

Legal Update

Supreme Court Decision in *West Virginia v. EPA* Casts Doubt on SEC's Climate Proposal and Other Regulatory Initiatives

On June 30, 2022, the U.S. Supreme Court decided *West Virginia et al. v. Environmental Protection Agency*, holding that the EPA lacks authority under Section 7411(d) of the Clean Air Act to limit greenhouse gas emissions from power plants through "generation shifting," *i.e.*, increasing the use of cleaner energy sources like wind and solar and reducing the use of dirtier sources like coal.¹ For a brief summary of the case, see our memorandum, *Supreme Court Limits EPA's Power To Regulate Greenhouse Gas Emissions From Power Plants*.²

Although the case centered on the interpretation of the EPA's authority under the Clean Air Act, the Court's reasoning could apply to other federal agency actions where an agency is seeking to issue significant new regulations. Indeed, questions have already arisen about the implications of the decision for the U.S. Securities and Exchange Commission, which, under Chair Gary Gensler's leadership, has sought to establish a series of new regulatory standards, including its climate-related disclosure rule proposal and its efforts to regulate digital assets as securities. This Legal Update provides a few initial observations on the practical impact of the *WV v. EPA* decision for the SEC on those two matters.

Climate-Related Disclosure Rules

With respect to the SEC's climate-related disclosure rule proposal,³ it is unlikely that the SEC will significantly modify the proposed rule prior to finalization in response to the decision in *WV v. EPA*. In our view, the SEC is committed to adopting broad and extensive climate-related disclosures and is willing to face legal challenges to its final rule.

Since litigation is expected, the key issue is whether the *WV v. EPA* decision increases the chances of the SEC's rule being struck down by courts. In our view, the answer is yes. To understand why, it is important to understand the Court's use of the major questions doctrine⁴ in *WV v. EPA*. The major questions doctrine is the principle that there are "extraordinary cases" where the "history and breadth" of the authority asserted and the "economic and political significance" of the assertion means that courts should hesitate before concluding that Congress meant to confer such authority.

A concurrence by Justice Gorsuch, joined by Justice Alito, elaborated on the idea that the Constitution vests Congress – not executive agencies – with "all legislative powers" and, therefore, only Congress can make major policy decisions.⁵ Allowing federal agencies to interpret their authorizing statutes to assume broad powers by which to implement major policies of national significance would undermine the Separation of Powers by

transferring legislative power from Congress to federal agencies. Further, where Congress has chosen not to enact legislation providing an agency with explicit authority to enact a new regulatory scheme, the major questions doctrine prevents agencies from bypassing Congress and simply adopting a broad, new reading of their authorities to enact that policy on their own. In *WV v. EPA*, for example, the Court noted that Congress had failed several times to pass carbon dioxide cap-and-trade legislation.

Applying the major questions doctrine to the SEC's climate-related disclosure rule, if finalized as proposed, it is possible that a court could conclude that the SEC had exceeded its statutory authority. First, the SEC is not only seeking to establish a new regulatory scheme requiring extensive disclosure by companies on a subject matter that the agency does not typically regulate, but in a divergence from historical practice, it is also proposing to require information to be provided that is not "material" to an average investor. As a result, a court could reasonably conclude that the SEC's policy objective is to impose environmental regulation through the guise of corporate disclosures. In doing so, the SEC would be acting as the EPA did by seeking a "fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation" into an entirely different kind. Second, the rule would be one of "economic and political significance," as it would seek to change company behavior to focus more on greenhouse gas emissions and climate risk oversight, rather than merely ensure that investors have material information with which to make investment decisions. In addition, Congress has repeatedly failed to enact legislation granting the SEC authority to require climate-related disclosures (*e.g.*, H.R. 2570, The Climate Disclosure Act of 2021; H.R. 3623, The Climate Disclosure Risk Act of 2019; and S. 3481, The Climate Disclosure Act of 2018).

Although *WV v. EPA* may prove helpful to expected litigants who challenge the final rule, much will depend on the changes the SEC makes to the proposed rule prior to its adoption. In particular, if the disclosure requirements are revised to be subject to materiality thresholds, the rule will likely be less vulnerable under *WV v. EPA*. For additional analysis of the potential legal challenges to the SEC's climate change-related disclosure rule, see our prior memorandum, *SEC's Climate Risk Disclosure Proposal Likely to Face Legal Challenges*.⁶

Digital Asset Regulation

Turning to the SEC's assertion of authority over digital assets, the decision in *WV v. EPA* may signal that Congress will need to enact legislation mandating how agencies should regulate digital assets rather than the SEC (and other federal financial regulators) adopting new regulations on its own. Applying the major questions doctrine to digital asset regulation, if the SEC either adopts a new regulatory scheme for digital assets or applies existing securities regulatory requirements to digital assets (to the extent they are not securities) and digital assets market participants, such regulation would arguably expand the SEC's authority, enabling it to create rules for new assets classes never before regulated by the SEC. The "economic and political significance" of such an action could be significant, particularly because of the dollar amount of the assets falling under the regulations.

Finally, Congress is actively considering – but has yet to enact – legislation to grant federal regulatory agencies authority over digital asset markets. Since the Court has clearly signaled that Congress, rather than federal agencies, should be making the decision on major policy issues, aggressive SEC regulatory action with respect to digital assets could be viewed as usurping Congress's legislative powers in violation of major questions principles.

It is important to state, however, that the application of *WV v. EPA* to SEC digital asset regulation will largely depend on the specifics of the regulatory action at issue. For example, a new SEC rule that seeks to broadly expand the agency's authority will be more vulnerable, while the application of the SEC's antifraud authority to a

particular transaction will likely be far less vulnerable. However, other legal requirements and judicial doctrines may provide other grounds for challenging the agency's actions.

What is certain is that the Court wants Congress to make major regulatory decisions and, therefore, the enactment of comprehensive digital asset legislation, providing agencies with clear regulatory authority, will be the best means for removing legal uncertainty about digital assets and establishing a durable and effective regulatory regime that will foster the growth of digital assets and provide necessary investor and consumer protections.

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Endnotes

¹ See the U.S. Supreme Court [Ruling](#) (June 30, 2022).

² See Mayer Brown's Supreme Court Decision Alert, [Supreme Court Limits EPA's Power to Regulate Greenhouse Gas Emissions From Power Plants](#) (July 5, 2022).

³ See Mayer Brown's Legal Update, [SEC Proposes Climate Change Disclosure Rules Applicable to Public Companies](#) (March 24, 2022).

⁴ See the Congressional Research Service's report of the Major Questions Doctrine (April 6, 2022): <https://crsreports.congress.gov/product/pdf/IF/IF12077>.

⁵ See p. 38 of the U.S. Supreme Court [Ruling](#).

⁶ See Mayer Brown's, [SEC's Climate Risk Disclosure Likely to Face Legal Challenges](#) (*Harvard Law School Forum on Corporate Governance*, May 10, 2022)