

## Investment Management Alert: Fifth Circuit Strikes Down Entire SEC Private Fund Adviser Rule

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June 5, 2024 Kit Addleman, Madelyn Calabrese, Evan Hall, Stuart Slayton

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On June 5, 2024, the U.S. Court of Appeals for the Fifth Circuit struck down the private fund adviser rules adopted by the Securities and Exchange Commission (SEC) in August 2023 (the Rule) that would have imposed significant regulatory burdens on private fund advisers and was estimated to cost at least \$5.4 billion and require millions of hours of employee time to comply.

The court held that the SEC exceeded its statutory authority under the Investment Advisers Act of 1940 (Advisers Act) and the Dodd-Frank Act of 2010 (Dodd-Frank Act) in promulgating the Rule and therefore vacated the Rule in its entirety. The Rule, which was challenged by several industry associations representing private fund managers, would have imposed new restrictions and disclosure requirements on private fund advisers regarding their fees, expenses, performance, conflicts of interest and preferential treatment of certain investors.

The court's decision is a significant victory for private fund advisers, who argued that the Rule would have fundamentally changed the way private funds are regulated in the United States and undermined the market-driven relationship between private fund advisers, the funds they advise and the sophisticated investors who invest in those funds. The court agreed that Congress drew a "sharp line" between private funds and funds that serve retail customers and that the SEC could not rely on a provision of the Dodd-Frank Act that applies to "retail customers" to regulate private fund advisers and investors. The court also rejected the SEC's reliance on its antifraud rulemaking authority under the Advisers Act, finding that the SEC failed to define the fraudulent acts or practices that the Rule purportedly was designed to prevent, and that the Rule lacked a "close nexus" with the statutory aims of the Advisers Act. The decision also casts doubt on the SEC's ability to adopt similar rules in the future without further congressional authorization.

We will monitor any further developments in this case and keep clients apprised of any developments, including a possible appeal by the SEC to the Supreme Court or a request for rehearing by the full Fifth Circuit.