IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

NATIONAL ASSOCIATION OF MANUFACTURERS and NATURAL GAS SERVICES GROUP, INC., Plaintiffs, v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION and GARY GENSLER, in his official capacity as Chair of the SEC, Defendants.	No. 7:22-cv-163-DC

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case is a study in capricious agency action. Beginning in 2010, the Securities and Exchange Commission ("SEC") embarked on a decade-long bipartisan policymaking process, culminating in a compromise rule addressing long-recognized issues surrounding the role of proxy advisory firms (also known as proxy firms, proxy voting advice businesses, and PVABs) in the corporate governance process. *See generally Exemptions From the Proxy Rules for Proxy Voting Advice*, 85 Fed. Reg. 55,082 (Sept. 3, 2020) ("2020 Rule"), Hughes Decl. Ex. C.

Shortly thereafter, however, a new SEC Chair took office—and under Chair Gary Gensler's leadership, the SEC immediately began to undermine and reverse this bipartisan compromise. The SEC unlawfully suspended the 2020 Rule via a series of coordinated actions in June 2021, and Chair Gensler then conducted closed-door meetings with opponents of the 2020 Rule as a prelude to formally rescinding it through an unduly abbreviated notice-and-comment process. *See generally Proxy Voting Advice*, 87 Fed. Reg. 43,168 (July 19, 2022) ("2022 Rescission"), Hughes Decl. Ex. A. Critically, at no point during this truncated rulemaking did the SEC provide any legitimate justification for why the same factual record that supported the 2020 Rule two years ago now requires its rescission.

The Administrative Procedure Act ("APA") exists precisely to check such arbitrary and capricious governmental conduct. An agency cannot reverse course by simply disregarding earlier factual findings that contradict its new intended action—but that is just what the SEC has done here. Nor can it rely on reasoning that is irrational—yet, here, the SEC relies on both baseless assumptions and false premises about the voluntary behavior of proxy advisory firms. And the agency must grapple with contrary comments received during the notice-and-comment process, as well as the views of dissenting Commissioners—but the SEC did not even attempt to respond to the significant, valid criticisms of its action. And finally, an agency cannot adopt or rescind a legislative rule like the one at issue here without providing the public a *meaningful* opportunity for comment—and courts thus routinely vacate agency actions taken through truncated and predetermined comment processes like the one the SEC employed here. For all of these reasons, therefore, the 2022 Rescission must be set aside.

BACKGROUND

A. The growing role of proxy firms.

Public companies make many of their most important corporate governance decisions via votes at shareholder meetings—yet few shareholders vote their own shares directly. To the contrary, "today's financial markets . . . are characterized by significant intermediation and institutional investor participation," and "proxies have become the predominant means by which shareholders of publicly traded companies exercise their right to vote on corporate matters." 2020 Rule, 85 Fed. Reg. at 55,083.

With the increasing importance of proxy voting, particularly by institutional investors and intermediaries, proxy advisory firms "have come to play an important role in the proxy voting process." 2020 Rule, 85 Fed. Reg. at 55,083. Such firms "typically provide investment advisers, institutional investors, and other clients with a variety of services that relate to the substance of voting decisions," including "research and analysis regarding the matters subject to a vote," promulgating "benchmark voting policies" or "specialty voting policies . . . such as a socially responsible policy," and "making specific voting recommendations to their clients on matters subject to a shareholder vote," including "based on the proxy voting advice business's benchmark or specialty policies." *Id.* "This advice is often an important factor in the clients' proxy voting decisions." *Id.* In addition to voting policies and voting recommendations, in some instances the firms "are given authority to execute votes on behalf of their clients." *Id.*

Indeed, because of the ubiquity of proxy voting and the sheer number of votes that must be taken by institutional investors and large intermediaries, proxy advisory firms "have become uniquely situated in today's market to influence, and in many cases directly execute, these investors' voting decisions." 2020 Rule, 85 Fed. Reg. at 55,083. To put it more concretely, institutional investors controlling over *$5 trillion* in assets under management "voted in lockstep alignment with either ISS or Glass Lewis in 2020," with the result that these proxy firms' recommendations directed those institutions' votes on over 100,000 individual corporate resolutions that year. *See* Paul Rose, *Proxy Advisors & Market Power: A Review of Institutional Investor Robovoting* 10-11 (Apr. 2021), perma.cc/U2HV-DMRN. As the SEC has recognized, ensuring "the transparency, accuracy, and completeness of the information provided to clients of proxy voting advice businesses in connection with their voting decisions" is therefore critical. 2020 Rule, 85 Fed. Reg. at 55,083.

There have been growing concerns, however, that proxy firms have *not* been providing "transparen[t], accura[te], and complete[]" information to their clients. 2020 Rule, 85 Fed. Reg. at 55,083. Indeed, a recent survey by the NAM found that nearly 78% of public company respondents were concerned about the actions of proxy advisory firms, and 56% of them found that they were having to divert resources from their core business functions in order to respond to the actions of proxy advisory firms. See *NAM Manufacturers' Outlook Survey, Fourth Quarter 2018* 8, 13 (Dec. 20, 2018), perma.cc/9CNE-HSYU. Similarly, data from 2016, 2017, and 2018 show that proxy advisory firms' reports on nearly one hundred companies included numerous factual and analytical errors. Frank M. Placenti, *Analysis of Proxy Advisor Factual and Analytical Errors in 2016, 2017, and 2018* (2018), perma.cc/RGR3-YR6X. And a more recent analysis identified 50 instances in 2021 alone in which public companies filed supplemental proxy materials to correct a proxy firm's analysis, a 21% increase over the year before. American Council for Capital Formation, *Proxy Advisors Are Still a Problem* 9 (Dec. 2021), perma.cc/C55R-39ZX.

In response to increasing concerns about the influence of proxy advisory firms and their conflicts of interest, lack of accuracy and transparency, and unwillingness to engage with issuers, the SEC in 2010 initiated a decade-long policymaking process involving SEC Chairs of both political parties, ultimately culminating in the adoption of the 2020 Rule. *See, e.g.*, *Concept Release on the U.S. Proxy System*, 75 Fed. Reg. 42,982, 42,982 (July 22, 2010) (noting concerns that "voting recommendations by proxy advisory firms may be made based on materially inaccurate or incomplete data"; that "the analysis provided to an institutional client may be materially inaccurate or incomplete" and that proxy firms "may be unwilling, as a matter of policy, to accept any attempted communication from the issuer or to reconsider recommendations in light of such communications," and discussing proposed solutions); Press Release, *SEC Announces Agenda, Panelists for Roundtable on Proxy Advisory Services* (Nov. 27, 2013), perma.cc/UE9F-KZRZ (announcing policy discussion of "the transparency and accuracy of recommendations by proxy advisory firms"); Chair Jay Clayton, *Statement Announcing SEC Staff Roundtable on the Proxy Process* (July 30, 2018), perma.cc/2D93-VGR4 (panelist discussion of "[w]hether issuers are being given an appropriate opportunity to raise concerns if they disagree with a proxy advisory firm's recommendations, including, in particular, if the recommendation is based on erroneous, materially incomplete, or outdated information," along with "[t]he appropriate regulatory regime for proxy advisory firms.").[1]

B. The SEC adopts modest conditions for proxy firms wishing to be exempt from proxy solicitation requirements.

The 2020 Rule was the culmination of this decade-long bipartisan process. With the 2020 Rule, the SEC acted to address proxy firms' conflicts of interest, lack of accuracy and transparency, and unwillingness to engage with issuers, adopting modest protections "so that investors who use proxy voting advice receive more transparent, accurate, and complete information on which to make their voting decisions." 2020 Rule, 85 Fed. Reg. at 55,082. Rather than attempt to regulate "all aspects of the proxy advice businesses' role in the proxy process," the 2020 Rule was

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[1] The NAM was a vocal participant throughout this process. *See, e.g.*, Comment of the National Association of Manufacturers 2, File No. 4-725, SEC Staff Roundtable on the Proxy Process (Oct. 30, 2018) (explaining, as part of the 2018 roundtable, that while "the NAM believes that proxy firms can be constructive and provide a useful service" under the correct conditions, "the flaws embedded into the business model of proxy advisory firms are at this point well-documented, and manufacturers have time and time again faced significant costs due to their influence"), perma.cc/G6SR-YE9Z, Netram Decl. Ex. B; *id.* at 2-3 (discussing the "notable lack of transparency" surrounding "the process by which proxy firm recommendations are developed"; proxy firms' "profusion of errors and misleading statements, ranging from specific incorrect facts to disingenuous assumptions about, for instance, a company's peer group or compensation practices"; and the fact that "[p]roxy firms have been steadfastly resistant to engaging in a productive dialogue with issuers to correct these errors," among other problems).

narrowly focused on "certain specific concerns about proxy voting advice businesses and would help to ensure that the recipients of their voting advice make voting determinations on the basis of materially complete and accurate information." *Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*, 84 Fed. Reg. 66,518, 66,521 (Dec. 4, 2019) ("2019 Proposed Rule"), Hughes Decl. Ex. D. Moreover, the Rule's requirements are not requirements at all, but rather conditions to exemptions from a more onerous reporting regime—the federal proxy rules' information and filing requirements—with which proxy firms would otherwise have to comply. *See, e.g.*, 2020 Rule, 85 Fed. Reg. at 55,084 (explaining that "persons furnishing proxy advice constituting a solicitation . . . will be eligible to rely on [existing] exemptions" from the proxy rules' information and filing requirements "only upon satisfaction of the conditions of new . . . Rule 14a-2(b)(9)").

1. Specifically, the 2020 Rule "codif[ied]" the SEC's pre-existing "interpretation that proxy voting advice generally constitutes a solicitation within the meaning of [Securities Exchange Act of 1934] Section 14(a) and therefore is subject to the Federal proxy rules." 2020 Rule, 85 Fed. Reg. at 55,083; *see* 17 C.F.R. § 240.14a-1(*l*)(1)(iii)(A). And it "condition[ed] the availability of certain existing exemptions from the information and filing requirements of the Federal proxy rules commonly used by proxy voting advice businesses upon compliance with additional disclosure and procedural requirements." 2020 Rule, 85 Fed. Reg. at 55,083-55,084. In particular, the 2020 Rule required proxy advisory firms seeking exemption from the proxy rules' information and filing requirements to both disclose specified conflicts of interest and to comply with a set of procedures for engaging with issuers—that is, publicly traded companies—that are the subject of the firms' proxy advice.

As adopted, the 2020 Rule's issuer-engagement provisions required proxy firms to adopt "policies and procedures reasonably designed to ensure that: (A) Registrants that are the subject of the proxy voting advice have such advice made available to them at or prior to the time when such advice is disseminated to the proxy voting advice business's clients; and (B) The proxy voting advice business provides its clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding its proxy voting advice by registrants who are the subject of such advice, in a timely manner before the security holder meeting." 2020 Rule, 85 Fed. Reg. at 55,154, *see* 17 C.F.R. § 240.14a-2(b)(9)(ii) (2020). In other words, the 2020 Rule simply required proxy firms to (a) disclose their proxy voting advice to the public companies that are the subject of the advice; and (b) provide their investor clients a mechanism through which they can become aware when a company responds to the firm's analysis.

Notably, the issuer-engagement provisions adopted by the 2020 Rule were actually a materially watered-down version of the policy originally proposed by the agency. The proposed rule, issued in 2019, would have required proxy firms to "provide registrants . . . a limited amount of time to review and provide feedback on the advice *before* it is disseminated to the business's clients." 2019 Proposed Rule, 84 Fed. Reg. at 66,531 (emphasis added). At the time, the SEC explained that it "believe[d] that establishing a process that allows registrants . . . a meaningful opportunity to review proxy voting advice in advance of its publication and provide their corrections or responses would reduce the likelihood of errors, provide more complete information for assessing proxy voting advice businesses' recommendations, and ultimately improve the reliability of the voting advice utilized by investment advisers and others who make voting determinations, to the ultimate benefit of investors." *Id.* at 66,530.[2]

But in response to "concerns raised by commenters regarding the potential unintended consequences" of the 2019 framework, "including those related to timing and the risk of affecting the

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[2] The NAM strongly supported this 2019 version of the issuer-engagement provisions, and in fact advocated for an even more active approach. Comment of the National Association of Manufacturers 10-11, 14-15, File No. S7-22-19, Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice (Feb. 3, 2020) ("2020 NAM Comment") (explaining that the 2019 proposed procedures "would reduce the likelihood of errors, provide investors with more complete information, and improve the reliability of proxy voting advice," without "imped[ing] the proxy firms' ability to meet the deadlines of proxy season" or "threaten[ing]" "the proxy advisory firms' independence"), perma.cc/CSA2-XEUN, Netram Decl. Ex. A; *id.* at 12 (advocating for enhancement to the 2019 proposal that would have required proxy firms to include the full text of an issuer's dissenting opinion alongside the firm's analysis).

independence of the [proxy voting] advice" (2020 Rule, 85 Fed. Reg. at 55,112), the SEC materially softened its approach, weakening the proposed safeguards and instead adopting the 2020 Rule's simultaneous-disclosure approach to issuer engagement. *See* 2022 Rescission, 87 Fed. Reg. at 43,170 n.26 (noting that "[t]he Commission adopted the [2020 issuer-engagement] conditions, in part, in response to the concerns expressed by commenters about the 'advance review and feedback' conditions that were included in the Commission's 2019 proposed rules"). Notably, this decision was made in the face of comments, including from the NAM, explaining that it was "extraordinarily unlikely" that the proposed 2019 framework would impede proxy firms' ability to deliver timely voting advice and that there was "no risk of the proxy advisory firms' independence being threatened by the proposed reforms." 2020 NAM Comment at 11, 14-15.

2. Aside from the conflict-of-interest disclosure and the issuer-engagement provisions, the 2020 Rule also added an explanatory Note (e) to the federal proxy rules' existing anti-fraud provision, Rule 14a-9, explaining that proxy firms' failure to disclose certain material information may be considered false or misleading, depending on the facts and circumstances. *See* 2020 Rule, 85 Fed. Reg. at 55,082, 55,154-55,155.

3. Finally, the same day that it finalized the 2020 Rule, the SEC also issued a supplemental guidance document "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 Rule]." *Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, 85 Fed. Reg. 55,155, 55,155 (Sept. 3, 2020) ("Robo-Voting Guidance"). This supplemental guidance document also communicated the SEC's view regarding what disclosures may be required by an investment adviser that utilizes a proxy advisory firm's robo-voting services (*i.e.*, when the proxy firm executes votes automatically on the adviser's behalf). *Id.* at 55,156-55,157.

C. The SEC suspends and rescinds the 2020 Rule.

Not long after the 2020 Rule was adopted, the SEC under its new Chair, Defendant Gary Gensler, began an abrupt about-face. Undoing the result of a decade of bipartisan policymaking, Chair Gensler "direct[ed] [SEC] staff to . . . consider whether to recommend that the Commission revisit" the 2020 Rule, and agency staff the same day stated that they would not enforce the 2020 Rule "during the period in which the Commission is considering further regulatory action in this area." Gary Gensler, SEC Chair, *Statement on the Application of the Proxy Rules to Proxy Voting Advice* (June 1, 2021), perma.cc/AZK5-6LND; SEC Division of Corporation Finance, *Statement on Compliance with the Commission's 2019 Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice and Amended Rules 14a-1(1), 14a-2(b), 14a-9* (June 1, 2021), perma.cc/GH2B-YSJ4. And SEC attorneys confirmed in litigation that these actions affirmatively "provide[d] . . . proxy voting advice businesses[] relief" from having to comply with the 2020 Rule. Mtn. for Abeyance, *Institutional Shareholder Services Inc. v. SEC*, No. 19-cv-3275 (D.D.C. June 1, 2021), Dkt. 53, at 4. In other words, the SEC effectively, and unlawfully, suspended the compliance requirement for the 2020 Rule, before it had even come into effect.[3]

Only days later, Chair Gensler held a closed-door meeting with a broad swath of the 2020 Rule's opponents—and none of its supporters—so that those organizations could "express[] general opposition to the 2020 Final Rules, including with respect to the [issuer-engagement] conditions." *Proxy Voting Advice*, 86 Fed. Reg. 67,383, 67,385-67,386 & n.24 (Nov. 26, 2021) ("2021 Proposed Rescission"), Hughes Decl. Ex. B (admitting that "Chair Gensler and members of the Commission staff" held this meeting with opponents of the 2020 Rule "on June 11, 2021," just over a week after the Chair announced that the 2020 Rule would be suspended).

The SEC took formal action to rescind key portions of the 2020 rule on November 26, 2021. *See generally* 2021 Proposed Rescission, 86 Fed. Reg. 67,383; *but see* Commissioner Elad L. Roisman, *Too Important to Regulate? Rolling Back Investor Protections on Proxy Voting Advice* (Nov. 17, 2021) ("Roisman Dissent"), perma.cc/WG4G-YKYS, Hughes Decl. Ex. E; Commissioner Hester M. Peirce, *Dissenting Statement on Proxy Voting Advice Proposal* (Nov. 17, 2021) ("Peirce 2021 Dissent"), perma.cc/PV7X-Z27G, Hughes Decl. Ex. F.

[3] Plaintiffs sued the SEC in a separate case seeking to set aside this unlawful suspension under the APA; that matter is currently in administrative closure while the Court considers Defendants' motion to dismiss on mootness grounds. *See* Order, *Nat'l Ass'n of Mfrs. v. SEC*, No. 7:21-cv-183-DC (Aug. 10, 2022), Dkt. 40.

After a 31-day comment period that encompassed portions of the Thanksgiving, Hanukkah, and Christmas holiday seasons, the SEC finalized that proposal on July 19, 2022, by a divided 3-2 vote of the five Commissioners. *See* 2022 Rescission, 87 Fed. Reg. 43,168; *but see* Commissioner Hester M. Peirce, *U-Turn: Comments on Proxy Voting Advice* (July 13, 2022) ("Peirce 2022 Dissent"), perma.cc/7BMX-GMA7, Hughes Decl. Ex. G; Commissioner Mark T. Uyeda, *Statement on Final Rule Amendments on Proxy Voting Advice* (July 13, 2022) ("Uyeda Dissent"), perma.cc/TS3H-FH6K, Hughes Decl. Ex. H. Specifically, the 2022 Rescission rescinds both the 2020 Rule's compromise issuer-engagement provisions, and the 2020 Rule's explanatory Note (e) to the anti-fraud rule.

As to issuer engagement, the agency provided no new facts or analysis to support its reversal of position. Instead, it offered essentially two justifications for discarding the protections that had emerged from its prior, deliberative policymaking process:

First, the SEC noted that "many investors and [proxy advisory firm] clients have continued to warn, both in response to the adoption of the 2020 [Rule] and again in comments on the 2021 [Proposed Rescission], that the [issuer-engagement] conditions risk impairing the independence and timeliness of proxy voting advice and imposing increased compliance costs on [proxy firms], without corresponding investor protection benefits." 2022 Rescission, 87 Fed. Reg. at 43,175. That is, regulated parties continued to express the same opposition that the SEC had considered and rejected in adopting the 2020 Rule in the first place.

Second, the SEC stated its "belie[f] that any negative effects of rescinding the [issuer-engagement] conditions will be mitigated, to some extent, by existing mechanisms in the proxy system that advance some of the same goals" (2022 Rescission, 87 Fed. Reg. at 43,176), citing back to the 2021 Proposed Rescission, which had cataloged voluntary practices by *one* leading proxy advisory firm that parallel *some* of the 2020 Rule's issuer-engagement provisions. *Id.*; *see* 2021 Proposed Rescission, 86 Fed. Reg. at 67,386-67,387 (discussing voluntary practices of proxy firms, predominantly Glass Lewis).

Separately, as to the rescission of the 2020 Rule's explanatory Note (e) regarding the applicability of the federal proxy rules' anti-fraud rule to proxy advisory firms, the Commission cited an alleged "risk of confusion regarding the application of Rule 14a-9 [that is, the anti-fraud rule] to proxy voting advice." 2022 Rescission, 87 Fed. Reg. at 43,181. But in rescinding the note, the Commission bizarrely reiterated and reaffirmed the substance of the note verbatim. *Compare* 17 C.F.R. § 240.14a-9 (2021) (explanatory note), *with* 2022 Rescission, 87 Fed. Reg. at 43,180.

Finally, the agency also rescinded the Robo-Voting Guidance, on the grounds that the guidance had been issued to accompany the 2020 Rule and was therefore no longer necessary. 2022 Rescission, 87 Fed. Reg. at 43,178 & n.161.

ARGUMENT

The SEC's rulemaking must be set aside under the APA. The SEC erred in several independent respects: In abruptly reversing course, the SEC improperly disregarded its earlier factual findings that contradict its new action; the SEC's reasoning is demonstrably irrational; the SEC failed to address significant criticisms leveled by commenters and dissenting Commissioners; and the SEC denied the public a *meaningful* opportunity to comment. For each of these reasons, the 2022 Rescission should be set aside.

"In the context of a challenge to an agency action under the APA, '[s]ummary judgment is the proper mechanism for deciding, as a matter of law, whether an agency's action is supported by the administrative record and consistent with the APA standard of review.'" *Delta Talent, LLC v. Wolf*, 448 F. Supp. 3d 644, 650 (W.D. Tex. 2020) (quoting *Am. Stewards of Liberty v. U.S. Dep't of Interior*, 370 F. Supp. 3d 711, 723 (W.D. Tex. 2019)). In other words, "[w]hen a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal," and "[t]he entire case on review is a question of law." *Id.*

Applying that standard of review here, the SEC's action is plainly unlawful. The 2022 Rescission is both substantively arbitrary and capricious several times over, and was adopted without good-faith observance of the APA's mandated rulemaking procedures. The rescission must therefore be set aside.

I. THE 2022 RESCISSION IS SUBSTANTIVELY UNLAWFUL.

The APA's most fundamental mandate "requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). The 2022 Rescission fails that essential obligation for several reasons.

First, when an agency reverses a prior policy, it must provide a reasonable rationale for doing so. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). In rescinding the 2020 issuer-engagement provisions, the SEC's decision centers around purported "risks . . . to the cost, timeliness, and independence of proxy voting advice" (2022 Rescission, 87 Fed. Reg. at 43,175)—yet the SEC fails to even acknowledge, much less rebut, its own prior conclusion that those same engagement provisions "do[] *not* create the risk that such advice would be delayed or that the independence thereof would be tainted" (2020 Rule, 85 Fed. Reg. at 55,112 (emphasis added)). That alone is enough to require vacatur of the 2022 Rescission.

Second, even without a change in position, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,'" and "an agency rule would be arbitrary and capricious if the agency has entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Here, the agency's reasoning is irrational, resting on baseless assumptions and false premises regarding behavior that proxy firms may voluntarily undertake.

Third, an agency's action must be set aside if it fails to "respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015). But the SEC failed to engage with significant comments from the public and the dissenting Commissioners.

Fourth, the SEC's rescission of Note (e) to the anti-fraud rule is flatly irrational. There is no substance to the Commission's view that deleting the note from the Code of Federal Regulations, yet repeating the same substance nearly verbatim in the Federal Register, would somehow alleviate purported confusion. In all, the 2022 Rescission cannot stand.

A. The SEC has not proffered an adequate explanation for reversing course on the same factual record.

First, the rescission of the issuer-engagement provisions is arbitrary and capricious for failure to adequately explain the agency's 180-degree turn. As the Supreme Court has explained, when an agency reverses course, it must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" if the "new policy rests upon factual findings that contradict those which underlay [the agency's] prior policy." *Fox*, 556 U.S. at 515; *see also, e.g.*, *Texas v. Biden*, 20 F.4th 928, 990-991 (5th Cir. 2021) (vacating DHS action because it "rested upon factual findings that contradict those which underlay" the agency's prior policy, "[y]et DHS didn't address its own prior factual findings at all when it terminated" that prior policy), *rev'd on other grounds*, 142 S. Ct. 2528 (2022); *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1139 (5th Cir. 2021) (similarly setting aside agency action for a *Fox* violation).

But that is just what has happened here. As noted above, the SEC's principal basis for rescinding the 2020 Rule's issuer-engagement provisions was that "many investors and [proxy advisory firm] clients have continued to warn, both in response to the adoption of the 2020 [Rule] and again in comments on the 2021 [Proposed Rescission], that the Rule 14a-2(b)(9)(ii) [issuer-engagement] conditions *risk impairing the independence and timeliness of proxy voting advice* and imposing increased compliance costs on [proxy firms], without corresponding investor protection benefits." 2022 Rescission, 87 Fed. Reg. at 43,175 (emphasis added); *see also id.* at 43,175 ("[W]e agree that the risks posed by the Rule 14a-2(b)(9)(ii) conditions to the cost, timeliness, and independence of proxy voting advice are sufficiently significant such that it is appropriate to rescind the conditions now.").

As the quoted text acknowledges, however, these "concerns" were not new; rather, they were "reiterated" from "the prior rulemaking process"—that is, the adoption of the 2020 Rule itself. Peirce 2022 Dissent, *supra*; *see also* pages 13-18, *infra* (explaining why these concerns are also baseless on the merits). And when presented with those same arguments in the earlier rulemaking—that is, that the issuer-engagement provisions would have negative effects on "independence and timeliness" of proxy advice—the agency *flatly rejected them*:

> Because [the 2020 Rule] does not require proxy voting advice businesses to adopt policies that would provide registrants with the opportunity to review and provide feedback on their proxy voting advice before such advice is disseminated to clients, the rule ***does not create the risk that such advice would be delayed or that the independence thereof would be tainted*** as a result of a registrant's pre-dissemination involvement.

2020 Rule, 85 Fed. Reg. at 55,112 (emphasis added).

That explicit finding that the 2020 Rule's issuer-engagement provisions "do[] not create . . . risk" to the independence or timeliness of proxy advice (2020 Rule, 85 Fed. Reg. at 55,112) is unmistakably and irreconcilably contradicted by the 2022 Rescission's "*agree[ment]* that the risks posed by the [issuer-engagement] conditions to the cost, timeliness, and independence of proxy voting advice" justify rescinding those provisions (2022 Rescission, 87 Fed. Reg. at 43,175 (emphasis added)). As the Fifth Circuit has explained, "[t]hat triggers the arbitrary-and-capricious rule set forth in *Fox*." *Texas*, 20 F.4th at 991. "Yet," as in *Texas*, "[the SEC] failed to give a 'detailed' (or *any*) discussion of the prior findings." *Id.* As the Fifth Circuit put it, under *Fox*, "[t]hat's that"—the unexplained change in position is arbitrary and capricious. *Id.*; *see also Wages & White Lion*, 16 F.4th at 1139 (agency about-face was arbitrary and capricious where the agency "turned around and ignored its prior" findings and reasoning). This fundamental failing is therefore fatal to the 2022 Rescission.

B. The stated justifications for the 2022 Rescission are irrational.

Further, even ignoring the SEC's unexplained rejection of its own explicit prior findings, the agency's justifications for rescinding the issuer-engagement provisions do not withstand scrutiny. *See, e.g.*, *State Farm*, 463 U.S. at 43 ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.") (quotation marks omitted); *cf.* Roisman Dissent, *supra* ("Troubling to me, I found the proposal lacks many of the due process and procedural protections that usually guide Commission rulemakings. It does not squarely answer the question of *why* we would peel back our existing rules, which were the product of substantial Commission and staff work and which had undergone the rigor of the Administrative Procedure Act. Nor does the proposal answer the question *why now*, before these rules have even taken effect.").

1. To begin, the SEC here has articulated *no* explanation for the very cornerstone of its action: the notion, discussed above, that the 2020 Rule's issuer-engagement provisions somehow risk undermining the "independence and timeliness of proxy voting advice." 2022 Rescission, 87 Fed. Reg. at 43,175.To the contrary, the 2022 Rescission simply repeats, with no further explanation, that "concerns" about timeliness and independence have been voiced by the 2020 Rule's opponents (*see, e.g.*, 2022 Rescission, 87 Fed. Reg. at 43,175), and ultimately states that the agency "agree[s]" with those concerns (*id.* at 43,175). But nowhere does the agency explain *why* a requirement that proxy advice be provided to registrants contemporaneously with the proxy firm's clients, and that those clients be made aware of a registrant's response, would affect the timeliness or independence of proxy advice. *Cf., e.g.*, *Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv.*, 707 F.3d 462, 472 (4th Cir. 2013) (agency's "failure to explain why it used [a particular] assumption renders [its action] arbitrary and capricious").

Nor could the SEC have provided a satisfactory explanation for this reasoning: As the NAM explained in its comment letter, "[i]t is implausible that a [proxy firm]'s ability to publish independent, unbiased voting advice could be impacted by a requirement that it send its voting recommendations to businesses *after they are finalized*"; instead, these "concerns" are merely recycled from the 2019 Proposed Rule, which would have required consultation with businesses on proxy firms' *draft* reports regarding those businesses. Comment of the National Association of Manufacturers 12, File No. S7-17-21, Proxy Voting Advice (Dec. 24, 2021) ("2021 NAM Comment"), perma.cc/FT3P-JWFB, Netram Decl. Ex. R; *see also* Peirce 2022 Dissent, *supra* (explaining that the comments submitted in support of the rescission "did not include new information to justify the Commission's U-Turn. Instead, they reiterated concerns that commenters had raised during the prior rulemaking process," when commenters were considering a *pre-publication* consultation requirement).

That is, while the NAM does not believe that even the 2019 Proposed Rule would have harmed the independence or timeliness of proxy voting advice, those concerns at least made arguable sense in the context of a requirement that proxy firms share and receive feedback on their advice prior to publishing it to their clients. Here, where the 2020 Rule requires a proxy advisory firm to take action only *after* its recommendations are finalized and disseminated, they do not. This failure of the SEC to "articulate . . . a 'rational connection between the facts found and the choice made'" is independently fatal to the 2022 Recission. *State Farm*, 463 U.S. at 43.

2. The SEC has similarly failed with respect to the second pillar of its reasoning for rescinding the 2020 Rule: the idea that voluntary measures by some proxy firms may approximate some of the mechanisms that the Rule would have required, thereby (the agency says) rendering those mechanisms unnecessary. *See* 2022 Rescission, 87 Fed. Reg. at 43,176.

To start with, it is arbitrary and capricious for an agency to find that proxy firms' voluntary conduct obviates the need for regulatory actions necessary to protect issuers. Current practice by proxy advisory firms offers no guarantee about their future behavior, nor does it address new market entrants. *See* Peirce 2022 Dissent, *supra* (noting, in addition to other "serious flaws in the Commission's stated rationale," that "[t]he Commission should not assume that proxy advisors' current voluntary engagement practices, even if they are good, will continue," particularly because, "[g]iven the concentration in the proxy voting advice market, proxy advisors have limited incentives to engage with public companies, particularly smaller ones, to correct errors"). And it is especially irrational for SEC to assert, on the one hand, that the 2020 issuer-engagement provisions would hinder timeliness or independence, while at the same time suggesting such measures are unnecessary because of some proxy advisory firms' own voluntary behavior to provide final voting recommendations to issuers. *See, e.g.*, *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 854 (D.C. Cir. 1984) (vacating and remanding based on "an internal inconsistency in the Commission's opinion" because "[t]he Commission cannot have it both ways."); *Appalachian Voices v. U.S. Dep't of Interior*, 25 F.4th 259, 280 n.16 (4th Cir. 2022) (similar). This too is irrational decision-making.

Moreover, the agency's reasoning on this point relies heavily on the voluntary engagement measures of Glass Lewis, one pole of what the SEC notes is a "duopoly" in the proxy advice industry. 2021 Proposed Rescission, 86 Fed. Reg. at 67,386; *see* 2022 Rescission, 87 Fed. Reg at 43,183-43,184 n.259 (quoting a third-party report to the effect that "today the market is essentially a duopoly consisting of Institutional Shareholder Services and Glass Lewis & Co.") (ellipses omitted). But as for ISS—the other pole of the duopoly, which by many metrics is significantly larger than Glass Lewis (*see, e.g.*, 2022 Rescission, 87 Fed. Reg. at 43,183)—the SEC could only muster that ISS "can . . . *choose to* engage with registrants during the process of formulating its proxy voting advice" and had to acknowledge that "although ISS provides a copy of its proxy voting advice to registrants for free [after publication], it does not allow registrants to share that advice with any external parties, *including its attorneys, proxy solicitors and compensation consultants*," which "may inhibit a registrant's ability to respond to ISS's proxy voting advice in a manner that would benefit its shareholders." 2021 Proposed Rescission, 86 Fed. Reg. at 67,387, 67,388 n.59 (emphases added). That is, ISS does not permit issuers to share its advice with the very parties from which the issuers would need advice on how best to respond.

Moreover, in practice, ISS is resistant to meaningful engagement with issuers—in fact, ISS *rescinded* its previous issuer-engagement program for companies in the S&P 500 in response to the SEC finalizing the 2020 Rule. 2021 Proposed Rescission, 86 Fed. Reg. at 67,387 n.48 (quoting ISS FAQ document stating that "[i]n the US, as from January 2021, drafts are no longer provided to U.S. companies including those in the S&P 500 index."). In other words, the only notable change in proxy firms' issuer-engagement practices between the SEC finalizing the 2020 Rule and rescinding it was that the largest proxy firm now provides *less* in the way of issuer engagement.

The SEC also cites some proxy firms' adherence to voluntary principles outlined by the Best Practices Principles Group ("BPPG"), a coalition of six proxy firms, as evidence that the 2020 Rule's issuer-engagement provisions are no longer needed. *See* 2021 Proposed Rescission, 86 Fed. Reg. at 67,386-67,387; 2022 Rescission, 87 Fed. Reg. at 43,170-43,171, 43,177. Putting aside that the firms' voluntary conduct cannot obviate the need for regulatory intervention (*see* pages 15-16, *supra*) and that the BPPG was formed in 2013 (well in advance of the 2020 Rule), the BPPG report highlighted by the SEC is silent on whether the member firms in fact have policies in place that approximate those that would be required under the 2020 Rule. The BPPG's best practices document encourages proxy firms to "disclose a policy (or policies) for dialogue with issuers" (BPPG Independent Oversight Committee, *Annual Report 2021* 34 (July 1, 2021), perma.cc/Q44E-CFH8), but, as the NAM pointed out to the SEC in its comment on the 2021 Proposed Rescission, the BPPG principles are "notably silent on what those policies should look like or what type of dialogue would be appropriate." 2021 NAM Comment at 14. Nevertheless, the SEC inexplicably claims that the firms' adherence to the BPPG principles guarantees that the firms have met standards for "communication with and feedback from registrants." 2022 Rescission, 87 Fed. Reg. at 43,184. Because the SEC's "explanation for its decision" thus "runs counter to the evidence before the agency," it is arbitrary and capricious for this reason, as well. *State Farm*, 463 U.S. at 43

What is more, the agency previously found that "the existing voluntary forms of outreach to registrants and other market participants" by proxy firms are *not* "alone sufficient" (2020 Rule, 85 Fed. Reg. at 55,108)—and the only policy that has changed since that finding is that ISS *stopped* providing any U.S. companies an opportunity to review proxy advice before it is published. *See* 2021 Proposed Rescission, 86 Fed. Reg. at 67,387 ("Notably, ISS does not provide draft proxy voting advice to any United States registrants."); *id.* at 67,387 n.48. Thus, U.S. issuers actually now benefit from *fewer* engagement opportunities than they did when the 2020 Rule was finalized—further undermining the SEC's 2022 claims that the Rule's issuer-engagement provisions are now unnecessary. *Cf.* pages 12-13, *supra* (discussing need for further explanation when agency contradicts its earlier findings of fact).

Despite acknowledging these shortcomings of ISS's issuer-engagement policies, the SEC in its 2022 Rescission touts the supposed "fact that the leading [proxy firms] have voluntarily adopted practices that provide their clients and registrants with some of the opportunities and access to information that would have been required by" the 2020 Rule as reason to think that rescinding the Rule will do no harm. 2022 Rescission, 87 Fed. Reg. at 43,176. Even assuming that voluntary practices could be a viable substitute for regulation (they cannot), by failing to address the deficiencies in the *largest* proxy advisory firm's issuer-engagement practices, and relying instead on those of the second-largest, the agency has "entirely failed to consider an important aspect of the problem," making its decision arbitrary and capricious for this independent reason, as well. *State Farm*, 463 U.S. at 43.

C. The SEC failed to respond to significant objections by commenters and the dissenting Commissioners.

These gaps in the reasoning of the SEC's 2022 Rescission should come as no surprise to the Commission, as each of them was brought to the agency's attention through the comment process. Because it failed to consider and respond to these important comments, the agency's action must be set aside for this reason, too. *See, e.g.*, *Carlson v. Postal Reg. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) (agency "must respond to comments that can be thought to challenge a fundamental premise underlying the proposed agency decision"); *accord Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 449 (5th Cir. 2021) (same) (quoting *Carlson*, 938 F.3d at 344).

First, the agency was not unaware that the central basis of its decision—the notion of protecting against "risks . . . to the . . . timeliness and independence of proxy voting advice" (2022 Rescission, 87 Fed. Reg. at 43,175)—simply had no application to the simultaneous-disclosure version of issuer engagement adopted by the 2020 Rule, as opposed to the more fulsome prepublication engagement contemplated by the 2019 Proposed Rule. As the NAM explained to the agency in its comment letter:

> [T]he concerns raised about the timeliness and independence of proxy voting advice are simply not credible. The 2020 rule's issuer engagement provisions provide significant flexibility to PVABs and require exactly zero action on their part before a recommendation is finalized. ***It is implausible that a PVAB's ability to publish independent, unbiased voting advice could be impacted by a requirement that it send its voting recommendations to businesses after they are finalized.*** The NAM believed that even the 2019 proposal's more stringent requirements related to PVABs' draft recommendations were extremely unlikely to impact the firms' independence; it is not believable that the 2020 compromise solution would have any impact whatsoever on the independence of PVABs or their voting recommendations

2021 NAM Comment at 12 (emphasis altered); *see also* Comment of Natural Gas Services Group 5, File No. S7-17-21, Proxy Voting Advice (Dec. 27, 2021) ("[I]t is erroneous to suggest that the simple act of providing a copy of a report to the subject of such report and making the subject's response available to clients will impair the independence and objectivity of the proxy advisory firm.") ("2021 NGS Comment"), perma.cc/5HZS-GLJN, Netram Decl. Ex. S.

But rather than respond to these comments—which attacked the key basis for the agency's decision to rescind—by explaining *why* the agency believed such a light-touch regulation posed timeliness and independence concerns (*see* pages 14-15, *supra*), the SEC simply "acknowledge[d]" the existence of hostile comments and failed entirely to respond to their content (2022 Rescission, 87 Fed. Reg. at 43,174). That is arbitrary and capricious. *Carlson*, 938 F.3d at 346 ("These public comments called into question the justifications offered by the [agency], and therefore [it] should have evaluated" the comments' merits); *see also, e.g.*, *Centro Legal de la Raza v. Exec. Office for Immigration Rev.*, 524 F. Supp. 3d 919, 958 (N.D. Cal. 2021) ("An agency . . . cannot simply '[n]od[] to concerns raised by commenters only to dismiss them in a conclusory manner.'") (quoting *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020)).

Commenters similarly pointed out flaws in the agency's second pillar of reasoning, including the false notion that, factually, proxy advisory firms (particularly ISS, the market leader) are open to meaningful engagement with issuers that could approximate the 2020 Rule's issuer-engagement provisions. For example: "[A]s the NAM has consistently explained, ISS—and other proxy firms—consistently choose *not* to engage with issuers, highlighting the ineffectiveness of voluntary measures." 2021 NAM Comment at 13; *see also* 2021 NGS Comment 3-4; Comment of Nasdaq, Inc. 4-5, File No. S7-17-21, Proxy Voting Advice (Dec. 27, 2021) (relaying examples of companies' "frustrations" with ISS and Glass Lewis's lack of engagement, and "conclud[ing] from these representative issuer experiences that the status quo"—that is, lack of a regulatory mandate for engagement—"has been ineffective"), perma.cc/5FY3-V84X, Hughes Decl. Ex. I. Again, the SEC failed to address these comments, which pointed out that the agency's reasoning was built on a factually false foundation, on the merits, instead simply repeating the notion that "PVABs already are incentivized to engage with registrants regarding their proxy voting advice." 2022 Rescission, 87 Fed. Reg. at 43,176. And once again, this failure to engage and respond constitutes arbitrary and capricious behavior under the APA.

Moreover, a multi-member Commission like the SEC is required to respond not only to significant public comments, but also to the views of dissenting Commissioners. *See, e.g.*, *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 20 (D.C. Cir. 2010) ("[W]hile FERC is not required to agree with arguments raised by a dissenting Commissioner, it must, at a minimum, acknowledge and consider them.") (citing, *inter alia*, *Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005)). As noted above, Commissioner Peirce's dissent "identified serious flaws in the Commission's stated rationale," particularly with respect to proxy firms' incentives to engage with issuers and the sufficiency of the industry's voluntary measures. Peirce 2022 Dissent, *supra*; *see also* pages 15-18, *supra*. And as discussed in more detail below, Commissioner Uyeda's dissent explained that, "[p]rocedurally, the 30-day comment period for the proposal was insufficient under the circumstances." Uyeda Dissent, *supra*; *see* pages 23-27, *infra*. Yet the Commission responded to neither. For this reason, too, the 2022 Rescission is arbitrary and capricious. *Am. Gas Ass'n*, 593 F.3d at 21 (vacating and remanding because "the Commission must [act] in a reasoned decision that acknowledges the concerns raised by the dissenting Commissioner.").

D. The deletion of explanatory Note (e) is also irrational.

Separately, the SEC's rescission of Note (e) to Rule 14a-9—the anti-fraud rule—is irrational, and therefore arbitrary and capricious. *See Prometheus Radio Project*, 141 S. Ct. at 1158

(APA "requires that agency action be reasonable and reasonably explained"). As mentioned above, Note (e) was adopted as part of the 2020 Rule, and added "[f]ailure to disclose material information regarding proxy voting advice . . . such as the proxy voting advice business's methodology, sources of information, or conflicts of interest" to a list of "examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of this section," and therefore unlawful. 17 C.F.R. § 240.14a-9, Note (e) (version effective November 2, 2020 to September 18, 2022); *see* 2020 Rule, 85 Fed. Reg. at 55,121, 55,155.

In deleting this note as part of the 2022 Rescission, the SEC explained that it was acting to address a supposed "risk of confusion regarding the application of Rule 14a-9 to proxy voting advice." 2022 Rescission, 87 Fed. Reg. at 43,181. But in rescinding Note (e), the SEC repeated the substance of that note, nearly verbatim, in explaining its understanding of what current law requires: "a [proxy advisory firm] may, depending on the facts and circumstances, be subject to liability under Rule 14a-9 for . . . an omission of material fact from[] its proxy voting advice, including with regard to its methodology, sources of information, or conflicts of interest." 2022 Rescission, 87 Fed. Reg. at 43,180.

It is difficult to understand how deleting a sentence from the Code of Federal Regulations, but repeating it in the Federal Register, does anything to address any supposed "confusion" that sentence had engendered. The SEC's statement in the 2022 Rescission is substantively identical to the Code of Federal Regulations note it deleted, and any confusion caused by the latter would necessarily be caused just as much by the former. Thus, as one of the dissenting Commissioners explained, "the deletion of Note (e) *fails* to provide regulatory clarity," and instead sows even further confusion. Uyeda Dissent, *supra* (emphasis added); *accord* Peirce 2021 Dissent, *supra* ("[T]he . . . proposed amendment to remove note (e) to Rule 14a-9 is also a head-scratcher. . . . If the Commission still believes that note (e) is true, then why does deleting the note from the rule and repeating it in the release make sense?").

The SEC has therefore again failed to "articulate . . . a rational connection between the facts found and the choice made" (*State Farm*, 463 U.S. at 43)—that is, a rational connection between finding a sentence to be confusing and deleting that sentence while simultaneously repeating it. The rescission of Note (e) must therefore be set aside.

In addition to the deletion of Note (e) being flatly irrational even on its own terms, the supposed "risk[s] of confusion" cited by the agency were already raised in the comment process that led to the 2020 Rule, and addressed in the rule itself. *See, e.g.*, 2020 Rule, 85 Fed. Reg. at 55,121 ("The amendment to Rule 14a-9 does not broaden the concept of materiality or create a new cause of action, as some have suggested."); *id.* ("The amendment also does not make 'mere differences of opinion' actionable under Rule 14a-9."). As with the rescission of the issuer-engagement provisions, the agency has failed to adequately explain that reversal. *See* pages 12-13, *supra*; *cf.* 2022 Rescission, 87 Fed. Reg. at 43,180-43,181. Nor did it respond substantively to comments pointing out these failings. *Compare id. with* 2021 NAM Comment, *supra*, at 16-19; *see* pages 18-20, *supra*. This aspect of the 2022 Rescission is therefore arbitrary and capricious as well.

E. If the Court sets aside the rescission of the issuer-engagement provisions, it should set aside the rescission of the Robo-Voting Guidance as well.

Finally, the SEC's retraction of the Robo-Voting Guidance should also be set aside. *See generally* Robo-Voting Guidance, 85 Fed. Reg. 55,155; 2022 Rescission, 87 Fed. Reg. at 43,178 (rescinding the Robo-Voting Guidance). The guidance was adopted "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 2022 Rule's issuer-engagement conditions, particularly "in circumstances where the investment adviser utilizes a proxy advisory firm's electronic vote management system that 'pre-populates' the adviser's proxies with suggested voting recommendations and/or for voting execution services." Robo-Voting Guidance, 85 Fed. Reg. at 55,155. That is, additional guidance was necessary regarding, for example, "what steps should an investment advisor take to demonstrate that it is making voting determinations in a client's best interest" when issuer responses to proxy advice "become available after or around the same time that the investment adviser's votes have been pre-populated but before the submission deadline," and regarding an adviser's disclosure to its clients that it uses proxy-firm automated voting. *Id.* at 55,156.

The SEC's decision to rescind the guidance as part of the 2022 Rescission was based entirely on the agency's simultaneous rescission of the 2020 Rule's issuer-engagement provisions, the adoption of which had been the impetus for the guidance. *See* 87 Fed. Reg. at 43,178 & n.161 (rescinding the guidance in light of comments "indicat[ing] that because the [guidance] was tied to the 2020 Final Rules, any rescission of those rules should also include the [guidance]").

Thus, if the Court sets aside the SEC's rescission of the 2020 Rule's issuer-engagement provisions—as it should—not only would the sole reasoning for rescinding the guidance no longer apply, but the same conditions that prompted the agency to issue the guidance in the first place (issuer responses commonly becoming available after pre-population of proxy votes) would again emerge. The Court should therefore set aside the rescission of the supplemental guidance as well, if it sets aside the rescission of the 2020 issuer-engagement provisions.

II. THE SEC FAILED TO PROVIDE A MEANINGFUL OPPORTUNITY FOR COMMENT.

The entirety of the 2022 Rescission is also unlawful, and must be set aside, for failure to follow the APA's rulemaking procedures. *See generally* 5 U.S.C. § 706(2)(D) ("The reviewing court shall . . . set aside agency action" taken "without observance of procedure required by law.").

When an agency adopts a binding legislative rule, like the 2022 Rescission here, the APA requires it to "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). Importantly, as the D.C. Circuit has explained, this "opportunity for comment must be a meaningful opportunity." *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009); *accord, e.g.*, *Coal. for Workforce Innovation v. Walsh*, 2022 WL 1073346, at *7-8 (E.D. Tex. Mar. 14, 2022) ("[C]ourts require that agencies provide a 'meaningful' opportunity for comment.").

Courts therefore regularly set aside rules adopted in purported compliance with APA notice-and-comment procedures where the specifics of the procedure employed—particularly, the length of the comment period—did not provide a meaningful opportunity for public participation. *See, e.g.*, *Coal. for Workforce Innovation*, 2022 WL 1073346, at *7-8 (holding that "the [agency] did not provide a meaningful opportunity to comment" "due to the limited time frame for comments"), *appeal filed*, No. 22-40316 (5th Cir.); *California v. U.S. Dep't of Interior*, 381 F. Supp. 3d 1153, 1176-1177 (N.D. Cal. 2019) (similar); *Pangea Legal Servs. v. DHS*, 501 F. Supp. 3d 792, 819-821 (N.D. Cal. 2020) (similar); *Catholic Legal Immigration Network, Inc. v. Exec. Office for Immigration Rev.*, 2021 WL 3609986, at *3 (D.D.C. Apr. 4, 2021) (similar).

a. That is exactly the case here, for multiple reasons. First, the length of the truncated comment period here strongly indicates that the procedures were inadequate. "While the APA is silent as to what constitutes sufficient time to comment," a 60-day comment period is standard,[4] and the D.C. Circuit "recently described 30 days as 'generally the *shortest* time period for interested persons to meaningfully review a proposed rule and provide informed comment.'" *Catholic Legal Immigration Network*, 2021 WL 3609986, at *3 (quoting *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1117 (D.C. Cir. 2019)) (emphasis added); *see also, e.g.*, *Coal. for Workforce Innovation*, 2022 WL 1073346, at *7 (noting "a minimum thirty-day period") (quoting *Chem. Mfrs. Ass'n v. EPA*, 899, F.2d 344, 347 (5th Cir. 1990)); *cf. Petry v. Block*, 737 F.2d 1193, 1202 (D.C. Cir. 1984) (30-day timeline "cut the comment period to the bone").

Here, the SEC's proposal to rescind the 2020 Rule was published in the Federal Register on November 26, 2021—the day after Thanksgiving—and allowed comments only until December 27, 2021, thirty-one days later. *See* 2021 Proposed Rescission, 86 Fed. Reg. at 67,383. Not only

[4] *See, e.g.*, *Catholic Legal Immigration Network*, 2021 WL 3609986, at *3 ("[B]ecause 30 days is ordinarily seen as the minimally acceptable period, two Executive Orders state that agencies should "generally" or "in most cases" provide "at least 60 days" for comments.) (citing Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993)). The Administrative Conference of the United States also recommends a 60-day comment period for significant regulations. *See* Admin. Conf. of U.S., *Rulemaking Comments* (June 16, 2011), perma.cc/Q97Q-UNLN.

was this period only a single day longer than the "shortest," "minimum" or "cut . . . to the bone" comment period generally permissible, but it was functionally even shorter, as it included the Christmas and Hanukkah holidays and set the comment deadline during the week between Christmas and New Year's Day, when "many businesses may close entirely." *Pangea*, 501 F. Supp. 3d at 819 n.24. What is more, this timing placed the comment period during the end-of-fiscal-year rush for many public companies, one of the main constituencies that supported the 2020 Rule. Courts have not hesitated to find similarly shortened and inconveniently timed comment periods unlawful. *See id.* at 819-820 (30-day comment period insufficient when it "spanned the holidays"); *Centro Legal*, 524 F. Supp. 3d at 954-955 & n.26 (30-day comment period that "included Labor Day, a federal holiday, . . . and overlapped with the comment periods for" related rules unlawful).

Indeed, even one of the SEC's own Commissioners came to the same conclusion, explaining that "the 30-day comment period for the proposal was insufficient under the circumstances, given that the "period overlapped with major holidays, including Thanksgiving, Christmas, Hanukkah, and the beginning of Kwanzaa"; "the comment deadline fell during the first holiday season since the rollout of COVID vaccines, which allowed families to gather in person safely for the first time in nearly two years"; and the deadline "came at a time when many public companies with calendar year-end fiscal years were in the midst of preparing and auditing their financial statements." Uyeda Dissent, *supra*. That conclusion, from inside the Commission itself, is telling.

By contrast, Chair Gensler has stated in congressional testimony that the SEC would "always" set the comment deadline "the later of" 60 days from the SEC's vote or one month from Federal Register publication—but the agency did not do so here. House Appropriations Committee, *Fiscal Year 2023 Budget Request for the Federal Trade Commission and the Securities and Exchange Commission* (May 18, 2022), perma.cc/UM6V-PUDR (video at 54:53-55:50); *see* Letter from Sens. Hagerty & Tillis to Chair Gensler (July 12, 2022) (criticizing the shortened procedure here in light of this inconsistency), perma.cc/7WT2-HMWT.

Moreover, "[i]n cases involving the repeal of regulations, courts have considered the length of the comment period utilized in the prior rulemaking process as well as the number of comments received during that time-period." *California*, 381 F. Supp. 3d at 1177 (citing *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012)). Both factors indicate that the comment period here was insufficient. When it proposed adopting the 2020 Rule, the SEC allowed 61 days for public comment. *See* 2019 Proposed Rule, 84 Fed. Reg. at 66,518. Yet in rescinding that same rule, the agency truncated the comment period to only 31 days—and, critically, gave no reason whatsoever for the shortened period. *See, e.g.*, *Centro Legal*, 524 F. Supp. 3d at 955 (finding 30-day period insufficient in part because the agency "did not identify any exigent circumstances requiring a compressed comment period"); *Catholic Legal Immigration Network*, 2021 WL 3609986 ("[I]t is troubling that defendants failed to abide by these [60-day] guidelines or explain their departure from them."). Nor could it have: The agency had already suspended enforcement of the 2020 Rule while it contemplated regulatory changes, so there was simply no urgency that could have justified rescinding the rule via an irregular and shortened comment procedure.

A comparison between the comments received during these two unequal periods is even more revealing: The 2022 Rescission garnered less than *one tenth* of the comments received during the rulemaking that led to the adoption of the 2020 Rule. *Compare* SEC, *Comments on Proposed Rule: Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*, File No. S7-22-19 (667 comments on 2019 Proposed Rule), perma.cc/29HH-26TS, *with* SEC, *Comments on Proposed Rule: Proxy Voting Advice*, File No. S7-17-21 (61 comments on 2021 Proposed Rescission), perma.cc/MB78-6CKQ. It appears that—as was fully predictable—many entities and individuals concerned with these issues were unable to submit comment letters on a compressed timeframe, over the holidays. Thus, "the number of comments received on the [2022 Rescission] also shows the comment period was inadequate." *Pangea*, 501 F. Supp. 3d at 820; *see also, e.g.*, *N.C. Growers' Ass'n*, 702 F.3d at 770 (finding that similar order-of-magnitude discrepancy in comments received indicated that shortened period was insufficient).

Finally, several entities objected to the SEC's timeframe, explaining that it did not permit the public to effectively comment. *See, e.g.*, Comment of the Chamber of Commerce of the United States 10, File No. S7-17-21, Proxy Voting Advice (Dec. 23, 2021) (discussing insufficiency of compressed holiday comment period, and explaining that the Chamber requested an extension of the comment deadline, which the agency did not grant), perma.cc/H4V2-QX6P, Hughes Decl. Ex. J; Letter of the American Securities Association, File No. S7-17-21, Proxy Voting Advice (Dec. 3, 2021) (similarly noting timing concerns, and requesting an extension, which was not granted), perma.cc/G58G-QT9T, Hughes Decl. Ex. K. This, too, is evidence of insufficient procedure. *Centro Legal*, 524 F. Supp. 3d at 955 (highlighting, in finding comment period insufficient, that "numerous commenters" "noted" that "a 30 day comment period is extremely limited").

b. Relatedly, these irregular and insufficient procedures—which are enough on their own to require vacatur of the 2022 Rescission, *see* pages 23-27, *supra*—are also symptomatic of a deeper problem with the rulemaking. As the D.C. Circuit has explained, "[t]he opportunity for comment must be a meaningful opportunity, and . . . in order to satisfy this requirement, an agency must also remain sufficiently open-minded." *Rural Cellular Ass'n*, 588 F.3d at 1101; *see also Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011) ("In addition, the FCC had an obligation to remain open-minded about the issues raised and engage with the substantive responses submitted.") (quotation marks omitted). In other words, the outcome of the notice-and-comment proceeding cannot be a preordained conclusion.

But there are significant indications that that is exactly what happened here: Chair Gensler's SEC had made up its mind to rescind the 2020 Rule before even initiating the notice and comment process. As we have described, the SEC unlawfully suspended the 2020 Rule on the same day that it announced it was "revisit[ing]" that rule (Gensler, *Statement on the Application of the Proxy Rules*, *supra*), indicating that the agency never intended to allow the 2020 Rule to take effect. *See* pages 7-8, *supra*. And the SEC then began that reconsideration process *not* by taking public comments, but by holding a secret, behind-closed-doors meeting with only *opponents* of the 2020 Rule, again biasing the agency against a good-faith consideration of comments from both sides. *See* 2021 Proposed Rescission, 86 Fed. Reg. at 67,385-67,386 & n.24 (admitting that "Chair Gensler and members of the Commission staff" met with opponents of the 2020 Rule "on June 11, 2021"—only 10 days after the SEC suspended the 2020 Rule—so that those organizations could "express[] general opposition to the 2020 Final Rules, including with respect to the [issuer-engagement] provisions"); *see also* Roisman Dissent, *supra*, (noting that this "closed-door meeting" was "seemingly determinative").

What is more, the agency then engaged in an unreasonably short comment process, over the holidays, without providing any explanation for its departure from the general norm of 60-day comment periods. *See* pages 24-27, *supra*. The agency's unexplained departure from this norm for the 2022 Rescission is not indicative of a good-faith effort to invite and consider public input.

Further, as the NAM itself pointed out in its comment, many impacted entities continue to support the 2020 Rule—yet that support is largely absent from the SEC's discussion. *See* 2021 NAM Comment at 12 ("As discussed, the NAM and many other stakeholders continue to support an issuer engagement framework aligned with the 2019 proposal's requirements, if not more robust. However, these views are not reflected in the proposing release, nor is the widespread support for the 2020 rule's compromise solution."). That is, the 2022 Rescission tosses aside a decade of bipartisan policymaking—the result of which continues to enjoy broad support—without truly explaining why, without a fulsome comment procedure, and apparently as the result of a closed-door meeting with its opponents. Those are not the actions of an "open-minded" agency. *Rural Cellular Ass'n*, 588 F.3d at 1101. For this reason, too, the 2022 Rescission must therefore be set aside.

III. PLAINTIFFS HAVE STANDING.

Finally, Plaintiffs plainly enjoy Article III standing to bring this case. Indeed, the government did not contest Plaintiffs' standing in the parties' earlier suit regarding the suspension of the 2020 Rule, and the ultimate rescission of that Rule challenged here implicates the same injuries. *See generally* No. 7:21-cv-183-DC, Dkt. 25 (not contesting Plaintiffs' standing). "[T]he 'irreducible constitutional minimum' of standing consists of three elements[:] The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-561 (1992)).

Plaintiffs are injured by the SEC's rescission of the 2020 Rule because the Rule would have prevented precisely the type of harm Plaintiffs have previously suffered at the hands of un-regulated proxy advisory firms. For example, Plaintiff Natural Gas Services Group, Inc. ("NGS") has repeatedly been forced to rebut proxy firms' inaccurate and misleading reports on compressed timeframes, necessitating both direct expenditures and diversion of NGS's resources—including significant time and effort of its top executives—away from running its business. Chisholm Decl. ¶¶ 3-11; *see, e.g.*, *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) ("[E]conomic injury is a quintessential injury upon which to base standing."); *N.A.A.C.P. v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010) ("[A]n organization may establish injury in fact by showing that it had diverted significant resources to counteract the defendant's conduct.").

These imminent harms—*i.e.*, similar monetary expenditures and diversion of resources in future proxy seasons, absent the Rule—are "fairly traceable to" the rescission of the 2020 Rule (*Spokeo*, 578 U.S. at 338), for the straightforward reason that the Rule's provisions would have ameliorated or eliminated them. That is, the 2020 Rule's requirement that proxy firms both provide their analysis to the company in question "at or prior to the time when such advice is disseminated to" shareholders, and "provide [their] clients with a mechanism by which they can reasonably be expected to become aware" of any rebuttal statements by the company "in a timely manner" (17 C.F.R. § 240.14a-2(b)(9)(ii)(A)-(B) (2020)), would lessen the mad scramble that NGS currently must undertake to make its position known to shareholders in the wake of a misleading proxy firm analysis, thereby reducing the financial costs of that response. *See* Chisholm Decl. ¶¶ 12-15.

Finally, these harms are "likely to be redressed by a favorable judicial decision." *Spokeo*, 578 U.S. at 338. If and when the Court sets aside the SEC's unlawful rescission of the 2020 Rule, the result will be that the 2020 Rule returns into force. *See, e.g.*, *Franciscan Alliance, Inc. v. Azar*, 414 F. Supp. 3d 928, 934 (N.D. Tex. 2019) ("Because Congress 'provided vacatur as a standard remedy for APA violations,' courts typically 'invalidate—without qualification—unlawful administrative rules as a matter of course, leaving their predecessors in place until the agencies can take further action.") (quoting *Pennsylvania v. President of the United States*, 930 F.3d 543, 575 (3d

Cir. 2019)); *Action on Smoking & Health v. C.A.B.*, 713 F.2d 795, 797-98 (D.C. Cir. 1983) ("[B]y vacating . . . the rescissions proposed by [an agency order], the judgment of this court had the effect of reinstating the rules previously in force."). And with the 2020 Rule's protections in place, the monetary injury to Plaintiffs will be diminished—just as the Rule itself intended.

The NAM also has standing. "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 (5th Cir. 2010) (quotation marks omitted). Here, the NAM's members would have standing to sue in their own right. First, Plaintiff NGS is a member of the NAM, and second, additional NAM members possess injuries similar to those asserted by Plaintiff NGS: They have frequently been forced to divert their resources to rebutting misleading proxy advice in a manner that would have been alleviated by the 2020 Rule. Netram Decl. ¶¶ 9-10 & n.2. The second prong of the associational standing test is also met, as strengthening and protecting the governance mechanisms of its corporate members is germane to the NAM's purpose. *Id.* ¶¶ 2-5; *see also Ass'n of Am. Physicians*, 627 F.3d at 550 n.2 ("[T]he germaneness requirement is 'undemanding' and requires 'mere pertinence' between the litigation at issue and the organization's purpose."). And as to the third element, while Plaintiff NGS is a NAM member, this litigation does not require the participation of individual members, as would be the case, for example, if the suit sought individual damages.

Both the NAM and NGS, accordingly, possess Article III standing to bring this case and set aside the SEC's unlawful rescission of 2020 Rule.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in favor of Plaintiffs, and set aside the 2022 Rescission.

Dated: September 9, 2022

Respectfully submitted,

/s/ *Paul W. Hughes*

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CERTIFICATE OF SERVICE

I hereby certify that that on September 9, 2022, I filed the foregoing document via the Court's CM/ECF system, which effected service on all registered parties to this case.

Dated: September 9, 2022 /s/ *Paul W. Hughes*