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Everything Everywhere All at Once: Regulatory Impact Analysis in the SEC Rulemaking Multiverse

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In his remarks at the Investment Company Institute's 2023 Investment Management Conference, Commissioner Mark T. Uyeda discussed his concerns with the Securities and Exchange Commission's (SEC or Commission) current regulatory approach in what he referred to as "the perils of regulation by theory and hypothesis."[1] Commissioner Uyeda observed that "[m]any of the Commission's rulemaking proposals are interrelated and interconnected, yet these proposals are not evaluated pragmatically and holistically," suggesting that "[t]he Commission's thinking must be grounded in practical, real world costs and benefits that are informed by data and experience—not hypotheses."[2]

Indeed, the SEC has issued an astounding 58 rule proposal releases between April 1, 2021 through June 1, 2023.[3] Reports of the US Government Accountability Office (GAO) and the SEC's Office of Inspector General (OIG) have spotlighted organizational and management problems with the agency itself, calling into question the soundness of its rulemaking practices.[4] The OIG reported that managers from within the SEC's divisions raised concerns about increased risks and difficulties managing resources because of the increase in the SEC's rulemaking activities. The report also recounted that certain managers reported relying on detailees, in some cases with little or no experience in rulemaking.[5]

Yet, based on its Spring 2023 regulatory agenda, the Commission plans to continue at its unprecedented pace as it moves to the adoption phase of numerous sweeping rule proposals, many of which have been broadly criticized as seeking to solve a problem that doesn't exist, with theoretical solutions that severely underestimate the costs imposed on impacted parties—whether taken in isolation or on a cumulative basis.[6] Of all rule proposals issued by the Commission since April 2021, less than half were unanimously approved and 14 were approved by a three to two vote.[7] Dissenting Commissioners have cited concerns that in certain instances a proposal exceeds the SEC's mandate or that the proposed regulation lacks thorough consideration of the potential economic and market impact.[8] Publicly available comments to Commission rule proposals echo these shortfalls and raise other fundamental procedural concerns, including the need for more time for the public to fully consider and analyze the market and economic implications of the proposals.[9]

Given the unprecedented scope and speed of new rule proposals, palpable industry frustration, and the current judicial and congressional climate, this article provides a discussion of the SEC's rulemaking authority and the evolution of its obligations to consider the economic impact of its regulatory actions in light of recent court developments challenging the power of administrative agency rulemaking.

Sources of the Regulatory Impact Analysis

Congress established the SEC to "protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation." Today, the SEC administers the Securities Act of 1933 (1933 Act), the Securities Exchange Act of 1934 (Exchange Act), the Trust Indenture Act of 1939, the Investment Company Act of 1940 (1940 Act), the Investment Advisers Act of 1940 (Advisers Act), to some extent the Securities Investor Protection Act of 1970, the Sarbanes-Oxley Act of 2002, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, and the Jumpstart Our Business Startups Act of 2012 (JOBS Act). [10] As early as the 1960s, academics began arguing that securities regulations should be criticized and challenged if the SEC fails to economically justify that a rulemaking will serve its goal of protecting investors.[11]

The SEC began voluntarily including a cost-benefit section in rulemaking in the 1970s, although this was not required at the time by any executive order or statute.[12] It wasn't until statutory provisions were added by the National Securities Market Improvement Act of 1996 (NSMIA) and the Gramm-Leach-Bliley Act of 1999 (GLBA) to the 1933 Act, Exchange Act, 1940 Act, and Advisers Act—which require the Commission to consider efficiency, competition, and capital formation whenever it is "engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest"—that the Commission was required to consider broad economic issues in addition to the protection of investors.[13] Additionally, Section 23(a)(2) of the Exchange Act requires the Commission to consider the impact that any rule promulgated under that Act would have on competition and to include in the rule's statement of basis and purpose "the reasons for the Commission's . . . determination that any burden on competition imposed by such rule or regulation is necessary or appropriate in furtherance of the purposes of [the Exchange Act]."[14] A number of other discrete statutory provisions also require the SEC to consider economic effects of rules adopted pursuant to those provisions.[15]

Whether these statutory provisions constituted a mandate to perform economic analysis was a matter that was unsettled in the years that followed NSMIA and GLBA. SEC regulations issued during this time were accompanied by analyses that were much less thorough than the analyses conducted by executive branch agencies.[16] The quality of the SEC's economic analysis and the SEC's adherence to its statutory analysis requirements came into question by SEC commissioners, the SEC's Inspector General, the GAO and Congress.[17] Then, a number of judicial interventions faulted the SEC for some form of inadequate economic analysis.

The DC Circuit Cases

In 2005, the US Court of Appeals for the District of Columbia Circuit interpreted the SEC's core statutes, together with the Administrative Procedure Act (APA), as imposing on the Commission a "statutory obligation to determine as best it can the economic implications of the rule it has proposed."[18] *Chamber of Commerce v. SEC* involved a regulation that required most mutual funds to have a supermajority of independent directors and an independent chair. The court remanded the regulation in part because the SEC refused to assess a disclosure alternative favored by two dissenting Commissioners. The court also faulted the SEC for failure to consider the costs that mutual funds would incur in complying with the rule. Although acknowledging that a full cost estimate may be difficult, the decision noted that the SEC could at least have provided a rough estimate. When the SEC readopted the rule after a week of deliberation, the court struck down the rule because the SEC relied on extra-record evidence and did not consider data on the costs already incurred by some funds that had complied with the regulation.

The second case in 2009, *American Equity v. SEC*, considered a rule that deemed fixed index annuities to be an investment product subject to the federal securities laws, not just an insurance product governed by state insurance laws.[19] In considering a challenge to the rule, the court swiftly found the SEC's interpretation reasonable under *Chevron v. Natural Resources Defense Council*, but vacated the rule because the SEC failed to properly consider the effect of the rule upon efficiency, competition, and capital formation as required under the 1933 Act.[20] The court faulted the SEC for asserting that a rule would increase competition and efficiency without assessing the current (baseline) extent of competition and efficiency under the state law regime. The court also criticized the SEC's circular reasoning, which was that the mere existence of a rule would increase competition by reducing uncertainty that it assumed existed in the absence of a rule. The court found that "the SEC's analysis [was] incomplete because it fail[ed] to determine whether, under the existing regime, sufficient protections existed to enable investors to make informed investment decisions" and that the "failure to analyze the efficiency of the existing state law regime renders arbitrary and capricious the SEC's judgment that applying federal securities law would increase efficiency").[21]

The third and most significant case was *Business Roundtable v. SEC*.[22] This case involved a challenge to Rule 14a-11 under the Exchange Act, which outlined the circumstances in which a company's board of directors had to include shareholder-nominated board candidates in the board's proxy materials sent to investors. The rule's adoption was the culmination of a process that included two previous iterations of a proxy access rule, as well as the passage of Dodd-Frank, which specifically gave the Commission the authority to enact proxy access reforms.[23] Rule 14a-11 was approved by a three to two Commission vote.[24] Less than a year after its passage, the US Court of Appeals for the DC Circuit struck down the rule, holding that the SEC violated the APA by failing to consider the rule's costs and benefits adequately.

According to the DC Circuit, the SEC had an obligation to "determine the likely economic consequences of Rule 14a-11 and to connect those consequences to efficiency, competition, and capital formation." One of the court's primary criticisms of the SEC's rulemaking on Rule 14a-11 was its failure to demonstrate that the rule was justified by empirical evidence. According to the court, the Commission had "not sufficiently supported its conclusion" that the new rule would improve company performance and shareholder value "[i]n view of the admittedly (and at best) 'mixed' empirical evidence."[25] Among its criticisms, the court found that the SEC failed to estimate companies' compliance costs even though there was evidence available, and that the SEC provided insufficient empirical support for its claim that the rule would benefit shareholders by improving corporate performance. The *Business Roundtable* decision was a critical setback in SEC rulemaking. In a harsh assessment of the SEC's rulemaking with respect to Rule 14a-11, the court found that the SEC "inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters."[26] By any measure, the DC Circuit cast doubt on the ability of the SEC to adopt rules that could withstand any judicial review of the cost-benefit calculus.

Current Guidance

Following *Business Roundtable* and a review by the SEC's OIG, the Commission significantly revamped how economic analysis would be conducted. The SEC's Office of General Counsel and Office of Economic Analysis issued new guidance for economic analysis that is explicitly based on the principles of Executive Order No. 12,866, which governs regulatory analysis and review in the executive branch.[27] These changes were publicly disclosed in a 2012 memorandum detailing how SEC cost-benefit analysis would be conducted moving forward (Guidance). Current Staff of the Commission have been directed by the Chairman to follow the Guidance in its rulemaking.[28]

The Guidance established that every SEC economic analysis should include four main requirements: (1) a statement of the need for the proposed action; (2) the definition of a baseline against which to measure the likely economic consequences of the proposed regulation; (3) the identification of alternative regulatory approaches; and (4) an evaluation of the benefits and costs—both quantitative and qualitative—of the proposed action and the main alternatives identified by the analysis.[29]

1. Justification for a Proposed Rule. *The first element of the economic analysis is to identify the problem or market failure leading to the proposed rulemaking and to describe how the action will correct it.* Rule releases must include a discussion of the need for regulatory action and how the proposed rule will meet that need. *It is an essential first step since clearly defining a problem creates a path for the remainder of the economic analysis.* In some circumstances, there will be more than one justification for a particular rulemaking. A proposed rule could be a response to a market failure that market participants cannot solve or can include, among others, improving government processes, interpreting provisions in statutes the Commission administers, and providing exemptive relief from statutory prohibitions where the Commission concludes that doing so is in the public interest. The Guidance also clarifies that Congressional direction to adopt a rule is justification alone for a rule but that the SEC should describe its specific authority for the action.[30]
2. Determine Baseline for Economic Impact. The economic baseline serves as a primary point of comparison for an analysis of a proposed regulation's potential costs and benefits, including effects on efficiency, competition, and capital formation. Under the Guidance, an economic analysis of a proposed regulatory action should "compare the current state of the world, including the problem that the rule is designed to address, to the expected state of the world with the proposed regulation (or regulatory alternatives) in effect."[31] Economic impacts of proposed regulations are measured as the differences between these two scenarios. In the absence of data availability, the SEC often encourages market participants to provide this data to the Commission. Yet some datasets necessary for analysis simply do not exist. In this respect, the Guidance notes the importance of detailing all assumptions and unknown costs in the baseline.[32]
3. Identify and Discuss Reasonable Alternatives. The Guidance requires the identification and discussion of reasonable potential alternatives to the approach in the proposed rule. For the SEC, these alternatives must be limited to those where the SEC has the authority to implement them. A common alternative is to take a similar but either more or less stringent approach than the proposed rulemaking. Other types of alternative approaches could include different compliance dates and different requirements for large and small firms. The Guidance states that the number and choice of alternatives selected for detailed analysis is a matter of judgment. Courts have made clear that "the Commission is not required to consider 'every alternative . . . conceivable by the mind of man . . . regardless of how uncommon or unknown that alternative' may be." [33] But the Commission is required to consider reasonable alternatives raised during the rulemaking. Such alternatives include those that are "neither frivolous nor out of bounds": "[W]here a party raises facially reasonable alternatives . . . the agency must either consider those alternatives or give some reason . . . for declining to do so."[34]
4. Analyze the Economic Consequences. *The final element of the economic analysis assesses the*

> *anticipated consequences of proposed rulemaking. Here, the SEC compares the economic costs and benefits of the proposal and alternative approaches to those of the baseline. In this section, the analysis needs to provide an economic argument that the proposed action will both address the market failure or need for rulemaking and is better than reasonable alternative actions or the status quo.* This includes: (a) identifying and describing the most likely economic benefits and costs of the proposed rule and alternatives; (b) quantifying those expected benefits and costs to the extent possible; (c) for those elements of benefits and costs that are quantified, identifying the source or method of quantification and discussing any uncertainties underlying the estimates; and (d) for those elements that are not quantified, explaining why they cannot be quantified.[35]

The intent of the Guidance was to establish a framework that fortifies the SEC's economic analysis, ostensibly to withstand inevitable legal challenges, which appear more and more likely as congressional and judicial skepticism of agency action continues to rise.[36] While many of the Commission's recent rule proposals concern matters clearly within the SEC's purview, there is also increased scrutiny of a number of rules where the SEC has asserted its authority to regulate new territory. The climate and cybersecurity disclosure rules are oft-cited examples of this expansion.[37] Recent court decisions raise questions about the SEC's espoused authority to promulgate new regulations and the process by which the SEC enforces them.[38]

Judicial Scrutiny

The US Supreme Court's landmark ruling in *Chevron v. Natural Resources Defense Council* is the seminal case establishing the test for judicial deference to government agencies' interpretations of certain agency-related statutes. In *Chevron*, the Supreme Court upheld as reasonable a regulation that interpreted the Clean Air Act to allow the Environmental Protection Agency (EPA) to define the term "stationary source" to mean whole industrial plants. *Chevron* established a highly deferential framework for courts to review agency interpretations of ambiguous statutes that the agency is charged with administering.[39]

Under *Chevron*, courts are instructed to perform a two-part analysis to determine if an agency's interpretation of a statute ought to be upheld. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue or the statute is ambiguous with regard to the relevant issue, the court should not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. In such cases, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[40]

Chevron has been a linchpin of administrative law for almost 40 years, governing how agencies promulgate rules and how courts review agency actions. Until recently, the SEC's proclamation that a particular rule furthers the statutory aim "to protect investors" has generally proven sufficient to establish that the Commission has adopted a rule pursuant to an express delegation of rulemaking authority.[41] But the Supreme Court has not deferred to an agency interpretation of federal law since 2016 and a number of recent cases have signaled a changing landscape for agencies, Congress and the federal courts.[42]

Threats to *Chevron* Deference

Supporters of *Chevron* deference have long advocated that its framework ensures fundamental adherence to the will of Congress, which delegated the interpretive burden to the agencies, not the courts.[43] In several recent decisions, however, the US Supreme Court has applied greater scrutiny in several cases where agencies have sought to rely on authority that has not been clearly authorized by Congress. First, in *Alabama Association of Realtors v. HHS*, the Court explained that a CDC eviction moratorium was of major national significance and required a clear statutory basis because the agency's action covered 80% or more of the nation; created an estimated economic impact of tens of billions of dollars; and interfered with the landlord-tenant relationship, which the Court explained is "the particular domain of state law."[44] Then, in *National Federation of Independent Business v. OSHA*, a case involving COVID-19 vaccination mandates imposed on most employers in the United States, the Court considered OSHA's emergency temporary standard to be of major economic and political significance because, in its estimation, it seriously intruded upon the lives of more than 80 million people.[45]

On the last day of its October 2021 term, the US Supreme Court issued its much-awaited opinion in *West Virginia v. EPA*, a case involving the scope of the EPA's authority to regulate greenhouse emissions from coal-fired electric power plants. In *West Virginia*, the Court rejected the EPA's reliance on a statutory provision that, in the Court's view, was a "previously little-used backwater." The Court concluded that it was unlikely Congress would task the EPA with "balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy," such as deciding the optimal mix of energy sources nationwide over time and identifying an acceptable level of energy price increases. In concluding that the Clean Air Act did not grant the EPA that power, the Court for the first time invoked in a majority opinion the "major questions doctrine."[46]

Under the major questions doctrine, a court must treat questions of "vast economic and political significance" differently when reviewing agency interpretations of its statutory authorities. In cases where there is something extraordinary about the "history and breadth of the authority" an agency asserts or the "economic and political significance" of that assertion, the Court indicated courts should "hesitate before concluding that Congress meant to confer such authority." The doctrine's precise relationship to the *Chevron* doctrine is unclear, but it represents the Supreme Court's heightened skepticism when an agency claims broad authority based on new interpretations of older statutes or statutes in which the grant of authority is not explicitly stated.[47]

On May 1, 2023, the Supreme Court agreed to hear *Loper Bright Enterprises v. Raimondo*, a case that threatens the *Chevron* doctrine. The Court granted Loper Bright's petition for a *writ of certiorari* on a direct challenge to *Chevron*: "Whether the Court should overrule Chevron or at least clarify that silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."[48] The case is expected to be heard next term, making a ruling not likely until 2024. If the Supreme Court overrules, or significantly narrows, *Chevron*, the possible impact on the SEC would be massive, given its extraordinary rulemaking deluge, where, as commenters point out, much of the agency's stated authority rests on more generalized rulemaking statutes, or "new-and-improved" interpretation of its existing statutory authority.[49] An overturn of *Chevron* could provide a significant advantage for legal challengers.

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NOTES

1 Commissioner Mark T. Uyeda, Remarks to the Investment Company Institute 2023 Investment Management Conference (Mar. 20, 2023).

2 *Id.*

3 Based on data from the SEC as of June 21, 2023, *https://www.sec.gov/rules/proposed.shtml*.

[4] Sec. & Exch. Comm'n Off. of Inspector Gen., The Inspector General's Statement on the SEC's Management and Performance Challenges 3 (Oct. 13, 2022), *https://www.sec.gov/files/inspector-generals-statement-sec-mgmt-and-perf-challenges-october-2022.pdf*; US Gov't Accountability Off., GAO-01-947, Securities and Exchange Commission Human Capital Challenges Require Management Attention (Sept. 2021).

[5] *Id.*

[6] *See, e.g., Investment Adviser Association Comment Letter* on SEC Rel. Nos. 33-11167, IA-6263, IC-34855, 33-11028, IA-5956, IC-34497 (File No. S7-04-22); SEC Rel. No. IA-6176 (File No. S7-25-22); SEC Rel. No. IA-6240 (File No. S7-04-23); SEC Rel. Nos. 34-97141, IA-6262, IC-34854 (File No. S7-05-23) (June 17, 2023), available at *https://www.sec.gov/comments/s7-04-23/s70423-206999-417002.pdf*.

[7] FOIA, *https://www.sec.gov/about/commission-votes*.

[8] *See, e.g.,* Commissioner Hester M. Peirce, Statement on Safeguarding Advisory Client Assets Proposal (Feb. 15, 2023), available at *https://www.sec.gov/news/statement/peirce-statement-custody-021523*; Hester M. Peirce, We are Not the Securities and Environment Commission—At Least Not Yet, SEC Statement (Mar. 21, 2022), available at *https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321*.

[9] *See* Joint Association Letter to Chair Gensler re: Importance of Appropriate Length of Comment Periods (Apr. 5, 2022), available at *https://www.sifma.org/wp-content/uploads/2022/02/SEC_Joint-Trades_Comment-Period-Letter_4-5-2022.pdf* (noting that "[r]ulemakings must provide sufficient factual detail on the legal basis, rationale, and supporting evidence for regulatory provisions such that interested parties are 'fairly apprised' of content, the reasoning of the agency implementing them, and the manner in which such regulations foreseeably may affect their interests") (citations omitted).

[10] 15 U.S.C. 78d(a); Seligman, Louis Loss & Troy Paredes, Securities Regulation § 1.H (6th ed. 2018). The SEC also has advisory functions in corporate reorganizations under the Bankruptcy Reform Act of 1978. *Id.*

[11] *See* George J. Stigler, "Public Regulation of the Securities Markets," 37 *J. Bus.* 117, 120 (1964) ("A proposal of public policy ... is open to criticism if it omits a showing that the proposal will serve its announced goal.").

[12] *See, e.g.,* Bruce Kraus & Connor Raso, "Rational Boundaries for SEC Cost-Benefit Analysis," 30 *Yale J. on Reg.* 289, 296-97 (2013) (noting that the voluntary inclusion of economic analysis was likely a strategic decision to thwart additional oversight).

[13] National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 106, 110 Stat. 3416, 3424 (1996).

[14] Securities Exchange Act of 1934 § 23(a)(2), 15 U.S.C. § 78w(a)(2). The Commission also is subject to the Paperwork Reduction Act of 1995, the Small Business Regulatory Enforcement Fairness Act of 1996, and the Regulatory Flexibility Act.

[15] *See, e.g.,* Securities Exchange Act of 1934 § 6(k)(1), 15 U.S.C. § 78F(k)(1) (2006) ("To the extent necessary or appropriate in the public interest, to promote fair competition, and consistent with the promotion of market efficiency, innovation, and expansion of investment opportunities, the protection of investors, and the maintenance of fair and orderly markets, the Commission and the Commodity Futures Trading Commission shall jointly issue such rules, regulations, or orders as are necessary and appropriate to permit the offer and sale of a security futures product traded on or subject to the rules of a foreign board of trade to United States persons").

[16] Hester Peirce, "Economic Analysis by Federal Financial Regulators," 9 *J.L. Econ. & Pol'y* 569, 583 (2013).

[17] Jerry Ellig & Hester Peirce, "SEC Regulatory Analysis: 'A Long Way to Go and a Short Time to Get There,'" 8 *Brook. J. Corp. Fin. & Com. L.* 361, 363 (2014); Kathleen L. Casey, Commissioner, SEC, Statement at Open Meeting: Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants (June 29, 2011); The SEC's

Aversion to Cost-Benefit Analysis: Hearing before the Subcomm. on TARP, Financial Servs. & Bailout of Pub. & Private Programs of the H. Comm. on Oversight and Gov't Reform, 112th Cong. (Apr. 17, 2012), available at *http://oversight.house.gov/hearing/the-secs-aversion-to-cost-benefit-analysis*.

18 Chamber of Commerce v. Sec. & Exch. Comm'n, 412 F. 3d 133, 143 (D.C. Cir. 2005).

19 American Equity Inv. Life Ins. Co. v. Sec. & Exch. Comm'n, 613 F.3d 166 (D.C. Cir. 2009).

20 *Id; see also infra* notes 40-43 and accompanying text.

21 *Id.*

22 Bus. Roundtable v. Sec. & Exch. Comm'n, 647 F.3d 1144 (D.C. Cir. 2011).

23 Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 971(b), 124 Stat. 1376, 1915 (2010) (codified as amended in scattered sections of 12 U.S.C.) ("The Commission may issue rules permitting the use by a shareholder of proxy solicitation materials supplied by an issuer of securities for the purpose of nominating individuals to membership on the board of directors of the issuer, under such terms and conditions as the Commission determines are in the interests of shareholders and for the protection of investors.").

24 *Facilitating Shareholder Director Nominations*, Securities Act Release No. 9136, Exchange Act Release No. 62,764, Investment Company Act Release No. 29,384, 75 Fed. Reg. 56,668, 56,668 (Sept. 16, 2010) (to be codified at 17 C.F.R. pts. 200, 232, 240, 249).

25 *Business Roundtable* at 1148-49.

26 *Id.*

27 Memorandum from the Div. of Risk, Strategy, and Fin. Innovation and the Off. of the Gen. Couns. of the SEC to Staff of the Rulewriting Div. and Off., Current Guidance on Economic Analysis in SEC Rulemakings (Mar. 16, 2012) [hereinafter Guidance]; Executive Order No. 12,866, 58 FR at 51735 ("Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.").

28 *Economic Analysis*, Division of Economic and Risk Analysis, *https://www.sec.gov/page/dera_economic-analysis* (last visited June 20, 2023).

29 Guidance at 4.

30 Guidance at 6; *see also* Off. of Mgmt. & Budget, Circular A-4, Regulatory Analysis (Sept. 17, 2003), available at *https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/*.

31 Guidance at 6.

32 *Id.*

33 Chamber of Commerce v. Sec. & Exch. Comm'n, 412 F.3d 133, 144-5 (D.C. Cir. 2005) (*quoting* Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 51 (1983)).

34 *See id.*

35 Guidance at 9-15.

36 *Id.* at 2.

37 *See* Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (Apr. 11, 2022); Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, 87 Fed. Reg. 16590 (Mar. 23, 2022).

38 Jarkesy v. Sec. & Exch. Comm'n, 51 F.4th 644 (5th Cir. 2022); Lucia v. Sec. & Exch. Comm'n, 138 S. Ct. 2044 (2018).

39 Chevron USA, Inc. v. Nat'l Res. Def. Council, 467 U.S. 837 (1984).

40 *Id.*

41 *See* U.S. Sec. & Exch. Comm'n v Alpine Sec. Corp., 982 F.3d 68, 77 (2d Cir. 2020) (concluding the SEC's determination that Rule 17a-8—which requires broker-dealers to comply with the Bank Secrecy Act's reporting requirements—would "serve to further the aims of the Exchange Act by protecting investors and helping to guard against manipulation" and was sufficient to conclude the "SEC acted pursuant to an express delegation of rulemaking authority" in promulgating Rule 17a-8), *cert. denied sub nom*. Alpine Sec. Corp. v Sec. & Exch. Comm'n, 142 S. Ct. 461 (2021). The petition for certiorari

in Alpine challenged the SEC's authority to touch on the Treasury's typical regulatory domain, but did not challenge the SEC's authority to promulgate the rule as "necessary or appropriate" to further the goals of the Exchange Act. *See* Petition for Writ of Certiorari, Alpine, No. 21-82 (U.S. Jul. 19, 2021), ECF No. 1.

42 *See* Kristen E. Hickman & Aaron L. Nielson, "The Future of Chevron Deference," 70 *Duke L.J.* 1015, 1016 (2021); James Kunhardt & Anne Joseph O'Connell, Brookings Inst., "Judicial Deference and the Future of Regulation" (Aug. 18, 2022).

43 *See Chevron*, 467 U.S. at 843-44.

44 Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2320 (2021).

45 Nat'l Fed'n Indep. Bus. v. OSHA, 595 U.S. __, __, 142 S.Ct. 661, 211 L.Ed.2d 448 (2022) (per curiam).

46 West Virginia v. EPA, No. 20-1530 (June 30, 2022).

47 *Id.*

48 Petition for Writ of Certiorari, Loper Bright, 45 F.4d 359 (No. 22-451).

49 *See, e.g.,* Andrew N. Vollmer, Comment Letter on Safeguarding Advisory Client Assets; Release No. IA-6240; File No. S7-04-23 (Apr. 7, 2023), available at *https://www.sec.gov/comments/s7-04-23/s70423-20163827-333933.pdf*.