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Investment Funds & Private Capital Market Insights

Industry Groups Challenge Over Private Funds Rule

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On September 1, 2023, a group of private fund industry groups¹ filed a petition in the United States Court of Appeals for the Fifth Circuit, challenging the SEC's recently adopted Private Funds Rule (defined below).² Our initial client alert ([available here](#)), provides an overview of the new rules and amendments. As noted in that alert, we will be publishing a second client alert with additional analysis of the new rules in the coming days.

Why It Matters:

- While the Private Funds Rule provides for a 12- to 18-month compliance transition period, the legal challenge creates potential uncertainty around how and when private fund advisers should prepare for compliance.
- Some or all of the Private Funds Rule may be found to be beyond the SEC's authority and/or subject to procedural defect, and therefore ultimately rescinded by the U.S. courts.

Key Takeaways:

- The industry groups allege that the Private Funds Rule (1) exceeds the SEC's statutory authority, (2) does not comply with notice-and-comment requirements, (3) is arbitrary, capricious, an abuse of discretion, and in violation of the Administrative Procedure Act and (4) is a violation of the SEC's obligation to consider its rules' effects on "efficiency, competition, and capital formation."
- Notwithstanding the challenge, private fund advisers may wish to discuss with counsel the implications for their current fundraising activities and ongoing operations.
- In establishing its statutory authority for the rulemaking, the SEC relied on a Dodd-Frank provision that previously had not been utilized for regulating private fund sponsors.
- Some commentators noted that the revisions to the final rule were calibrated to reduce vulnerability to legal challenge, and the combination of more burdensome compliance, the expansive and precedential nature of the SEC's statutory interpretation and a Supreme Court that recently decided cases against administrative agencies it believed over-interpreted their statutory authority may make for an opportune moment to seek redress.

¹ Petitioners in the case are the Managed Funds Association (MFA), the National Association of Private Fund Managers (NAPFM), National Venture Capital Association (NVCA), American Investment Council (AIC), Alternative Investment Management Association (AIMA), and Loan Syndications & Trading Association (LSTA).

² As a reminder, on August 23, 2023, the SEC voted (3-2) to adopt new rules and amendments under the Investment Advisers Act of 1940 applicable to private fund advisers ([available here](#)) (the "Private Funds Rule").

Go Deeper:

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Our [Investment Funds & Private Capital – Regulatory](#) practice includes attorneys with deep experience handling sensitive and complex regulatory and compliance issues. In the U.S., we regularly advise on Investment Company Act status and structuring issues, private fund investment manager registration, Investment Advisers Act, Securities Act, Securities Exchange Act and other compliance, SEC examinations and enforcement.



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