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NCLA Encourages Fifth Circuit to Rein in Renegade SEC's Unlawful Private Fund Regulation Effort

National Association of Private Fund Managers, et al. v. Securities and Exchange Commission

Washington, DC (November 9, 2023) – The Securities and Exchange Commission (SEC) recently promulgated a rule that restricts—and in some cases prohibits—certain common contractual agreements between private investment funds and their investment advisers. The New Civil Liberties Alliance has filed an *amici curiae* brief in *National Association of Private Fund Managers v. SEC*, asking the U.S. Court of Appeals for the Fifth Circuit to set aside this unlawful rule, which exceeds SEC's statutory authority and ignores Congress' design. Securities law scholars Paul Mahoney, Adam Pritchard, and J.W. Verret joined NCLA's brief in the case, which draws from comments some of them filed during SEC's rulemaking process.

SEC argues Congress gave it the legal authority to promulgate this "Restricted Activities Rule," which affects an estimated $26 trillion private-fund industry, via a provision in the Dodd-Frank Act of 2010. But that Dodd-Frank provision was focused entirely on *retail* customers and not highly sophisticated private investment funds. SEC's interpretation of the provision requires believing that Congress improbably hid a very large elephant from a very attentive industry inside a very tiny mousehole.

Moreover, SEC's new rule contravenes Congress' 1996 amendment of the Investment Company Act to exclude private funds available only to qualified purchasers from regulation as investment companies. Who suggested that exclusion measure? SEC itself did. Agency staff concluded that "no sufficiently useful governmental purpose is served by continuing to regulate funds owned exclusively by sophisticated investors." Instead, Congress determined that financially sophisticated investors are capable enough of appreciating the risks associated with certain investment pools that they don't need the protections offered by burdensome SEC regulation, so it directed the government's limited regulatory resources elsewhere.

SEC's new rule suggests the opposite, upending this long-standing, congressionally-mandated regulatory status and ignoring the industry's massive reliance interests. By adopting its new rule without considering or addressing its effect on the advisers and funds that must respond to such a drastic change in regulation, SEC also violated the Administrative Procedure Act. NCLA joins *amici*'s call for the Fifth Circuit to scrap this unlawful SEC rule.

NCLA released the following statement:

"SEC has exceeded its lawful power in a misguided attempt to regulate a highly sophisticated industry sector that both the agency and Congress had previously determined should be left alone. We are confident that, once again, the courts will rein in the SEC and set aside this new rule."
— Russ Ryan, Senior Litigation Counsel, NCLA

For more information visit the *amicus* page here.

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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