

U.S. Key Developments & the Latest Trends in the U.S. From a Legal Perspective

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BIO

Janelle Ibeling advises investment managers and institutional investors on structuring, forming, and managing alternative investment products, including hedge funds, private equity funds, and funds of funds. Her expertise spans leveraged products, credit facilities, side pocket issues, single-investor funds, managed accounts, investor negotiations, and co-investments. She also provides guidance on SEC registration, compliance, and best practices.

Janelle assists institutional investors with hedge and private equity fund investments and advises family offices on regulatory matters, including formation, SEC/CFTC registration, and exemptions. She supports asset managers through fund formation, spin-outs, seeding capital, and equity transactions.

Recognized for her exceptional legal acumen, Janelle has received numerous accolades, including the Chicago Daily Law Bulletin's 2022 Salute! Top Women in Law and The Hedge Fund Journal's 2023 50 Leading Women in Hedge Funds. She is ranked in Chambers Global and Chambers USA for Investment Funds and praised for her "outstanding legal skills" and ability to navigate sensitive negotiations.

A key member of Sidley's acclaimed Investment Funds group, Janelle has been recognized in Who's Who Legal: Private Funds and The Legal 500 USA for her extraordinary talent. The group has earned top rankings in Chambers USA since 2008 and was named "Law Firm of the Year" in 2022 by U.S. News – Best Lawyers.



Key Developments & the Latest Trends in the U.S. From a Legal Perspective

I. Introduction

2024 was a notable year of active rulemaking, examinations and enforcement activities for the primary U.S. functional regulators in the asset management industry. Across jurisdictions and regulatory bodies, the number of new rules, interpretations and guidance through administrative and legal actions has been at historic levels. Through the course of the year, U.S. courts have also vacated controversial rules.

In this evolving landscape, navigating legal compliance is challenging. Legal decisions that seemingly erase decades-old understandings and regulatory shifts that redefine compliance standards can make it difficult to know the path forward. The speed of technological advancements has been dizzying for regulators and professionals alike. Investor expectations about their money, where it is going and for what, continues to increase. In this article, we examine 2024's key developments and trends from a U.S. legal perspective in the asset management industry.



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II. An Industry Empowered

Litigation with the Securities and Exchange Commission

The past year saw the most significant litigation in the asset management field since 2006, when Goldstein v. Securities and Exchange

Commission (SEC) vacated the SEC's rule requiring most asset managers to register with the SEC. The private funds industry scored a significant victory against the SEC



when the U.S. Fifth Circuit Court of Appeals (Fifth Circuit) vacated all five of the SEC's Private Fund Adviser Rules (PFAR Rules) in June 2024 because the SEC exceeded its statutory authority. See National Association of Private Fund Managers v. Securities and Exchange Commission. The PFAR Rules would have required extensive changes to private fund managers' widely used and long-standing business relationships and practices.

Industry trade associations also prevailed over the SEC in November 2024 when the U.S. District Court for the Northern District of Texas vacated the SEC's "dealer registration" rule, which expanded the definition of "dealer" activity for purposes of the U.S. Securities Exchange Act of 1934 (Exchange Act) on the basis that the SEC exceeded its statutory authority. This decision provides important relief to the industry, which was concerned about the overly broad reach of the SEC's rule.

U.S. Supreme Court Decisions

SEC Administrative Proceedings: Jarkesy Decision.

In June 2024, the U.S. Supreme Court handed down its highly anticipated decision, Securities and Exchange Commission v. Jarkesy (Jarkesy). Jarkesy held that the SEC cannot use an in-house administrative hearing when the SEC seeks civil penalties against a defendant for securities fraud because the Seventh Amendment of the U.S. Constitution requires a jury trial. The Jarkesy decision therefore threatens the SEC's use of administrative enforcement proceedings. The full ramifications of Jarkesy remain to be determined through future litigation. For several years, however, the SEC has largely brought litigated enforcement actions in federal district court—a trend that is likely to continue. Meanwhile, because the Seventh Amendment right to a jury trial can be waived by defendants, Jarkesy is unlikely to affect the SEC's practice of bringing settled enforcement actions as administrative proceedings.



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Deference to Federal Agencies by U.S. Courts: Loper

Bright. The U.S. Supreme Court also decided Loper Bright Enterprises, et. al., v. Raimondo, holding that courts may no longer be required to defer to interpretations of federal statutes by U.S. federal agencies when Congressional intent is not clear or the statute is ambiguous, overruling Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. (Chevron). Over time, Chevron deference had resulted in courts deferring to federal agencies' interpretation of statutes, even when changes in presidential administrations resulted in rapidly changing interpretations. By eliminating deference to an agency's interpretations, Loper Bright may lead to courts making interpretive decisions that conflict with the interpretation by the federal agency. Although the Court admitted that agency interpretations of federal statutes should be accorded proper respect, the holding in Loper Bright will benefit private litigants objecting to an agency's interpretation.

Litigation with the U.S. Federal Trade Commission

In August 2024, the U.S. District Court for the Northern District of Texas granted a nationwide injunction in *Ryan LLC v. Federal Trade Commission* against the U.S. Federal Trade Commission (FTC) rule that would have banned noncompete provisions in most contracts with workers because it determined the FTC exceeded its statutory authority. In October 2024, however, the FTC filed an appeal of this decision. It is unclear if defending this FTC rule will be a priority for the incoming administration of President-elect Donald Trump. U.S. state laws governing non-competes and other restrictive covenants do continue to apply. Participants in the asset management industry should continue to evaluate the changing legal and regulatory landscape to safekeep their businesses.

Empowerment of Investors

Impact investing not just a focus of investors but

regulators. Investors have been empowered to make investments with the public good in mind. While environmental, social and governance (ESG) strategies have existed for decades, investor interest has recently surged. Industry participants are now facing additional pressure from investors to more effectively integrate ESG principles into their investment practices and from regulators who continue to keep a close eye on these

labels. While recent years have seen an increase in climate and greenwashing related rules and enforcement actions, the future of U.S. regulation and enforcement in this area, along with investor focus, remains uncertain.



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Pressure on fees due to current high cash returns. Investors are

calling on managers

to rethink their incentive fee arrangements—requesting hurdles to address the current high interest rate market environment. Therefore, increasingly, managers and investors are agreeing to performance compensation structures subject to hurdles/benchmarks or tiered performance compensation rates. A hurdle may be a fixed annual percentage rate that must be met prior to the manager receiving performance allocations, or it could be a market-based benchmark designed to reward alpha generation. Oftentimes benchmarks are heavily customized, reflecting a weighted combination of several market measures.



III. Rapidly Evolving Artificial Intelligence Regulation

Artificial intelligence (AI) is increasingly being used as a tool for asset management firms to modernize and streamline operational processes, investor communications and compliance programs. All is also being used as part of the risk management and investment process.

The SEC has wasted no time in bringing enforcement actions on "Al washing," where the SEC alleged that an asset manager has made false and misleading statements regarding its use of Al in making investment decisions.



The speed at which new rules are promulgated by multiple federal agencies and new state laws affecting the industry are adopted has been dizzying in recent years.

Asset management firms should develop robust procedures regarding their use of AI, pay close attention to their statements about how they utilize AI and assume the SEC is reviewing all of their public statements about AI.

The staff of the Commodity Futures Trading Commission (CFTC) has also

requested public comment on the use of Al in the commodity derivatives markets. The CFTC also recently appointed its first Chief Artificial Intelligence Officer.

FINRA also remains focused on Al's impact by reminding members that its ordinary rules (e.g., supervision, communications with the public, etc.) apply to Al-based communications just like any other communication.

Artificial intelligence also raises a host of non-securities legal issues, including matters relating to intellectual property, privacy and cybersecurity. U.S. regulation of artificial intelligence is evolving rapidly at both the U.S. federal and state levels.

IV. Challenges to Managers

Dizzying Pace of New Regulations

The speed at which new rules are promulgated by multiple federal agencies and new state laws affecting the industry are adopted has been dizzying in recent years. While some rules have been struck down by U.S. courts, industry participants have spent an unprecedented amount of time and money to analyze rules, provide comments to the regulators and commit resources to implementation.

FINRA. Regulation by the Financial Industry Regulatory Authority (FINRA) can be summed up simply: everything is a risk. In 2024, FINRA published a 90-page Annual Regulatory Oversight Report covering more than 20 regulatory areas and continuing the trend of placing increasing emphasis on a wide range of areas like cybersecurity, market integrity and regulatory risk reporting.

CFTC. The CFTC has also issued a significant number of rule proposals, including margin requirements applicable to futures commission merchants (DCOs), rules about conflicts of interest applicable to derivatives clearing organizations (DCOs), designated contract markets (DCMs) and swap execution facilities (SEFs), as well as multiple proposed amendments to Dodd-Frank rules. The CFTC has also continued its aggressive enforcement posture toward the asset management industry. The Division of Enforcement (Division) has been extracting large monetary penalties and is showing little tolerance for repeat offenders. No sector has found itself in the crosshairs of CFTC enforcement more than the virtual currency industry. In just one enforcement action, the Division entered into a \$2.7 billion dollar settlement with cryptocurrency exchange Binance. In the Binance action, its chief compliance officer was personally fined \$1.5 million dollars after the Division found he was "willfully aiding and abetting Binance's numerous violations."



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The Division has increasingly been recommending monitors be imposed as part of settlements, and the Division has required monitors to submit reports detailing progress in implementing recommendations to improve compliance.

While the Division's enforcement efforts may unsettle even the most compliant market participants, companies should be aware that, similar to the SEC, the CFTC has communicated that it views self-reporting and cooperation favorably. The CFTC continues to elaborate behaviors they see as cooperative and harm reducing, consistent with a focus on achieving accountability and minimizing future misconduct. According to the CFTC staff, those who self-report and cooperate in an investigation may see significant reduction in penalties to the CFTC.

Digital Assets. For the first time, the SEC approved multiple proposed rule changes filed by national securities exchanges to permit the listing and trading of exchange-traded products that invest directly in digital assets, starting with bitcoin in January 2024 and then Ethereum in July 2024. However, the regulatory landscape relating to digital assets continues to develop. Applications to list and trade products that provide exposure to various other digital assets have been filed, but are yet to be approved, in part due to uncertainty as to whether certain digital assets are securities. It would be reasonable to expect the new administration to promote innovation and engage with digital asset market participants to provide regulatory clarity on a broad range of issues involving digital assets, tokenized securities, and market structure.

For the first time, the CFTC charged several software developers of decentralized finance (DeFi) protocols, alleging that they violated the Commodity Exchange Act by offering or entering into retail commodity transactions on exchanges not registered with the CFTC, as a result of developing and deploying smart contractenabled automated trading protocols. In another first, the CFTC charged a "crypto prime broker" for failing to register with the CFTC as an FCM while facilitating access for U.S. persons to digital asset derivatives exchanges. The entity charged in this matter received a lower penalty due to their "substantial cooperation and remediation."

Meanwhile, the CFTC

- like the SEC - has
suggested it intends
to take a more proinnovation approach
to digital assets and
blockchain technology
in the future, including
exploring the use of
tokenized collateral
to satisfy regulatory
margin requirements
for both cleared
and non-cleared
derivatives.



For the very first time, the CFTC charged an intermediary entity for failing to register with the CFTC as an FCM while facilitating access to digital asset exchanges for U.S.

While the digital asset landscape provides new and exciting investment opportunities for investors and asset managers alike, participants should carefully follow developments as regulations continue to evolve.





SEC Enforcement

The SEC has aggressively pursued actions for off-channel communication recordkeeping against broker-dealers, investment advisers, and dually registered broker-dealers and investment advisers. These actions involved recordkeeping failures in connection with employees' use of unapproved applications on personal devices to engage in communications relating to the firms' business (off-channel communications). In a departure from common practice of settlements on a non-admission basis, these actions required admissions of violations of the U.S. federal securities laws; they also included significant financial penalties and the retention of a third-party consultant. These cases also illustrate the limits of self-reporting, as even the self-reporters admitted liability and paid millions in penalties.



2024 was a rollercoaster year in U.S. regulation of the asset management industry. SEC enforcement has also focused on (1) marketing rule violations, many of which relate to hypothetical performance; (2) policy and procedure violations where the SEC settled with an adviser for failure to establish, maintain and enforce written policies and procedures relating

to material nonpublic information received due to the adviser's different business lines or strategies; (3) use of impermissible liability disclaimers in its advisory and private fund agreements (i.e., "hedge clauses"); (4) custody rule violations (including actions related to digital assets); (5) liquidity rule affecting mutual funds; (6) whistleblower protection (where the SEC charged an investment adviser with violating Exchange Act Rule 12F-17 by impeding potential whistleblowers by, among other things, not providing an exception in employee confidentiality agreements for disclosure to the SEC by

potential whistleblowers); (7) fiduciary duty; (8) conflicts of interest (e.g., cherry picking in allocating trades to favored accounts); (9) valuation (inflating pricing data, inflation of net asset value in a deal flow for inflated quotes scheme, failing to adopt policies and procedures concerning valuation of level 3 assets); (10) disclosure failures (failure to disclose revenue sharing and financial conflicts, failure to make adequate disclosures regarding an affiliated brokerdealer, failure to disclose conflicts associated with special purpose acquisition companies, loss of control of crypto assets, "ESG washing"); (11) fee and expense related matters (inaccurate fee calculations, failure to waive fees when required and payment of undisclosed fees); and (12) run-of-the-mill compliance failures (e.g., unaddressed exam findings, inadequate compliance manual, failure to supervise outside business activities).

V. Conclusion

2024 was a rollercoaster year in U.S. regulation of the asset management industry. The results of the 2025 election will impact the asset management industry, as it is anticipated that the agenda of the second Trump administration will be more deregulatory. While it expected that it will be business as usual on the SEC examination front, the pace of rule proposals is expected to slow (although the SEC under the first Trump administration with Commissioner Clayton adopted over 70 rules which was one of the busiest rulemaking calendars in SEC history). Even with a new Republican agenda, core principles still apply in that robust compliance helps mitigate regulatory consequences.

By: Meegan E. Mayer - Associate





RECOGNIZED ACROSS SECTORS

Investment Funds: Hedge Funds, *Chambers Global:* Multi-Jurisdictional 2024

Investment Funds: Investor Representation, *Chambers USA* 2024

Investment Funds: Regulatory & Compliance, Chambers USA 2024

Private Equity: Fund Formation, *Chambers USA* 2024

Registered Funds: Chambers USA 2024

Investment Funds: Hedge Funds & Investment Funds: Private Equity, *Chambers Asia-Pacific* 2025



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