IN THE 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 Chair of the Securities and Exchange Commission,

Defendants.

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

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

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INTRODUCTION

The rulemaking below represents the latest step in the Securities and Exchange Commission's efforts to strike an appropriate balance in regulating proxy voting advice businesses ("PVABs")—who play an increasingly important role in the proxy voting process—while protecting the timeliness and independence of the advice those businesses provide to investors. In 2020, the Commission adopted a package of proxy rule amendments representing one view of how to strike this balance. But many investors—the intended beneficiaries of the rules—reasonably took a different view, and overwhelmingly opposed certain provisions of the amendments. In 2022, the Commission reconsidered and rescinded two of those provisions, finding that doing so more appropriately balanced the competing concerns.

Shifting from one reasonable policy approach to another in this way, after both a change in the composition of the Commission and additional notice-and-comment rulemaking, is neither nefarious nor surprising. It is a permissible recalibration by a multimember agency confronting a challenging issue for which there is no compelled solution. The rescinded provisions conditioned PVABs' eligibility for certain proxy rule exemptions on PVABs' making their advice available to companies at or prior to the time they deliver it to their clients and providing notice to clients when a company has filed a written response (the "notice-and-awareness conditions"). Plaintiffs and *amici* spin a fictional narrative portraying the rescission of these conditions as a sudden partisan unraveling of a bipartisan consensus. In reality, the conditions were controversial and contested from the start: every Commission vote on the proposed and adopted 2020 rules and 2022 amendments was sharply divided. As the Commission's releases demonstrate, that division is attributable to different reasonable judgments about the appropriate policy response warranted by the record evidence.

Plaintiffs and others in the registrant community had long argued that regulations were needed to address alleged factual and analytical errors in proxy voting advice. But the version of the

conditions proposed in 2019 triggered a firestorm of criticism from a broad swath of investors and investor advocates, including a majority of the Commission's Investor Advisory Committee, who argued that there was no compelling evidence of material deficiencies in proxy voting advice, that registrants already have ample means to convey their views to shareholders, and that the proposed conditions would significantly impair the cost, timeliness, and independence of proxy voting advice.

The Commission modified the proposed conditions to mitigate some of these concerns. But in adopting the notice-and-awareness conditions in 2020, the Commission made no finding that systemic deficiencies in proxy voting advice existed. Rather, it acknowledged that such claims were heavily disputed and that the evidence was mixed, and it instead concluded that the conditions would enhance discussion of proxy voting advice and thus improve the overall mix of information available to investors. And, in a divided vote that again drew strong criticism, the Commission made a policy judgment that these potential informational benefits justified the risk of adverse effects.

The Commission revisited that judgment in 2022. After considering both the prior record and new comments, the Commission weighed the competing interests anew and rescinded the notice-and-awareness conditions while leaving other parts of the 2020 rules in place. In doing so, the Commission complied with the Administrative Procedure Act. Numerous commenters argued that the conditions could adversely affect the cost, timeliness, and independence of proxy voting advice, and the Commission highlighted the specific concerns it found persuasive with respect to each risk. The Commission was unpersuaded that there are systemic inaccuracies in proxy voting advice; and it reasonably concluded that the general informational benefits relied on in adopting the notice-and-awareness conditions in 2020 did not sufficiently justify the risks they pose. But it retained the 2020 requirement that PVABs disclose conflicts of interest and reiterated its determination that proxy voting advice is a form of solicitation subject to the proxy rules, including potential liability for misstatements or omissions of material fact.

Plaintiffs' assertion that a more detailed justification was required is incorrect. Settled law establishes that agencies have significant discretion to reevaluate prior policy choices, even where (unlike here) the record is entirely the same. Plaintiffs seek to recast disagreements about the significance of competing policy interests as contradictory factual findings requiring more substantial explanation, but their arguments misunderstand the Commission's analysis. And contrary to Plaintiffs' contentions, the Commission reasonably considered the potential economic consequences of rescinding the conditions as well as reasonable alternatives.

Plaintiffs' procedural objections are also meritless. The 31-day comment period in this targeted rulemaking exceeded the length that courts have held is generally sufficient even for significant rule changes. Plaintiffs had even more time—40 days—to file their comments. The Commission received dozens of extensive comments from supporters and opponents of the conditions, including Plaintiffs. And after more than half a year of consideration, the Commission rescinded the conditions in a reasoned release. No more was required.

BACKGROUND

A. Market Overview

Shareholders of public companies generally have a right under state law to vote on corporate governance matters at shareholder meetings. For example, public companies hold annual meetings to elect directors, approve executive compensation, and consider other management and shareholder proposals. They may also call special meetings to consider mergers and acquisitions or other major transactions. The vast majority of shareholders do not attend these meetings in person; they vote through the use of proxies. *Exemptions from the Proxy Rules for Proxy Voting Advice*, 85 Fed. Reg. 55,082, 55,082 (Sept. 3, 2020) (2020 Rules). Typically, management or others will distribute to shareholders a form of proxy seeking authorization to vote on their behalf.

A substantial majority of the shares issued by U.S. public companies are owned by intermediaries such as broker-dealers, mutual funds, and pension plans. *Id.* at 55,083, 55,123. Given the breadth of their holdings, these institutional investors (or their investment advisers) must vote in "potentially hundreds, if not thousands, of shareholder meetings and on thousands of proposals that are presented at these meetings each year." *Id.* at 55,083. Most of these decisions are concentrated in a period of a few months. *Id.* And institutional investors generally have fiduciary obligations to vote in the best interest of the customers on whose behalf their shares are held. *See Concept Release on the U.S. Proxy System*, 75 Fed. Reg. 42,982, 43,009 (July 22, 2010); 17 C.F.R. 275.206(4)-6.

Institutional investors have increasingly turned to PVABs for assistance in making these voting determinations. 2020 Rules, 85 Fed. Reg. at 55,083. PVABs provide research and analysis on matters subject to a vote, as well as specific voting recommendations based upon client objectives. *Id.* PVABs may also assist clients in handling the administrative tasks of the voting process by, for example, enabling clients to efficiently cast votes on an electronic platform or, in some cases, directly executing votes on their clients' behalf. *Id.* PVABs typically have a matter of weeks to formulate and distribute their advice in time for clients to decide and enter their votes, which clients may change at any time prior to the meeting date. *Id.* at 55,109 n.342, 55,136 n.607. Registrants may respond to PVAB advice by publicly filing additional soliciting materials with the Commission. *See Proxy Voting Advice*, 87 Fed. Reg. 43,168, 43,176 (July 19, 2022) (2022 Amendments).

PVABs play a critical role in the proxy voting process, "help[ing] facilitate the participation of shareholders in corporate governance through the exercise of their voting rights." 2020 Rules, 85 Fed. Reg. at 55,084. To fulfill their duties, investors "depend on receiving independent proxy voting advice in a timely manner." 2022 Amendments, 87 Fed. Reg. at 43,175.

B. Statutory and Regulatory Scheme

Section 14(a) of the Securities Exchange Act of 1934 makes it unlawful for any person to "solicit . . . any proxy" with respect to certain securities "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. 78n(a)(1). These rules and regulations define "solicitation" and other relevant terms (Rule 14a-1), require that a person engaged in solicitation furnish to each person solicited a written proxy statement containing certain mandatory disclosures and file the statement with the Commission (Rules 14a-3 to 14a-15), establish exemptions from those information and filing requirements (Rule 14a-2), and prohibit misstatements or omissions of material fact in proxy solicitations (Rule 14a-9). 17 CFR 240.14a-1, *et seq.*

The Commission has long considered proxy voting advice generally to be a form of "solicitation" subject to the proxy rules, including Rule 14a-9's antifraud proscriptions. *See* 75 Fed. Reg. at 43,009-10. But PVABs have been eligible for two conditional exemptions from the proxy rules' information and filing requirements. 2020 Rules, 85 Fed. Reg. at 55,131.

C. Proceedings Before the Commission

1. The Commission adopted the 2020 Rules by a divided vote.

In July 2020, by a 3-1 vote, the Commission adopted amendments to its proxy rules. The 2020 Rules codified the Commission's view that proxy voting advice by PVABs generally constitutes a "solicitation" under the rules. 85 Fed. Reg. at 55,154. The 2020 Rules also conditioned PVABs' exemption from the proxy rules' information and filing requirements on three new requirements. To qualify for an exemption, PVABs were required to make certain conflicts-of-interest disclosures and to adopt policies and procedures reasonably designed (1) to make their advice available to the registrant that is the subject of the advice at or before the time the advice is disseminated to their clients and (2) to provide clients a mechanism by which they can reasonably be expected to become

aware of any written response the registrants might subsequently file. *Id.* And, in an attempt to clarify its application, the 2020 Rules added explanatory Note (e) to Rule 14a-9 giving specific examples of material misstatements or omissions related to proxy voting advice. *Id.* at 55,155.

In adopting the 2020 Rules, the Commission recognized that "introducing new rules into a complex system like proxy voting . . . could inadvertently disrupt the system and impose unnecessary costs if not carefully calibrated." *Id.* at 55,107. As originally proposed in 2019 (by a 3-2 vote), the rules would have required that PVABs give registrants an opportunity to review and provide feedback on their advice *before* disseminating it to their clients and include in their advice a hyperlink to the registrant's response. *Id.* at 55,102, 55,103-05. But the Commission acknowledged in 2020 that investors overwhelmingly opposed those proposed requirements. Many argued that they would adversely affect the cost, timeliness, and independence of proxy voting advice and were not justified by any credible evidence that errors in proxy voting advice occur frequently. *Id.* at 55,103-04. A majority of the Commission's Investor Advisory Committee ("IAC"), an advisory body established by Congress in 2010 (15 U.S.C. 78pp), similarly argued that although "some corporate managers and their lawyers and trade group representatives . . . claim problems with proxy advisors exist," they "provide no reliable basis for concluding material problems actually do exist" or that "government-mandated regulations of the type proposed" are justified. Matro Decl. Ex. A at 4, 5.

The Commission attempted to mitigate these concerns by adopting the notice-and-awareness conditions instead, concluding that they would "impose lower compliance costs and result in fewer disruptions for [PVABs] and their clients" and would "substantially address, if not eliminate altogether," the "objectivity and timing" concerns raised by the proposed advance review mechanism. *Id.* at 55,137-39; *see also id.* at 55,112, 55,133. The Commission acknowledged that commenters disagreed about the incidence of errors in proxy voting advice and that the empirical evidence on both the quality of such advice and its influence on voting decisions was "inconclusive."

Id. at 55,103-04, 55,107, 55,124-25. But it found that the conditions would nonetheless "facilitat[e] investor access to enhanced discussion of proxy voting matters" and thus "improv[e] the mix of information available to shareholders." *Id.* at 55,107, 55,110. And it made a policy judgment that these informational benefits justified any potential adverse effects. *Id.* at 55,142.

The dissenting Commissioner argued, among other things, that the notice-and-awareness conditions still "impose significant new costs and delays" and "increase issuer involvement in what is supposed to be independent advice" despite "almost universal opposition from investors . . . who have emphatically stated that no rule is needed or wanted." Matro Decl. Ex. B (Lee 2020 Dissent).

On the same day that it adopted the 2020 Rules, the Commission issued guidance "to assist investment advisers in assessing how to consider the additional information that may become more readily available to them as a result of [the 2020 Rules]." *Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, 85 Fed. Reg. 55,155, 55,155 (Sept. 3, 2020) ("2020 Supplemental Guidance"). This guidance supplemented guidance issued the year before to assist investment advisers in complying with their proxy voting responsibilities. *Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, 84 Fed. Reg. 47,420 (Sept. 10, 2019).[1]

2. The Commission reconsidered its policy judgments and, after notice and comment, rescinded parts of the 2020 Rules.

On June 1, 2021, the new Chair of the Commission issued a statement directing the staff to consider whether the Commission should revisit the policy choices in the 2020 Rules. *See* Pls.' Ex.

[1] Institutional Shareholder Services Inc. ("ISS"), a leading PVAB, challenged the 2020 Rules. *Institutional Shareholder Services, Inc. v. SEC*, No. 1:19-cv-3275 (D.D.C.). ISS's challenges include that the Commission lacks authority under Section 14(a) to regulate proxy voting advice and that the notice-and-awareness conditions were arbitrary and capricious under the APA and violated the First Amendment. Oral argument on the parties' cross-motions for summary judgment is pending.

16.[2] After such consideration, on November 17, 2021, the Commission proposed (by a 3-2 vote) to rescind the notice-and-awareness conditions and to delete Note (e) to Rule 14a-9, while retaining the codification of the Commission's interpretation of solicitation and the conflicts-disclosure condition. *Proxy Voting Advice*, 86 Fed. Reg. 67,383 (Nov. 26, 2021) (2021 Proposed Amendments). The comment period for the proposal closed on December 27, 2021. *Id.* at 67,383.

After considering the comments received, the Commission adopted the proposed amendments (by a 3-2 vote) on July 13, 2022. 87 Fed. Reg. 43,168; *see also* Matro Decl. Exs. C, D, E (statements of supporting commissioners). The Commission explained that the 2020 Rules "reflected an effort to balance competing policy concerns," including its interests in "facilitating more informed proxy voting decisions" and in avoiding "adverse effects on the cost, timeliness, and independence of proxy voting advice." *Id.* at 43,169-70. The Commission "revisited" its assessment of the competing concerns, however, and struck a different "policy balance." *Id.* It was not persuaded that there are systemic inaccuracies in proxy advice, and it agreed with "the vast majority of PVABs' clients and investors that expressed views" that "the potential informational benefits" of the conditions "do not sufficiently justify the risks they pose to the cost, timeliness, and independence of proxy voting advice on which many investors rely." *Id.* at 43,175 & n.124.

The Commission also concluded that Note (e) had exacerbated, rather than alleviated, legal uncertainty and should be deleted. *Id.* at 43,181. And it rescinded the 2020 Supplemental Guidance. *Id.* at 43,178. The Commission emphasized that it was not altering the definition of "solicitation" or

[2] On the same day, the staff of the Commission's Division of Corporation Finance issued a statement that the Division would not recommend enforcement action to the Commission based on the 2020 Rules during the period in which the Commission considered further regulatory action. Pls.' Ex. 14. Although the Commission rescinded that staff statement when it adopted the 2022 Amendments, 87 Fed. Reg. at 43,169 n.18, a court has since ruled that the staff statement, combined with the Chair's statement and a related filing in the ISS litigation, constituted final agency action unlawfully suspending the compliance date of the 2020 Rules. *See* Mem. Op., *Nat'l Ass'n of Mfrs. v. SEC*, No. 7:21-cv-183-DC (W.D. Tex. Sept. 28, 2022).

the conflicts-disclosure condition from the 2020 Rules and that PVABs were still subject to liability under Rule 14a-9 for any misstatements or omissions of material fact in their advice. *Id.* at 43,170.

ARGUMENT

I. The 2022 Amendments are reasonable and reasonably explained.

Under the APA's "deferential" arbitrary-and-capricious standard, "[a] court simply ensures that the agency . . . has reasonably considered the relevant issues and reasonably explained the decision." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). "If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions . . . must be upheld." *Clean Water Action v. EPA*, 936 F.3d 308, 312 (5th Cir. 2019) (quotation omitted). "Even when an agency explains its decision with less than ideal clarity, a reviewing court will not upset the decision on that account if the agency's path may reasonably be discerned." *Oakbrook Land Holdings, LLC v. Comm'r of Internal Revenue*, 28 F. 4th 700, 720 (6th Cir. 2022) (quotation omitted).

A. The Commission provided a reasoned explanation for rescinding the notice-and-awareness conditions.

An agency's change in policy "is not subjected to a heightened standard or more substantial review than the scrutiny applicable to policy drafted on a blank slate." *Handley v. Chapman*, 587 F.3d 273, 282 (5th Cir. 2009). The APA "imposes no heightened obligation on agencies to explain 'why the original reasons for adopting the displaced rule or policy are no longer dispositive.'" *Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 376 (D.C. Cir. 2013) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009)). Nor are agencies required to identify "new evidence" or a "change in circumstances." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1037-38 (D.C. Cir. 2012) (quotation omitted); *accord Clean Water Action*, 936 F.3d at 315. Rather, "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates." *Fox*, 556 U.S. at 515.

The 2022 Amendments clear *Fox*'s "low bar." *Inv. Co. Inst.*, 720 F.3d at 377. Plaintiffs do not dispute that Congress has left the policy decision to impose the notice-and-awareness conditions to the Commission's discretion. *See* 15 U.S.C. 78n(a)(1). In 2020, a divided Commission concluded that the conditions' informational benefits justified any adverse effects. In 2022, the Commission forthrightly acknowledged, in a considered release issued after notice-and-comment, that it had "revisited" that policy judgment and, "weigh[ing] the[] competing concerns differently," reached a different conclusion. 2022 Amendments, 87 Fed. Reg. at 43,169-70, 43,175. And contrary to Plaintiffs' arguments, the Commission provided a reasoned explanation for this policy shift.

1. The Commission reasonably explained the potential adverse effects of the notice-and-awareness conditions.

Plaintiffs incorrectly argue (at 21) that the Commission "never explained" the risks that the notice-and-awareness conditions posed to the cost, timeliness, and independence of proxy voting advice. When it adopted the 2020 Rules, the Commission acknowledged that PVABs "may pass through a portion of the costs of modifying or developing systems to meet the requirements [of the conditions] to their clients through higher fees for proxy advice." 85 Fed. Reg. at 55,139. The Commission reached the same conclusion in this rulemaking, 2022 Amendments, 87 Fed. Reg. at 43,186, reasonably crediting commenters' concern that the conditions would "increase compliance costs which get passed on to [PVABs'] clients," *id.* at 43,171, 43,175 & n.118.[3]

The Commission also reasonably identified the basis for its concern about timeliness. The conditions required PVABs to provide their advice to each registrant at or prior to the time they delivered it to clients and provide clients a mechanism to access each registrant's publicly filed response. 2020 Rules, 85 Fed. Reg. at 55,154. PVABs relying on safe harbors adopted with the

[3] *See also, e.g.*, Matro Decl. Ex. F at 2 (MFA Comment); Matro Decl. Ex. G at 3 (IAA Comment); Matro Decl. Ex. H at 2 (New York Comptroller Comment).

rules may also have had to send "two separate notices" to clients regarding a registrant's intent to file and actual filing of a response. *Id.* at 55,114 n.381. Given that PVABs "may engage with hundreds of issuers regarding thousands of shareholder proposals during a critical shareholder season," the Commission rationally credited concerns that managing all of these communications with registrants and clients could "disrupt[] the preparation and delivery of proxy voting advice" to PVABs' clients. 2022 Amendments, 87 Fed. Reg. at 43,171 & n.44, 43,175 & n.118 (quotation omitted); *cf.* Pls.' Ex. 15, App. A. at 7 (Nasdaq Comment) (indicating that up to 15% of surveyed companies may have acknowledged that the conditions could "create unnecessary delays or confusion"). And it further noted that any resulting delays "could impair the ability of PVABs' clients to receive and process . . . advice sufficiently in advance" of the vote. 2022 Amendments, 87 Fed. Reg. at 43,176 n.139.

Similarly, the Commission rationally credited widespread investor concern that forcing PVABs to facilitate registrants' communications to their clients risked compromising the independence of their advice as well as "investors' confidence in the integrity of such advice." *Id.* at 43,189. Investors rely on PVABs for independent advice. *Id.* at 43,175. Yet the notice-and-awareness conditions used that relationship as a mechanism to help disseminate the views of *registrants*—and only registrants—about proxy voting advice. *See, e.g.*, Matro Decl. Ex. I at 3-4 (NASAA Comment). The Commission shared concerns that this could have "tilt[ed] the playing field in favor of company management and create[d] unequal access to the proxy solicitation process." *Id.* at 43,171-72 & nn.43, 59-60, 43,175 & n.118 (quotation omitted).[4]

The Commission also shared the concern that PVABs "may feel pressure to tilt voting recommendations in favor of management more often, to avoid critical comments from companies that could draw out the voting process and expose the firms to costly threats of litigation." *Id.* at

[4] Multiple commenters agreed with this assessment. *See* Matro Decl. Ex. I at 3 (NASAA Comment); Matro Decl. Ex. J at 1 (ICGN Comment); Matro Decl. Ex. K at 1 (US IIA Comment).

43,175 & n.118 (quotation omitted). The concern that the conditions could have caused PVABs to "err[] on the side of caution in complex or contentious matters" is entirely plausible given that registrants are most likely to file a response—and thus trigger PVABs' obligation to alert their clients—when they disagree with the PVAB's recommendation. *Id.* at 43,189.

Invoking *Susquehanna International Group, LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017), Plaintiffs contend (at 21) that the Commission could not credit investors' concerns without "perform[ing] [its] own analysis." But *Susquehanna* involved the Commission's statutory obligation to make independent findings in approving a rule proposed by a self-regulatory organization, rather than "unquestioningly" relying on the proposing-entity's submissions. 866 F.3d at 447. Here, by contrast, the Commission appropriately relied on the comments of a broad collection of investors, investor groups, and others in its own rulemaking under the APA. These commenters were not the entities subject to the conditions; indeed, they included investors and advisers that rely on proxy advice to fulfill their fiduciary duty and whose views are no more self-serving than Plaintiffs' own.

And in justifying the weight it placed on those commenters' concerns, the Commission pointed to the specific comments, and the specific reasoning within those comments, that it found persuasive. *See, e.g.*, *Oakbrook Land Holdings*, 28 F.4th at 712-13, 721 (discerning agency's rationale from its citations to the record); *Aera Energy LLC v. FERC*, 789 F.3d 184, 192 (D.C. Cir. 2015) (discerning rationale from record). The Commission thus based its reasonable predictive judgment on substantial evidence in the record. *See Nasdaq Stock Market LLC v. SEC*, 38 F. 4th 1126, 1142-43 (D.C. Cir. 2022) (upholding the Commission's reliance on comments to substantiate a potential future risk); *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (upholding agency judgment that "found support in various comments"). Plaintiffs may disagree that the risks specified by the Commission will materialize, but it is not the Court's role—nor that of Plaintiffs—to "substitute [its] judgment for that of the agency." *Fox*, 556 U.S. at 530 (quotation omitted).

In any event, the Commission's discussion of the competing interests makes clear that its policy choice did not rest on these risks alone. Rather, as discussed below, it was also unconvinced that the purported benefits justified these risks. *See* 2022 Amendments, 87 Fed. Reg. at 43,175-76.

2. The Commission reasonably explained that the informational benefits were insufficient to justify the conditions' potential adverse effects.

The Commission balanced the risks discussed above against the potential benefits of the notice-and-awareness conditions. In 2020, the Commission grounded its adoption of the conditions on the view that providing investors "more complete and robust information and discussion" would lead to more informed voting decisions. *Id.* at 43,175 (quoting 2020 Rules, 85 Fed. Reg. at 55,107). In rescinding them in 2022, the Commission reasonably concluded that this "general principle" did not justify retaining potentially harmful new regulations strongly opposed by the very investors they were intended to benefit. *Id.* at 43,170, 43,175.

Opposing commenters argued that the conditions were justified by the prevalence of errors in proxy voting advice, citing their experiences, anecdotal evidence, and certain studies or surveys. *See id.* at 43,173. But the Commission considered much of the same evidence in 2020, found it to be disputed, and declined to make a finding about the prevalence of errors, adopting the conditions on a different rationale. *Id.* at 43,175-76 & n.127. It was thus reasonable for the Commission to conclude in 2022 that the same evidence did not necessitate retaining the conditions; to the contrary, "the error rate in proxy voting advice appears to be low." *Id.* at 43,175-76 & n.127, 43,187.[5]

For example, the American Council for Capital Formation ("ACCF") studies relied on by many opposing commenters (Br. 7) actually showed that "only 0.90% of all registrants disputed a

[5] Numerous comments, including from investors subject to fiduciary obligations in exercising their voting authority, support this assessment. *See* Matro Decl. Ex. L at 2 (T. Rowe Price Comment); Matro Decl. Ex. M at 1 (WSIB Comment); Matro Decl. Ex. N at 4 (OPERS Comment); Matro Decl. Ex. O at 3 (CalPERS Comment); Matro Decl. Ex. P at 6 (Better Markets Comment).

PVAB's proxy voting advice in supplemental filings in 2021, which is only a 0.11% increase" from 2020. *Id.* at 43,173, 43,175-76 n.127; *see also id.* at 43,187 (noting that these filings "represented less than one percent of the proxy materials filed by registrants that year"). And even these percentages "may not reflect the error rates in proxy voting advice, as the fact that a registrant raises a dispute regarding proxy voting advice in a supplemental filing does not necessarily indicate that an error exists in such advice." *Id.* at 43,175-76 n.127; *see also id.* at 43,172 n.58 (noting that "much of the registrant feedback [one institutional investor] had observed 'involve[d] differences of opinion'"); *cf.* Matro Decl. Ex. Q at 2-3 (CII 2019 Comment) (arguing that only 18 of 39 claimed errors in ACCF study were actual factual inaccuracies, out of 31,830 PVAB reports).

Nor was the Commission persuaded to retain the conditions based on surveys of registrants by the Society for Corporate Governance ("SCG") and Willis Towers Watson. The Commission reasonably concluded that these surveys were not "persuasive indicators of systemic inaccuracies . . . as neither survey identified any specific instances of errors in proxy voting advice." *Id.* at 43,175 & n.127 (noting also that the Commission in 2020 did not rely on these surveys as evidence of the prevalence of errors); *see also* 2020 Rules, 85 Fed Reg. at 55,103 n.258 (noting disputes over the "rigor" and "usefulness" of such surveys). Unlike the ACCF studies, which at least identified specific supplemental filings responding to specific alleged errors, the SCG survey contained only brief, generalized descriptions of anonymous, unsubstantiated allegations. *Contra* SCG Br. 10. Thus there was no reliable way to assess how many of the allegations involved material factual inaccuracies rather than insubstantial errors or analytical or methodological disagreements.[6]

[6] Plaintiffs assert (at 7) that Business Roundtable surveys from 2013 and 2018 prove that the ACCF studies "vastly understate" the error rate, but the 2020 comment they cite contains even less information than the SCG survey. *See* Pls.' Ex. 52 (Bus. Roundtable 2020 Comment).

Plaintiffs also claim (at 26 n.5) that the Commission "ignored" other evidence that PVABs "frequently" provide "inaccurate" advice. But in discussing the incidence of errors, most of the cited comments relied exclusively on the same ACCF studies and/or registrant surveys that the Commission addressed. And the few other anecdotal examples of alleged factual errors out of the thousands of voting recommendations made by PVABs every year—at least one of which the PVAB corrected—do not establish that the Commission acted unreasonably in rescinding the notice-and-awareness conditions. *See* Pls.' Ex. 38 at 2 (NGS Comment); Pls.' Ex. 16 at 5 (Nasdaq Comment).

The Commission also explained that rescinding the notice-and-awareness conditions would not leave registrants without the ability to consider and respond to proxy voting advice. Indeed, neither the adoption nor the rescission of the conditions altered the pre-existing mechanisms issuers have long had to communicate with shareholders in the proxy process. *Id.* at 43,176. And the Commission pointed to evidence that registrants have been able to identify purported factual or analytical errors in proxy voting advice and respond using these pre-existing mechanisms. *Id.* Moreover, the Commission observed that "leading PVABs have voluntarily adopted practices that provide their clients and registrants with some of the opportunities and access to information that would have been required" under the 2020 Rules. *Id.*; *see also* 2021 Proposed Amendments, 86 Fed. Reg. at 67,386-87 (describing practices).

The Commission also addressed the argument that the conditions were needed to ensure that investors review any response filed by the registrant. *See* 2022 Amendments, 87 Fed. Reg. at 43,173 & n.86, 43,176 & n.136. The Commission reasonably "expect[ed] that the types of investors that utilize proxy voting advice are sufficiently sophisticated" to find registrants' publicly-filed responses. *Id.* at 43176. And it noted that the leading PVABs already provide their clients access to registrants' filings through their online platforms. *Id.* at 43,176 n.137.

Plaintiffs contend (at 26-27) that the Commission "ignored" evidence that "numerous" companies "lacked the time and resources" to respond to proxy advice before the vote. But the only evidence they cite is a comment arguing for the advance review mechanism proposed in 2019 on the ground that supplemental proxy materials are "ineffective" at persuading investors to "reconsider" their votes. Pls.' Ex. 35 at 25 (Exxon Comment). The 2022 Amendments have no bearing on that concern because, as the Commission explained, any registrant response facilitated by the 2020 Rules would have also been via a supplemental proxy filing. 87 Fed. Reg. at 43,176.

In any event, the Commission acknowledged that the conditions may have "help[ed] facilitate timely investor access to information," but it made a policy judgment that this and other potential benefits did not justify the risks associated with the conditions. *Id.*; *see also id.* at 43,187. Plaintiffs' challenge to that judgment is, at bottom, a "policy quarrel dressed up as an APA claim." *XY Planning Network, LLC v. SEC*, 963 F.3d 244, 255 (2d Cir. 2020).

3. No "more detailed justification" was required.

Plaintiffs err in asserting that more was needed to justify the Commission's policy change. While an agency must provide a "more detailed justification" when "its new policy rests upon factual findings that contradict those which underlay its prior policy," *Fox*, 556 U.S. at 515, here the Commission did not reject any prior factual findings. And "a reevaluation of which policy would be better in light of the facts . . . is well within an agency's discretion even when the agency offer[s] no new evidence to support its decision." *Clean Water Action*, 936 F.3d at 315 (quotation omitted); *see also Nat'l Ass'n of Home Builders*, 682 F.3d at 1038 (*Fox* "dispenses with the petitioners' complaint that [the challenged policy reversal] merely revisits old evidence and arguments"); *NRDC v. Nat'l Marine Fisheries Serv.*, 71 F. Supp. 3d 35, 58 (D.D.C. 2014) (similar).

Plaintiffs claim (at 20) that the Commission's analysis contradicts its prior determination that the notice-and-awareness conditions "do[] not create the risk that [proxy voting] advice would be

delayed or that the independence thereof would be tainted ***as a result of a registrant's pre-dissemination involvement***" because the conditions "do[] not require" such involvement. 2020 Rules, 85 Fed. Reg. at 55,112 (emphasis added). But that statement does not address investors' arguments in this rulemaking that the conditions may compromise the timeliness and independence of proxy advice *in other ways*. And regardless, *Fox* referenced the need for a more-detailed-justification to disregard "facts and circumstances." 556 U.S. at 516. The policy concern that a PVAB's independence may be compromised by a mandate to help disseminate registrants' views is "not susceptible to the same type of verification or refutation by reference to the record as are factual questions." *Superior Oil Co. v. FERC*, 563 F.2d 191, 201 (5th Cir. 1977).

Moreover, the Commission's judgment in 2020 that the informational benefits of the conditions justified any potential adverse effects was informed by its determination that the conditions *mitigated*, but did not necessarily eliminate, risks to timeliness and independence. *See, e.g.,* 2020 Rules, 85 Fed. Reg. at 55,137 (conditions would "result in *fewer* disruptions for [PVABs] and their clients" and would not "*unduly* encumber[] the ability of [PVABs] to provide their clients with timely and reliable voting advice"); *id.* at 55,139, 55,141 (conditions "should *reduce* concerns that registrants will lobby proxy voting advice businesses for changes to recommendations," and would "*limit* the presence and *ameliorate* the possible effects" on PVAB independence) (emphases added). But in this rulemaking, the Commission weighed the potential risks and corresponding benefits differently in light of comments from investors raising specific concerns about the notice-and-awareness conditions as adopted, as well as its own policy views. And it provided the "reasoned explanation" that *Fox* requires for recalibrating the policy balance it struck in 2020. *See supra* 10-16.

Plaintiffs similarly err in asserting (at 22-23) that the Commission disregarded its prior conclusion that PVABs' voluntary practices did not "suffice to achieve our goal of ensuring . . . timely access to a more complete mix of relevant information." 2020 Rules, 85 Fed. Reg. at 55,108.

Contrary to Plaintiffs' suggestion (at 14, 22), the Commission did not find that PVABs' voluntary practices rendered the conditions "unnecessary" to achieve that goal. *See* 2022 Amendments, 87 Fed. Reg. at 43,177, 43,189 (acknowledging that PVABs' voluntary practices do not "replicate" the notice-and-awareness conditions). Rather, as discussed, the Commission was not persuaded that this informational goal sufficiently justified the conditions in the first place. *Id.* at 43,175. And because PVABs' voluntary practices provide at least "some" of the same benefits, the Commission explained that they further "reinforce[d]" its policy determination that the conditions "should be rescinded, especially when balanced against the risks that th[e] conditions present." *Id.* at 43,177.

Plaintiffs fail to establish that considering PVABs' voluntary practices in this limited respect was unreasonable. The Commission did not "blindly" rely on "PVAB self-regulation" (Br. 22-23) or "market" incentives (Br. 27); it reconsidered the merits of a specific regulatory intervention in light of other relevant regulatory requirements. *See* 2022 Amendments, 87 Fed. Reg. at 43,178 (emphasizing that proxy voting advice "will remain subject to Rule 14a-9 liability" and that PVABs "will have to satisfy the conflicts of interest disclosure requirements" adopted in 2020). Moreover, the Commission acknowledged that it did not "know for sure whether [PVABs'] voluntary practices will continue" but explained that PVABs have "financial[]" and other "market-based" incentives to maintain such practices, that numerous investors and PVAB clients expected PVABs to maintain them, and that, in any event, it would "continue to monitor the PVAB market" and would "take further action" if necessary. *Id.* at 43,177 & n.151, 43,187-88; *see also* 2020 Rules, 85 Fed. Reg. at 55,125 & n.493 (citing comments discussing PVABs' incentives to provide accurate advice).

Plaintiffs gain no traction by highlighting the ways in which PVABs' practices fall short of the notice-and-awareness conditions (Br. 22-23) because, as discussed, the Commission never claimed otherwise. Nor does the fact that ISS has ended its practice of giving some U.S. registrants an opportunity to review *draft* advice render the Commission's policy choice arbitrary or capricious.

The Commission acknowledged ISS's policy change, but explained that the conditions "do not require that PVABs provide registrants with *draft* proxy voting advice," so their rescission "should not impact the availability of such opportunities." 2022 Amendments, 87 Fed. Reg. at 43,176-77 n.142 (emphasis added). The Commission reasonably found it "more relevant" that ISS continues to make its benchmark advice available to registrants "after" disseminating it to clients. *Id.*

Courts have also required a more detailed justification when a "prior policy has engendered serious reliance interests that must be taken into account." *Fox*, 556 U.S. at 515. That was the case in *Encino Motorcars, LLC v. Navarro*, where the Supreme Court found lacking a "summary discussion" that gave "almost no reasons at all" for a policy change that upended "decades of industry reliance" on the prior policy, potentially requiring "systemic, significant changes" to regulated parties' business practices. 579 U.S. 211, 222-24 (2016). But here, while many registrants may have been planning to take advantage of the notice-and-awareness conditions, "commenters did not present evidence that registrants have incurred significant costs or significantly altered existing practices in reliance on the conditions." 2022 Amendments, 87 Fed. Reg. at 43,177; *see also id.* at 43,188. "Nor is there any other reason to believe that [the conditions] have engendered significant reliance interests given that [they] were adopted only two years ago and took effect less than a year ago." *Id.* at 43,177.

And contrary to Plaintiffs' suggestion (at 2, 19-20, 21), *Encino Motorcars* does not require that agencies show that policy changes are "necessary," regardless of the reliance interests at stake. The Court reaffirmed that agencies are generally "free to change their existing policies" as long as there are good reasons to do so. 579 U.S. at 221; *see also id.* at 222 (recognizing that even a "summary discussion may suffice in other circumstances" not involving "significant reliance interests").

B. Plaintiffs' objections to the Commission's economic analysis are meritless.

When the Commission engages in certain rulemaking, it must "consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital

formation." 15 U.S.C. 78c(f). This statutory mandate requires that the Commission "determine as best it can the economic implications of the rule," but the Commission does not have to "conduct a rigorous, quantitative economic analysis" of every cost and benefit. *Lindeen v. SEC*, 825 F.3d 646, 657-58 (D.C. Cir. 2016) (quotation omitted). The Commission's consideration of the potential economic effects of the 2022 Amendments (87 Fed. Reg. at 43,183-90) satisfied that obligation.

Plaintiffs contend (at 25) that the Commission's economic analysis is inadequate because it is shorter than its 2020 analysis. But it is the rationality not the length of the analysis that matters. *Lindeen*, 825 F.3d at 658 (economic analysis sufficient if the Commission "articulate[s] a satisfactory explanation for its action, including a rational connection between the facts found and the choice made" (quotation and alterations omitted)). And in any event, much of the 2020 analysis consisted of background discussion that was referenced but not repeated in the 2022 analysis, as well as discussion of provisions that were not revisited in 2022. *See* 2022 Amendments, 87 Fed. Reg. at 43,183 & n.245. The analyses of the *notice-and-awareness conditions*, however, address largely the same economic considerations and (*contra* Br. 25) are both "primarily qualitative." *Id.* at 43,185; *see also* 2020 Rules, 85 Fed. Reg. at 55,133, 55,136-37 (explaining that uncertainties and lack of data precluded quantification of the costs and benefits of the conditions). To the extent Plaintiffs fault the Commission for not quantifying potential costs and benefits, they "do not identify any data that was before the [Commission] at the time of the [2022 Amendments] that would have enabled it to [do so]." *Cigar Ass'n of Am. v. FDA*, 480 F. Supp. 3d 256, 276 (D.D.C. 2020).

Nor is there any merit to Plaintiffs' arguments (at 25-28) that the Commission "ignor[ed]" or "understated" the costs of rescinding the conditions. Their claims that the record evidence establishes the necessity of the conditions do not withstand scrutiny. *See supra* 15-16. And in any event, the Commission acknowledged that rescinding the 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." *Id.* at 43,187; *see also id.* at 43,189. But the Commission balanced these potential costs against the potential benefits, including avoiding burdens that could adversely affect the cost, timeliness, and independence of proxy advice. *Id.* at 43,186-87, 43,189. In weighing these interests, the Commission considered the lack of evidence of systemic inaccuracies, the limited reliance interests, the existence of other mechanisms in the proxy system for registrants to communicate their views, and the fact that PVABs "will remain subject to Rule 14a-9 liability" and the conflicts disclosure requirements. *Id.* at 43,175, 43,178, 43,188. It thus articulated "a rational connection between the facts found and the choice made." *Lindeen*, 825 F.3d at 658 (quotation omitted).[7]

Finally, contrary to Plaintiffs' argument (at 25-26), there is no "contradict[ion]" between the Commission's discussion of PVABs' voluntary practices (2022 Amendments, 87 Fed. Reg. at 43,187, 43,196) and its determination that rescinding the conditions will reduce PVABs' costs (*id.* at 43,186). The Commission noted that PVABs' voluntary practices may mitigate the costs to investors and registrants of rescinding the conditions. *Id.* at 43,187, 43,196. But it also acknowledged that any such practices would also "limit[]" the benefits of rescission, and that the cost savings to PVABs will "vary depending on each PVAB's current practices." *Id.* at 43,186.

C. Plaintiffs' claim that the Commission failed to consider a reasonable alternative to rescinding the notice-and-awareness conditions is meritless.

Plaintiffs contend (at 28-29) that the Commission failed to consider retaining the notice-and-awareness conditions until it can determine whether their potential adverse effects materialize. But

[7] *City of Holyoke Gas & Electric Department v. FERC*, 954 F.2d 740 (D.C. Cir. 1993), cited at Br. 25, has no bearing on this *qualitative* assessment. There, FERC "fail[ed] to identify the data and assumptions it used in calculating" a reasonable rate, thereby "depriv[ing] the ratepayer of a rational explanation of its decision." 954 F.2d at 743. Plaintiffs likewise err in asserting (at 27) that the Commission "failed to consider" that PVABs' advice may be affected by conflicts of interest. The Commission rejected this argument, concluding that the 2020 conflicts-disclosure requirements and potential Rule 14a-9 liability were sufficient. 2022 Amendments, 87 Fed. Reg. at 43,188.

the central policy question in the rulemaking was whether to retain the conditions, as Plaintiffs and the dissenting Commissioners urged, or "to rescind [them] *now* to limit any burdens that PVABs and their clients may experience." 2022 Amendments, 87 Fed. Reg. at 43,175, 43,187 (emphasis added). For the reasons discussed above, the Commission reasonably chose the latter course. *Supra* 10-16.

The Commission specifically responded to the argument that it was premature to rescind the conditions before their impact could be assessed, concluding that it was "appropriate to proceed expeditiously . . . rather than wait until the risks th[e] conditions pose materialize and investors are harmed" in light of "(1) the important role that PVABs play in the proxy voting process and the scope of the potential consequences should that role be disrupted, (2) the fact that the vast majority of PVABs' clients that expressed views on [the conditions] opposed them, and (3) [its] conclusion that the reliance interests implicated by rescinding th[e] conditions are limited." *Id.* at 43,177-78.[8]

D. Plaintiffs' claim that the Commission treated similarly situated parties differently is meritless.

Plaintiffs' claim (at 29-30) that the Commission treated similarly situated parties differently fares no better. As discussed, the Commission did not "defer[] to PVAB self-regulation." *See supra* 18. And while Plaintiffs assert that the Commission's policy choice is inconsistent with unrelated requirements on other entities under different parts of the securities laws, their only explanation for how PVABs are similarly situated to those other entities is that they are all subject to some part of the securities laws. But if that were sufficient, the APA would be transformed into a one-way, pro-regulatory ratchet whereby an agency's decision to impose a regulatory burden in one context imposes a heightened obligation to justify *not* imposing burdens in other contexts.

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[8] *Department of Homeland Security v. Regents of the University of California*, 140 S.Ct. 1891 (2020), is thus inapposite. There, the agency failed to consider retaining the part of a policy that was not impacted by its rationale for rescinding the policy. *Id.* at 1913. Nor is the Commission, in responding to dissenting commissioners, required to do more than address any significant issues they raise (as it did here). *Contra* Br. 28-29; *cf. Thompson v. Clark*, 741 F.2d 401, 408-09 (D.C. Cir. 1984).

Nor does the Commission's general interest in promoting "transparency" and "disclosure" create a presumption that *any* regulatory intervention that arguably advances those objectives should be adopted (or retained). All interventions must be assessed in the context of their relative benefits and burdens. And the proxy rules impose "varying [disclosure] obligations" that are "tailored" to the specific roles of different participants in the proxy voting process. 2020 Rules, 85 Fed. Reg. at 55,084-85. Here, the Commission reasonably concluded that the general informational benefits that Plaintiffs emphasize did not sufficiently justify retaining the conditions. *See supra* 13-16.

E. Plaintiffs' cursory challenge to the deletion of explanatory Note (e) fails for lack of standing or final agency action, and it is in any event without merit.

Rule 14a-9's explanatory note, which is not part of the rule's operative text, sets forth a list of "examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of" the rule. 17 C.F.R. 240.14a-9. Note (e) added to this list "[f]ailure to disclose material information regarding proxy voting advice . . . , such as the [PVAB's] methodology, sources of information, or conflicts of interest." 2020 Rules, 85 Fed. Reg. at 55,155. The deletion of this Note was not final agency action and Plaintiffs lack standing to challenge it.

Note (e) was intended to "clarify the potential implications of Rule 14a-9 for proxy voting advice" and did not "change[] its application or scope." *Id.* at 55,121; *see also id.* at 55,140; 2022 Amendments, 87 Fed. Reg. at 43,180-81. Its deletion thus does not fall within any of the "five categories" of "agency action" under the APA. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004) (citing 5 U.S.C. § 551(13)). And even if it did, it does not determine "rights or obligations" or give rise to any "direct and appreciable legal consequences." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). Moreover, the Supreme Court has made clear that standing needs to be established for "each claim [a plaintiff] seeks to press." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quotation omitted). Plaintiffs' cursory, speculative assertion (at 15 n.3) that they "may no longer be able to rely on the examples of Note (e)," does not come close to establishing that they

face a "certainly impending" injury from the deletion of an explanatory note that concededly had no legal force or effect. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 412 (2013) (quotation omitted).

In any event, the Commission reasonably concluded that Note (e) had "created a risk of confusion" in at least two ways. 2022 Amendments, 87 Fed. Reg. at 43,181. First, it was the only example singling out "a particular type of solicitation," which could unintentionally "imply that proxy voting advice poses heightened concerns" under Rule 14a-9. *Id.* Second, "singling out a PVAB's methodology, sources of information, and conflicts of interest as examples of material information regarding proxy voting advice unintentionally could suggest that PVABs have a unique obligation to disclose that information with their advice." *Id.* But Note (e) "was not intended to impose any such affirmative requirement." *Id.* Rather, just "like any other person that engages in a solicitation, a PVAB may, depending on the facts and circumstances, be subject to liability under Rule 14a-9 for a material misstatement of fact" or an "omission of material fact." *Id.* at 43,180.

Nor is this explanation indistinguishable from Note (e) itself. *Contra* Br. 24. By referring to "material information . . . such as the [PVAB's] methodology, sources of information, or conflicts of interest," Note (e) implied that a PVAB's methodology and sources of information *are* material information (or, at a minimum, are likely to be). *See id.* at 43,181 (noting that Note (e) singles out such information as "examples of material information"). But the Commission's explanation cannot be construed to address whether such information is material and must be disclosed. It reaffirms that, *if material*, a misstatement or omission of fact "with regard to [a PVAB's] methodology, sources of information, or conflicts of interest" would be prohibited under the rule. *Id.* at 43,180-81.

Moreover, the record demonstrates that Note (e) was a potential source of confusion. *Id.* at 43,179 & nn.181-85 (citing concerns that the Note could be interpreted to impose unique disclosure obligations on PVABs); *id.* at 43,179 & nn.192,195 (citing concerns that its deletion would "weaken antifraud provisions"). And while the Commission considered alternatives (Br. 29) as well as the

possibility that deleting Note (e) could also cause confusion (Br. 24), it made a reasonable judgment that "returning to the *status quo* that existed before the addition of Note (e)" was the appropriate course. *Id.* at 43,181 n.222, 43,182.

F. Plaintiffs lack standing to challenge the rescission of the 2020 Supplemental Guidance, and that challenge also fails on the merits.

Plaintiffs have not demonstrated their standing to challenge the rescission of the 2020 Supplemental Guidance. The 2020 Supplemental Guidance addressed the obligations of investment advisers, not registrants. And it did not confer a benefit on registrants such as the right to receive a copy of proxy voting advice. As a result, plaintiffs' standing is "substantially more difficult" to establish. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quotation omitted).

Here, the obstacles are insurmountable. As Plaintiffs note, the 2020 Supplemental Guidance stated that investment advisers should consider disclosing information about their use of automated voting and their policies for considering additional soliciting materials filed by registrants. 85 Fed. Reg. at 55,156. But existing guidance from 2019 affirms that an adviser "must make full and fair disclosure to its clients of all material facts relating to the advisory relationship." 84 Fed. Reg. at 47,421 n.20 (quotation omitted). It also emphasizes that advisers must comply with Rule 206(4)-6, which requires them to describe their voting policies and procedures to clients. *Id.* at 47,423. And it suggests that advisers "consider policies and procedures that provide for consideration of additional information that may become available" after proxy voting advice is issued, including additional proxy materials filed by registrants. *Id.* at 47,424.

Plaintiffs' claimed injury thus rests on a "highly attenuated chain of possibilities" in which a member registrant identifies an error in proxy voting advice and files a timely response, but despite the 2019 guidance, an investment adviser disregards the response due to the rescission of the 2020 Supplemental Guidance and this causes the adviser to vote client shares against the registrant. *Clapper*, 568 U.S. at 410. This is insufficient to confer standing. *Id.*; *see also Lujan*, 504 U.S. at 562.

In any event, plaintiffs err in asserting (at 24) that the rescission of the 2020 Supplemental Guidance was unreasonable. That guidance did not prohibit or discourage automated voting. And the Commission reasonably concluded that its existing guidance was sufficient "to assist investment advisers in carrying out their obligations under rule 206(4)-6." 2022 Amendments, 87 Fed. Reg. at 43,178. Apart from citing a comment that did not even mention automated voting or the guidance, Plaintiffs identify no basis under the APA to second-guess the Commission's judgment.

II. The 2022 Amendments are procedurally valid.

Plaintiffs' claim that the Commission did not provide a meaningful opportunity for public comment fails. Rather than specify a minimum comment period, the APA requires that an agency "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. 553(c). Here, the Commission determined that a 30-day comment period was appropriate given the "targeted nature" of the proposal. 2022 Amendments, 87 Fed. Reg. at 43,173 n.71. And the period actually closed 40 days after the Commission issued the proposal on its website, and 31 days after publication in the Federal Register.

In arguing that this amount of time was insufficient, Plaintiffs rely on non-binding authorities recommending at least a 60-day comment period as best practice. Br. 18. But courts have long held that a comment period of at least 30 days is generally sufficient, even for substantial rule changes. *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1117 (D.C. Cir. 2019); *Chem. Mfrs. Ass'n v. EPA*, 899 F.2d 344, 347 (5th Cir. 1990); *see also Fleming Cos., Inc. v. U.S. Dep't of Agric.*, 322 F. Supp. 2d 744, 764 (E.D. Tex. 2004), *aff'd* 164 F. App'x 528 (5th Cir. 2006); *Conn. Light and Power Co. v. NRC*, 673 F.2d 525, 534 (D.C. Cir. 1982); *cf. Coal. for Workforce Innovation v. Walsh*, 2022 WL 1073346, at *9 (E.D. Tex. Mar. 14, 2022) ("a comment period of at least 30 days" would have been sufficient).

Plaintiffs object (at 17) that the comment period was functionally shorter than 31 days because it spanned the year-end holidays. But courts do not subtract holidays (or weekends) from

comment periods. *Cf. Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 102 (2015) ("[C]ourts lack authority to impose upon an agency its own notion of which procedures are best" (quotations and alterations omitted)). And the comment period was functionally *longer* for Plaintiffs—40 days—because they received notice of the proposal on the day it was issued. *See* U.S. Chamber of Commerce, *U.S. Chamber Statement on SEC Proxy Advisory Firms Rule Rollback* (Nov. 17, 2021) (Matro Decl. Ex. R); *see also Omnipoint Corp. v. FCC*, 78 F.3d 620, 629-30 (D.C. Cir. 1996) (considering comment period from the date challengers received notice); *cf. Pangea Legal Servs. v. DHS*, 501 F. Supp. 3d 792, 820 (N.D. Cal. 2020) (emphasizing that the proposed rule was not "previously published in any form" in assessing the sufficiency of a 30-day comment period that spanned holidays).

In any event, Plaintiffs identify only four rules in the history of the APA in which a comment period of 30 days or more was found insufficient—and in each case, that finding turned on circumstances not present here. In *Becerra v. Department of Interior*, the court predicated its holding not on the length of the comment period alone but also the agency's refusal to accept or consider substantive comments about the rule it was repealing. 381 F. Supp. 3d 1153, 1176-77 (N.D. Cal. 2019). No such content restriction was imposed here. *See also Coal. for Workforce Innovation*, 2022 WL 1073346, at *9-10 (19-day period with content restriction); *N.C. Growers' Ass'n v. United Farm Workers*, 702 F.3d 755, 769-70 (4th Cir. 2012) (10-day period with content restriction).

Similarly, the court's holding in *Estate of Smith v. Bowen*, rested on a confluence of obstacles that precluded meaningful comment, including the agency's failure to provide basic information about the rule, its refusal to reopen the comment period following publication of a major government-sponsored study that arguably contradicted its findings, and the "great numbers of interested persons" and "governmental units" affected. 656 F. Supp. 1093, 1097-98, 1099 (D. Colo. 1987). It too is inapposite.

And in the other cases, the holdings rested on a combination of the significance and complexity of the rules and the overlap of the comment period with the comment periods of other significant, interrelated rules in a way that made it impossible to meaningfully comment. *See Centro Legal de la Raza v. Exec. Office for Immigration Rev.*, 524 F. Supp. 3d 919, 955, 958, 962 (N.D. Cal. 2021) (rule made "extensive changes to the immigration court system that altered long-established policy and practice" and was "intertwined" with other proposed rules that obscured the "true impact" of the rule); *Catholic Legal Immigration Network, Inc. v. Exec. Office for Immigration Rev.*, 2021 WL 3609986, at *1, *3 (D.D.C. Apr. 4, 2021) (describing same rule as "highly technical and complex" and emphasizing the "slew of interrelated rulemaking activity"); *Pangea Legal Servs.*, 501 F. Supp. 3d at 798, 814, 819-22 (rule dramatically "change[d] asylum law," "upend[ing] decades of precedent," and was part of a "staggered rulemaking process" involving "several other related proposed rules").

The 2022 Amendments, by contrast, rescinded a few newly adopted, discrete proxy rule provisions after considering whether concerns raised by investors counseled in favor of their rescission. The Commission reasonably concluded (and Plaintiffs do not contest) that there were no significant reliance interests at stake. 2022 Amendments, 87 Fed. Reg. at 43,177, 43,188. And the public was not forced to comment on multiple interrelated rules simultaneously.

Plaintiffs' argument thus boils down to the fact that the 2022 Amendments had a shorter comment period and generated fewer comments than the 2020 Rules. Br. 18-19. But the cases they cite do not suggest that such a comparison, standing alone, could be dispositive here. In *North Carolina Growers' Association*, the agency provided only 10 days to comment on the repeal of regulations that were adopted after a 60-day comment period. 702 F.3d at 770. In *Becerra*, the discrepancy in comment period was also much starker—30 days for repeal versus 120 days for adoption—*and* the agency refused to consider substantive comments. 381 F. Supp. 3d at 1176-77.

Moreover, the rulemakings compared in those cases had the same scope. Not so here. The 2020 Rules were the first in decades to address the regulation of proxy voting advice, codifying for the first time the Commission's authority to regulate such advice under the proxy rules and thus confirming that Rule 14a-9's antifraud proscriptions apply. And they imposed an industry-wide conflicts disclosure standard. These important provisions generated significant commenter discussion in the prior rulemaking, *see* 2020 Rules, 85 Fed. Reg. at 55,089-90, 55,097-98, but were not revisited in this one. Many commenters in the prior rulemaking also focused on the proposed requirement that PVABs allow registrants to review drafts of their advice. *See id.* at 55,103-06.

Plaintiffs also err in asserting (at 2, 16) that there is an open-mindedness test under the APA. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2385 (2020). Except in narrow circumstances that Plaintiffs do not (and cannot) claim apply here, "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Biden v. Texas*, 142 S. Ct. 2528, 2547 (2022) (quotation and alteration omitted). In any event, contrary to Plaintiffs' insinuation (at 11-12), there was nothing improper about the Chair and staff meeting with investor groups after announcing reconsideration of the 2020 Rules. Such meetings are permitted under the APA and serve important policymaking functions. *See, e.g., Tex. Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 327 (5th Cir. 2001); *Sierra Club v. Costle*, 657 F.2d 298, 400-01 (D.C. Cir. 1981). And, although agencies are not required to disclose pre-proposal meetings, *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977), the Commission disclosed the meeting, its participants, and subject matter as soon as it issued a proposed rule. *See* 2021 Proposed Amendments, 86 Fed. Reg. at 67,385-86 n.24. And the views of some of the meetings' participants are outlined in their public comments. *See* 2022 Amendments, 87 Fed. Reg. at 43,171-72.

Finally, and importantly, Plaintiffs fail to show any prejudice. *See* 5 U.S.C. 706. Agency action may not be reversed on the basis of "a mistake that has no bearing on the ultimate decision or

causes no prejudice." *Coal. for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 468 (6th Cir. 2004). Here, any procedural deficiency "did not defeat the purpose of" notice and comment. *United States v. Utesch*, 596 F. 3d 302, 312 (6th Cir. 2010). Plaintiffs received notice of the proposed rules and "had sufficient opportunity to weigh in on [them]." *United States v. Stevenson*, 676 F.3d 557, 565 (6th Cir. 2012). The Commission also "received and addressed numerous comments from the public" raising the same issues that Plaintiffs raise in this Court. *Id.*. And plaintiffs "fail[] to identify any substantive challenges [they] would have made had [they] been given additional time." *Omnipoint Corp.*, 78 F.3d at 630; *cf. Centro Legal*, 524 F. Supp. 3d at 956 (highlighting declarations explaining why plaintiffs were unable to meaningfully comment). In such circumstances, any violation is "plainly harmless." *City of Arlington v. FCC*, 668 F.3d 229, 244-45 (5th Cir. 2012).

III. The appropriate remedy for any of the alleged APA violations would be remand without vacatur.

If the Court finds any APA violation, it should remand without vacatur. *See Ackerman Bros. Farms, LLC v. U.S. Dep't of Agric.*, 2021 WL 6133910, at *5 (E.D. Mich. Dec. 29, 2021) (discussing power of courts to remand an agency action without vacatur). "Remand, not vacatur, is generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Tex. Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389 (5th Cir. 2021). Here, there is a "serious possibility that the [Commission] will be able to remedy [any] failures"—including, if necessary, explaining its policy judgment in greater detail. *Id.*; *see also Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1049 (D.C. Cir. 2002).

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for summary judgment, grant Defendants' cross-motion for summary judgment, and enter judgment for Defendants.

Dated: November 4, 2022

Respectfully submitted,

/s/ Daniel E. Matro

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2022, I electronically filed the foregoing Combined Memorandum in Support of Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment using the Court's CM/ECF system, which will send notice to all parties listed below as indicated on the electronic filing receipt.

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