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Securities and Exchange Commission Decides Not to Seek Supreme Court Review of Decision Vacating Private Fund Rules

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The Securities and Exchange Commission (“SEC”) has decided not to petition the U.S. Supreme Court for a writ of certiorari to review the U.S. Court of Appeals for the Fifth Circuit’s decision to vacate a controversial package of private fund rules (collectively, the “Private Fund Rules”).¹ On June 5, 2024, a unanimous three-judge panel of the Fifth Circuit vacated the Private Fund Rules in their entirety and held that the SEC exceeded the bounds of its rulemaking authority when it adopted them (for additional detail, please see our client alert on the Fifth Court’s June 5 decision, [available here](#)). The 90-day deadline for seeking Supreme Court review—the only remaining way for the SEC to salvage the Private Fund Rules absent a new rulemaking process—lapsed on Tuesday, September 3rd.

The Fifth Circuit’s decision to vacate the Private Fund Rules is the latest in a series of cases in which the Fifth Circuit has ruled against the SEC. For example, since 2022, the Fifth Circuit has held that the SEC’s administrative proceedings violate the Constitution,² has vacated the SEC’s share repurchase disclosure rules,³ and has vacated the SEC’s changes to the notice-and-awareness requirements for proxy advisory firms.⁴

The SEC’s decision not to seek Supreme Court review of the Private Fund Rules will be a welcome final chapter in the saga for private fund sponsors, many of whom argued the rulemaking exceeded the agency’s statutory authority, interfered with market-oriented and negotiated investor arrangements, and disproportionately harmed smaller and upstart sponsors by unnecessarily raising compliance costs. It remains to be seen how the SEC’s approach to the Fifth Circuit decision will affect other pending rulemakings and future rulemaking processes, or whether judicial resistance will result in increased oversight and policing efforts by the SEC’s Examinations and Enforcement Divisions.



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¹ See *Nat'l Assoc. of Private Fund Mgrs. v. SEC*, 103 F.4th 1097 (5th Cir. 2024).

² See *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023), and *cert. denied*, 143 S. Ct. 2690 (2023), and *aff'd and remanded*, 144 S. Ct. 2117 (2024).

³ See *Chamber of Commerce v. SEC*, 88 F.4th 1115 (5th Cir. 2023).

⁴ See *Nat'l Assoc. of Manufacturers v. SEC*, 105 F.4th 802 (5th Cir. 2024). In 2018, the Fifth Circuit also struck down the Department of Labor's controversial fiduciary rule. See *Chamber of Commerce v. Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018).

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