

Fifth Circuit Court of Appeals Hears Oral Arguments in Industry Groups' Ongoing Petition to Vacate Private Fund Adviser Rules

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On 5 February 2024, the US Fifth Circuit Court of Appeals heard [oral arguments](#) from the Securities and Exchange Commission (SEC) and industry groups representing private investment fund sponsors, in the industry groups' ongoing petition to vacate the new private fund adviser rules (PFAR) adopted by the SEC on 23 August 2023.

Arguments from both sides largely centered on whether the SEC overstepped its authority in adopting the PFAR. While both sides agreed that private funds are excluded from the Investment Company Act of 1940 (1940 Act), the industry groups argued that the SEC improperly claimed as statutory authority certain provisions of 2010's Dodd-Frank Wall Street Reform Act and Consumer Protection Act (Dodd-Frank Act), which updated the Investment Advisers Act of 1940, "as a backdoor way of bypassing [private funds'] exemption from the [1940 Act]." The SEC countered that the specific provision the SEC cites for its authority speaks of "investors," which reflects an intent by Congress to include private fund investors within the SEC's expanded authority under the Dodd-Frank Act.

As the judges' questions during oral arguments largely focused on asking the petitioners why the Court should vacate the entirety of the PFAR—rather than certain provisions—legal [analysts](#) believe the Court may be preparing to overturn at least some portion of the PFAR. The Court is now expected to issue a ruling.

If implemented as adopted, the most significant aspects of the PFAR will begin coming into effect for certain advisers this September.

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