WINSTON & STRAWN LLP

BLOG

SEC Climate Rulemaking Litigation Heats Up as SEC, States, and Interest Groups File Briefs in 8th Circuit Before September Deadline

AUGUST 22, 2024

As expected, a flurry of briefs from state attorneys general, the Securities and Exchange Commission (the **SEC**), and amici curiae have been filed with the 8th Circuit Court of Appeals as the climate rulemaking case[1] makes its way through the courts.

Following the SEC's adoption of its final climate change disclosure rules on March 6, 2024, numerous lawsuits challenging the final rules were filed in several jurisdictions alleging that the SEC fell short of its statutory mandate to protect investors and erred by exceeding its statutory authority. The cases have been consolidated before the 8th Circuit Court of Appeals, which set deadlines for briefing the case throughout the summer of 2024. While the case is pending before the court, the final rule has been stayed to avoid potential regulatory uncertainty.

The petitioners challenging the rulemaking, including the states of Iowa, Georgia, and Ohio, have made a number of arguments in their filings with the 8th Circuit, including:

- The SEC acted beyond its authority by attempting to address a major question in its rulemaking without authorization from Congress and rewriting the longstanding materiality standard applicable to SEC disclosures;
- The rulemaking was arbitrary and capricious, because the SEC failed to provide a reasoned explanation why existing regulations were inadequate to address climate-related concerns, failed to prove that the goal of the rulemaking was supported by substantial evidence, and failed to provide notice of the scientific research on which it relied during the rulemaking process; and
- The cost of being a public company will increase substantially (estimated at an increase of 21%) if these rules take effect, representing billions of dollars in additional compliance costs.

A number of environmental interest groups, including the Sierra Club, had initially challenged the rulemaking due to, among other things, the SEC's allegedly arbitrary removal of requirements to report Scope 3 (indirect greenhouse gas) emissions. However, these petitioners voluntarily withdrew from the 8th Circuit case in order to preserve the SEC's ability to regulate in this area at all.

The SEC has defended its regulatory actions by responding with the following counterarguments in its response brief:

- Requiring disclosure of climate-related risks is part of the SEC's mandate to elicit full and fair disclosure of information that investors need to make investment decisions, to promote efficiency and capital formation, and to allow the assessment of the financial value and risk of securities;
- The rulemaking was subject to a fulsome notice-and-comment process, and the SEC tailored the final rule to address major concerns, including by making modifications to add materiality qualifiers, limiting disclosures to circumstances to where the issuer has determined there is a substantial likelihood that a reasonable investor would consider the information important to their investment and voting decisions, and reducing the disclosures required in the financial statements and GHG emission disclosures (most notably by eliminating "Scope 3" disclosures); and
- Mandating issuers to provide factual information about the climate-related risks to their business does not infringe on First Amendment rights, since the factual disclosure requirements do not require an issuer to disclose its opinion about climate change generally and similar disclosure requirements have existed alongside the First Amendment for years.

As the case progresses through the briefing process, a number of filings have been made by parties to the case, including:

1. A request from the Sierra Club and Sierra Club Foundation to voluntarily dismiss their petition for review of the rulemaking in order to concentrate their attention "on advocating for improved investor protections outside of court, while also supporting efforts to defend the SEC's fundamental authority to require disclosure of climate-based risks…" This request was granted by the 8th Circuit on June 6, 2024.
2. A similar request from the Natural Resources Defense Council to voluntarily dismiss its petition for review of the rulemaking was granted by the 8th Circuit on June 6, 2024.
3. In June 2024, the petitioners challenging the rulemaking for, among other reasons, overstepping the SEC's statutory authority filed petitions with the 8th Circuit, including the Texas Alliance of Energy Products and Domestic Energy Producers Alliance, Chamber of Commerce of the United States of America, Liberty Energy and Nomad Proppant Services, LLC, National Legal and Policy Center and Oil and Gas Workers Association, and several state attorneys general who filed a joint petition.
4. In late June 2024, amici curiae filed briefs in support of the petitioners, including Americans for Prosperity Foundation, members of Congress, the state attorneys general from Kansas and Florida, and Advancing American Freedom, Inc.
5. On August 5, 2024, the SEC filed its response brief.
6. On August 15, 2024, amici curiae filed briefs in support of the SEC, including a group of institutional investors and Center for Climate and Energy Solutions, the We Mean Business Coalition, and the World Business Council for Sustainable Development North America.

The petitioners' final reply brief is due to the 8th Circuit by September 3, 2024. Winston's Capital Markets and Securities Law Watch will keep you updated as the final filings become available and the judicial process continues.

---

[1] *See* State of Iowa, et al. v. SEC, No. 24-1522 (8th Cir. 2024)

5 Min Read

Authors

J. Eric Johnson

Jonathan D. Brightbill

John P. Niedzwiecki

Related Topics

Securities and Exchange Commission (SEC) | Climate Pollution | GHG | GHG Regulations | Eighth Circuit

Related Capabilities

Capital Markets | Public Companies | Corporate Governance

Related Professionals

J. Eric Johnson

Jonathan D. Brightbill

John P. Niedzwiecki

This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.