

MEMO# 32533

June 16, 2020

D.C. Circuit Court of Appeals Invalidates SEC's Transaction Fee Pilot Program

[32533]

June 16, 2020 TO: Equity Markets Advisory Committee RE: D.C. Circuit Court of Appeals Invalidates SEC's Transaction Fee Pilot Program

Earlier today, the U.S. Court of Appeals for the D.C. Circuit issued an opinion invalidating the SEC's Transaction Fee Pilot Program. We are currently reviewing the opinion and will provide a follow-up memo with greater detail on the court's decision.

The court determined that the SEC "significantly" exceeded its authority under the Exchange Act in adopting the pilot program. The court characterized the pilot program as an "aimless, 'one-off' regulation" that would impose costs and burdens without affirmatively addressing an identified problem caused by the "maker-taker" model. Further, the court found that using the pilot program to gather data and identify whether a problem exists does not adequately justify its existence.

The concurring opinion acknowledges the problems that the SEC sought to identify through the pilot program but concluded that the SEC failed to (i) take a definitive position that such problems exist; and (ii) explain how the data gathered through a pilot program would help inform a potential solution.

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