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The Case Against the SEC's Final Climate Rules Begins in Earnest (and What It Means)

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On March 21, 2024, the US Court of Appeals for the Eighth Circuit was selected as the court that will hear challenges against the Securities and Exchange Commission (SEC or Commission) over its final climate disclosures rules, which were adopted on March 6.[1] On April 4, 2024, the SEC announced that it would voluntarily stay its final climate disclosure rules pending judicial review.[2] The announcement comes on the heels of multiple requests for a stay filed by petitioners in the Eighth Circuit, where, as mentioned above, cases challenging the rules were recently consolidated.

Prior to consolidation in the Eighth Circuit, the Fifth Circuit had granted an administrative stay of the final climate disclosure rules on March 15. (For more on that court's decision, see our blog post.) However, the Fifth Circuit lifted its administrative stay just one week later as part of its order transferring the case to the Eighth Circuit.

The Eighth Circuit, which covers the states of Arkansas, the Dakotas, Iowa, Minnesota, Missouri, and Nebraska, was chosen through a lottery system and was among the six circuit courts in which petitions were filed challenging the final rules. Its selection consolidates a number of actions, including those by:

- 19 state attorneys general,[3] who filed petitions for review in the Eighth and Eleventh Circuits;
- the US Chamber of Commerce, which filed a petition for review in the Fifth Circuit; and

[1] For a detailed analysis of the final rules, see our Client Alert The SEC's Final Climate Disclosure Rules: Requirements, Practicalities, and Next Steps.

[2] See *In re Enhancement and Standardization of Climate-Related Disclosures for Investors*, Rel. Nos. 33-11280, 34-99908 (Apr. 4, 2024) (announcing voluntary stay).

[3] Attorneys general for Alabama, Alaska, Georgia, Indiana, New Hampshire, Oklahoma, South Carolina, Virginia, West Virginia, and Wyoming filed a petition for review in the US Court of Appeals for the Eleventh Circuit and attorneys general for Arkansas, Idaho, Iowa, Missouri, Montana, Nebraska, North Dakota, South Dakota, and Utah filed a petition for review in the US Court of Appeals for the Eighth Circuit.

- the Ohio Bureau of Workers' Compensation, with the state attorneys general of Kentucky and Tennessee, which filed a petition for review in the Sixth Circuit.[4]

Once the cases were transferred to the Eighth Circuit and consolidated, petitioners, including the US Chamber of Commerce, filed motions requesting that the Eighth Circuit reinstitute a stay. In addition, the US Chamber of Commerce requested that the Eighth Circuit expedite the briefing schedule, which could result in a decision by the court as early as September.

The SEC originally opposed the stay requests, indicating in a March 27th letter to the court that the court "should deny petitioners' request for an administrative stay and stay pending judicial review for the reasons stated in the Commission's filings in the Fifth Circuit." However, a few days later, the Commission voluntarily stayed its rules pending judicial review.

The SEC's order voluntarily staying its rules explained that a stay would (1) allow the Eighth Circuit to move more quickly to merits briefing, and (2) prevent uncertainty stemming from the regulations coming into effect while still under review. It also appears, based on its April 5 filing, that the SEC may be willing to confer on an expedited briefing schedule.

These are just the latest developments in the rapidly evolving litigation landscape with respect to the final rules, which had been predicted to be subject to litigation since the SEC issued the proposed rules in March 2022. There are likely to be many more twists and turns in the litigation that is being closely watched by many, including both supporters and opponents of the final rules. However, as discussed in more detail below, it is quite possible that regardless of the ultimate outcome of the litigation, global market expectations regarding climate-related transparency will continue to advance.

Legal Challenges

The primary bases for the legal challenges to the final rules include the following:

- Under the Administrative Procedure Act (APA), courts generally must set aside agency action found to be, among other things: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of an agency's jurisdiction, authority, limitations, or short of statutory right; or (4) issued without observance of the procedure required by law. An example of the APA in action, and a case that may indicate the overall thrust of certain challenges to SEC's final climate rules, is *Chamber of Commerce v. SEC*,[5] in which the

[4] In addition to the challenges described above, on the other side of the policy debate, the Sierra Club is suing the SEC in the US Circuit Court of Appeals for the District of Columbia, alleging that the final rules will yield much less information about companies' exposure to climate-based risks than the proposed rules would have.

[5] *Chamber of Com. of the United States v. SEC*, 88 F.4th 1115, 1118 (5th Cir. 2023).

Fifth Circuit ruled that the SEC acted arbitrarily and capriciously in its enactment of its share repurchase rule, violating the APA.

- The major questions doctrine is a principle of statutory interpretation that presumes Congress does not delegate to executive agencies issues of major political or economic significance without clear authorization. A case that may also relate to the current challenges is *West Virginia v. EPA*,[6] in which the Supreme Court ruled that a particular EPA rule fell under the major questions doctrine and that Congress did not grant the EPA authority to regulate emissions from existing power plants based on generation shifting mechanisms. While the *West Virginia* case is distinct from the present case challenging the Commission's climate disclosure rules, it is one example of how the major questions doctrine may play out in this context.

- Notably, the Supreme Court is considering whether to overturn the *Chevron* doctrine this year.[7] The *Chevron* doctrine was established 40 years ago in *Chevron v. Natural Resources Defense Council*,[8] which held that courts should defer to an agency's reasonable interpretation of an ambiguous statute. A ruling overturning the Chevron doctrine could position courts to more stringently review the SEC's final rules, either through applying the major questions doctrine or otherwise.

- Finally, under the First Amendment, petitioners may take the position that the Commission's final rules violate corporations' free speech. As an example, in *National Association of Manufacturers, et al., v. Securities and Exchange Commission*,[9] the District of Columbia Circuit struck down parts of the Commission's conflict minerals rules on the basis that those portions violated free speech rights.

All this raises an important question: whether and how the Eighth Circuit case might affect the ultimate compliance dates for the final rules. The SEC's voluntary stay alone does not purport to change the ultimate compliance dates, although the Commission has indicated that it will agree to the expedited briefing schedule, which could result in a decision from the Eighth Circuit this year.

Depending on the timing and effect of the Eighth Circuit's decisions regarding an expedited review and the merits — if, for example, the stay remains in place as the Eighth Circuit's review stretches toward 2025 and beyond, if the SEC voluntarily postpones the compliance dates, or if the Eighth

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[6] *West Virginia v. EPA*, 597 U.S. 697 (2022).

[7] The cases before the Court that may result in a change to the Court's approach with respect to deference to federal agencies are *Loper Bright Enterprises v. Raimondo* (No. 22-451) and *Relentless, Inc. v. Department of Commerce* (No. 22-1219).

[8] *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, Inc., 467 U.S. 837 (1984).

[9] *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015).

Circuit itself issues a stay or grants other relief for petitioners — compliance could well be delayed. In addition, any Eighth Circuit decision could result in an appeal to the Supreme Court.

Practicalities Looking Forward

Regardless of the ultimate outcome of the litigation, market actors continue to look for ways to more fully integrate climate-related risks and strategies into business decisions and capital allocation. While ultimately the SEC's final rules may be overturned entirely or in part — or go unenforced by a future Commission — state-level developments, regulatory advances in other jurisdictions, and private ordering regarding sustainability matters are likely to continue.

Moreover, it is clear that the existence of the final rules has altered, perhaps permanently, the internal conversations many companies are having with respect to the integration of climate-related risks and impacts, the oversight of climate-related matters, the recognition of climate-related costs and expenditures, the accuracy of GHG emissions reporting, and the complexity of cross-jurisdictional sustainability and climate-related reporting.

In addition, with some US states already having acted, and others poised to act, to adopt climate- and sustainability-related legislation and regulation, it is quite possible the US will continue to weigh in on the global climate-related regulatory conversation, even if US federal securities climate-related disclosure regulation remains in litigation limbo or subject to the tides of political change for the foreseeable future.

For companies operating in other jurisdictions, or with capital providers or other third parties engaged in business in other jurisdictions, the push for climate- and sustainability-related transparency is likely to continue and intensify. By way of an example, during the same time period as the developments regarding the litigation against the SEC's final climate rules have taken place, developments in the EU have continued moving in, arguably, the opposite direction.

On March 15, 2024, the European Council endorsed a compromise text on the Corporate Sustainability Due Diligence Directive (CSDDD) after considerable negotiation. The CSDDD would require companies to conduct due diligence to identify and assess environmental and human rights issues across their value chain, and to take steps to prevent and eliminate them, and will also apply to US companies generating over €450 million annual turnover in the EU. (See our blog post for further details.) This development stands in contrast to what is likely to be an extended pushback to the SEC's final rules in the US, and serves to further highlight both global trends and jurisdictional divergences with respect to climate-related disclosure regulation.

Latham & Watkins will continue to monitor these developments.