

## RECENT CASES

SECURITIES REGULATION — DODD-FRANK ACT — D.C. CIRCUIT HOLDS THAT RETROACTIVE APPLICATION OF DODD-FRANK PROVISION IS IMPERMISSIBLE. — *Koch v. SEC*, 793 F.3d 147 (D.C. Cir.), *reh'g en banc denied*, No. 14-1134, 2015 U.S. App. LEXIS 16375 (D.C. Cir. Sept. 14, 2015).

On July 21, 2010 — almost three years to the day after news first broke that two subprime mortgage-linked hedge funds belonging to Bear Stearns had collapsed<sup>1</sup> — President Barack Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>2</sup> (Dodd-Frank), which he called “a transformation on a scale not seen since the reforms that followed the Great Depression.”<sup>3</sup> Five years after Dodd-Frank’s passage, courts and agencies still struggle to define the contours of its sweeping mandate.<sup>4</sup> Recently, in *Koch v. SEC*,<sup>5</sup> the U.S. Court of Appeals for the District of Columbia Circuit held that the Securities and Exchange Commission (SEC) could not retroactively punish an investment adviser under Dodd-Frank for misconduct that predated the Act. The D.C. Circuit’s refusal to consider the SEC majority’s “prospective relief” theory in its retroactivity analysis vindicates the dissenting Commissioners’ position. The dissenters’ choice to issue a public statement expressing their approval of the D.C. Circuit’s opinion, however, exemplifies the deepening rifts within the SEC.

Donald Koch, a former Federal Reserve economist and finance professor, founded Koch Asset Management (KAM) in 1992 to make investments in small, highly illiquid bank stocks on behalf of several friends and associates.<sup>6</sup> In 2009, after becoming concerned that clients would question his investment strategy due to short-term underper-

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<sup>1</sup> See Walden Siew, *Bear Says Troubled Funds Have “Very Little Value,”* REUTERS (July 17, 2007, 7:23 PM), <http://www.reuters.com/article/2007/07/17/businesspro-bearstearns-funds-dc-idUKN1726029320070717> [<http://perma.cc/ZX2V-EPSX>].

<sup>2</sup> Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

<sup>3</sup> Remarks on Financial Regulatory Reform, 1 PUB. PAPERS 843, 844 (June 17, 2009).

<sup>4</sup> See, e.g., Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 76 Fed. Reg. 68,846, 68,849 (proposed Nov. 7, 2011) (“[T]he delineation of what constitutes a prohibited or permitted activity under [Dodd-Frank] often involves subtle distinctions that are difficult both to describe comprehensively within regulation and to evaluate in practice.”).

<sup>5</sup> 793 F.3d 147 (D.C. Cir.), *reh'g en banc denied*, No. 14-1134, 2015 U.S. App. LEXIS 16375 (D.C. Cir. Sept. 14, 2015).

<sup>6</sup> KAM accounts were charged 0.25% of their value quarterly if they did not decline in value and 20% of realized net gains in excess of 5% annually. Koch, 103 SEC Docket 2664, 2665 (ALJ May 24, 2012).

formance,<sup>7</sup> Koch instructed his broker to increase bidding frequency near market close — a practice known as “marking the close” — to artificially inflate certain stock prices and, by extension, buoy the value of his customers’ accounts.<sup>8</sup>

On April 25, 2011, the SEC formally instituted enforcement proceedings against both Koch and KAM,<sup>9</sup> charging them with market manipulation under the Securities Exchange Act of 1934,<sup>10</sup> the Investment Advisers Act of 1940,<sup>11</sup> and the Investment Company Act of 1940.<sup>12</sup> The SEC sought, inter alia, to bar Koch from associating with a range of securities industry participants.<sup>13</sup> Before Dodd-Frank, the SEC was empowered only to levy an investment adviser associational bar against Koch.<sup>14</sup> Dodd-Frank authorized the SEC to bar purported violators from associating with any entity that the SEC regulates, known in the securities industry as a “full collateral bar.”<sup>15</sup> The SEC argued the expanded scope of Dodd-Frank’s sanctions was warranted in Koch’s case.<sup>16</sup>

In May 2012, an administrative law judge (ALJ) found that Koch had illegally marked the close.<sup>17</sup> She imposed an investment adviser associational bar on Koch,<sup>18</sup> but declined to apply a full collateral bar, because neither any court nor the SEC had yet approved a retroactive application of those provisions.<sup>19</sup> Koch and KAM appealed to the SEC.

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<sup>7</sup> Koch worried that after the financial crisis, “[s]ome of [his] newer and younger clients, especially the women,” were tracking their accounts too closely. Koch, Exchange Act Release No. 72,179, Investment Company Act Release No. 31,047, 2014 WL 1998524, at \*2 (May 16, 2014).

<sup>8</sup> End-of-day transactions are not prohibited per se; in fact, trading volume is often heaviest near market close. See Daniel R. Fischel & David J. Ross, *Should the Law Prohibit “Manipulation” in Financial Markets?*, 105 HARV. L. REV. 503, 520 (1991). Marking the close is prohibited, however, because it is designed to distort closing prices and mislead investors in violation of federal securities law. See, e.g., SEC v. Masri, 523 F. Supp. 2d 361, 369–70, 372 (S.D.N.Y. 2007).

<sup>9</sup> Koch, Exchange Act Release No. 64,337, Investment Advisers Act Release No. 3190, Investment Company Act Release No. 29,659, 100 SEC Docket 3391 (Apr. 25, 2011).

<sup>10</sup> 15 U.S.C. §§ 78a–78pp (2012).

<sup>11</sup> *Id.* §§ 80b-1 to -21.

<sup>12</sup> *Id.* §§ 80a-1 to -64.

<sup>13</sup> See Koch, 103 SEC Docket 2664, 2673 (ALJ May 24, 2012). The SEC also requested that Koch and KAM pay civil penalties and disgorge gains made from the trades, and that KAM be censured. See *id.* at 2672–73.

<sup>14</sup> Before 2012, Section 203(f) of the Advisers Act only authorized the SEC to bar individuals from associating with regulated entities of the same type with which they were associated at the time of their violation. See 15 U.S.C. § 80b-3(f) (2006) (amended 2012).

<sup>15</sup> See 15 U.S.C. § 80b-3(f) (2012); Lawton, Investment Advisers Act Release No. 3513, 105 SEC Docket 673, 677 (Dec. 13, 2012). Dodd-Frank expanded Section 203(f) to authorize the SEC to bar offenders from association with any “investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.” See *id.*

<sup>16</sup> Koch, 103 SEC Docket at 2673.

<sup>17</sup> *Id.* at 2670–71.

<sup>18</sup> *Id.* at 2673. Consistent with the SEC’s request, the ALJ also ordered Koch and KAM to pay civil penalties and disgorge profits from the trades. *Id.*

<sup>19</sup> *Id.* at 2673 n.29.

In May 2014, upon its de novo review of the facts, a divided SEC<sup>20</sup> affirmed the ALJ's finding that Koch had marked the close<sup>21</sup> and that he could properly be charged as a primary violator under the Exchange Act and the Advisers Act.<sup>22</sup> Unlike the ALJ, however, the SEC imposed a full collateral bar.<sup>23</sup> The SEC justified this extension of sanctions by invoking *John W. Lawton*,<sup>24</sup> which had not been decided at the time of the ALJ's hearing.<sup>25</sup> In *Lawton*, the SEC found that collateral bars were not impermissibly retroactive because they are "prospective remedies whose purpose is to protect the investing public from future harm."<sup>26</sup> Because Koch's intentional market manipulation raised "significant doubts about his fitness to remain in the securities industry in any capacity," the majority concluded that a full collateral bar was warranted.<sup>27</sup> Koch and KAM appealed.<sup>28</sup>

The D.C. Circuit granted Koch's petition in part and vacated the SEC's prior order in part.<sup>29</sup> Writing for the panel, Judge Henderson<sup>30</sup> affirmed all of the SEC's decision except with respect to the full collateral bar.<sup>31</sup> In light of the "great deference" accorded to the SEC's remedial decisions,<sup>32</sup> the D.C. Circuit first agreed with the SEC's view that Koch manipulated the market through marking the close.<sup>33</sup> The court then examined Koch's claim that he was not a primary violator under the Exchange Act. Judge Henderson found Koch fell squarely

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<sup>20</sup> Chair White and Commissioners Aguilar and Stein formed the majority; Commissioners Gallagher and Piowar concurred in part and dissented in part with respect to the collateral bar. Koch, Exchange Act Release No. 72,179, Investment Company Act Release No. 31,047, 2014 WL 1998524, at \*24 (May 16, 2014).

<sup>21</sup> The SEC found sufficient support for its holding in the record's "convincing evidence of [Koch's] intent to mark the close." *Id.* at \*15.

<sup>22</sup> Because Koch "advis[ed] others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities" in his capacity as KAM's principal, the SEC found that his actions fell within the scope of the Advisers Act. *Id.* at \*18 (omission in original) (quoting 15 U.S.C. § 80b-2(a)(11) (2012)).

<sup>23</sup> *Id.* at \*25.

<sup>24</sup> Lawton, Investment Advisers Act Release No. 3513, 105 SEC Docket 673 (Dec. 13, 2012).

<sup>25</sup> See Koch, 2014 WL 1998524, at \*20.

<sup>26</sup> Lawton, 105 SEC Docket at 681.

<sup>27</sup> Koch, 2014 WL 1998524, at \*21. Commissioners Gallagher and Piowar, who dissented with respect to the collateral bar, did not issue an opinion or statement in connection with the decision. See *id.* at \*24.

<sup>28</sup> Koch, 793 F.3d at 151.

<sup>29</sup> *Id.* at 149–50.

<sup>30</sup> Judge Henderson was joined by Senior Judge Ginsburg and Judge Millett.

<sup>31</sup> Koch, 793 F.3d at 149–50.

<sup>32</sup> *Id.* at 152 (quoting *Horning v. SEC*, 570 F.3d 337, 343 (D.C. Cir. 2009)). SEC rulings must stand unless "unwarranted in law or without justification in fact." *Id.* (quoting *Horning*, 570 F.3d at 343).

<sup>33</sup> According to the court's review, the surge of last-minute trades in Koch's account could not "be explained by anything other than intent to mark the close." *Id.* at 153. Because such intent is the only precondition for an Exchange Act violation, *id.* at 153–54, Judge Henderson found "ample evidence" that Koch manipulated the market in marking the close, *id.* at 152.

within the Act's definition of a primary violator;<sup>34</sup> she also concluded Koch should not be absolved of liability under the Advisers Act.<sup>35</sup>

The D.C. Circuit overturned the imposition of an expanded collateral bar pursuant to Dodd-Frank.<sup>36</sup> Judge Henderson began this line of analysis by noting that “[t]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.”<sup>37</sup> However, she noted, the “inherent unfairness”<sup>38</sup> of retroactive application is not universal; in certain cases, it serves “entirely benign and legitimate purposes.”<sup>39</sup> In *Landgraf v. USI Film Products*,<sup>40</sup> the Supreme Court established a two-part test to check this potential for unfairness.<sup>41</sup> Under the test, courts must first determine if Congress has expressly authorized retroactive application of a statute.<sup>42</sup> Absent any such authorization, courts may only impose retroactive application where it would not “impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.”<sup>43</sup>

The D.C. Circuit then applied this framework to Koch’s case. First, the court considered whether Dodd-Frank expressly authorized the SEC to apply a full collateral bar retroactively. Determining that it did not,<sup>44</sup> the court turned to the next step of *Landgraf*’s retroactivity framework. Because the SEC was not empowered to bar Koch from associating with municipal advisors or credit rating agencies in 2009, the full collateral bar “‘attache[d] new legal consequences’ to his conduct.”<sup>45</sup> Consequently, the D.C. Circuit concluded that the SEC’s application of Dodd-Frank’s full collateral bar was impermissibly retroactive and should be vacated.<sup>46</sup> One week after the D.C. Circuit re-

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<sup>34</sup> Because anyone “who employs a manipulative device . . . may be liable as a primary violator,” Judge Henderson found the act of marking the close sufficient to support Koch’s status as a primary violator of the Exchange Act. *Id.* at 156 (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994)).

<sup>35</sup> Judge Henderson noted that because there was no requirement that an investment adviser be registered with the SEC in order to fall under the Advisers Act’s purview, Koch could properly be charged as a primary violator under the Act. *Id.* at 157.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (quoting *Landgraf*, 511 U.S. at 267–68).

<sup>40</sup> 511 U.S. 244.

<sup>41</sup> *See id.* at 280.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Koch*, 793 F.3d at 157–58 (noting language in the Act that its provisions were to “take effect 1 day after the date of enactment,” and finding any application of retroactivity inapposite (quoting Dodd-Frank Act, Pub. L. No. 111-203, § 4, 124 Stat. 1376, 1390 (2010))).

<sup>45</sup> *Id.* at 158 (alteration in original) (quoting *Landgraf*, 511 U.S. at 270).

<sup>46</sup> *Id.*

leased its opinion, Commissioners Gallagher and Piwowar, who dissented from the SEC's 2014 order, issued a joint statement expressing that they were "pleased" with the court's holding and urging the SEC to promptly address "all impermissibly retroactive collateral bars that have been misapplied since the enactment of Dodd-Frank."<sup>47</sup>

In *Lawton*, the SEC justified its retroactivity rule on a theory of "prospective relief" first addressed in *Landgraf*. Prospective relief constitutes a significant exception to the general presumption against retroactivity because it is meant to "affect the future rather than remedy the past."<sup>48</sup> The SEC argued that collateral bars were analogous to prospective relief because these bars operate to address "the harm to the investing public posed by the future securities industry association of a person who has demonstrated unfitness to act as a securities professional."<sup>49</sup> In making this argument, the SEC invoked *Vartelas v. Holder*,<sup>50</sup> in which the Court held that a statutory provision was impermissibly retroactive because it imposed a new disability on past conduct.<sup>51</sup> The SEC examined the debate between the *Vartelas* majority and dissent over whether statutes can impose "new disabilities related to past events" and still "not operate retroactively" to conclude that statutes attempting to remedy future risks to the public interest may consider preenactment conduct without raising retroactivity concerns.<sup>52</sup> Because expanded enforcement of collateral bars under Dodd-Frank invokes similar public interest concerns, the SEC argued its application did not conflict with an antiretroactivity interest.<sup>53</sup>

In *Koch*, the D.C. Circuit reached its holding through a straightforward application of the *Landgraf* test, without expressly weighing in on the SEC's "prospective relief" theory; thus, *Koch* appears to foreclose that theory, at least in cases where past conduct automatically triggers additional legal consequences. Acknowledging Dodd-Frank's silence on retroactivity, Judge Henderson limited her analysis to a simple question: whether applying the bar to Koch "would impair rights [he] possessed when he acted, increase [his] liability for past conduct, or impose new duties with respect to transactions already complet-

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<sup>47</sup> Daniel M. Gallagher & Michael S. Piwowar, *Statement on Decision of the D.C. Circuit on Retroactive Collateral Bars*, SEC (July 22, 2015), <http://www.sec.gov/news/statement/statement-decision-dc-circuit--retroactive-collate.html> [<http://perma.cc/ESP2-EEX6>].

<sup>48</sup> *Landgraf*, 511 U.S. at 293 (Scalia, J., concurring in the judgments); see also *id.* at 273 (majority opinion) ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.")

<sup>49</sup> *Lawton*, Investment Advisers Act Release No. 3513, 105 SEC Docket 673, 678 (Dec. 13, 2012).

<sup>50</sup> 132 S. Ct. 1479 (2012).

<sup>51</sup> *Id.* at 1490.

<sup>52</sup> See *Lawton*, 105 SEC Docket at 678 (quoting *Vartelas*, 132 S. Ct. at 1495 (Scalia, J., dissenting)).

<sup>53</sup> *Id.*

ed.”<sup>54</sup> Answering in the affirmative, Judge Henderson summarily concluded that applying Dodd-Frank’s enhanced penalties to Koch would be impermissibly retroactive.<sup>55</sup> Notably, Judge Henderson’s analysis did not mention the potential prospective relief that a full collateral bar could provide.<sup>56</sup> Accordingly, in its refusal to apply the *Vartelas* dicta invoked by the SEC’s opinion in *Lawton*, the D.C. Circuit seemed to reject the application of the SEC’s prospective relief theory when past conduct mandates enhanced sanctions.

The D.C. Circuit’s decision endorsed the opinion of the dissenting Commissioners in *Lawton*, the first decision in which the SEC retroactively applied Dodd-Frank’s full collateral bar. Like the D.C. Circuit in *Koch*, Commissioner Gallagher’s *Lawton* dissent only applied *Landgraf* analysis in determining that applications of full retroactive collateral bars were impermissibly retroactive.<sup>57</sup> He also noted that the SEC’s invocation of *Vartelas* and its theory of prospective relief were inapposite, because they represented dicta and a “tangential discussion . . . of non-securities statutes.”<sup>58</sup> Although Commissioner Gallagher believed that the SEC gave “dispositive weight to the Court’s discussion of [*Vartelas*’s] hypothetical scenarios” in its opinion,<sup>59</sup> the D.C. Circuit declined to do so.<sup>60</sup> Thus, the absence of any prospective-relief analysis in *Koch* vindicated the *Lawton* dissent’s belief that such analysis was a “red herring.”<sup>61</sup>

The way in which the dissenting Commissioners publicly proclaimed this vindication regarding the D.C. Circuit’s ruling is consistent with a trend of escalating internal divisions within the SEC. Viewed in context, the joint statement underscores internal strife in two significant ways. First, issuing a separate statement — rather than a dissent — without legal analysis has no effect except as a jab. Second, the statement’s strong language suggests disdain for the majority’s overturned rule and a lack of concern with preserving the image of a unified, consensus-driven agency.

Since the financial crisis, the SEC has experienced unprecedented interaction with Congress and has encountered significant difficulty in achieving its stated mission in both its rulemaking and adjudicatory functions. In 2014, the agency succeeded in finalizing only seven

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<sup>54</sup> *Koch*, 793 F.3d at 158 (alterations in original) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)).

<sup>55</sup> *Id.*

<sup>56</sup> *See id.*

<sup>57</sup> *See* Daniel M. Gallagher, *Opinion of Commissioner Gallagher* (Aug. 5, 2014), <http://www.sec.gov/litigation/opinions/2014/ia-3513-dissent-commissioner-gallagher.pdf> [<http://perma.cc/H9DU-UDRS>].

<sup>58</sup> *Id.* at 9.

<sup>59</sup> *Id.*

<sup>60</sup> *See Koch*, 793 F.3d at 158.

<sup>61</sup> *See* Gallagher, *supra* note 57, at 8.

rules — 59% less than its average over the preceding decade.<sup>62</sup> These rules are often passed by narrow three-to-two majorities, rather than decisive five-to-zero votes characteristic of former Commissions.<sup>63</sup> The SEC's enforcement arm has experienced a similar phenomenon. In fiscal year 2014, the SEC under Chair White brought a record 755 enforcement actions;<sup>64</sup> however, of its 10 remedial opinions issued that year, 3 were divided<sup>65</sup> — a much larger proportion than the 7% of opinions that were divided during the tenure of White's long-serving predecessor, Chair Schapiro.<sup>66</sup> These delays and splits, in both rulemaking and enforcement contexts, reflect an increasingly polarized, divided agency.

The joint statement is consistent with this trend of increasing intra-agency division because the issuance of such a statement without legal analysis, rather than a dissent, serves no other purpose than to attack the other Commissioners. Multimember agencies are designed to “benefit from a collegial decisionmaking process that brings to bear on the ultimate decisions the diverse viewpoints of agency members who have differing philosophies, experiences, and expertise.”<sup>67</sup> Debates over the merits of a rule before its enactment, or of a decision before a final vote, are critical to achieving agency objectives because they can contribute meaningfully to the harmonization of discrete viewpoints before reaching consensus on significant issues. A stinging postpromulgation or postjudgment dissent, conversely, cannot advance these aims. Rather, such dissents can be understood as pure statements of opinion, “based on what the dissenter perceives as bad policy.”<sup>68</sup> The joint statement — made over a year after the issuance of the SEC's original opinion, containing neither legal nor factual analysis of the decision — analogously addresses the dissenting Commissioners' arguments about what is “bad policy,” but does not offer a meaningful contribution to legal analysis. Thus, it can be interpreted as mere disparagement of the majority rather than a good-faith effort to advance the agency's common goals.

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<sup>62</sup> See Andrew Ackerman & Aruna Viswanatha, *SEC Bickering Stalls Mary Jo White's Agenda*, WALL ST. J. (June 3, 2015, 9:55 PM), <http://www.wsj.com/articles/sec-bickering-derails-whites-agenda-1433374702>.

<sup>63</sup> See Floyd Norris, *Independent Agencies, Sometimes in Name Only*, N.Y. TIMES, Aug. 9, 2013, at B1 (“[S]tarting in the George W. Bush administration, 3-to-2 votes became much more common.”).

<sup>64</sup> See Ackerman & Viswanatha, *supra* note 62.

<sup>65</sup> See U.S. SEC. & EXCH. COMM'N, *Commission Opinions and Adjudicatory Orders Archive: 2014*, <http://www.sec.gov/litigation/opinions/opinionarchive/opinarch2014.shtml>.

<sup>66</sup> See Jean Eaglesham & Brooke Masters, *SEC: No Longer a Doormat*, FIN. TIMES (Aug. 26, 2010, 10:00 PM), <http://www.ft.com/cms/s/0/1d2fd850-b14d-11df-b899-00144feabdco.html>.

<sup>67</sup> Special Comm., Admin. Conference of the U.S., *Report & Recommendation by the Special Committee to Review the Government in the Sunshine Act*, 49 ADMIN. L. REV. 421, 424 (1997).

<sup>68</sup> See Luke N. Roniger, *Regulatory Dissent and Judicial Review*, 2015 COLUM. BUS. L. REV. 390, 422 (discussing regulatory dissents).

The joint statement is also consistent with a trend of increasing intra-agency division because its strong language suggests disdain for the majority's overturned rule and a lack of concern with preserving the image of a unified, consensus-driven SEC. Superficially, the one-page statement does little more than restate that a full collateral bar is facially impermissibly retroactive where the misconduct at issue predated Dodd-Frank's enactment,<sup>69</sup> but the language the Commissioners use to express this belief achieves another outcome. The statement reminds the public that discord over the application of collateral bars is longstanding.<sup>70</sup> Gallagher and Piwowar continue by stating they feel "pleased" and even "vindicat[ed]" by the D.C. Circuit's decision.<sup>71</sup> Such strong language is not unprecedented in their public statements regarding agency decisions. Gallagher in particular does not eschew hypercritical, often colorful language in his public rhetoric. His allusions — ranging from artistic<sup>72</sup> to poetic<sup>73</sup> to Biblical<sup>74</sup> — suggest more than just disagreement with the majority's rule. They evince both disparagement of the majority and indifference toward preserving the public's perception of harmony within the SEC.

As its practical consequence, *Koch* calls into question post-*Lawton* orders that penalized conduct predating Dodd-Frank. This impact will naturally diminish over time as prosecution of pre-financial crisis conduct concludes. Beyond this, however, the minority Commissioners' response to the D.C. Circuit's opinion forms part of a trend toward division that may impede the SEC's ability to achieve its mission.

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<sup>69</sup> See Gallagher & Piwowar, *supra* note 47.

<sup>70</sup> See *id.*

<sup>71</sup> *Id.*

<sup>72</sup> See Daniel M. Gallagher, *Dissenting Statement at an Open Meeting on Dodd-Frank Act "Clawback" Provision*, SEC (July 1, 2015), <http://www.sec.gov/news/statement/dissenting-statement-compensation-clawback-listing-standards.html> [<http://perma.cc/U69E-WAM4>] (claiming that "Dodd-Frank gave [the SEC] a canvas" and the majority used it to "unveil[] our newest Goya, tortured and nightmarish").

<sup>73</sup> See Daniel M. Gallagher, *Dissenting Statement of Commissioner Daniel M. Gallagher Concerning Adoption of Rules Implementing the Credit Risk Retention Provisions of the Dodd-Frank Act*, SEC (Oct. 22, 2014), <http://www.sec.gov/News/PublicStmnt/Detail/PublicStmnt/1370543240793> [<http://perma.cc/5XUH-TAW8>] ("When two roads diverged in a wood, one representing the standard, well-trodden path of kowtowing to special interest groups and politics, the other a courageous, rarely taken path of doing the right thing despite the pressure to fall in line with the loudest lobbyists, . . . [the SEC] took the one far, far more travelled by.").

<sup>74</sup> Compare Daniel M. Gallagher, *Dissenting Statement at an Open Meeting to Adopt the "Pay Ratio" Rule*, SEC (Aug. 5, 2015), <http://www.sec.gov/news/statement/dissenting-statement-at-open-meeting-to-adopt-the-pay-ratio-rule.html> [<http://perma.cc/92KM-JAR3>] ("[O]ver five years after Dodd-Frank, the Commission is still wandering through the wilderness, and . . . the voice of one or two minority Commissioners crying out in that wilderness can do little to put us back on the right path."), with *Mark* 1:3 ("[T]he voice of one crying in the wilderness: 'Prepare the way of the Lord, make his paths straight.'").