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Gibson Dunn Wins Sweeping Victory in Fully Overturning SEC Private Funds Rule

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We are pleased to announce that Gibson, Dunn & Crutcher LLP, on behalf of leading industry groups, has won its challenge to a rule adopted by the U.S. Securities and Exchange Commission ("SEC") that would have fundamentally changed the way private funds and their advisers are regulated.

In August 2023, the SEC adopted a sweeping rule that would have restricted, or even prohibited, the longstanding, widely used business arrangements of private funds—pooled investment vehicles like hedge funds and private equity funds that are generally not accessible to retail customers. Because private funds serve large, predominantly institutional investors capable of serving their own interests, Congress deliberately exempted them from the prescriptive regulatory regime applicable to retail-focused investment vehicles such as mutual funds. Yet, in its rule, the SEC adopted a host of new restrictions on private funds, including limitations on longstanding practices regarding side letters, disclosure or consent requirements for charging certain fees and expenses to funds, and onerous quarterly-reporting requirements. By the SEC's own estimate, the rule would have cost *$5.4 billion* and required *millions of hours* of employee time.

Today, a unanimous panel of the Fifth Circuit vacated the rule in full. The Court held that the SEC exceeded its statutory authority because neither of the two provisions it relied on empowered it to adopt the rule. Decisively rejecting the SEC's argument that a provision of the Dodd-Frank Act authorized it to issue rules for the protection of private fund investors, the Court agreed with Gibson Dunn's argument that this provision applies only to retail customers, noting that private fund investors "have a significant hand in determining the terms on which they invest." The Court also rejected as "pretextual" the SEC's argument that it could adopt the rule under an anti-fraud provision of the Investment Advisers Act of 1940—concluding that the SEC failed to articulate any rational connection between fraud and the rule. "Because the promulgation of the Final Rule was unauthorized," the Court concluded, "no part of it can stand."

This significant victory provides private fund advisers with a degree of stability after months of uncertainty related to the numerous disruptive requirements that were set to go into effect under the rule. Under the Court's decision, those requirements will no longer take effect because they have now been invalidated. In holding that the SEC exceeded its statutory authority under the two provisions at issue, the Court's decision also may impose barriers to future SEC rulemakings regulating private fund advisers. The decision, *National Association of Private Fund Managers v. SEC*, No. 23-60471 (5th Cir.), is available **here**.

The petitioners—the National Association of Private Fund Managers, Alternative Investment Management Association Ltd., American Investment Council, Loan Syndications and Trading Association, Managed Funds Association, and National Venture Capital Association—were represented by partners Eugene Scalia and Helgi Walker, with

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The following Gibson Dunn lawyers assisted in preparing this update: Eugene Scalia, Helgi Walker, Kevin Bettsteller, Shukie Grossman, Brian Richman, and Stephen Hammer.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding the decision and its impact on the private funds industry, including investor negotiations and SEC examination and enforcement practices. Please contact the Gibson Dunn lawyer with whom you usually work in the firm's Administrative Law and Regulatory, Investment Funds, or Private Equity practice groups, or the following Practice Group leaders:

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