

# Latest Supreme Court Term Presents New Challenges for SEC

## Client Alerts

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## I. Introduction

The Supreme Court's most recent term has forced the SEC to face new realities regarding its powers. As has been widely publicized, the Supreme Court's overruling of *Chevron* in *Loper Bright Enterprises v. Raimondo* highlighted that the agency would no longer receive deference when interpreting statutes. And in *SEC v. Jarkesy*, the Supreme Court held that the SEC's in-house adjudication process cannot be used to hear fraud cases brought by the agency. These decisions are just the latest evidence that the SEC's authority has been increasingly challenged and will continue to be challenged. This client alert discusses the latest developments and how this environment will impact the SEC's approach to rulemaking and enforcement going forward.

## II. SEC Faced Challenges Prior to *Loper Bright* and *Jarkesy*.

Even before the most recent Court term, the SEC faced an increasingly hostile litigation environment with successful challenges to its rules under both the Administrative Procedure Act and various constitutional claims. For example:

- In 2023, the Fifth Circuit vacated the SEC's Share Repurchase Disclosure Modernization Rule issued earlier that year. *Chamber of Com. of the USA v. SEC*, No. 23-60255 (5th Cir. Dec. 19, 2023).
- In 2024, after a long public comment process, the agency issued a controversial new rule that would "require registrants to provide certain climate-related information in their registration statements and annual reports." SEC, Order Issuing Stay (Apr. 4, 2024), . After challenges and some initial defeats, the SEC agreed to stay the rule.
- More recently, on June 5, 2024, the Fifth Circuit vacated the SEC's "Private Fund Adviser Rules," which provided for additional substantive requirements for audit, reporting, and fee disclosure matters to protect private fund investors. *Nat'l Ass'n of Private Fund Mgrs. v. SEC*, No. 23-60471 (5th Cir. June 28, 2024). The SEC has indicated it will not challenge the court's decision.

Thus, even before the Supreme Court handed down its decisions in *Loper Bright* and *Jarkesy*, the SEC's rulemaking abilities were already being successfully challenged.

### **III. *Loper Bright* and *Jarkesy* Add to SEC's Challenges.**

Toward the end of its most recent term, in *Loper Bright Enterprises v. Raimondo*, the Supreme Court overturned the 40-year-old doctrine established in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, which required courts to defer to agency interpretations of silent or ambiguous acts of Congress. For a more detailed analysis of the Court's decision in *Loper Bright*, see Jenner & Block's recent client alert: *End of an Era: The Supreme Court Reverses Chevron* (June 28, 2024), . For the purposes of this discussion, it suffices to note that the end of *Chevron* deference creates fundamental challenges for the SEC specifically: the agency's focus, broadly speaking, is on promoting the formation of capital, protecting investors, and ensuring the operation of US capital markets. Consequently, the SEC's mandate often requires it to act "in the public interest" and certain current and longstanding rules have been issued on that basis. Its recent rulemaking requiring disclosure of climate risks was not authorized specifically by Congress, but reflected the SEC's views on matters important to investors and capital formation. This example indicates that many of the SEC's programmatic aim for new disclosure requirements, which may not have been expressly spelled out in a statute, may now be vulnerable to challenges under *Loper Bright*. The bottom line is that the end of *Chevron* deference means that it will be even more difficult for the SEC to gain acceptance of new rules.

The Supreme Court created more challenges for the SEC with its decision in *SEC v. Jarkesy*. In the years after the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, the SEC increasingly used its in-house forum for fraud actions, which has been subject to constitutional challenges. In *Jarkesy*, the Court held that the SEC's use of in-house courts to hear fraud cases seeking civil penalties violates the Seventh Amendment right to a jury trial. Slip Op. at 27. *Jarkesy* underscores that the SEC's administrative forum (and other agencies' administrative fora for certain types of claims) will continue to face challenges and an uncertain future.

Although *Loper Bright* and *Jarkesy* on their own present significant challenges to the SEC, these decisions fit within the recent trend of litigation challenging the agency's authority.

### **IV. Proposed Responses**

The post-*Chevron* landscape will almost certainly prove hostile to the SEC's statutory interpretation, which had already been stymied prior to the Court's decision in *Loper Bright*. As a result, it is likely that the SEC will turn its attention to other forms of interpretative guidance as rulemaking slows, and there is an expectation that the federal courts will play a more prominent role in SEC-related litigation.

#### **A. Focus on SEC Guidance and Staff Comments**

If the SEC's notice and rulemaking continues to face challenges, the SEC may pivot toward an increased issuance of agency guidance. The SEC regularly issues guidance on a variety of matters, which includes statements of commissioners, officials, and other staff members, as well as interpretive guidance (e.g., Compliance and Disclosure Interpretations) and staff bulletins. Although these statements and related guidance do not have the same legal force as rules issued under notice and comment rulemaking, such statements and related guidance help issuers understand the SEC's disclosure and enforcement initiatives. *See, e.g., SEC, Securities Act Rules Compliance and Disclosure Interpretations* (last updated Nov. 20, 2023), (collection of C&DIIs comprising interpretations of rules adopted under Securities Act); Gurbir S. Grewal, *What's Past Is Prologue: Enforcing the Federal Securities Laws in the Age of Crypto* (July 2, 2024), (speech from the Director of Division of Enforcement regarding the enforcement of securities laws as applied to crypto assets).

Similar to agency guidance, the SEC can impact disclosures and issuer actions through its comment letter process, as well as making inquiries about various business practices and disclosures. From time to time, the SEC has focused on issuing comment letters across industries or certain businesses and companies with specific characteristics. This has had the effect of conforming and changing disclosures and other processes as issuers pick up the "sweep" or targeted actions. Specific enforcement communications will require careful responses to discern whether the issuer is a target of any enforcement action, even if it is not immediately apparent on the face of the letter. Moreover, such interpretive guidance and comment letters may still face legal risks to the extent the agency is offering interpretations of legal or statutory questions.

### **B. Expect Rulemaking to Slow Down and Courts to Take Center Stage**

The primary impact of *Loper Bright* and the Fifth Circuit's recent decisions is that rulemaking will slow down as the SEC considers the new litigation landscape. As certain rules have been vacated and stayed, court proceedings (and related communications from the SEC) may be more important to monitor to determine when rules will actually be in effect.

Moreover, rulemakings will need more specific congressional enabling language, so it is likely that the rulemaking agenda will focus the rules on such language in lieu of rules that would be in the "public interest" or support capital formation. It will also be worth paying attention to budget bills, as such bills may contain authorizing language to issue rules.

### **C. Expect Continued Challenges to the SEC's Enforcement Authority**

Finally, a word on enforcement. The end of *Chevron* deference is unlikely to directly impact enforcement. The SEC had also recently limited its use of its in house forum for fraud actions after litigants began to make constitutional challenges. But the reality that the SEC's authority is subject to successful challenge in federal courts will continue to be a factor both in enforcement investigations and litigations. Given its aggressive posture, the SEC has had to resort to litigation increasingly to

carry out its programmatic aims. In litigating these cases, the SEC has often faced mixed results. It has faced setbacks in the Supreme Court—such as *Jarkesy*. But, like any litigant, the SEC also can face setbacks when litigating at the District Court level. This has recently been shown in the split decision after the ruling from the US District Court for the Southern District of New York largely granting the defendants’ motion to dismiss in *SEC v. SolarWinds*. See Jenner & Block’s recent client alert: Key Takeaways from the Motion to Dismiss Ruling in SEC v. SolarWinds et al. (July 24, 2024). The SEC has already faced such challenges to its enforcement actions related to cryptocurrency companies. See, e.g., *SEC v. Binance Holdings Ltd.*, No. 23-1599 (D.D.C. June 28, 2024) (dismissing the SEC’s claims related to Binance’s secondary sales of its proprietary token, but allowing much of the remainder of the agency’s claims to proceed).

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