imposed *sanctions* (both monetary and nonmonetary) are based on the date a respondent settled or otherwise finalized the action, regardless of when the action was initiated. For actions in which monetary sanctions are imposed jointly and severally upon an individual and a firm, our analysis allocates half of the monetary sanction to the individual and half to the firm.

Please see the **Appendix** for a list of defined terms.

III. H1 2024 Activity vs. Our Predictions

A. **Prediction 1: Overall Enforcement Activity Against Auditors Will Remain Elevated**

In our 2023 report, we predicted that enforcement activity against regulators would remain elevated because both the SEC and PCAOB had stepped up enforcement efforts under their current administrations, and by year-end 2023, neither regulator had indicated that their interest in enforcement against auditors was waning.

HOW DID WE DO?



PCAOB in H1 2024



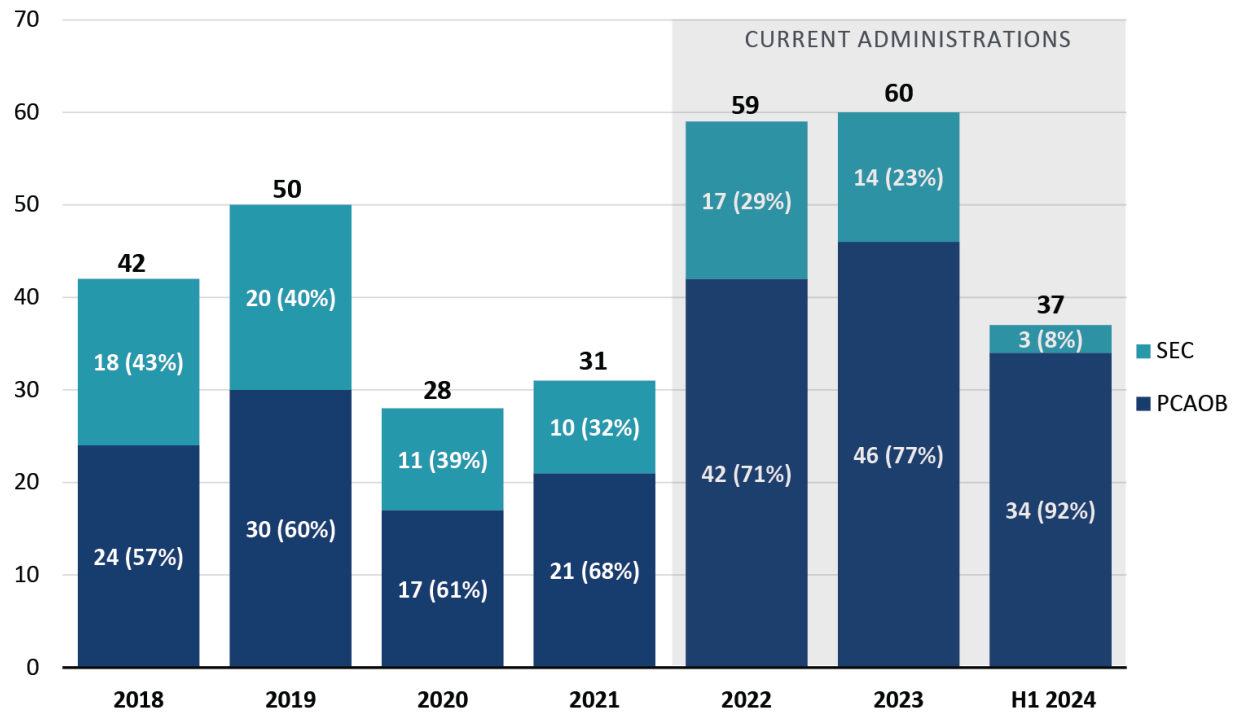
SEC in H1 2024

As described in more detail below, our prediction has proved true for the PCAOB during the first half of 2024. SEC enforcement activity, however, has been off to its slowest start in recent years, perhaps due to uncertainties related to the constitutionality of the SEC's use of in-house administrative law judges (ALJs) as the agency awaited the US Supreme Court's decision in the *SEC v Jarkesy* matter.

1. Level of Activity

TOTAL ENFORCEMENT ACTIVITY IN H1 2024

FIGURE 1: TOTAL ACTIONS INITIATED AGAINST AUDITORS: 2018–H1 2024



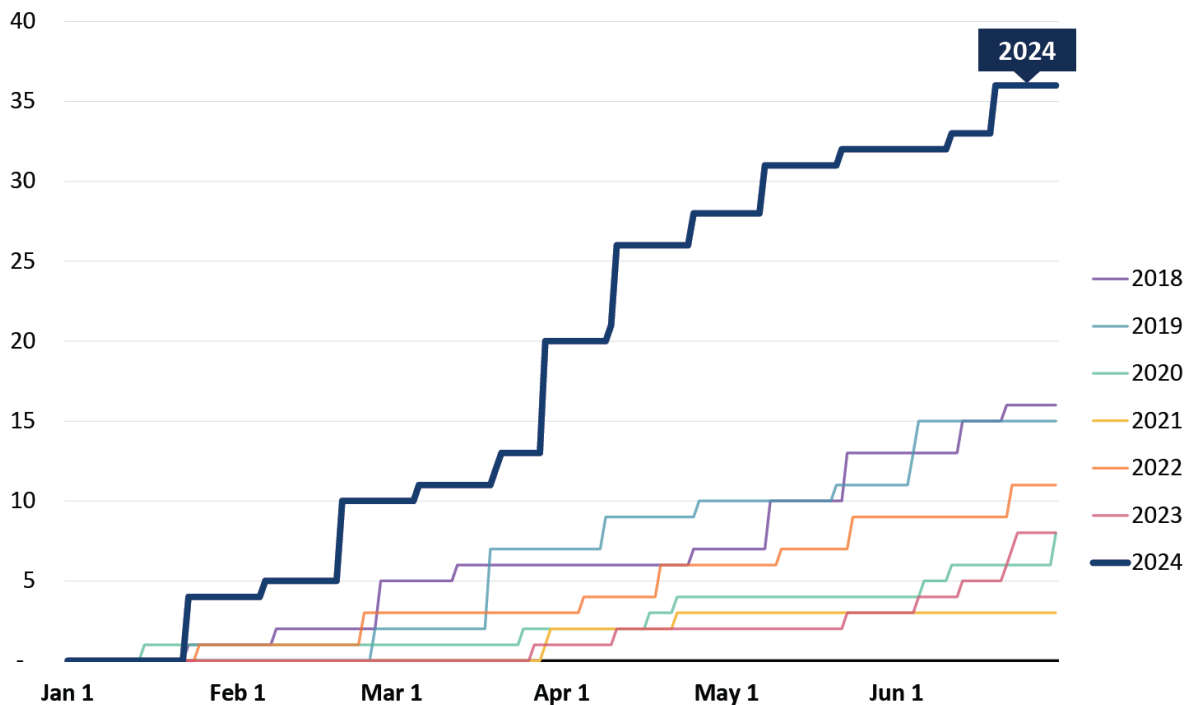
Sources: <https://www.sec.gov/page/litigation>; <https://pcaobus.org/oversight/enforcement>.

- Total H1 2024 activity (37 actions involving 49 respondents) significantly outpaced activity in the first half of 2023 (13 actions involving 18 respondents).
- Roughly 60% of initiated actions in H1 2024 involved only a firm respondent. Fewer than 15% of the actions involved both individual and firm respondents. Just over a quarter of the actions involved individual respondents only.
- Nearly two-thirds of initiated actions were brought against US respondents.
- Over a quarter of total actions initiated in H1 2024 involved individual and/or firm respondents associated with the six largest global networks.²

² The PCAOB often reports audit quality statistics separately for “global network firms” (GNFs) and “non-affiliated firms” (NAFs). According to the [PCAOB](https://pcaobus.org), GNFs are firms affiliated with the six largest global networks: BDO International Limited, Deloitte Touche Tohmatsu Limited, Ernst & Young Global Limited, Grant Thornton International Limited, KPMG International Cooperative, and PricewaterhouseCoopers International Limited.

PCAOB ENFORCEMENT ACTIVITY IN H1 2024

FIGURE 2: CUMULATIVE PCAOB ACTIONS IN FIRST HALF OF CALENDAR YEAR: 2018–2024

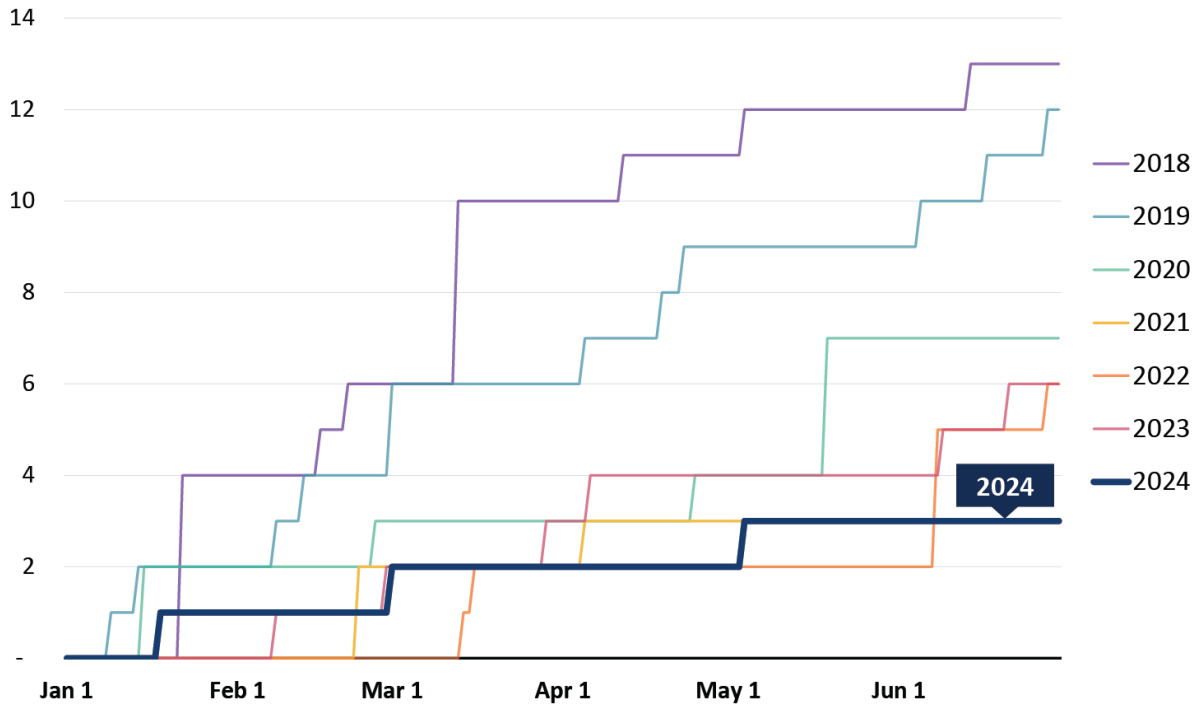


Sources: <https://www.sec.gov/page/litigation>; <https://pcaobus.org/oversight/enforcement>.

- PCAOB enforcement is off to its fastest start in PCAOB history.
 - Through the end of June 2024, the PCAOB has brought 34 enforcement actions involving 45 respondents (20 individuals and 25 firms).
 - In comparison, through June of last year, the PCAOB brought seven enforcement matters involving nine respondents (three individuals and six firms).
- The PCAOB has already brought more actions in the **first half** of 2024 than it did in each **full year** under the prior administration (2018–2021).
- 20 of the 34 actions (59%) brought by the PCAOB during the first half of 2024 involved US respondents (12 individuals and 15 firms). In the 14 actions involving non-US respondents in H1 2024, eight individual respondents and ten firms were charged.
- Approximately 30% of PCAOB actions disclosed in H1 2024 involved respondents associated with the six largest global networks.
- More than half of actions involving firm respondents in H1 2024 alleged violations related to firms’ systems of quality control.

SEC ENFORCEMENT ACTIVITY IN H1 2024

FIGURE 3: CUMULATIVE SEC ACTIONS IN FIRST HALF OF CALENDAR YEAR: 2018–2024



Sources: <https://www.sec.gov/page/litigation>; <https://pcaobus.org/oversight/enforcement>.

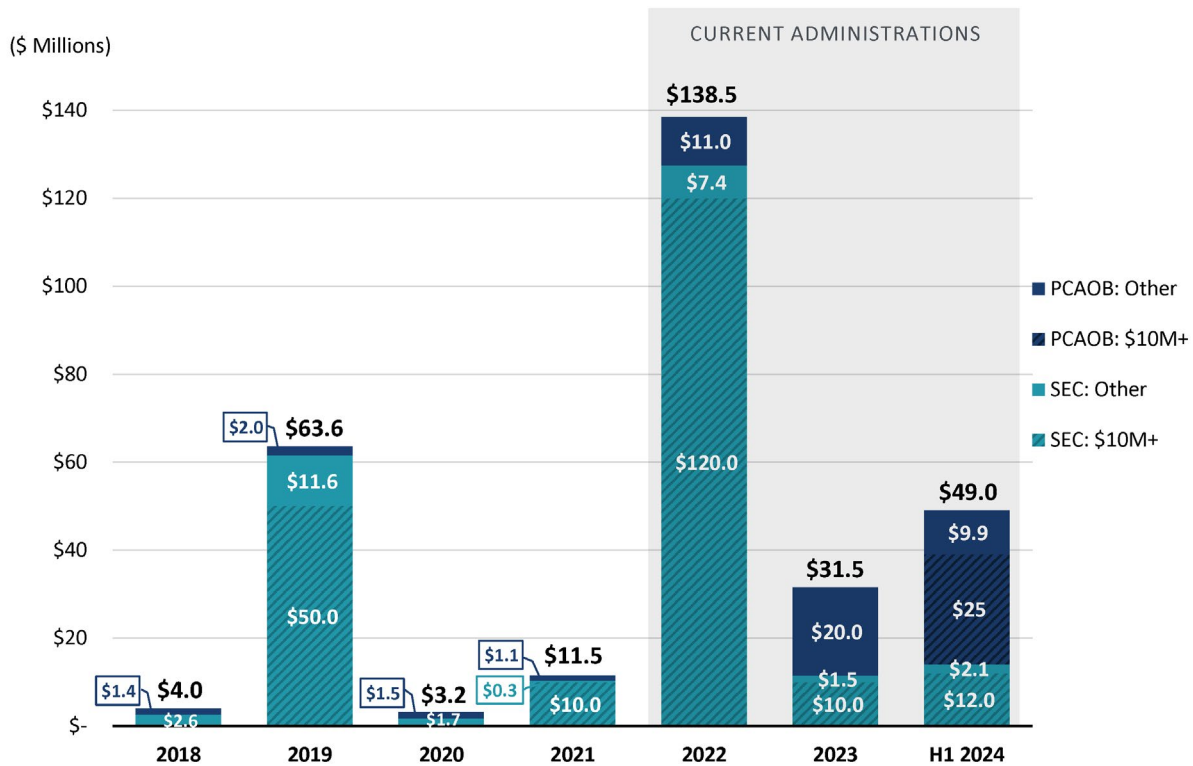
- SEC activity through H1 2024 is at its lowest levels in recent years.
 - The SEC initiated three actions in H1 2024 involving four respondents (two individuals and two firms).
 - In comparison, in the first half of 2018, the year with the highest H1 activity in our sample, the SEC initiated 13 actions involving 17 respondents (nine individuals and eight firms).
- Neither of the two SEC actions involving firm respondents alleged violations related to the firms' systems of quality control.

- The low levels of SEC enforcement activity in the first half of 2024 may be due, in part, to uncertainties related to the constitutionality of the SEC’s in-house ALJs while the agency awaited the US Supreme Court’s decision in the *SEC v Jarkesy* matter.³
 - For example, on April 29, 2024, the SEC agreed to [stay an in-house proceeding](#) against a partner at accounting firm Marcum LLP, postponing the proceeding until 30 days after the Supreme Court issued its decision in *Jarkesy*.⁴

2. Sanctions

TOTAL SANCTIONS IN H1 2024

FIGURE 4: TOTAL MONETARY SANCTIONS IN FINALIZED ACTIONS AGAINST AUDITORS: 2018–H1 2024



Sources: <https://www.sec.gov/page/litigation>; <https://pcaobus.org/oversight/enforcement>.

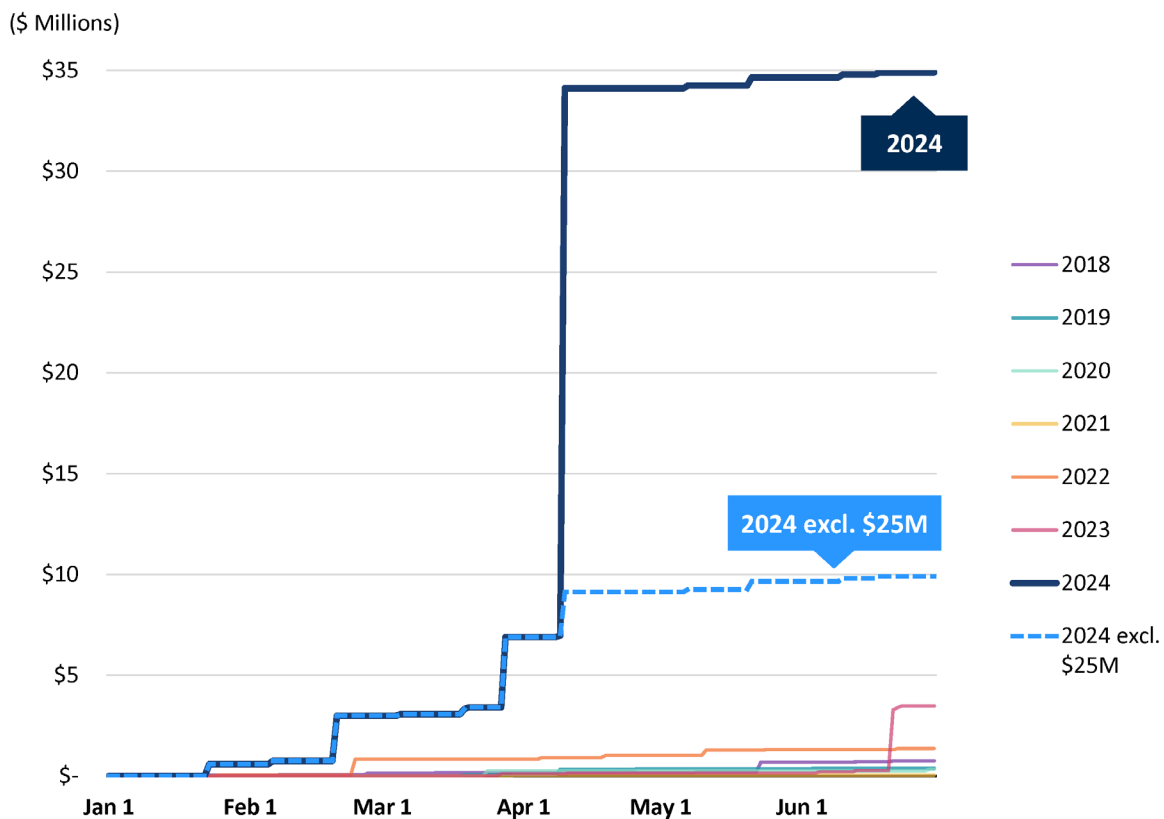
³ The low levels of enforcement are in spite of the fact that the SEC indicated that the pending Supreme Court ruling would not have an impact on enforcement activity. In October 2023, [Director Grewal discussed](#) how “some uncertainty in the Court” would not stop the agency from “holding auditors and other gatekeepers responsible of their professional obligations.”

⁴ As discussed in **Section IV.A.**, the Supreme Court issued its [opinion in *Jarkesy*](#) on June 27, 2024.

- During H1 2024, the PCAOB and SEC together imposed total monetary sanction of \$49 million on auditors and audit firms, larger than the combined full-year penalties in four of the last six years.
- Nearly two-thirds of total penalties in the first half of 2024 were imposed by the PCAOB.
- Nearly 15% of firm respondents in finalized H1 2024 actions were required to obtain an independent monitor/consultant.⁵

PCAOB SANCTIONS IN H1 2024

FIGURE 5: CUMULATIVE PCAOB PENALTIES IN FIRST HALF OF CALENDAR YEAR: 2018–2024



Note: The “2024 excl. \$25 million” line represents H1 2024 penalties, excluding the PCAOB’s record \$25 million penalty against KPMG Netherlands in April.

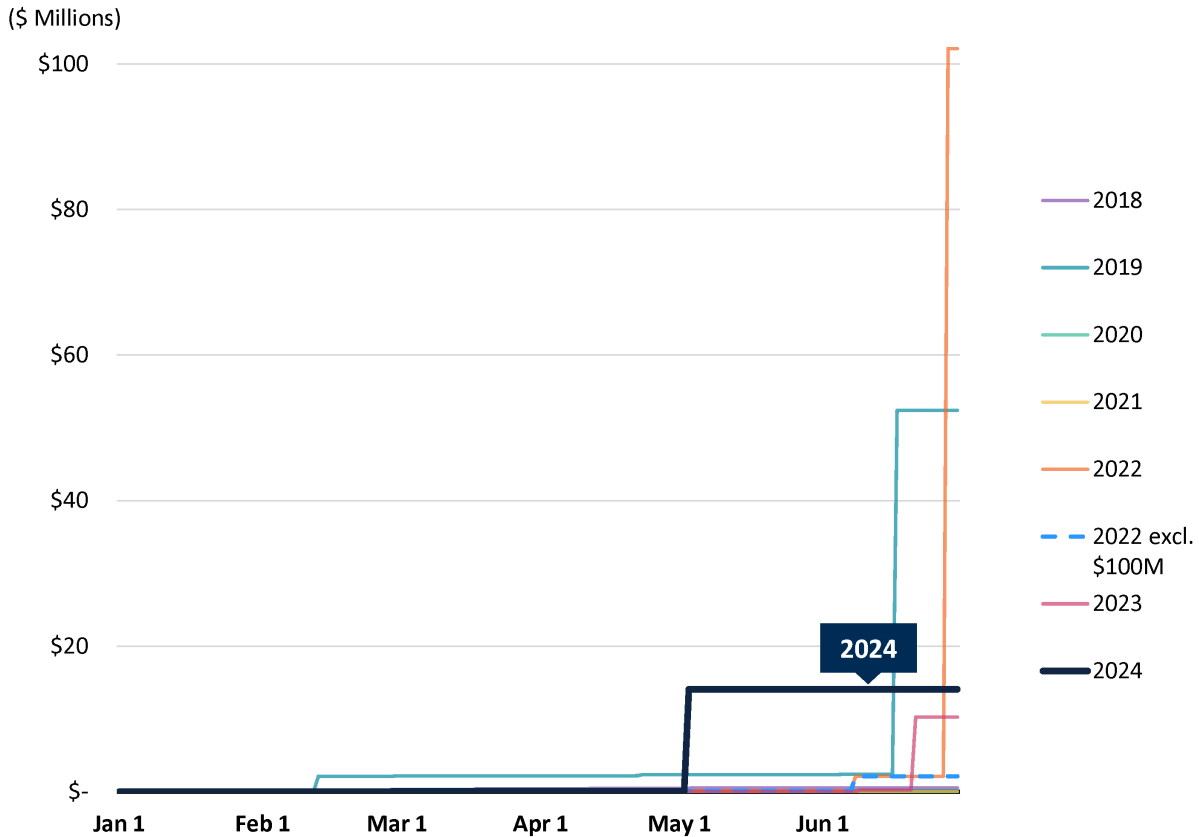
Sources: <https://www.sec.gov/page/litigation>; <https://pcaobus.org/oversight/enforcement>.

⁵ This includes one [PCAOB matter](#) in which a foreign Big Four firm was to “be subject to an intensive supervision program conducted by” the local regulator, to include “remediation, conducting a root cause analysis, and establishing policies and procedures... and exploring further appropriate changes to Firm culture.”

- The PCAOB imposed penalties of nearly \$35 million in the **first half** of 2024, more than the combined penalties imposed by the SEC and PCAOB during **all** of 2023 and three of the four years under the SEC and PCAOB’s prior administrations.
 - In comparison, the PCAOB imposed a then-record \$20 million during **all** of 2023, up from its previous annual high of \$11 million in 2022.
- The \$35 million in penalties in H1 2024 was driven by one mega-settlement of [\\$25 million](#) with KPMG Netherlands in April.
 - This \$25 million settlement was not only the largest penalty in PCAOB history but was more than three times greater than the regulator’s prior record of \$8 million imposed on a firm in 2016.
 - Even setting aside the \$25 million settlement, penalties in 2024 are outpacing 2023.
- Monetary penalties were imposed on respondents in more than 95% of actions initiated in H1 2024.
- Five firm respondents settled for \$1 million or more.
- Four firms were required to engage an independent consultant.
- The PCAOB took four firm respondents’ cooperation into consideration when determining sanctions.

SEC SANCTIONS IN H1 2024

FIGURE 6: CUMULATIVE SEC PENALTIES IN FIRST HALF OF CALENDAR YEAR: 2018–2024



Sources: <https://www.sec.gov/page/litigation>; <https://pcaobus.org/oversight/enforcement>.

Note: The “2022 excl. \$100M” dashed line excludes one mega-settlement of \$100 million in 2022.

- The SEC imposed monetary penalties of \$14 million in the two actions that were finalized in H1 2024.
 - Despite finalizing only two actions in H1 2024, penalties in the **first half** of 2024 are greater than the \$11.5 million imposed by the SEC in **all** of 2023 and three of the four full years under the SEC’s prior administration.
- The SEC imposed severe nonmonetary penalties in both actions it settled in H1 2024:
 - In one settlement, the SEC required a firm respondent to retain an independent consultant.
 - In the second action, both the firm and individual respondents were permanently barred.⁶

⁶ See additional discussion of the BF-Borgers settlement in **Section IV.C.** below.

- Despite a continued emphasis on cooperation, no respondents in finalized SEC actions involving auditors received cooperation credit in H1 2024 settlements.
 - The SEC has been touting the benefits of cooperation, stating that it can affect both the charges brought and the remedies imposed.
 - In remarks at the May Securities Enforcement Forum West conference, SEC Director of the Division of Enforcement [Grubir S. Grewal](#) provided five “principles of effective cooperation”: self-policing, self-reporting, remediation, going beyond what is legally required, and frequent and relevant communication with SEC enforcement staff.

Director Grewal suggested that “once you discover a possible violation, self-report without delay” because “given the success of the Commission’s whistleblower program, our improved use of data analytics, and our increased use of risk-based initiatives, it’s really no longer a question of *if* we’ll find out about a violation, but often *when*.”

B. **Prediction 2:** Enforcement Activity Involving PCAOB-Registered Firms in the People’s Republic of China (PRC) and Hong Kong Will Increase

In August 2022, for the first time in its history, the PCAOB obtained [full access](#) to inspect PCAOB-registered firms in the PRC and Hong Kong. This access provided the PCAOB with unprecedented “sole discretion to select the firms, audit engagements, and potential violations it inspected and investigated – without consultation with, nor input from, PRC authorities.”

By year-end 2023, [PCAOB inspections](#) covered firms that “audited 99% of the total market cap of US-listed companies audited by Hong Kong and mainland China firms” and were “on track to inspect firms that audited [100% of the total market cap](#) by the end of 2024.”

In late [November 2023](#), the PCAOB announced the first major enforcement settlements since securing full inspection access, sanctioning three China-based firms and four individuals a total of \$7.9 million.

In our 2023 report, we predicted that these inspections would lead to increased enforcement in the PRC and Hong Kong in 2024.

HOW DID WE DO?



PCAOB in H1 2024



SEC in H1 2024

[In March of this year](#), the PCAOB brought a fourth action it attributed to securing full inspection access, imposing a total of \$150,000 in fines against three partners of a Big Four firm in China.

The SEC did not bring any actions involving PRC/Hong Kong respondents during H1 2024.

While we have not seen a significant amount of enforcement against PCAOB-registered firms in the PRC and Hong Kong in the first half of 2024, enforcement actions are generally disclosed a year or more after a firm’s inspection report is issued.⁷ As a result, we do expect to see more settlements with PRC and Hong Kong-based PCAOB-registered firms and their personnel in the second half of this year.

C. **Prediction 3:** Heightened Focus on “Audit Firm Culture” May Drive Increased Enforcement Pertaining to Systems of Quality Control, Independence, and Ethics

During December 2023’s AICPA & CIMA Conference on Current SEC and PCAOB Developments, there was substantial discussion – by both the SEC and PCAOB – about the importance of [audit firm culture](#) and “tone at the top,” including an announcement by the PCAOB of a new inspections initiative to evaluate firm culture.⁸ We predicted that this heightened focus on audit firm culture could drive increased enforcement related to systems of quality control (QC), ethics, and independence.

⁷ “Part II: Recent Developments in Accounting, Auditing, and the Law Series,” June 19, 2024 webcast, WilmerHale and Center for Audit Quality, slide 10.

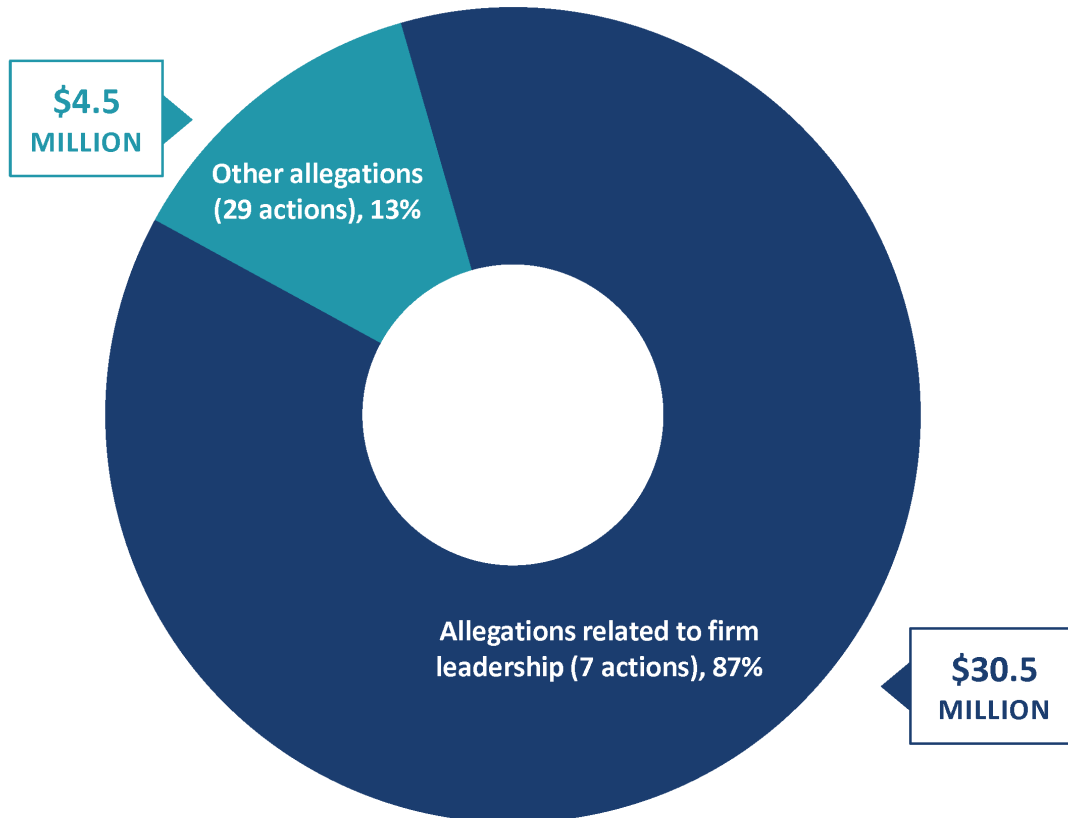
⁸ The PCAOB identified the following areas of focus in its new inspections initiative: (1) behaviors, including tone at the top and peer pressure, (2) how decisions are rewarded or punished, and (3) systems and structures, including policies, procedures, organizational structure, performance management system, and code of conduct. “PCAOB Registration, Inspection, and Enforcement Update” at the AICPA & CIMA Conference on Current SEC and PCAOB Developments, Christine Gunia, then serving as Acting Director, Division of Registration and Inspections, December 3, 2023, slide 9.



The PCAOB's and SEC's focus on "tone at the top" and "audit firm culture" has not waned.

PCAOB ENFORCEMENT ACTIVITY

FIGURE 7: MONETARY PENALTIES, BY ALLEGATION, IN PCAOB ENFORCEMENT ACTIONS: H1 2024



Source: <https://pcaobus.org/oversight/enforcement>.

87% of total penalties imposed by the PCAOB in the first half of 2024 resulted from seven actions (involving five firms and two individuals) alleging improper firm leadership.

Of particular note was the PCAOB's \$25 million settlement with [KPMG Netherlands](#) alleging that the firm violated QC standards related to integrity and personnel management by failing to establish appropriate policies and procedures associated with internal training tests.

- The PCAOB alleged that the "misconduct revealed an inappropriate tone at the top," which enabled a "pervasive problem with the firm's culture." In particular, according to the PCAOB, this entailed:

- Improper answer sharing that “reached the highest level of personnel” in the firm, including the firm’s Head of Assurance and its Supervisory Chairman.
- Inaccurate representations made to the PCAOB. It took two whistleblower complaints for the firm to fully disclose the extent of the answer sharing.
- In addition to the \$25 million penalty imposed on the firm, in a separate enforcement action, the Head of Assurance was fined \$150,000 and received a permanent bar.

In two actions involving affiliates of Big Four firms, the PCAOB imposed a total of \$2 million for alleged improper answer sharing, noting the extraordinary cooperation provided by both firms.

The PCAOB also fined a Big Four firm \$2.75 million, claiming the firm’s QC policies and procedures failed to provide reasonable assurance that its personnel maintain independence in fact and appearance.

- In particular, the order alleged that the firm’s quality control policies and procedures “did not advise or require any Independence Office consultation prior to discussions with an audit client about the possibility of terminating the audit relationship to allow for consideration of potential joint business activities.”
- Notably, the PCAOB did not allege that the firm’s independence *was* impaired.

SEC ENFORCEMENT ACTIVITY

Of the three actions initiated by the SEC in H1 2024, one action involved tone at the top and audit firm culture at a smaller firm:

- On May 3, 2024, the SEC imposed a collective \$14 million in penalties and imposed permanent bars on [BF Borgers](#) and its 100% managing partner and owner, Benjamin Borgers, for their alleged “sham audit mill.”
- According to the order, among other allegations:
 - Mr. Borgers instructed staff to “copy workpapers from previous engagement as the final workpapers for new engagements.”
 - Mr. Borgers “provided that staff member with usernames to create the false appearance of separate sign offs by the staff auditor, the engagement partner, and the EQR [engagement quality reviewer] in individual workpapers. In reality, all of those sign offs were done by the same staff person within seconds of each other.”⁹

⁹ See **Section IV** for additional information about the BF Borgers settlement.

In addition, the SEC has made clear that tone at the top at audit firms remains an important priority for SEC enforcement. For example, on May 15, 2024, SEC Chief Accountant Paul Munter issued a [statement](#) entitled “Fostering a Healthy ‘Tone at the Top’ at Audit Firms” and repeated the same themes during his keynote speech at the 2024 [Accountants’ Liability Conference](#) the following day. Mr. Munter cautioned, among other things, that:

- Firm leadership should address enforcement incidents “head-on,” including “openly discuss[ing] among its personnel what went wrong; us[ing] the underlying violations as an opportunity to teach and instill in all staff the critical importance of professional integrity, ethics, and serving the public trust; and possibly internally sanction[ing]” individuals involved with violations.
- “[C]reating alternative practice structures...designed to grow the non-attest practice...may pose serious challenges for the audit firm’s future ability to comply with independence rules. As such, they risk sending a message to staff that complying with professional standards, providing high-quality audits, and fulfilling its public watchdog role are not the firm’s highest priority.”
- Firm leadership must make ethics and character a fundamental part of the firm’s hiring, retention, and promotion criteria. Extolling the importance of ethics and integrity is not enough. “[A]ll those words and policies can easily be diluted or undermined by leadership’s ‘tone’ which is exhibited by actions.”

FIGURE 9: BUILDING BLOCKS OF A HEALTHY AUDIT FIRM CULTURE



Source: “[Fostering a Healthy ‘Tone at the Top’ at Audit Firms](#), Paul Munter, SEC Chief Accountant, May 15, 2024.

“[W]hen firm leadership fails to set a strong tone at the top...they risk eroding the firm’s culture, professional skepticism, quality control systems, and public responsibility as gatekeepers of our capital markets.”

– Paul Munter, SEC Chief Accountant

D. Prediction 4: PCAOB and SEC Enforcement Activity Will Increasingly Focus on CAMs

Auditors have been required to disclose critical audit matters (CAMs) in audit reports of large accelerated filers beginning with audits of fiscal years ending on or after June 30, 2019. For all other companies audited under PCAOB standards, the requirements became effective for audits of financial statements for fiscal years ending on or after December 15, 2021.

As discussed in our 2023 report, both the PCAOB and SEC brought actions involving CAMs for

HOW DID WE DO?



PCAOB in H1 2024



SEC in H1 2024

the first time in 2023. We predicted an increase in enforcement actions alleging CAMs violations in 2024, in part because PCAOB [inspections staff reported](#) in July 2023 that it found deficiencies related to the auditor’s assessment and reporting of CAMs in nearly a third of recently inspected audits.

In the first half of 2024, the PCAOB brought four matters alleging CAMs-related violations. These actions primarily related to the firm respondents’ failure to establish and implement policies and procedures to reasonably assure that the engagement teams appropriately identified, evaluated, and communicated CAMs.

None of the three matters initiated by the SEC in H1 2024 alleged CAMs-related violations.

“A critical audit matter is any matter arising from the audit of the financial statements that was communicated or required to be communicated to the audit committee and that: (1) relates to accounts or disclosures that are material to the financial statements and (2) involved especially challenging, subjective, or complex auditor judgment.” (AS 3101.11)

E. Prediction 5: We May See More Joint Actions Brought by Both the PCAOB and SEC

While PCAOB/SEC coordination on audit-related *investigations* is common practice, in early 2023, we saw increasing indications of interest in bringing joint *enforcement actions* – a departure from historical practice.¹⁰ For example, during the May 2023 ALI-CLE Accountants’ Liability Conference, the PCAOB’s Deputy Director of Enforcement and Investigations, John Abell, said, “We can expect to see” more parallel proceedings with the SEC, due, in part, to the “slightly different remedies” available and the “stronger deterrent impact” if there are concurrent actions by both entities.

A month later, the [SEC](#) and [PCAOB](#) each charged Marcum LLP with systemic quality control failures and violations of audit standards in connection with its work for hundreds of special purpose acquisition company (SPAC) clients.

We predicted that we may see more joint actions this year.

HOW DID WE DO?



In H1 2024

While there has not been a joint action this year between the SEC and PCAOB, the PCAOB’s investigation of KPMG Netherlands (discussed above) was done in parallel with the Dutch financial markets regulator, the Authority for the Financial Markets (AFM), and sanctions included “an intensive supervision program” to be conducted by the AFM.

¹⁰ See, e.g., [‘When you are a hammer, the world is a nail’ – SEC and PCAOB Senior Staff Signal Increased SEC and PCAOB Gatekeeper Enforcement](#), Akin Gump Strauss Hauer & Feld LLP, June 16, 2023.

IV. Additional H1 2024 Developments

A. Challenges to SEC and PCAOB Administrative Power

1. *SEC v. Jarkesy*

In November 2023, the Supreme Court heard oral arguments in *SEC v. Jarkesy*, which challenged the constitutionality of the SEC’s use of its in-house administrative forum – specifically, the use of ALJs – to seek civil penalties for securities fraud.¹¹ The [matter stemmed](#) from an administrative proceeding brought in 2013 against hedge fund founder George Jarkesy. An ALJ found that Mr. Jarkesy and his firm had committed securities fraud and imposed monetary penalties of \$300,000, among other sanctions.

On June 27, 2024, the Supreme Court’s conservative majority passed down a 6-3 ruling, finding “A defendant facing a fraud suit has the right to be tried by a jury of his peers before a neutral adjudicator” and therefore, the SEC’s use of its in-house court system when seeking financial civil penalties violates the Seventh Amendment.

Prior to *Jarkesy*, the vast majority of SEC enforcement matters involving auditors were brought in administrative proceedings under [Rule 102\(e\)](#), which allows the agency to censure respondents or deny them the privilege of appearing or practicing before the SEC if the respondent is found to have engaged in improper professional conduct and other improprieties.

After the Supreme Court heard oral arguments in *Jarkesy* last fall, rather than seeking relief in an administrative proceeding, the SEC charged accounting firm [Pregar Metis](#) in federal court for independence violations under Rule 2-01 of Reg S-X and for aiding and abetting their clients’ violations of federal securities laws.

¹¹ The questions presented in the [Jarkesy matter](#) were: “1. Whether statutory provisions that empower the Securities and Exchange Commission (SEC) to initiate and adjudicate administrative enforcement proceedings seeking civil penalties violate the Seventh Amendment. 2. Whether statutory provisions that authorize the SEC to choose to enforce the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine. 3. Whether Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection.”

While the SEC has brought two 102(e) matters this year against auditors as administrative proceedings, the Pregar Metis matter may indeed be a harbinger of how and where the SEC chooses to bring future enforcement actions against auditors.

The implications for SEC enforcement post-*Jarkesy* are still being debated. For example, the decision leaves open the question of whether the Seventh Amendment may limit the SEC's use of ALJs in cases not charging fraud or seeking monetary penalties. *Jarkesy* also raises questions about the constitutionality of PCAOB enforcement proceedings.¹²

Despite the *Jarkesy* ruling, many still expect to see a significant number of SEC [settlements](#) in the administrative forum. When [no settlement](#) is reached during an SEC investigation, the SEC will either have to litigate before a federal judge and jury or not seek civil monetary penalties.

2. *John Doe v. PCAOB*

On March 5 of this year, echoing the *Jarkesy* matter, an anonymous accountant instituted an action [against the PCAOB](#), alleging that the regulator's disciplinary proceedings against him violate the US Constitution.¹³

The March 5 complaint, filed in the Middle District of Tennessee, is not the only lawsuit calling the PCAOB's enforcement methods into question. Since January 2023, auditors subject to either disciplinary action or investigation have anonymously filed [three separate but similar lawsuits against the PCAOB](#) (including the M.D. Tenn. matter)¹⁴ that challenge the constitutionality of its use of in-house proceedings. Specifically, the allegations across each of these challenges include that the PCAOB – as a private regulatory entity created by the Sarbanes-Oxley Act to oversee auditors of public companies – is unlawfully exercising judicial powers reserved for federal courts by prosecuting and adjudicating matters against auditors, and that the proceedings violated the Plaintiff's Fifth Amendment right to due process, and Sixth and Seventh Amendment rights to a jury trial.¹⁵

¹² See, e.g., [Audit Watchdog's Future at Risk After Supreme Court's SEC Ruling](#), *Bloomberg Law*, August 5, 2024 (“The Supreme Court has treated the PCAOB as part of the government, like the SEC. This suggests the Seventh Amendment, as interpreted in *Jarkesy*, applies to PCAOB proceedings as well as SEC in-house tribunals. Consequences for the PCAOB may be more far-reaching than for the SEC....”).

¹³ The Plaintiff has referred to *Jarkesy* as a “[nearly identical Seventh Amendment Challenge](#).” *Doe v. Public Company Accounting Oversight Board* (M.D. Tenn. 3:24-cv-00254).

¹⁴ The first of the three suits was filed in January 2023 (D.D.C. 1:24-cv-00780-UNA). Two matters were filed in March 2024 (S.D. Tex. 4:24-cv-01103 and M.D. Tenn. 3:24-cv-00254).

¹⁵ Each matter lodges Constitutional challenges against the PCAOB. See, e.g., the [Complaint for Injunctive and Declaratory Relief](#) filed on behalf of an individual auditor in the Middle District of Tennessee.

The parties in *John Doe v. PCAOB* have filed a joint preliminary statement stipulating that the parties will “engage in a good faith effort to resolve the case” at or prior to the initial case management conference¹⁶ – suggesting that near-term resolution in at least one of the matters brought against the PCAOB is possible. Given the common defendant and constitutional challenges, the results of this attempted resolution, which must be submitted to the Courts by the end of August, may foreshadow the resolution of the remaining matters.

B. PCAOB Amends Rule 3502 Governing Contributory Liability

In its June 12 meeting, the PCAOB board unanimously approved an [amendment to Rule 3502, Responsibility to Not Knowingly or Recklessly Contribute to Violations](#), that would expand liability for associated persons who contribute to a registered firm’s primary violation.

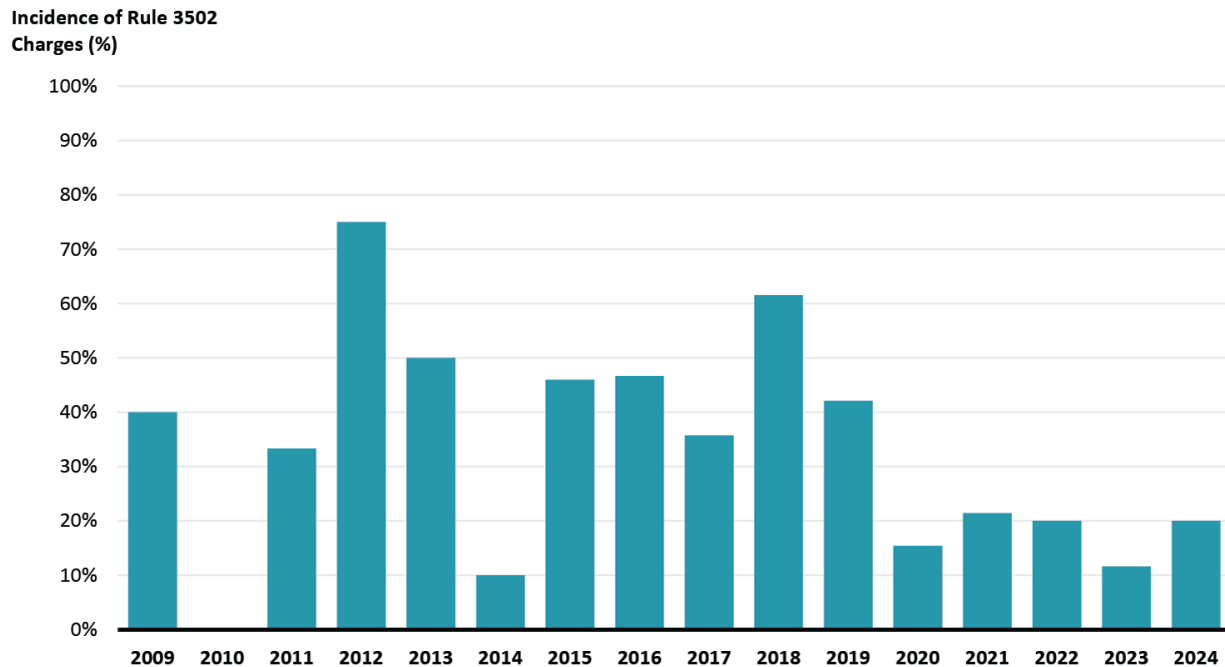
Under the existing rule, which dates to 2005, the PCAOB can hold contributors liable for firm violations if they act *recklessly*, defined as “an *extreme departure* from the standard of ordinary care” that “presents a danger to investors or to the markets that is either known to the actor or is so obvious they must have been aware of it.”

The amendment, which is subject to SEC approval, requires only *negligent* conduct – that is, “the *failure to exercise reasonable care* of competence” and would rename Rule 3502 to *Responsibility Not to Contribute to Violations*.

According to [PCAOB Release No. 2024-008](#), under the existing rule, “over two-thirds of the cases in which a firm was sanctioned, no contributory actor was held accountable under Rule 3502.”

¹⁶ See *John Doe v. Public Company Accounting Oversight Board*, No. 3:24-cv-00254, Proposed Case Management Order (July 11, 2024).

FIGURE 9: RULE 3502 CHARGES AS A PERCENT OF FIRMS SANCTIONED: 2009–APRIL 2024



Source: PCAOB, Amendment to PCAOB Rule 3502 Governing Contributory Liability, “Table 1. Number and Incidence of Rule 3502 Charges, 2009–2024,” June 12, 2024, https://assets.pcaobus.org/pcaob-dev/docs/default-source/rulemaking/053/2024-008-rule-3502-adoption.pdf?sfvrsn=9819bcd3_2.

In June 2024, the [Center for Audit Quality](#) discussed potential unintended consequences of the amended rule, including:

- Further discouraging students from pursuing a career in public accounting.
- Driving experienced auditors out of the profession or discouraging them from taking on leadership roles due to “fear of being held liable under a simple negligence standard for good faith judgments.”
- Lower audit quality “by diverting professionals’ attention away from important aspects of the audit.”
- A reduction in the market for audit services due to a disproportionate impact on small- and medium-sized firms.

The SEC is currently [soliciting comments](#). The amendment, if approved by the SEC, will become [effective 60 days](#) after such approval.

C. BF Borgers Settlement

On May 3, 2024, the [SEC charged BF Borgers](#) and its owner, Benjamin F. Borgers, with engaging in a massive fraud involving “deliberate and systemic failures [of the firm] to comply with [PCAOB] standards in its audits and reviews incorporated in more than 1,500 SEC filings from January 2021 through June 2023 [;] fabricating audit documentation to make it appear that the firm’s work did comply with PCAOB standards; and falsely stating in audit reports included in more than 500 public company SEC filings that the firm’s audits complied with PCAOB standards.”

“Ben Borgers and his audit firm, BF Borgers, were responsible for one of the largest wholesale failures by gatekeepers in our financial markets.”

— Gurbir S. Grewal, Director of the SEC’s Division of Enforcement

To [settle](#) the SEC’s charges, the firm and Mr. Borgers agreed to \$12 million and \$2 million in civil penalties, respectively. Both respondents also agreed to permanent bars from appearing or practicing as accountants before the Commission. Consequently, according to the SEC’s press release, “Borgers and his sham audit mill have been permanently shut down.”

Due to the firm’s permanent bar, hundreds of issuers that had engaged BF Borgers to audit or review financial information to be included in filings to be made on or after May 3 were required to [engage new PCAOB-registered public accountants](#).¹⁷

BF Borgers’ highest profile client, Trump Media & Technology Group Corp., quickly secured a new auditor. However, according to [Bloomberg News](#), by late June, approximately 70 former clients had not yet found replacement auditors.

While we expect enforcement to remain elevated in the second half of 2024 (especially at the PCAOB), the impact of the *Jarkesy* decision and the results of the 2024 presidential election could have significant implications for PCAOB and SEC enforcement in and after 2025,

¹⁷ In a [May 3, 2024 staff statement](#) following the Rule 102(e) Order against BF Borgers, the SEC also warned issuers to “consider whether their filings [prior to May 3] may need to be amended to address any reporting deficiencies arising from the BF Borgers engagement.”

particularly if former President Trump wins his bid for re-election and replaces the current PCAOB and SEC leadership.

We will continue to follow these developments and others and will highlight overall enforcement activity against auditors in our 2024 annual update.

V. Appendix: Defined Terms

Auditors	Public accounting firms and individuals associated with public accounting firms.
Bar	Includes bars, suspension, revocation of registration, or denial of privilege of appearing.
Current administration	Proxied by the years 2022–2023. For the SEC, Chair Gensler was sworn into office in April 2021, followed by Enforcement Director Grewal in late July. For the PCAOB, Chair Williams was sworn in January 2022.
Finalized action	Includes settled, adjudicated, and dismissed actions. Most settled actions are initiated and finalized on the same day.
Individuals associated with a public accounting firm	Professionals employed by a public accounting firm. Includes auditors and non-auditors involved with audit-related issues (e.g., tax preparers and attorneys in matters alleging independence violations).
Initiated action	The first action related to a particular matter. Most actions are initiated and finalized on the same day.
Monetary sanctions	Civil money penalties. For SEC actions, also includes disgorgement and pre-judgment interest. For actions in which the PCAOB or SEC impose joint and several penalties upon an individual and a firm, our analysis allocates half of the monetary sanction to the individual and half to the firm.
Non-US respondent	Firm respondents headquartered outside the United States or individual respondents associated with a firm headquartered outside of the United States.
PCAOB actions	All settled and adjudicated disciplinary orders are available at https://pcaobus.org/oversight/enforcement/enforcement-actions .
Prior administration	Proxied by 2018–2021. For the SEC, former Chair Jay Clayton served from May 2017 to December 2020. For the PCAOB, former Chair William D. Duhnke III served from January 2018 to June 2021.

Public accounting firm Any proprietorship, partnership, incorporated association, corporation, limited liability company, limited liability partnership, or other legal entity that is engaged in the practice of public accounting or preparing or issuing audit reports.

Respondents Individuals and/or firms listed as respondents in PCAOB and SEC administrative proceedings or defendants in SEC civil actions.

SEC actions SEC enforcement actions involving respondents that are public accounting firms or individuals associated with a public accounting firm, available at <https://www.sec.gov/litigation/litreleases> or <https://www.sec.gov/divisions/enforce/friactions>.

US respondents Firm respondents headquartered in the United States or individual respondents associated with a firm headquartered in the United States.