THE SEC AND THE TERRIBLE, HORRIBLE, NO GOOD, VERY BAD SUMMER

Readers with small children (or those old enough to have grown ones) may be familiar with the popular children's story, Alexander and the Terrible, Horrible, No Good, Very Bad Day. In it, a young boy is confronted with a league of woes that he must endure and surmount. Well, this summer turned out to be the Securities and Exchange Commission's terrible, horrible, no good, very bad summer. Let's take a look at what happened and the likely impact these developments will have on the Commission.

The *DEBT Box* Debacle

Before spring had even turned into summer, the SEC was sanctioned over $1 million for perpetuating an emergency crypto action while misrepresenting material facts in district court in Utah. SEC v. Digital Licensing Inc., d/b/a DEBT Box, et al., 23-cv-482 (RJS), 2024 WL 1157832 (D. Utah Mar. 18, 2024), available here. According to the district court, the SEC engaged in "a gross abuse of the power entrusted to it by Congress" in connection with a TRO and preliminary injunction application to seize defendant Debt Box's bank accounts, and that the SEC's justifications for its conduct were "entirely without color." Perhaps relatedly, the SEC announced it would be closing its Salt Lake City office just a few months later.

Things only declined from here.

The SEC's Private Funds Rule

After years of wrangling about scope and implementation, a panel of the Fifth Circuit tossed an entire rule that would have required private fund advisers to provide detailed disclosures to investors in a sweeping decision that could threaten other agency initiatives on such matters as climate change, artificial intelligence, and crypto currency. According to the court, "The Commission has exceeded its authority in adopting the final rule," and, therefore, no part of the rule was salvageable. **Nat'l Ass'n of Private Fund Managers v. SEC,** 103 F.4th 1097, 1114 (5th Cir. 2024), available here. The SEC did not appeal the decision.

Starbucks and the Standard for Preliminary Relief

On June 13, 2024, the U.S. Supreme Court ruled that the FTC must prove all four traditional injunction factors – probability of success, irreparable harm, balancing of equities and public interest – when seeking preliminary relief. Some circuits, including the Second Circuit, had formerly utilized a truncated, two-factor test. The rationale in Starbucks should apply equally to other federal agencies, including the SEC, making emergency applications for relief more difficult to obtain going forward. ***Starbucks Corp. v. McKinney,*** 144 S.Ct. 1570 (2024), available here.

Jarkesy and the Future of Administrative Proceedings

On June 27, 2024, the Supreme Court ruled that the SEC cannot use its administrative courts in place of Article III federal district courts to decide securities fraud claims seeking civil penalties. ***Jarkesy v. SEC,*** 143 S.Ct. 2690 (2024), available here. Instead, the agency will be forced

to litigate garden-variety broker-dealer and investment adviser disputes in a federal judicial forum. The burden of litigation (time and cost) and the risk of adverse decisions should seriously impact the agency, recognizing that the SEC has been preparing for this eventuality by moving most litigated cases toward a federal forum.

The impact of Jarkesy on administrative proceedings seeking only equitable or non-monetary relief (i.e., bar orders) is far from clear, but just last month the SEC dismissed eight pending Rule 102(e) proceedings against accountants. No explanation for the dismissals was provided.

Loper Bright and the Demise of the Chevron Doctrine

On June 28, 2024, the final day of the term, the Supreme Court discarded forty years of jurisprudence in a single stroke, ruling that courts no longer need defer to agency interpretations of ambiguous statutes under the Chevron doctrine. ***Loper Bright v. Raimondo,*** 144 S.Ct. 2244 (2024), available here.

The decision poses a host of issues for the SEC. First, Loper Bright directly threatens the agency's ambitious regulatory attempts to address controversial issues such as climate and emissions data disclosure. Second, it complicates the efforts of the SEC to regulate via enforcement existing laws in new environments like the crypto and cyber industries. Finally, as with all federal departments and agencies, the decision dramatically increases the risk that courts will issue opinions that conflict with each other as well as with decades of agency precedent.

SolarWinds and the Dispute Over Cyber Disclosure

On July 18th, the U.S. District Court for the Southern District of New York dismissed a significant portion the of the SEC's groundbreaking enforcement action against SolarWinds Corp., one that challenged the timing and quality of cybersecurity-related responses by the company to a massive cyber-attack. ***SEC v. SolarWinds Corp. et al.***, No. 23-cv-9518 (PAE), 2024 WL 3461952 (S.D.N.Y. July 18, 2024), available here. Among other things, the court held that Section 13(b)(2)(B) of the Securities Exchange Act of 1934, which addresses the quality of a company's accounting controls, did not extend to information regarding cyberbreaches. The court also dismissed the Commission's claim that the company lacked sufficient disclosure controls, noting that "errors happen without systemic deficiencies."

Although a single fraud claim remains against the company and its chief information security officer, the partial dismissal was a clear setback for the SEC. Recently, counsel on both sides confirmed they are in settlement talks regarding the remaining claims.

Say 'Goodbye,' ESG?

If all of this were not bad enough, the legality of the SEC's complicated climate disclosure rules –part of the agency's most controversial initiative – is under serious attack. Briefing closed this month in a challenge by several states to the SEC's rulemaking authority regarding climate disclosure. Numerous amici briefs have been filed as well. ESG was a core feature of the Gensler agenda; now its very existence hangs in the balance. See ***State of Iowa, et al. v. SEC,*** No. 24-1522 (8th Cir. 2024).

CONCLUSION

The SEC is – and will continue to be – a dominating force in the country's financial regulatory scheme. Indeed, the SEC broke its fair share of new ground this year, with big wins in the crypto and insider trading spheres, among others. Nonetheless, the last several months have witnessed setbacks for an agency used to prevailing in court, thereby forcing it to adapt. Moreover, the level and nature of these recent judicial rebukes may chasten the agency as it goes about policing our securities markets.

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