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

PLAINTIFFS' RESPONSE TO DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants' December 6, 2022 Notice of Supplemental Authority brings to this Court's attention a recent decision from the U.S. District Court for the Western District of Texas. (ECF No. 70 (citing Mem. Op., *Nat'l Ass'n of Mfrs., et al.* v. *SEC*, No. 22-cv-163 (W.D. Tex. Dec. 4, 2022)).) That decision denied a challenge raised by the National Association of Manufacturers (NAM) to the same 2022 Proxy Voting Advice Rule at issue in this case. (*Id.*) Plaintiffs respectfully submit that the *NAM* decision, which is currently being appealed, lacks persuasive value because the district court there overlooked certain arguments and erred in addressing others.

Procedural Inadequacy. With regard to NAM's argument that the 2022 Rule's comment period was inadequate, the court improperly assumed that a 30-day comment period is presumptively lawful. (Mem. Op. 14.) The court failed to recognize that the APA requires

courts to assess whether commenters had a "meaningful opportunity" to comment on a particular proposed rule taking into account all available context. *See* 5 U.S.C. § 553(c) (requiring that agencies "give interested persons an opportunity to participate in the rulemaking"). Contrary to the court's discussion of this issue (Mem. Op. 15-16), a determination of whether a comment period provided a "meaningful" opportunity for public participation in the rulemaking is not an imposition of a court's own procedural preferences, but rather a necessary evaluation of whether the procedural safeguards of the APA were followed. (*See* Pls.' Opening Br. 16 (citing cases, including *N. Carolina Growers' Ass'n, Inc.* v. *United Farm Workers*, 702 F.3d 755, 763 (4th Cir. 2012)).) Here, commenters did not have a meaningful opportunity to comment for the various reasons explained in Plaintiffs' briefs, most of which are not discussed in the court's decision. (*See* Pls.' Opening Br. 16-19; Pls.' Reply Br. 1-5.) Commenters and lawmakers expressed as much to the Commission during the rulemaking itself, which generated fewer than *one-tenth* of the comments submitted for the 2020 Rule. (Pls.' Opening Br. 13, 18-19; Pls.' Reply Br. 2, 4.)

Fox*'s Heightened Justification.* The court also erred by rejecting NAM's contention that the Commission was obligated to provide a "more detailed justification" for its 2022 Rule under Supreme Court precedent, reasoning that the Commission did not make any new factual findings in promulgating the 2022 Rule but instead weighed the same facts differently. (Mem. Op. 5-8 (citing *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).) That is exactly Plaintiffs' point. In the 2022 Rule the Commission directly contradicted at least two factual findings that underpinned the 2020 Rule. First, as the court recognized, the Commission "concluded that no risk to the timeliness and independence [of PVAB advice] remained at all under the 2020 Rule" and "just two years later . . . concluded that the 2020 Rule *did* pose a risk to the cost, timeliness, and independence of PVABs." (Mem. Op. 5; *see* 2020 Rule at 55,112; 2022 Rule at 43,175.) Yet the court inexplicably concluded that the Commission's factual

findings on that subject did not change. (Mem. Op. 6-8.) Second, the court did not address the Commission's contradictory findings between the 2020 Rule and the 2022 Rule concerning the effectiveness (or lack thereof) of PVABs' voluntary practices. (*See* Pls.' Reply 7 n.3 & App. A.) Because of these factual inconsistencies, a "more detailed justification" was required—which Defendants openly concede they have not provided here. *Fox*, 556 U.S. at 515.

No Reasoned Explanation for the 2022 Rule. After incorrectly finding that a "more detailed justification" was not required, the court held that the Commission had articulated a "satisfactory explanation" for the 2022 Rule. (Mem. Op. 9-13.) According to the court, it was perfectly fine for the Commission to simply "incorporate[] outside comments into the 2022 [Rule's] reasoning" rather than provide its own reasoned explanation for the Rule. (*Id*. at 11.) In reaching that conclusion, the court misapprehended both the record and the APA's requirements. (Pls.' Reply Br. 8.) Although the Commission is free to "incorporate" reasoning from comments, the 2022 Rule merely summarized each comment letter received without purporting to adopt the reasoning of specific commenters. (*Id*.) Moreover, the Commission failed to satisfy its obligation to provide an explanation as to *why* it accepted comments advocating a certain position over others. (*Id*. (citing *AARP* v. *U.S. Equal Emp't Opportunity Comm'n*, 267 F. Supp. 3d 14, 32 (D.D.C. 2017)).)

Note (e) Is Part of an Agency Rule. In a few cursory sentences, the court accepted the Commission's contention that the deletion of Note (e) was not final agency action, because the note was "explanatory" and therefore did not create "rights or obligations . . . from which legal consequences will flow." (Mem. Opp. 17.) The court did not address Plaintiffs' arguments here that Note (e) cannot be severed from the remainder of the (unlawful) 2022 Rule, and that Note (e) does indeed create "legal consequences" in part because it identifies bases for liability under federal securities laws. (Pls.' Reply Br. 13-14.)

***Arguments Not Addressed by the* NAM *Court*.** Finally, the court's decision does not touch on Plaintiffs' arguments that the 2022 Rule was arbitrary and capricious because: (i) the Commission conducted a legally deficient cost-benefit analysis (Pls.' Opening Br. 24-28; Pls.' Reply Br. 10-12); (ii) the Commission failed to consider viable alternatives to the 2022 Rule (Pls.' Opening Br. 28-29; Pls.' Reply Br. 12); and (iii) the Commission treated similarly situated stakeholders differently (Pls.' Opening Br. 29-30; Pls.' Reply Br. 12-13). Each of these grounds is an independent basis for setting aside the 2022 Rule as unlawful under the APA.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 9, 2022, a copy of the foregoing Response to Notice of Supplemental Authority 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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