

Introduction

Prior editions of this book discussed in the introduction significant recent changes to the provisions of the 1940 Act governing status issues, and what the Commission and the Staff substantively might do in the future to further rationalize the regulation of investment company status issues. Happily, the Commission and the Staff have in some cases moved in the directions I suggested, although it is doubtful the book's commentary had anything to do with it.

This edition of the book also reflects important changes to the provisions governing status issues. For example, Section 3(c)(1) was expanded to permit certain venture capital funds to have up to 250 beneficial owners, instead of the 100 beneficial owners generally permitted under that Section. The Staff has modified, and may continue to modify, when lending businesses, including real estate lending businesses, can qualify for the exception in Section 3(c)(5). The Commission adopted a new rule to facilitate crowd funding offerings. The Commission and the Staff also have issued a number of exemptive orders and no-action letters that have important ramifications for certain issuers considering their investment company status. All of these are discussed in this book.

Our suggestions here for what the Commission and the Staff might do in the future are more procedural and less substantive than some of the suggestions in prior editions. In the long run, these suggestions also may be more important, in that they affect not just the issues discussed in this book, but issues under the remainder of the 1940 Act and under each of the other federal securities laws administered by the Commission.

In *Loper Bright Enterprises v. Raimondo*, the Supreme Court abandoned the “*Chevron* doctrine,” which generally required courts to defer to the interpretation of an unclear statute by the regulatory agency charged with administering that statute. Instead, courts are required to exercise their independent judgment on the interpretation of an ambiguous statute. The *Loper Bright* decision does not mean, however, that agency interpretations are irrelevant; if an interpretation is well reasoned and persuasive to a court, the court may decide to rely on or adopt that interpretation.

The *Loper Bright* decision calls into question how much weight a court will give to any of the Commission interpretations discussed in this book, if the court determines that the statutory provision to which that interpretation relates is ambiguous. Following *Loper Bright*, a court might not accord much or any weight to some of those Commission interpretations if the court determines that the Commission's interpretation was not the best legal interpretation of the relevant statutory provisions, and/or if the Commission's legal analysis explaining its interpretation does not persuasively explain why that interpretation is the best legal interpretation of the relevant statutory provisions.

The *Loper Bright* decision also offers the Commission and the Staff, and maybe especially the Staff, an opportunity. In short, *Loper Bright* should motivate both the Commission and the Staff to seek to make their interpretations,

both those they adopt in the future and those they have previously adopted, more legally persuasive, and where appropriate more legally reasonable, in light of the statute or statutes relevant to those interpretations. Post *Loper Bright*, the Commission and the Staff have a significant opportunity, through well-reasoned and persuasive legal interpretations, to potentially persuade courts to adopt their interpretations on securities law issues, even when the Commission is not a party to the relevant lawsuit.

An interesting corollary of the *Loper Bright* decision is that Staff interpretations, such as through no-action letters, can now be as relevant to a court as Commission interpretations. Following *Loper Bright*, the Commission's interpretive views on ambiguous statutory provisions are subject to no special deference, and to no more weight than a Staff interpretation; the question faced by the court is what the court thinks is the correct statutory interpretation, and a court might rely on a well-reasoned, persuasive legal discussion in a Staff no-action letter every bit as much as it might rely on a well-reasoned, persuasive legal discussion in a Commission interpretive release. This possibility to some extent undercuts the relevance of the Commission's oft-stated position that only the Commission, and not the Staff, speaks for the Commission. That statement is of course true, but at least in a post-*Loper Bright* court proceeding, a well-reasoned and persuasive Staff legal interpretation can be an important component of a court decision, even though it is not a Commission statement.

Following the *Loper Bright* decision, the Commission and the Staff probably should consider taking a number of actions to improve the likelihood that courts will interpret ambiguous securities law provisions consistently with how the Commission and the Staff interpret those provisions. In each case, the actions of the Commission and the Staff should be intended to provide a well-reasoned and persuasive legal interpretation, with a laser focus on why that interpretation is the best *legal* interpretation of the relevant statute or statutes. We discuss some of these potential actions primarily in the context of investment company status issues, although the discussion is more broadly applicable to the entire 1940 Act, and to all the other statutes principally administered by the Commission.

When it is able, the Staff might review and, where appropriate, supplement or revise its more important existing no-action letters and other interpretations. In many cases, the Staff has offered very little of its own analysis as to the basis for its interpretation. For example, in a number of no-action letters, the Staff summarizes arguments made by counsel, and states that it agrees with the conclusion without necessarily agreeing with the counsel's arguments. In relatively few cases does the Staff present a detailed analysis of why its interpretation is the best *legal* interpretation of the relevant statutory provisions. This book contains numerous discussions of no-action letters and other Staff (and Commission) interpretations that may not contain sufficient legal discussions and analyses to survive challenge in light of *Loper Bright*. The Staff also might review and appropriately revise some of the substantive positions it has taken in no-action letters and other interpretations that likely are not the best legal interpretation of the relevant statutory provisions. This book contains discussions of some of these letters and interpretations as well. One example (discussed in chapters 6

and 36) is the Staff's position that partnerships must meet special requirements to qualify as a majority-owned subsidiary, when those requirements are not included in the statute and are not applicable to corporations or other entities. Another example is the Staff's framework for determining whether a commodity pool is an investment company, which as discussed in Chapter 34 has not meaningfully been updated in decades, despite substantial changes in the laws regulating futures and swaps, and despite significant changes in the markets for those instruments. In these and other cases, the Staff should consider revising the relevant interpretations to reflect the Staff's (and perhaps the Commission's) best legal interpretation of the relevant statute or statutes.

Moving forward, the Staff should consider including in its no-action letters and other interpretations a well-reasoned, persuasive legal analysis of why its interpretations are not only consistent with the relevant statutes, but are the best legal interpretations of those statutes.

Just as the Staff should consider reviewing its prior no-action and other interpretive positions in light of *Loper Bright*, the Commission also should consider engaging in a similar revision of its most important prior interpretations, and should consider revising its approach in the releases accompanying interpretations of the securities laws. Often, the Commission's releases lack significant analysis of why the interpretation the Commission is taking is the best *legal* conclusion. In many cases, the Commission's releases seem to focus on why its interpretation is a good policy, or makes economic sense, or on other equally valid considerations. But what the *Loper Bright* Court appears to require is the best *legal* interpretation of the relevant statutes.

An example is the Commission's release on fair valuation, discussed in Chapter 6. As discussed in that Chapter, the Commission adopted a rule (Rule 2a-5) on how to calculate fair value; oddly, that rule neither defines fair value nor discusses how to calculate fair value. The release accompanying that rule, however, suggests (and seemingly requires) fair value to be determined consistently with certain accounting rules. The release contains little statutory analysis and other legal discussion of why, for example, rules largely developed by *accountants* for how to present fair value of assets in a company's financial statements reflect the best *legal* interpretation of Congress' use of the term "fair value" for purposes of making valuation determinations under the 1940 Act. This is not to say that the Commission's interpretation is legally wrong; it is to say that the Commission could better explain its *legal* reasoning in a way that might make it more likely that a court would determine that the Commission's interpretation is the best *legal* interpretation of the relevant statutory provisions.

Moving forward, Commission releases and other statements that include statutory interpretations of the federal securities laws might include a "*Loper Bright*" section, which specifically focuses on the relevant statutory language, court cases, and administrative history, and carefully analyzes, as a court might, why the Commission believes its interpretation is the best *legal* interpretation of the statutory language.

To be fair, *Loper Bright* presents challenges to the Commission, in part because of specific requirements the Commission must follow, such as the

requirements for the Commission to conduct certain economic and cost-benefit analyses when it adopts rules; these requirements may be somewhat divorced from the question of what the best legal interpretation is. The Commission (like many regulatory agencies) also is subject to political interests and pressure that may sometimes affect its decision making and statutory interpretations.

Courts, however, are not subject to these requirements and pressures; they are bound by the *Loper Bright* decision. As a result, courts may sympathize with the myriad competing considerations the Commission is statutorily required to consider, but after *Loper Bright* their inquiry likely will focus on what is the best legal interpretation of an ambiguous statute. Presumably, that must be the Commission's focus when issuing legal interpretations of the federal securities laws as well. Economic, cost-benefit, and similar considerations, important as they are, presumably must be made after the determination of, and in the context of, the best legal interpretation of the relevant statute or statutes.