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Public Chatter

The SEC’s Rulemaking Authority After West Virginia v. EPA

I've taken my time to process the US Supreme Court's recent decision in *West Virginia v. EPA*, reading many of the fine analyses of this important administrative law case - including **this one** by Perkins Coie's own Marcy Hupp. The upshot of the *West Virginia* decision is that the Supreme Court has cast doubt on the EPA's ability to promulgate future climate-related regulations without more explicit statutory authority if the regulations would have significant economic and political implications.

When I was in law school, I took an administrative law class - a natural fit for someone living in DC. Professor Dash urged us - at least once during each class - to "always read the statute" and not just rely on reading a rule. Of course, once you get into the actual practice of securities law, you wind up almost never reading the statute.

In fact, it might be rare that you go back and re-read a particular rule once you've read it as a junior lawyer a half dozen times. By then, you've moved on to mainly dealing with one of a dozen different types of interpretations that the Corp Fin Staff pushes out about the nuances of that rule. That's just the way it is.

So it was interesting to get into the nitty gritty of this Supreme Court decision and be reacquainted with issues like the difference between the "*Chevron* deference" and "major questions" doctrines. The *Chevron* doctrine - born in a **1984 Supreme Court decision** - states that courts normally should accept a federal agency's interpretation of a law that has ambiguous language if the interpretation is "rational and reasonable." The SEC often relies on *Chevron* deference and has typically been successful in doing so over the years.

On the other hand, the "major questions" doctrine requires agencies to jump through some hoops when they try to regulate issues of "major economic and political significance." The *West Virginia* decision was based on the major questions doctrine - there was no mention of the *Chevron* doctrine in the Supreme Court's opinion - and this doesn't bode well for the power of federal agencies under this newly-constituted Supreme Court.

Given that the Gensler SEC has embarked on a breathtaking flurry of rulemaking since Gary Gensler was sworn in as Chair - as noted in this **Reuters article** - it's unlikely that the SEC will back off from its goals anytime soon. Chair Gensler's penchant for rulemaking predates his time at the SEC - he also was prolific when he ran the CFTC.

Where does that leave the SEC? We are now living in a time of great uncertainty, almost akin to when the first federal securities law were promulgated nearly 90 years ago. That was a time where it was uncertain if those initial slate of laws would really be enforced. As a new agency, the number of SEC Staffers could be counted on a half-dozen hands and turf wars among the host of new Depression-era agencies was rife.

Where does that leave us? Sure, the SEC might adopt new rules in all sorts of areas this year and next - but the next SEC Chair might act quickly to unwind those. Or perhaps a court will beat the next SEC Chair to the punch and invalidate them.

That makes it quite challenging for those of us in the trenches to advise the business people in our life. The pace of change right now is so great - and it doesn't appear that it will let up anytime soon. This *West Virginia* decision emphatically adds one more wrinkle to what has shaped up to be one of the most challenging times to

be in the securities law field in generations.

This might come across as a bit of an old man rambling. I guess what I'm trying to say is that you're not alone. This is not normal.

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