

# Private Funds Rules Vacated

On June 5, 2024, the United States Court of Appeals for the Fifth Circuit (the “Court”) vacated the entire set of new Investment Advisers Act of 1940 (the “Advisers Act”) rules applicable to private fund advisers (the “Private Funds Rules”), which were otherwise slated to go into effect later in 2024 and 2025. The Private Funds Rules were expected to have a significant impact on investment advisers to private funds (in varying degrees for both registered investment advisers and exempt reporting advisers).<sup>1</sup> However, the Court found that the SEC “has exceeded its statutory authority in adopting the [Private Funds Rules]” and “no part of it can stand.”<sup>2</sup>

Following approval of the Private Funds Rules by the SEC in 2023, trade groups for the private funds industry (the “Petitioners”) sued the SEC in the Fifth Circuit Court of Appeals. Petitioners argued that the SEC exceeded the authority granted to it pursuant to the Dodd-Frank Act under the Advisers Act and that exceeding such authority violated the Administrative Procedures Act.

The Court agreed that the SEC’s reliance on section 913 of the Dodd-Frank Act as justification for statutory authority was misplaced, as section 913 applies to “retail customers,” which the Court distinguished from “private fund investors” - with the Court indicating “[section 913] has nothing to do with private funds.”<sup>3</sup>

The Court also rejected the SEC’s claim that the Private Funds Rules served an anti-fraud purpose, stating, “The [Private Fund Rules] anti-fraud measure is pretextual. The [Petitioners] claim that the [SEC] has not articulated a “rational connection” between fraud and any part of the [Private Funds Rules] the [SEC] adopted. [The Court] agree[s].”<sup>4</sup>

We anticipate that the SEC will consider its options for rehearing or appeal to the U.S. Supreme Court. The SEC alternatively could propose an amended version of the Private Funds Rules. While it is unlikely that the Private Funds Rules will become effective as originally adopted, it remains possible that they will become effective in whole or in part on an altered timeline. The SEC may also seek to enforce similar substantive obligations (as the Private Funds Rules) through existing rules. Therefore, we will continue to monitor this space for developments and provide updates. Please do not hesitate to reach out to your Polsinelli contact with any questions.

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<sup>1</sup> For a high-level summary of the now-vacated Private Funds Rules, please see Polsinelli’s prior update: *SEC Enacts Significant Compliance Reforms for Advisers to Private Funds*.

<sup>2</sup> *National Association of Private Fund Managers, Alternative Investment Management Association Ltd., American Investment Council, Loan Syndications and Trading Association, Managed Funds Association,*

*and National Venture Capital Association v. Securities and Exchange Commission*, Ruling, Page 25, available at [https://assets.law360news.com/1844000/1844506/23-60471\\_documents.pdf](https://assets.law360news.com/1844000/1844506/23-60471_documents.pdf).

<sup>3</sup> *Id.* at 21.

<sup>4</sup> *Id.* at 23.