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The Impact of Agency Commissioners' Dissents

Major rulemakings are expected this year from the SEC, FTC and other agencies. Some of these rules will be accompanied by dissenting opinions that could be potentially game-changing.

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Major rulemakings are expected this year from the U.S. Securities and Exchange Commission, Federal Trade Commission, and other "independent" agencies. The more controversial of these rules will be accompanied by dissenting opinions from one or two of the agency's members. What's the impact of such dissents? Potentially game-changing.

In some respects, agency dissents function like a dissenting opinion in a court of appeals. By pointing out errors in a draft majority opinion, a judge's dissent can improve the final product. In a similar way, when a dissenting commissioner notes flaws in a draft rule's terms, or in the explanation given by the commission majority, the opinion can contribute to a final product that is less onerous, more effective, or more thoroughly considered and explained in the "preamble" that accompanies the final rule.

A judge's dissent can also point the way to the future—think of Justice Harlan's *Plessy v. Ferguson* dissent. In a similar (if less exalted) way, a commission dissent can stake out a position that eventually prevails at the commission under new leadership.

At times a judge's dissent can even precipitate a reversal in the case at hand, as when a court of appeals dissent catches the attention of Supreme Court justices, helping secure a writ of certiorari that ultimately results in the court adopting the position articulated by the dissenter.

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Headquarters of the U.S. Securities and Exchange Commission in Washington, D.C.

An effective agency dissent can have an even greater, more direct impact on a rule's litigation prospects, in multiple ways.

For starters, when an agency rule is challenged in court, a dissent can help the litigant establish one of the most important grounds for vacating a rule—that the agency overlooked "an important aspect of the problem." [*Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 43 (1983).]

Litigants typically make this showing by pointing to rulemaking comments that were filed with the agency but ignored in the preamble that accompanied the final rule. When the "aspect of the problem" that a litigant says was neglected is featured in a dissenting opinion, the litigant has an easier time persuading the court that the issue is truly important and merited consideration by the agency.

Under the Administrative Procedure Act, regulations can also be invalidated when the agency's explanation for its action is deficient or internally inconsistent, or if the agency fails to consider alternative regulatory approaches that might be preferable. Here again, a commissioner's dissent can lay the groundwork for the rule's defeat in court, by highlighting flaws and contradictions in the agency's rationale, or proposing an effective and less onerous regulatory approach that the commission majority rejects.

A legal argument, when voiced in a dissent, is one a litigant has a better chance persuading the court was—under *Chevron*—a "reasonable" interpretation the majority should have considered. [*Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).] Record evidence emphasized in a dissent is also more likely to get attention from the court.

A commission dissent makes a rule more vulnerable simply by diminishing the patina of expertise that helps shield agency actions from judicial scrutiny. When two out of five members of an agency make a compelling argument why a rule is problematic, judges may be less inclined to defer than when an agency action reflects the unanimous judgment of the "experts" Congress entrusted with the matter.

Finally, dissenting commissioners are in the cat bird seat to point out flaws in the internal agency processes that led to adoption of the final rule, shaking courts' confidence in the thoughtfulness and even the motive of the agency action.

Former SEC Commissioner Paul Atkins was a master at this, as in a 2005 rulemaking in which the SEC readopted, unchanged, a rule that had been remanded from the D.C. Circuit just eight days earlier. In dissent, Atkins showed how the commission majority raced to readopt the rule in advance of the previously scheduled resignation date for two of the commissioners: in a week that the SEC chairman and two other commissioners were overseas, and while agency personnel were moving offices to new Washington, D.C., headquarters, ordinary agency processes were flouted to secure the rule's readoption before the majority was lost. The disputed provisions of the rule were stayed and later vacated by the court, never going into effect. [*See Chamber of Commerce v. SEC*, 443 F.3d 890 (D.C. Cir. 2006).]

This coming year, when agency members issue strongly worded dissents from controversial rulemakings, their opinions may sound like the final, futile cri de coeur of a defeated commissioner. In actuality, they may be paving the way for the rule's eventual defeat.

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