

Courts May Call “Lane Violation” on Recent SEC Actions

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With increasing frequency, petitioners representing the securities industry are asking courts to decide that rules adopted by the SEC exceed the agency’s authority, even when the rules have barely left the starting blocks. **SEC Expansion of Private Fund Adviser Regulation** For example, the National Association of Private Fund Managers and several other trade associations have filed a petition challenging the recent massive expansion of regulation over private fund investment advisers (and, by extension, of private funds). This expansion was adopted in 2023 by a split (3–2) vote of the SEC commissioners and is further discussed in [“SEC and CFTC Amend Form PF ... Again.”](#) The petitioners in this case, which is pending before a three-judge panel in the Fifth Circuit Court of Appeals, make numerous arguments. Underlying many of these, however, is the idea that the SEC has committed something like a regulatory lane violation:

- Congress specifically prescribed different and distinct regulatory schemes for investment advisers, broker-dealers, registered investment companies, and private funds; and
- The SEC has impermissibly distorted and blurred the differences and distinctions, based on its own current judgment and preferences.

The petitioners also allege procedural infirmities, including that the SEC did not allow enough time for public comment on, and did not provide an adequate cost-benefit analysis of, these reforms. **Controversies Around SEC Requirements for Consolidated Audit Trail Database** In another case, Citadel Securities and the American Securities Association have filed a petition challenging the SEC’s recent action that reallocated to broker-dealer firms substantial costs of maintaining what is commonly known as the “consolidated audit trail” database. As originally adopted, these costs were to be borne by FINRA and the securities exchanges. The costs are quite substantial, as the database must gather information about almost all broker-dealer transactions and be searchable by regulators for numerous purposes. The petitioners are challenging this reallocation, which the SEC approved by a once-again split vote of its commissioners, in the Eleventh Circuit Court of Appeals. The petitioners allege that the reallocation violated the Administrative Procedure Act, because the SEC failed to consider the reallocation’s impact on investors, despite the likelihood that at least some of the costs

will be passed on (directly or indirectly) to broker-dealers' customers. The petitioners also allege that the database itself is legally flawed in various respects. Moreover, another complaint challenging the consolidated audit trail database was filed in late April in the U.S. District Court for the Western District of Texas. That case is a putative class action on behalf of all investors whose personally identifiable information is held in the consolidated audit trail database. Among other things, the complaint alleges that the database violates such investors' federal constitutional rights. **SEC's Climate Change Disclosure Rules** Perhaps the most prominent, complicated, and potentially significant example of this trend occurred recently when multiple challenges to the SEC's final emissions reporting rules were filed commencing virtually immediately after the SEC's action (by a 3-2 vote of its commissioners) to adopt the rules. The U.S. Chamber of Congress, state attorneys general, and various other parties also filed challenges to these rules in the Fifth and several other circuits. However, all of these cases have been consolidated in the Eighth Circuit. In light of this litigation, the SEC has issued an order that stays effectiveness of the rules, pending judicial resolution of the issues raised.

In the future, more challenges can be expected to assert that other SEC rules have strayed outside applicable boundary lines established by one or more governing statutory or constitutional provisions.

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