UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, and TENNESSEE CHAMBER OF COMMERCE & INDUSTRY,

Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION and GARY GENSLER, in his official capacity as Chairman of the Securities and Exchange Commission,

Defendants.

Civil Action No. 3:22-cv-00561
Judge Aleta A. Trauger
Magistrate Judge Jeffery S. Frensley

ORAL ARGUMENT REQUESTED

PLAINTIFFS' COMBINED MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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The Commission's opposition candidly admits that the 2022 Rule—a sudden repeal of the 2020 Rule's Review and Notice Conditions—was not the result of new evidence or changed circumstances, but rather solely of one political party gaining a new majority on the Commission. The Commission then takes the remarkable position that such politically driven agency rulemaking is perfectly fine. If the Commission were correct, every election would mean regulatory whiplash across federal agencies. But the Administrative Procedure Act (APA) requires more of agencies, including reasoned decisionmaking and a meaningful opportunity for public comment, neither of which occurred here. With the next major proxy season set to begin in March of 2023, Plaintiffs respectfully ask this Court to swiftly set aside the 2022 Rule before the Commission's arbitrary and capricious rulemaking can have serious consequences.

I. THE COMMISSION'S OPPOSITION CONFIRMS THAT THE INADEQUATE COMMENT PERIOD VIOLATED THE APA (COUNT I).

The Commission agrees that proxy voting advice businesses (PVABs) "play a critical role in the proxy voting process." (SEC Br. 4.) Yet the Commission hastily rescinded the 2020 Rule's Review and Notice Conditions, which offered companies the opportunity to review and respond to PVABs' "critical" recommendations before a shareholder vote. The glaring procedural inadequacies of the Commission's reversal alone merit setting aside the 2022 Rule. A federal court has already found that an initial step in the Commission's rescission, its suspension of the 2020 Rule without providing for notice and comment, violated the APA. *Nat'l Ass'n of Mfr.* v. *SEC*, No. 7:21-cv-183 (W.D. Tex. Sept. 28, 2022). As explained in Plaintiffs' opening brief, the 2022 Rule's 30-day comment period was likewise unlawful because it deprived the public of a meaningful opportunity for comment. (Pls.' Br. 16-19.)

The Commission mischaracterizes Plaintiffs' argument as "boil[ing] down to the fact that the 2022 Amendments had a shorter comment period and generated fewer comments than the

2020 Rules." (SEC Br. 28.) To the contrary, as Plaintiffs and *amici*—including a bipartisan group of former SEC officials and scholars—have demonstrated, *numerous* factors collectively render the 2022 Rule's 30-day comment period "patently flawed." (*See, e.g.*, ECF No. 53 (*Amicus* Br. of Former SEC Officials and Scholars) at 4.)

- The comment period contravened well-established practice of prior presidential administrations and the Administrative Conference of the United States of providing "not less than 60 days" to comment (Pls.' Br. 18);
- The comment period violated Defendant Gensler's own self-professed policy of always giving market participants "at least two months" to comment on Commission rule proposals (Pls.' Br. 18);
- The comment period was half the length of the comment period for the 2020 Rule (30 days compared to 60 days) (Pls.' Br. 16-17);
- The comment period overlapped with numerous year-end holidays and the year-end fiscal reporting period (Pls.' Br. 17);
- The Commission ignored requests to extend the comment period (Pls.' Br. 17);
- The comment period was deemed "insufficient under the circumstances" by a dissenting Commissioner (Pls.' Br. 18-19); and
- The comment period yielded only *one-tenth* as many comments as the 2020 Rule (Pls.' Br. 18).

Courts reviewing the sufficiency of a comment period do so holistically because the touchstone under the APA is whether the opportunity for comment was "meaningful" and provided "enough" time for public participation, which requires examining all "unique circumstances associated with the rulemaking." *Cath. Legal Immigr. Network* v. *Exec. Off. for Immigr. Rev.*, 2021 WL 3609986, at *3 (D.D.C. Apr. 4, 2021). The Commission's after-the-fact justifications for its short comment period fail to satisfy that standard.

First, the Commission argues that "a 30-day comment period was appropriate given the 'targeted' nature of the proposal." (SEC Br. 26.) But the 2022 Rule's "target" was substantial—new industry-wide Review and Notice Conditions that were "the first in decades to address the

regulation of proxy voting advice." (SEC Br. 29.) Although the Commission says that the "*important* provisions [of the 2020 Rule] . . . were not revisited," *id.* (emphasis added), the Review and Notice Conditions were the *centerpieces* of the 2020 Rule. These requirements were certainly "important" to the hundreds of commenters who supported their inclusion in the 2020 Rule, and a bipartisan chorus of Congress members who denounced the 2022 Rule's truncated comment period. (Ex. 53 (Ltr. from Sen. Toomey, *et al*.) (2022 Rule's "unreasonably short comment period" may "run afoul of the [APA]"); Ex. 54 (Ltr. from Sen. Tester, *et al*.) (12 Democratic senators requesting more time for public comment on current SEC rulemakings because of "critical" need for "adequate time to evaluate each individual rule"); *see also* Ex. 55 (Ltr. from Comm. on Fin. Servs.) (inquiring whether "tech glitch" impacted 2022 Rule).)

Second, the Commission attempts to artificially expand the length of the comment period by suggesting that the period began when "the Commission *issued the proposal on its website*." (SEC Br. 26 (emphasis added).) That suggestion contravenes the plain text of the APA, which provides that the comment period runs from publication in the *Federal Register*, not posting on the SEC's website, 5 U.S.C. § 553(b), (c).[1] In any event, the additional nine days from when the Commission announced the 2022 Proposed Rule on its website to when it was published in the Federal Register (which spanned the Thanksgiving holiday) hardly solves the problem.

Third, the insufficiency of the 30-day comment period here is confirmed by the long-standing Executive Branch practice of providing at least 60 days for notice and comment. The

[1] The Commission relies on two inapposite cases. In *Omnipoint*, the court held that a shortened comment period was justified due to a statutory deadline, rendering the subsequent discussion of actual notice dicta. 78 F.3d 620, 629-30 (D.C. Cir. 1996). And in *Pangea Legal Services*, in discussing a 30-day comment period "spanning the holidays" that the court deemed *insufficient*, the court measured the comment period from the date of publication in the Federal Register. 501 F. Supp. 3d 792, 820 (N.D. Cal. 2020).

Commission dismisses these authorities as "non-binding . . . best practice." (SEC Br. 26.) Binding or not, the Commission's response does not change the fact that "it is troubling that defendants failed to abide by these guidelines." *Cath. Leg. Immigr. Network*, 2021 WL 3609986, at *3. Nor did the Commission explain the inconsistency between the 30-day comment period used here and the Commission's *own* stated policy of providing "at least two months" for the public to consider its rule proposals. (Pls.' Br. 18.)

Fourth, the evidence of the insufficiency of the comment period speaks for itself: it resulted in just *one-tenth* of the number of public comments compared to the 2020 Rule. The Commission says that the truncated period was "harmless" because the U.S. Chamber and Business Roundtable managed to submit comments. (SEC Br. 29-30.) But the Commission does not address the ways in which the abbreviated comment period deprived Plaintiffs of the opportunity for *meaningful* comment. (*See* ECF No. 13, Ex. 19 (U.S. Chamber, Comment) (the Proposed 2022 Rule "requests comment on an array of complex issues that cannot be properly addressed within 30 days").) The Commission itself stated that the limited reservoir of comments resulted in a less informed analysis, noting that, despite having solicited additional data from commenters, it did "not receive[] information or data that would permit a quantitative analysis." (ECF No. 13, Ex. 21 at 43,186 (2022 Rule).) The failure to provide an adequate notice and comment period is harmless only where the agency's mistake "clearly had no bearing on the procedure used or the substance of decision reached." *U.S.* v. *Stevenson*, 676 F.3d 557, 565 (6th Cir. 2012); *see also U.S.* v. *Utesch*, 596 F.3d 302, 312 (6th Cir. 2010). The Commission, according to its own 2022 Rule, has not met that high bar here. And unlike the rules at issue in the Commission's harmless error cases, the 2022 Rule did not meaningfully

respond to the limited comments received, nor was the Proposed Rule modified *in any way* in response to the comments filed. *See Omnipoint Corp.*, 78 F.3d at 630.

Fifth, even if the Commission were correct that each procedural deficiency should be viewed in a vacuum, the Commission is wrong about each one here. For example, in response to Plaintiffs' argument that the comment period did not provide a meaningful opportunity for comment in part because it overlapped with year-end holidays, the Commission asserts incorrectly that "courts do not subtract holidays" (SEC Br. 26), when the opposite is true. *See Pangea Legal Servs.* v. *DHS*, 501 F. Supp. 3d 792, 819-820 (N.D. Cal. 2020) (year-end holidays); *Centro Legal de la Raza* v. *Exec. Off. for Immigr. Rev.*, 524 F. Supp. 3d 919, 954-955 & n.26 (N.D. Cal. 2021) (Labor Day). Further, the Commission does not dispute that courts evaluate whether competing demands—such as overlapping comment periods for interrelated rules—reduce interested parties' ability to comment. (SEC Br. 28.) Companies' year-end fiscal reporting deadlines constituted one such competing demand here.

Sixth, and finally, the Commission misses the point when it attempts to distinguish the cases on which Plaintiffs rely by arguing that, "in each case, th[e] finding turned on circumstances not present here." (SEC Br. 27-28.) Regardless of whether the exact same circumstances are present in this case—and some of the circumstances are quite similar[2]—the fact remains that a number of unique circumstances, considered individually or collectively,

[2] *Estate of Smith* found that a 60-day comment period was invalid due in part to the agency's failure to extend the period in response to requests from interested parties, as was true here. 656 F. Supp. 1093, 1098 (D. Colo. 1987). In *Becerra*, like here, the original rule "was promulgated following an extensive period of consideration" compared to "only a 30-day comment period to consider its repeal." 381 F. Supp. 3d 1177 (N.D. Cal. 2019). And in *North Carolina Growers Association*, the court found that when an earlier rulemaking generated thousands of comments over a 60-day comment period the nearly 1,000 comments received over a 10-day comment period did not "support the argument that the Department provided adequate opportunity for comment." 702 F.3d 755, 770 (4th Cir. 2012).

deprived the public of a meaningful opportunity to comment on the Proposed 2022 Rule.

II. THE COMMISSION'S ARBITRARY AND CAPRICIOUS REVERSAL OF THE 2020 RULE VIOLATED THE APA (COUNTS II-VI).

A. The Commission Failed to Provide the Required Enhanced Justification for Reversing Course (Count IV).

The Commission ultimately issued an unreasoned 2022 Rule that reversed course on a decade of "bipartisan legislative and regulatory review" of the PVAB industry. (*Amicus* Br. of SEC Officials and Scholars at 5; *see also* Pls.' Br. at 19-24.) The conclusory analysis offered by the Commission is fatal here, given that an agency must provide a "more detailed justification" for a rule change when "its new policy rests upon factual findings that contradict those which underlay its prior policy." (SEC Br. 16 (citing *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).) The Commission does not even attempt to argue that it has met that standard. Instead, it argues that the 2022 Rule was based on the *same* factual determinations as the 2020 Rule, so the standard does not apply. (SEC Br. 16-17.) That is plainly incorrect.

In the 2022 Rule, the Commission rejected numerous factual findings it had offered in support of the 2020 Rule. (*See* App. A (Reversed Factual Findings)). Most notably, the 2020 Rule found that the Review and Notice Conditions would "not create the risk that [proxy voting] advice would be delayed or that the independence thereof would be tainted." (ECF No. 35, Ex. 2 (2020 Rule) at 55,112.) But the 2022 Rule reached the opposite conclusion, namely, that the "risks posed . . . to the cost, timeliness, and independence of proxy voting advice are sufficiently significant such that it is appropriate to rescind the conditions now." (2022 Rule at 43,175; *see also* ECF No. 51 (*Amicus* Br. of National Association of Manufacturers) at 7-8 (explaining that the agency had "flatly rejected" "those same arguments" in the earlier rulemaking).)

In response, the Commission suggests that its assessment of such risks was simply a policy judgment, and that the 2022 Rule did not rest on *any* factual findings. (SEC Br. 17.) Not

so. A "factual finding" is "[a] conclusion by way of reasonable inference from the evidence." *Black's Law Dictionary* 569 (5th ed. 1979). Thus, a determination of whether a rule will cause delay or create conflicts of interest—*i.e.*, its costs—is a *factual* finding on which a policy judgment will be *based*. *Whitman-Walker Clinic, Inc.* v. *HHS*, 485 F. Supp. 3d 1, 50 (D.D.C. 2020) (assessing agency's reversal on costs and burdens of a regulation under *Fox*'s standard).

Accordingly, because the 2022 Rule directly contradicts factual findings underlying the 2020 Rule, the Commission was legally required to address why the agency "disregard[ed]" those "facts and circumstances." *Fox*, 565 U.S. at 514. The Commission does not argue that it has done so. Given this critical deficiency, the Court should set aside the 2022 Rule.[3]

B. The Commission's Decision Runs Counter to the Evidence Before the Agency (Count III).

Even if the Commission were correct that *Fox*'s enhanced-justification requirement is not applicable here, the Commission would still be obligated to provide "good reasons" for its "new policy." *Fox*, 556 U.S. at 515; (SEC Br. 9). Indeed, when an agency reverses a determination—factual or otherwise—it must "explain why it deemed it *necessary* to overrule its previous position." *Encino Motorcars* v. *Navarro*, 579 U.S. 211, 222 (2016) (emphasis added). Rather than provide "good reasons" for its about-face, the Commission vaguely asserted in the 2022 Rule that it had "weigh[ed] competing concerns differently today." (2022 Rule at 43,175.) The Commission's candor gives away the game: the Commission flip-flopped not based on anything

[3] The Commission also argues that it did not contradict its past factual findings concerning PVABs' voluntary practices. (SEC Br. 17-18.) But it does not dispute that the 2020 Rule found that "we do not believe the existing voluntary forms of outreach to registrants and other market participants . . . are alone sufficient" (2020 Rule at 55,108), and that in the 2022 Rule the Commission stated, without explanation, that "certain voluntary practices of PVABs . . . are likely, at least to some extent, to advance the goals underlying the [Review and Notice Conditions]," (2022 Rule at 43,170). That these factual findings are inconsistent is enough to require an enhanced explanation under *Fox*.

that would count as a "good" reason—like new facts or changed circumstances—but simply based on an act of political will. And the Commission's post-hoc litigation rationales cannot backfill the absence of any acceptable explanation in the 2022 Rule itself.

As Plaintiffs have explained, the Commission accepted the assertions of interested parties without justification and then offered an insufficient "summary discussion" of its abrupt reversal. (Pls.' Br. 19-21 (quoting *Encino Motorcars*, 579 U.S. at 222).) Most notably, the 2022 rulemaking never explained *why* "the 2020 Rule still threatened the cost, timeliness, and independence of PVABs' advice." (Pls.' Br. 21.) The Commission now belatedly asserts that it could "reasonably credit commenters' concern[s]" that the Review and Notice Conditions would "increase compliance costs," disrupt "the preparation and delivery of proxy voting advice," and compromise "investors' confidence in the integrity of such advice." (SEC Br. 10-11.) But the Commission has a problem: it did not actually "credit" such commenter concerns in the 2022 Rule itself. Tellingly, the Commission's brief cites the "Comments Received" section of the 2022 Rule, where the agency simply recited all of the comments submitted without providing any independent analysis or even commentary. (SEC Br. 10-16.) "[A]n agency's actions must be upheld, if at all, on the basis articulated by the agency itself," and not based on "counsel's post hoc rationalization[s]." *Hicks* v. *Comm'r of Soc. Sec*., 909 F.3d 786, 808 (6th Cir. 2018).

Even if the 2022 Rule had explained that the Commission was "crediting" the comments that the Commission now cites, that would still fail to fulfill the Commission's obligation to provide its own reasoned analysis for its rulemaking. Agencies *must* "examine" comments "critically" with "reasoned explanation." *Am. Great Lakes Ports Ass'n* v. *Zukunft*, 296 F. Supp. 3d 27, 39 (D.D.C. 2017). And where comments advocate different approaches, "[a]n agency must explain *why* it chose to rely on certain comments rather than others." *AARP* v. *U.S. Equal*

Emp't Opportunity Comm'n, 267 F. Supp. 3d 14, 32 (D.D.C. 2017).[4] Yet beyond summarizing the comments received, the Commission merely offers the conclusory statement that "we agree that the risks posed by the [Review and Notice] conditions to the cost, timeliness, and independence of proxy voting advice are sufficiently significant." (2020 Rule at 43,175.) The APA does not permit rulemaking by such *ipse dixit*.

The Commission also cannot substantiate its assertion that certain "voluntary practices of PVABs" were possible substitutes for the Review and Notice Conditions. (2022 Rule at 43,170.) The Commission had concluded the *exact opposite* in the 2020 Rule and PVABs had *reduced* issuer engagement in the interim. (Pls.' Br. 22-24.) The Commission cannot explain this change-in-position and appears to concede that PVABs' voluntary practices "fall short of the notice-and-awareness conditions." (SEC Br. 18). However, the Commission now seeks to minimize this factor, contending that the Commission only considered voluntary practices in a "limited respect" to "reinforce" its decision. (SEC Br. 18.) But PVAB self-regulation was one of only two factors supporting the rescission of the Review and Notice Conditions. (2022 Rule at 43,170.) The failure to justify one of the two pillars underlying the 2022 Rule further renders it arbitrary and capricious.

[4] The cases cited by the Commission (SEC Br. 12) are inapposite. Several do not deal with comments at all. *See Oakbrook Land Holdings* v. *Comm'r of Internal Revenue*, 28 F.4th 700, 712-13, 721 (6th Cir. 2022) (accepting agency statutory interpretation set forth during litigation because it was "the only plausible explanation"); *Aera Energy LLC* v. *FERC*, 789 F.3d 184, 193 (D.C. Cir. 2015) (discerning agency rationale for refusing to consider a particular argument from record of past agency opinions). Others describe an agency's reliance on comments where it also provided the requisite analysis. *Nasdaq Stock Mkt.* v. *SEC*, 38 F.4th 1126, 1142 (D.C. Cir. 2022) (approving of agency analysis supported by supervisory experience and comments); *Stilwell* v. *Off. of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) ("[agency] *thoroughly explained* its concern" citing "long [supervisory] experience" along with support in comments) (emphasis added).

In a final attempt to save this rulemaking, the Commission asserts that the "more complete and robust information and discussion" provided by the 2020 Rule "did not justify retaining potentially harmful new regulations." (SEC Br. 13.) This new rationale is a hollow one because it was not even offered in the 2022 Rule and relies on the same conclusory assertions described above—*i.e.*, that the 2020 Rule would negatively impact the independence, cost, and timeliness of PVABs' advice—without explaining why those harms would be realized.

C. The Commission's Cursory Economic Analysis Is Inadequate (Count II).

As Plaintiffs have explained, the Commission failed to engage in the robust economic analysis explicitly required under the Exchange Act. (Pls.' Br. 24-28.) The Commission agrees that an "inadequate" economic analysis renders a rule arbitrary and capricious but attempts to downplay this issue as a dispute over page count and a lack of quantitative data. (SEC Br. 19-20.) The Commission's shortcomings are far more serious.

First, as Plaintiffs previously described, the Commission's economic analysis was "inadequate" because it contradicted itself as to the benefits of the 2022 Rule. (Pls.' Br. 25-26.) The Commission asserted that (i) the "main benefit" of the 2022 Rule would be cost savings to PVABs due to reduced employee hours needed to comply with the Review and Notice Conditions (2022 Rule at 43,186), while also stating that (ii) the increased costs of the 2022 Rule to investors and registrants would be low because PVABs have in place "voluntary practices" that provide similar benefits as these same conditions. (*Id.* at 43,188, 43,196.) The Commission's only defense of this internally inconsistent logic is to state that it "acknowledged that any such [voluntary] practices would also 'limit[]' the benefits of rescission, and that the costs savings to PVABs will 'vary depending on each PVAB's current practices.'" (SEC Br. 21 (quoting 2022 Rule at 43,186).) The Commission thus "acknowledges" that its assumed cost savings will only materialize if PVABs discontinue the voluntary practices that the Commission

relied on to justify the rescission of the 2020 Rule in the first place.

Second, the Commission cannot defend its understatement of the costs of the 2022 Rule to companies and their shareholders. (Pls.' Br. 26-28.) The Commission asserts that it "acknowledged that rescinding the [Review and Notice] conditions 'could increase costs to investors and registrants' by 'reducing the overall mix of information available to [PVABs'] clients' and 'limit[ing] a registrant's ability to timely identify errors and mischaracterizations in proxy voting advice.'" (SEC Br. 20-21.) But an acknowledgement is not the same as actually accounting for the costly implications of corporate-governance decisions being based on inaccurate or incomplete information. *Gresham* v. *Azar*, 950 F.3d 93, 103 (D.C. Cir.) ("Nodding to concerns . . . only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking."). Nor does the Commission's passing reference to "consider[ing] the lack of evidence of systemic inaccuracies" in prior PVAB advice justify discounting altogether the costs to registrants, investors, and capital markets of the issuance of inaccurate information in that advice. (SEC Br. 21.) The Commission ignores a great deal of record evidence demonstrating that a substantial number of PVAB recommendations are marred by errors, along with evidence that even a small error rate has a profound impact. (ECF No. 49 (*Amicus* Br. of Society for Corp. Governance) at 6-9; (Pls.' Br. 27).) "By ducking serious evaluation of the[se] costs," the Commission acted arbitrarily. *Bus. Roundtable* v. *SEC*, 647 F.3d 1144, 1152 (D.C. Cir. 2011).

Finally, the length of the economic analysis—just one-fourth of the length of the economic analysis in the 2020 Rule—while not dispositive, is a useful metric in a case with no quantitative data. In combination with the other fundamental errors already described, it provides a clear snapshot of the cursory nature of the Commission's analysis. The failure to quantify the 2022 Rule's costs and benefits further reinforces this conclusion. The

Commission's excuse that it had "not received information or data that would permit a quantitative analysis" (2022 Rule at 70; SEC Br. 20), reveals an inappropriate abdication of the Commission's responsibilities and highlights the insufficiency of the 30-day comment period. The Commission cannot now rely on the lack of data and analysis resulting directly from circumstances it manufactured as a justification to uphold its inadequate economic analysis.

D. The Commission Failed to Consider Viable Alternatives (Count V).

Additionally, the Commission offers no justification whatsoever for failing to consider viable alternatives to rescission of the Review and Notice Conditions (Pls.' Br. 28-29). It tries to dodge the issue by framing the "central policy question" as an up-or-down vote on "whether to retain the [C]onditions." (SEC Br. 22.) That premise simply highlights the Commission's predetermined approach to the 2022 Rule. Rather than give meaningful consideration to an alternative other than complete rescission of the conditions, such as Commissioner Pierce's proposal to conduct a retrospective review of the 2020 Rule, the Commission chose to "proceed expeditiously." (SEC Br. 22.) In so doing, the Commission inappropriately promoted regulatory instability rather than guarding against it. *Dep't. of Homeland Sec.* v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (duty to first consider reasonable alternatives within ambit of existing policy).

E. The Commission Fails to Justify Treating Similar Stakeholders Differently (Count VI).

Finally, the Commission still has not justified the 2022 Rule's preferential treatment of PVABs compared to other regulated parties. (Pls.' Br. 29-30.) Instead, the Commission accuses Plaintiffs of inadequately explaining "how PVABs are similarly situated to those other entities." (SEC Br. 22.) Plaintiffs, however, provided concrete examples of other instances in which the Commission explicitly rejected self-regulation or championed transparency in the context of

regulating participants in the shareholder voting process. (Pls.' Br. 29-30.) The Commission offers no reason why such principles would be appropriate for some of these entities but not others. The Commission also contends that accepting Plaintiffs' argument would "transform [the APA] into a one-way, pro-regulatory ratchet" requiring agencies to meet "a heightened obligation to justify not imposing burdens in other contexts." (SEC Br. 22.) To the contrary, an agency is simply required to provide sufficient "reasons for treating similar situations differently." *Transactive Corp.* v. *United States*, 91 F.3d 232, 237 (D.C. Cir. 1996). Because the Commission has failed to do so here, the 2022 Rule cannot stand.

III. THE COMMISSION'S STANDING ARGUMENTS CONCERNING NOTE (E) AND THE 2020 GUIDANCE ARE MERITLESS.

The Commission also contends that Plaintiffs lack standing to contest the 2022 Rule's deletion of Note (e) and the rescission of the 2020 Guidance (SEC Br. 23-25), and that the deletion of Note (e) is immune from any challenge because it was not final agency action. *Id*.[5] But because Plaintiffs' challenge is to the entirety of the 2022 rulemaking, individual portions of which are non-severable, neither argument holds up to scrutiny.

It is settled law that when a court "invalidate[s] a specific aspect of an agency's action, [it] leave[s] related components of the agency's action standing only if '[it] can say without any substantial doubt that the agency would have adopted the severed portion on its own.'" *ACA Int'l.* v. *Fed. Comm'n*., 885 F.3d 687, 708 (D.C. Cir. 2018) (quotation marks omitted). Accordingly, if any aspect of the 2022 Rule's process or substance violated the APA, then the whole rule should be set aside. The Commission's deletion of Note (e) formed part and parcel of

[5] Although the Commission does not contest Plaintiffs' standing to challenge the Review and Notice Conditions, Plaintiffs are submitting declarations in support of their standing out of an abundance of caution. (*See* Nov. 21, 2022 Declarations of Tom Quaadman; Nov. 22, 2022 Declarations of Maria Ghazal and Bradley Jackson filed herewith.)

the defective 2022 Rule, and its rescission of the 2020 Guidance depended on the 2022 Rule.[6] Because there is substantial doubt that the Commission would have taken either action independently, these portions of the 2022 Rule are non-severable, and there is no need to "ask whether the plaintiff has standing to challenge those other provisions." *Murphy* v. *Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1487 (2018) (Thomas, J., concurring).

The Commission's argument that the deletion of Note (e) is non-final agency action likewise fails. By amending the text of Rule 14a-9 to remove Note (e) through its promulgation of the 2022 Rule, the Commission has clearly engaged in final agency decisionmaking that is not "of a merely tentative or interlocutory nature" and "from which legal consequences will flow," especially given that Note (e) identified specific grounds for holding PVABs liable under federal securities laws. *Bennett* v. *Spear*, 520 U.S. 154, 178 (1997).

IV. VACATUR IS THE APPROPRIATE REMEDY.

Finally, this Court should reject the Commission's cursory assertion that remand without vacatur would be appropriate here. (SEC Br. 30.) The APA directs reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions" found to violate one of its standards of review. 5 U.S.C. § 706(2). Following the statute's plain language, "vacatur is the normal remedy" for unlawful agency action. *Allina Health Servs.* v. *Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014). In contrast, remand without vacatur is allowed only "[i]n rare cases," *United Steel* v. *Mine Safety & Health Admin*., 925 F.3d 1279, 1287 (D.C. Cir. 2019), and is so unusual that this Circuit has *never* granted such relief.

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[6] Where a "first, invalid holding is treated as the necessary predicate to its second, [the court] must vacate the latter as well." *Am. Fed'n. of Gov't. Emps., AFL-CIO* v. *Fed. Lab. Rel. Auth*., 24 F.4th 666, 674, 676 (D.C. Cir. 2022). Because the 2020 Guidance rescission is premised on the defective 2022 Rule, it cannot survive independent of the 2022 Rule. (2022 Rule at 43,178.)

Remand without vacatur is assessed under the *Allied-Signal* balancing test and granted only when the "seriousness of the order's deficiencies" is minimal, and the likely "disruptive consequences" of vacatur are large. *Allied-Signal, Inc.* v. *U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). And because the APA creates a "presumption of vacatur," this presumption must be overcome by the Commission. *Alliance for the Wild Rockies* v. *U.S. Forest Serv.*, 907 F.3d 1105, 1121-22 (9th Cir. 2018). The Commission's conclusory remark that remand without vacatur is warranted because it can "remedy [any] failures . . . [by] explaining its policy judgment in greater detail" (SEC Br. 30), falls far short of its burden.

As already discussed, *see supra* Section I, II.B.; Pls.' Br. 19-24, the 2022 Rule is riddled with serious substantive defects that "go to the heart of the [agency's] decision" and thus require vacatur. *Humane Soc'y of U.S.* v. *Zinke*, 865 F.3d 585, 614-15 (D.C. Cir. 2017). And the Commission cannot cure these deficiencies with an additional explanation because the record itself does not support the 2022 Rule. *Nat'l Women's L. Ctr.* v. *Off. of Mgt. and Budget*, 358 F. Supp. 3d 66, 93 (D.D.C. 2019) (vacatur required where agency explanation "lacked support in the record"). In addition, the Commission's failure to provide a meaningful opportunity for comment is a "fundamental flaw" that almost always requires vacatur. *Heartland Reg'l Med. Ctr.* v. *Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009).

Further, the Commission does not argue that vacatur would have serious disruptive consequences here. Nor could it, given that such a remedy would merely reinstate the 2020 Rule status quo. This argument is accordingly waived. *McPherson* v. *Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997) (failure to develop argument in response to motion constitutes waiver); *see United Steel*, 925 F.3d at 1287 (vacating rule given failure to argue *Allied-Signal* factors).

CONCLUSION

The Court should grant Plaintiffs' motion for summary judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on November 22, 2022, a copy of the foregoing Combined Memorandum in Opposition to Defendants' Motion for Summary Judgment and Reply in Support of Plaintiffs' Motion for Summary Judgment was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

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