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

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

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INTRODUCTION

Our opening brief explained that the SEC's 2022 Rescission—in which the agency abruptly reversed course and rescinded critical proxy-voting protections based on the same record that had supported adopting them in the first place—fails under the APA on both substantive and procedural grounds. The SEC's attempts to justify its momentous reversal fall far short; as we explain, the 2022 Rescission is fatally flawed, and therefore must be set aside.

ARGUMENT

I. THE 2022 RESCISSION IS SUBSTANTIVELY UNLAWFUL.

Our opening brief demonstrated that the substance of the 2022 Rescission is unlawful for multiple reasons: It failed to acknowledge—much less adequately explain—its departure from, earlier factual findings that the 2020 Rule would not endanger proxy firms' independence and timeliness; its substantive reasoning was irrational and arbitrary in several respects; and it failed to respond to public comments and the statements of dissenting Commissioners, each of which pointed out fundamental flaws in the agency's reasoning. In its brief, the SEC attempts to justify its action against each of these attacks, but its efforts do not persuade.

A. The SEC cannot escape its failure to grapple with contrary factual findings.

First, we explained that in adopting the 2020 Rule, the SEC had made factual findings that the Rule's provisions did not risk negatively affecting the timeliness and independence of proxy firms' advice—yet the agency based the 2022 Rescission on supposed concerns about exactly that. Pls. Br. 12-13; *compare Exemptions from the Proxy Rules for Voting Advice*, 85 Fed. Reg. 55,082, 55,112 (September 3, 2020) ("2020 Rule") ("[T]he rule does not create the risk that such advice would be delayed or that the independence thereof would be tainted."), *with Proxy Voting Advice*, 87 Fed Reg. 43,168, 43,175 (July 19, 2022) ("2022 Recission") ("[W]e agree that the risks posed by the [2020 Rule] to the cost, timeliness, and independence of proxy voting advice are sufficiently significant such that it is appropriate to rescind the conditions now."). That unacknowledged and unexplained departure from a prior factual finding is fatal under Supreme Court and Fifth Circuit precedent. *See Texas v. Biden*, 20 F.4th 928, 990-992 (5th Cir. 2021) (vacating DHS action because

it "rested upon factual findings that contradict those which underlay" the prior policy, "[y]et DHS didn't address its own prior factual findings at all when it terminated" that prior policy; under *Fox*, "[t]hat's that") (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)), *rev'd on other grounds*, 142 S. Ct. 2528 (2022); *id.* at 991 ("[I]t's legally required for a decision predicated on contradicting prior agency findings" "to address [those] prior factual findings—explaining why they were mistaken, misguided, or the like.").

In response, the SEC first denies that it even made such a finding, suggesting that its statements in the 2020 rule went no further than rejecting risks to independence and timeliness "as a result of a registrant's *pre-dissemination* involvement" (2020 Rule, 85 Fed. Reg. at 55,112 (emphasis added)), which had been part of the 2019 proposal but not the final rule. *See* SEC Br. 19. That is pure semantics; in the very same paragraph of the 2020 Rule, the SEC explained that, "[b]y adopting this approach"—that is, the simultaneous-disclosure version of issuer engagement under the 2020 Rule—"*we believe we have addressed* the concerns raised by commenters regarding the potential unintended consequences of requiring a proxy voting advice business to engage with a registrant in connection with its proxy voting advice, *including those related to timing and the risk of affecting the independence of the advice*." 2020 Rule, 85 Fed. Reg. at 55,112 (emphasis added).

In other words, in context, the agency concluded that no risk to timeliness and independence remained *at all* under the 2020 Rule—because, as we have explained, *there is no reasonable basis to believe* that simultaneous disclosure as adopted in the 2020 Rule carries risks to timeliness or independence, and the Commission certainly did not identify one in 2020. *See* Pls. Br. 14-15; *infra* pages 3-5. Additional statements from the 2020 Rule confirm that this was the SEC's view at the time. *See* 2020 Rule, 85 Fed. Reg. at 55,138-55,139 ("[W]e believe the final amendments will substantially address, *if not eliminate altogether*, the concerns raised by commenters related to objectivity and timing pressure associated with the proposed engagement process.") (emphasis added); *id.* at 55,139 ("Further, because the [2020 Rule] does not include a registrant review and feedback process that requires pre-publication review, it . . . *should not* discourage proxy voting advice business from making recommendations that oppose management or impose additional

timing constraints on proxy voting advice businesses.") (emphasis added). But the SEC failed to address its 2020 findings about the risks—or lack thereof—posed by the 2020 Rule's approach to issuer engagement when it rescinded the 2020 Rule based on a contrary factual premise. That is reversible error. *Texas*, 20 F.4th at 990-992; *Fox*, 556 U.S. at 515.[1]

The SEC also suggests that its earlier evaluation of risks is not a "factual finding" at all, such that the *Fox* rule would not apply. *See* SEC Br. 19-20. But it is commonplace throughout the law that the existence or non-existence of a particular risk *is* a factual finding. *See, e.g.*, *Ball v. LeBlanc*, 792 F.3d 584, 592 (5th Cir. 2015) ("The predicate findings of a substantial risk of serious harm" to prison inmates, for an Eighth Amendment claim, "are factual findings reviewed for clear error."); *United States v. Mitchell*, 709 F.3d 436, 440 n.6 (5th Cir. 2013) (discussing statute that "requires commitment" of an incompetent defendant "if the court finds by clear and convincing evidence that the person['s] . . . release would create a substantial risk of bodily injury") (quotation marks omitted); *Bradley v. Univ. of Texas M.D. Anderson Cancer Ctr.*, 3 F.3d 922, 924 (5th Cir. 1993) (disability discrimination claim under the Rehabilitation Act requires "findings of facts . . . about (a) the nature of the risk . . . (b) the duration of the risk . . . [and] (c) the severity of the risk") (alteration incorporated). What the agency choses to *do* about that risk may be a "policy concern" (*cf.* SEC Br. 20), but whether such a risk *exists* is a factual question, and thus subject to *Fox.*

Because the SEC in the 2022 Rescission did "not address its prior factual findings—explaining why they were mistaken, misguided, or the like"—its contrary decision cannot stand. *Texas*, 20 F.4th at 991.

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[1] Nor would the SEC be absolved of its *Fox* responsibilities even if its 2020 findings were understood to conclude merely "that the conditions mitigated, but did not necessarily eliminate, risks to timeliness and independence." SEC Br. 20. In *Texas*, the Fifth Circuit concluded that the rescission of a prior policy violated *Fox* because the agency's later findings that the policy "had mixed effectiveness" and "'did not adequately or sustainably [achieve its objectives]' *in a cost-effective manner*" conflicted with earlier findings that the policy "[was] *beginning* to" be effective and created the correct "incentives." 20 F.4th at 991 (emphasis added). That is, *Texas* teaches that factual findings that are generally in conflict, even if not stated as diametrically opposed absolutes, "trigger[] the arbitrary-and-capricious rule set forth in *Fox*." *Id.*

B. The SEC does not rehabilitate the substance of its decision.

Our opening brief further demonstrated that, apart from its failure to grapple with its earlier contrary findings, the SEC failed to adequately explain either of the two central pillars of its rescission decision: (1) the notion that even the simultaneous disclosure version of the issuer-engagement requirement provisions adopted in the 2020 Rule would endanger the timeliness or independence of proxy voting advice; and (2) the notion that those provisions are not needed because of certain proxy firms' supposed voluntary measures. *See* Pls. Br. 14-15, 15-18. Though the SEC attempts to justify both conclusions in its brief (*see* SEC Br. 11-14, 14-18), it cannot do so.

1. First, as the NAM has long maintained, "[i]t 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." Pls. Br. 19 (quoting 2021 NAM Comment, Netram Decl. Ex. R, at 12); *see also id.* at 14-15. The Commission's first attempt at demonstrating legitimate independence concerns misses the point entirely: Whether the 2020 Rule "tilt[ed] the playing field in favor of company management" and away from "other stakeholders" such as activist shareholders by providing issuers "unequal access to the proxy solicitation process" (SEC Br. 14 (quoting 2022 Rescission, 43,172); *see also id.* at 14 n.5) is completely irrelevant to whether that rule poses "risks" to the "independence of proxy voting advice" provided *by the proxy firms*, which was the stated basis for the Commission's decision. 2022 Rescission, 87 Fed. Reg. at 43,175 (emphasis added). That is, although the Commission discussed comments regarding the alleged disadvantaging of stakeholders *other than* the proxy firms, it did not purport to base the rescission on those concerns, so that rationale may not be invoked by the Commission's lawyers now. *See, e.g.*, *Wages & White Lion Invs., LLC v. FDA*, 16 F.4th 1130, 1136 (5th Cir. 2021) ("In reviewing an agency's action, we may consider only the reasoning articulated by the agency itself; we cannot consider *post hoc* rationalizations.") (quotation marks omitted).

The SEC's only other attempt to defend its independence reasoning is to point to comments that proxy firms "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." SEC Br. 12-13 (quoting 2022 Rescission, 87 Fed. Reg. at 43,175 & n.118). But it is entirely unclear (and the agency fails to explain) why the existence of the 2020 Rule—which, again, does not require proxy firms to share draft recommendations—would "expose the firms to costly threats of litigation" any more than is the case without the Rule. Even without the Rule, issuers will still access proxy firms' recommendations—a point that the SEC appears to affirmatively endorse. 2022 Rescission, 87 Fed. Reg. at 43,177. Any "threats of litigation" will thus exist regardless. Nor does the SEC explain how the 2020 Rule's mechanism enabling registrants to effectively respond to proxy firm advice *by communicating with shareholders* (*see* 2020 Rule, 85 Fed. Reg. at 55,113) somehow magnifies any litigation risk.[2]

As to the timeliness of proxy voting advice under the 2020 Rule, the SEC relies on a single comment—notably, *not* a comment by a proxy firm—raising "concerns that these 'additional compliance burdens' could 'disrupt[] the preparation and delivery of proxy voting advice.'" SEC Br. 11 (quoting 2022 Rescission, 87 Fed. Reg. at 171 & n.145) (in turn quoting the comment of the Managed Funds Association, Matro Decl. Ex. 6).[3] A single, unsourced sentence that "additional compliance burdens" might "muddle the timely delivery" of proxy advice, in a single comment letter from a party without first-hand knowledge of proxy firms' operations (*see* Matro Decl. Ex.

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[2] Nor does the SEC explain why "draw[ing] out the [shareholder] voting process" (SEC Br. 12)—as opposed to proxy firms' internal, pre-publication processes—would somehow compromise the independence of proxy firm advice. *Cf.* n.4, *infra*. And to the extent the shareholder voting process is drawn out by the availability to shareholders of additional material information, the SEC has already explained that that is a *good* thing. *See, e.g.*, 2020 Rule, 85 Fed. Reg. at 55,107 ("[T]he principle that more complete and robust information and discussion leads to more informed investor decisionmaking, and therefore results in choices more closely aligned with investors' interests, has shaped our federal securities laws since their inception.").

[3] The agency also cites another comment discussing "delays" due to "investment advisors . . . consider[ing] and evaluat[ing] any response from companies to proxy advice" (2022 Rescission, 87 Fed. Reg. at 43,175 n.118; *see* SEC Br. 11)—but again, delays to the voting process that occur *after* proxy firms render their advice were not the basis for the rescission, and thus are not properly invoked by the government now. *See* page 2-3, *supra*; *Wages & White Lion*, 16 F.4th at 1136.

6, at 2), cannot form a rational basis for concluding that the 2020 Rule risked impairing the timeliness of proxy advice. *See, e.g.*, *Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget*, 358 F. Supp. 3d 66, 91 (D.D.C. 2019) ("[A]n agency cannot simply rely on the speculation of commenters. Instead, the agency must conduct a critical examination of comments on which it relies.") (collecting authorities). And that is especially true when other commenters, including the NAM, explained the common-sense proposition that because "[t]he 2020 rule's issuer engagement provisions . . . require exactly zero action on [proxy firms'] part before a recommendation is finalized," "the concerns raised about the timeliness . . . of proxy voting advice are simply not credible." 2021 NAM Comment, Netram Decl. Ex. R, at 12; *see, e.g.*, *Nat'l Women's Law Ctr.*, 358 F. Supp. 3d at 91 ("Without explaining why, an agency cannot rely on some comments while ignoring comments advocating a different position.").[4]

Finally, the government points out that "Plaintiffs do not dispute that the notice-and-awareness conditions could have increased the cost of proxy voting advice." SEC Br. 11. True—of course the imposition of a new legal regime can result in one-off compliance costs[5]—but also irrelevant, because the SEC does not argue that those costs alone can justify jettisoning the 2020 Rule's light-touch protections.

In sum, the agency has still not provided any substantive reason "*why* a requirement that proxy advice be provided to registrants contemporaneously with the proxy firm's clients, and that

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[4] The government reaches too far when it cites a Nasdaq survey for the proposition that "up to 15% of surveyed companies may have acknowledged that the conditions could 'create unnecessary delays or confusion.'" SEC Br. 12. What that survey actually reported is that 85% of respondents "said that [the issuer-engagement] mechanism *would not* create unnecessary delays or confusion in the proxy voting process." Nasdaq comment, Hughes Decl. Ex. I. First, delays in "the proxy voting process" are *not* necessarily delays in the provision of proxy firms' advice. *See supra* notes 2 & 3. And second, the survey does not indicate how the other 15% of respondents answered or whether they skipped the question entirely; Nasdaq did not publish how many respondents, or even if *any* respondents, thought that the mechanism would cause delays. Nasdaq comment, Hughes Decl. Ex. I.

[5] *See* 2020 Rule, 85 Fed. Reg. at 55,138 (explaining that "much of the burden of the final amendments would" consist of one-time startup costs "to develop policies that satisfy the principles and accordingly modify or develop systems and practices to implement such policies").

those clients be made aware of a registrant's response, would affect the timeliness or independence of proxy advice" (Pls. Br. 14). That failure is fatal. *See, e.g.*, *Susquehanna Int'l Grp., LLP v. SEC,* 866 F.3d 442, 447 (D.C. Cir. 2017) (SEC acted arbitrarily and capriciously when it "took [the regulated party's] word for it" rather than "critically review[ing] [that party's] analysis or perform[ing] its own"); *Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018) ("Conclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict do not suffice to meet the deferential standards of our review.").

2. Our brief also explained several major flaws in the notion that proxy firms' voluntary measures, combined with pre-existing mechanisms for shareholder communication, could meaningfully replicate the benefits to the proxy process of the 2020 Rule. Pls. Br. 15-18.

The Commission's response is curious. Rather than attempt to rebut our demonstration, the government seems to *agree* that proxy firms' voluntary activities fall well short of what the 2020 Rule would have required, but suggests that the decision to rescind did not depend on even a rough equivalence between the 2020 Rule and the firms' voluntary measures. SEC Br. 16. Indeed, the government goes even further; in an attempt to evade our demonstration that it failed to respond to comments and dissenting statements regarding the true extent of those voluntary practices (*see* Pls. Br. 19-20) it contends that the SEC's "decision to rescind the [2020] conditions *did not rest on* [its] prediction" that "PVABs were likely to maintain certain voluntary practices that provide at least some of the same benefits as the conditions." SEC Br. 18 (emphasis added).

We doubt this is the correct understanding of the agency's action. *See, e.g.*, 2022 Rescission, 87 Fed Reg. at 43,170 (introduction to the 2022 Rescission, citing, as one of two "factors support[ing] the reasonableness of our analysis," the existence of "certain voluntary practices of PVABs" that "are likely" to "provid[e] . . . some of the benefits that those conditions were expected to produce."). But if the government's current characterization *is* correct, then the Commission has an even bigger problem—it has, apparently, entirely abandoned the decades-long policymaking process that culminated in the 2020 Rule: "facilitating investor access to enhanced discussion of proxy voting matters," thereby "contribut[ing] to more informed proxy voting decisions." 2020

Rule, 85 Fed. Reg. at 55,107.[6] Yet the SEC has never even recognized this monumental shift.

To explain: agency action is void if it fails to "display awareness that it *is* changing position." *Fox*, 556 U.S. at 515 (emphasis in original). The SEC stated in adopting the 2020 Rule that its goal was "promot[ing] the reliability and completeness of information available to investors and those acting on their behalf at the time they make voting determinations." 85 Fed. Reg. at 55,107. Now, though, the SEC informs us that its 2022 Rescission "did not rest on" the continued existence of alternative mechanisms providing *any* "of the same benefits as" the 2020 Rule. SEC Br. 18. If the SEC means to say that it disclaims the need for any mechanism to provide more reliable and complete information to investors, then it has abandoned wholesale the core principle that animated the 2020 Rule. Yet it has never acknowledged this massive change in position.

To put it slightly differently: The government must "articulate . . . a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). To satisfy this burden, the government would have to explain not only why the supposed risks to proxy firms justified rescinding the specific 2020 issuer-engagement provisions (*but see* pages 6-7 *supra* (describing that they did not)), but *also* explain why those supposed risks justified abandoning the goal of "more informed decision-making" (2020 Rule, 85 Fed. Reg. at 55,107) altogether. The 2022 Rescission certainly does not make that showing. One way or the other, it must be set aside.

C. The SEC's failure to respond to commenters and to the dissenting Commissioners cannot be excused.

Our brief further explained that the SEC failed to "respond to comments that can be thought to challenge a fundamental premise underlying the proposed agency decision," and thereby ran

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[6] *Id.* ("[T]he principle that more complete and robust information and discussion leads to more informed investor decisionmaking, and … results in choices more closely aligned with investors' interests, has shaped our federal securities laws since their inception and is a principal factor in the Commission's adoption of these amendments. … [W]e reiterate the far-reaching implications that proxy voting advice can have in the market and accordingly continue to believe that measured changes designed to facilitate more complete and robust dialogue and information sharing among proxy voting advice businesses, their clients, and registrants would improve the proxy voting system, and ultimately lead to more informed decision-making, to the benefit of all participants.").

afoul of the APA in an additional manner. *Carlson v. Postal Reg. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019); *see* Pls. Br.18-20. In response, the SEC *admits* that it did not respond directly to, for example, the NAM's comment explaining that concerns about timeliness and independence of proxy advice were illogical (*see* Pls. Br. 19), instead asserting that its general discussion of those topics sufficed. SEC Br. 13 n.6. Not so: The gist of the NAM's comment was that the supposed "concerns" about timeliness and independence under the 2020 Rule *made no sense* as a matter of logic (*see* 2021 NAM Comment at 12); the agency cannot be said to have "demonstrate[d] the rationality of its decision-making process by responding to those comments that are relevant and significant" (*Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 225 (D.C. Cir. 2007)) when its response is to simply repeat (without explanation) the factual premise that a comment has challenged as illogical. *Cf. e.g.*, *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir.) ("Nodding to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking."), *vacated as moot*, 142 S. Ct. 1665 (2022); *AARP v. EEOC*, 267 F. Supp. 3d 14, 32 (D.D.C. 2017) (An agency "is certainly entitled to rely on comments," "[b]ut the agency must explain *why* it chose to rely on certain comments rather than others" to survive review).[7]

We further pointed out that the Commission failed to respond to Commissioner Uyeda's explanation that, as a procedural matter, the truncated, holiday-season comment period "was insufficient under the circumstances." 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; *see* Pls. Br. 20, 25. The SEC does not respond. *See generally* SEC Br. This failure, too, renders the agency's action unlawful.[8]

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[7] In other words, the SEC's non-response to the NAM's and others' comments does *not* "enable us to see . . . why the agency reacted to [the policy issues] as it did" (SEC Br. 13 n.16 (quoting *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993)), because the SEC did not engage with the premise of the commenters' point—which was that the cited concerns made no sense.

[8] Moreover, as noted above (at 8-9), we showed that commenters and dissenting Commissioners challenged the SEC's factual portrayal of proxy firms' voluntary practices, and the agency did not respond. *See* Pls. Br. 19-20. The Commission admits it did not respond, defending only on the basis that, it says, "even 'if true' . . . these comments would not have 'require[d] a change in [the]

II. THE RULEMAKING PROCEDURE WAS UNLAWFUL.

We also explained that the comment procedure the Commission employed in rescinding the 2020 Rule—utilizing a shortened comment period that coincided with multiple holidays and ended in the week between Christmas and New Year's Day—was insufficient to provide the "meaningful opportunity" for comment required by the APA. *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009); *see* Pls. Br. 22-26 (collecting cases).

The SEC's response is to attempt to distinguish each of the many cases on which we rely, taking them one by one and finding different reasons why each individual case is not exactly like this one. *See generally* SEC Br. 24-28. But this strategy of piecemeal distinctions does not detract from the overall thrust of the case law: A comment period of roughly 30 days—which is already "generally the *shortest* time period for interested persons to meaningfully review a proposed rule and provide informed comment." *Catholic Legal Immigration Network, Inc. v. Exec. Office for Immigration Rev.*, 2021 WL 3609986, at *3 (D.D.C. Apr. 4, 2021) (emphasis added) (quotation marks omitted)—is vulnerable to APA attack when various plus-factors are also present. And as we explained, many highlighted in the case law are present here:

- The period includes holidays. *See Pangea Legal Servs. v. DHS*, 501 F. Supp. 3d 792, 819-820 (N.D. Cal. 2020); *Centro Legal de la Raza v. Exec. Office for Immigration Rev.*, 524 F. Supp. 3d 919, 954-955 & n.26 (N.D. Cal. 2021). The SEC states without citation that "courts do not subtract holidays . . . from comment periods" (SEC Br. 25) but does not engage with our citation of cases that do exactly that as part of their functional analysis. *See* Pls. Br. 23-24.

- The period is timed inconveniently for regulated parties. *See, e.g.*, *Catholic Legal Immigration Network*, 2021 WL 3609986, at *3; *Centro Legal*, 524 F. Supp. 3d at 958, 962; *Pangea*; 501 F. Supp. 3d at 819-822. The government agrees that this factor applies when the agency proposes multiple related rules at once (*see* SEC Br. 26-27), but fails to explain why the same would

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proposed rule." SEC Br. 18. If the court disagrees with the government's current characterization of the 2022 Rule as "not rest[ing] on" its discussion of voluntary proxy firm practices (*cf.* pages 4-8, *supra*), then vacatur would be required on the basis that the Commission did not adequately respond to comments on a key pillar of the rescission.

not be true when the timing of the period is foreseeably inconvenient to stakeholders for other reasons—such as the fact that, as pointed out by Commissioner Uyeda, the deadline here "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," even though "the 2020 amendments were intended to benefit public companies." Uyeda Dissent, *supra*.

- Commenters complain about the inconvenience of the shortened timing. *Centro Legal*, 524 F. Supp. 3d at 955; *see* Pls. Br. 26-27.

- There is a discrepancy between the length of comment period and number of comments received between adopting a rule and rescinding it. *California v. U.S. Dep't of Interior*, 381 F. Supp. 3d 1153, 1177 (N.D. Cal. 2019); *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012); *see* Pls. Br. 26. The SEC claims that the 2:1 difference in comment period length here, and the *10:1* difference in number of comments received, is appropriate given that the 2022 Rescission rescinded only some of the 2020 Rule's provisions. SEC Br. 27-28. But it cannot seriously maintain that the issuer-engagement provisions, one of the two key reforms adopted in the 2020 Rule, only deserve *one tenth* the public consideration earlier provided.

- There is no valid explanation for shortening the period. *Centro Legal*, 524 F. Supp. 3d at 955; *Catholic Legal Immigration Network*, 2021 WL 3609986. *See* Pls. Br. 24-25. The agency again claims that its actions were justified by the supposedly "targeted nature" of the 2022 Rescission—but as we pointed out, even if targeted, there was simply no need here to provide less notice than the 60 days Chair Gensler promised in Senate testimony, given that the rule had been (unlawfully) suspended and proxy firms had no current compliance obligation. Pls. Br. 25-26.

The SEC also argues that the proper unit of analysis is 39 days, because it posted the rescission proposal on its website prior to Federal Register publication. SEC Br. 26-27. First, the text of the APA makes Federal Register notice (not notice on a website) the relevant consideration: Section 553's mandate that "the agency shall give interested parties an opportunity" for comment

is triggered by "notice required *by this section*," that is, "notice . . . published in the Federal Register." 5 U.S.C. § 553(b), (c).[9] But even if the SEC were right, that hardly helps the agency, as the 39-day period it cites only sweeps in the Thanksgiving holiday as well. And it does nothing to address the other plus factors discussed above.

Finally, the government argues harmless error. SEC Br. 28. But harmless error "is to be used only when a mistake of the administrative body is one that *clearly* had no bearing on the procedure used or the substance of the decision reached." *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 215 (5th Cir. 1979) (quotation marks omitted). When "the Agency's error plainly affected the procedure used," the court "cannot assume that there was no prejudice to petitioners." *Id.*; *see also Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001) ("[A]bsence of such prejudice must be clear for harmless error to be applicable."). And far from "consider[ing] [commenters'] arguments and respond[ing] to them," as might demonstrate a lack of prejudice (*United States v. Johnson*, 632 F.3d 912, 932 (5th Cir. 2021); *cf.* SEC Br. 28)), the agency has *not* meaningfully responded to key comments received even during the truncated period it allowed. *See* pages 8-9, *supra*. Plaintiffs thus need not "identify" additional "substantive challenges [the public] would have made" (SEC Br. 28 (quotation marks omitted))—if that is even a requirement in the first place. *Cf. California v. Azar*, 911 F.3d 558, 580 (9th Cir. 2018) ("There is no such requirement for harmless error analysis."). The procedure employed by the Commission did not provide a meaningful opportunity for comment, and must be set aside.

III. THE DELETION OF NOTE (E) AND RESCISSION OF THE ROBO-VOTING GUIDANCE ARE INSEVERABLE FROM THE 2022 RESCISSION.

Our brief also demonstrated both that the deletion of Note (e) from the antifraud rule was plainly irrational, and that the rescission of the Robo-Voting Guidance that accompanied the 2020 Rule should be set aside, as it was premised on the rescission of the issuer-engagement provisions.

[9] The one case the SEC cites to the contrary (SEC Br. 26) first held that a statutory deadline for agency action was "sufficient to justify the shortened comment period" (*Omnipoint Corp. v. FCC*, 78 F.3d 620, 629 (1996)), making its subsequent discussion of actual notice dictum. Moreover, the SEC's duty to provide notice runs to the entire interested public, not just to these Plaintiffs.

SEC Br. 20-24; *see* Pls. Br. 20-23. In response, the SEC raises threshold objections to these specific challenges based on final agency action and standing—but those objections (even if valid[10]) cannot save these aspects of the agency's action, for two reasons.

First, Plaintiffs' procedural challenge applies to the entirety of the SEC's rulemaking process, with the result that—if the procedure was flawed—the entire output of that process is void.

Second, Plaintiffs' substantive challenge requires vacatur of the entire package of rulemaking adopted by the SEC in the 2022 Rescission, because the individual elements of that rulemaking are not severable from one another. As the D.C. Circuit has explained, "we may limit invalidation to defective portions of an agency's action and leave others standing when 'they operate entirely independently of one another,' but will invalidate the action as a whole *if we are not 'sure'* the provisions are 'wholly independent.'" *Am. Fed'n of Gov't Emps., AFL-CIO v. Fed. Lab. Rels. Auth.*, 24 F.4th 666, 674 (D.C. Cir. 2022) (emphasis added). The fact that a plaintiff may not be specifically harmed by inseverable elements of a regulation or statute does nothing to alter this result. *See, e.g.*, *Murphy v. NCAA*, 138 S. Ct. 1461, 1487 (2018) (Thomas, J., concurring) ("If one provision of a statute is deemed unconstitutional, the severability doctrine places every other provision at risk of being declared nonseverable and thus inoperative; our precedents do not ask whether the plaintiff has standing to challenge those other provisions."). Because the court "cannot be certain that the agency would have" rescinded the Robo-Voting Guidance and Note (e) without the accompanying rescission of the issuer-engagement provisions (*see, e.g.* Pls. Br. 22, 23), the entirety of the 2022 Rescission must fall. *ACA Int'l v. FCC*, 885 F.3d 687, 708 (D.C. Cir. 2018).

IV. VACATUR IS THE APPROPRIATE REMEDY.

Finally, the SEC argues in passing that "[i]f the Court finds any APA violation, it should

[10] The government's final agency action argument regarding the deletion of Note (e) is striking: The Commission has literally edited the text appearing in the Code of Federal Regulations; it cannot therefore claim that this action is non-final, nor non-reviewable. And the SEC is further wrong that the injury to the NAM's members from rescission of the Robo-Voting Guidance is "highly attenuated" (SEC Br. 24)—indeed, this chain of causation is precisely the reason why the NAM strongly supported the Robo-Voting Guidance in the first place.

remand without vacatur." SEC Br. 30. Not so.

The SEC's brief discussion fails to mention that, "[b]y default, remand *with* vacatur is the appropriate remedy." *Data Mtkg. P'ship, LP v. U.S. Dep't of Labor*, 45 F.4th 846, 859 (5th Cir. 2022) (quoting *Texas v. Biden*, 20 F.4th 928, 1000 (5th Cir. 2021), *rev'd on other grounds*, 142 S. Ct. 2528 (2022)); *see also, e.g.*, *Lifenet, Inc. v. U.S. Dep't of Health & Human Servs.*, __ F. Supp. 3d ___, 2022 WL 2959715, at *10 (E.D. Tex. July 26, 2022) (same). In other words, remand without vacatur is appropriate only "[i]n rare cases." *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) ("The ordinary practice is to vacate unlawful agency action."). And "[b]ecause vacatur is the default remedy, . . . defendants bear the burden to prove that vacatur is unnecessary." *Friends of the Earth v. Haaland*, 583 F. Supp. 3d 113, 157 (D.D.C. 2022).

The SEC's single paragraph fails to carry that burden. In order to remedy the 2022 Rescission's substantive legal shortcomings, the Commission on remand need not just "explain[] its policy judgment in greater detail." *Cf.* SEC Br. 30. Rather, it must explain *why* a policy that simply requires simultaneous disclosure would imperil the timeliness or independence of proxy voting advice, when (a) the agency has already failed to give a satisfactory explanation both in the rescission and in its brief before this Court; (b) the agency found the *opposite* to be true, based on the same facts, in 2020; and (c) as has frequently been pointed out, that proposition simply makes no logical sense. *See* pages 1-3, *supra*; Pls. Br. 13-14.

The SEC's failure to reason logically and to grapple with its prior, contrary factual findings on the key issues are thus the kind of "major shortcoming[s] that [go] to the heart of the agency's decision" and therefore "favor[] vacatur." *Kent. Mun. Energy Agency v. FERC*, 45 F.4th 162, 180 (D.C. Cir. 2022); *see id.* (agency's "failure to consider an important . . . factor," which required agency to "redo its . . . analysis" on remand, required vacatur); *Humane Soc'y of U.S. v. Zinke*, 865 F.3d 585, 614-15 (D.C. Cir. 2017) (agency analysis that "failed to address [an] effect" and "turned its back on the implications" of its action required vacatur). The "default" remedy of "remand *with* vacatur" (*Data Mtkg. P'ship*, 45 F.4th at 859)—rather than the "exceptional remedy" of "remand without vacatur" (*Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 519 (D.C. Cir. 2020))—

is therefore required here, should the Court agree with our substantive arguments.

Moreover, "deficient notice is a 'fundamental flaw' that almost always requires vacatur." *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (quoting *Heartland Regional Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009)); *see also, e.g.*, *Capital Area Immigrant Rights Coal. v. Trump*, 471 F. Supp. 3d 25, 58 (D.D.C. 2020 (same); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021) ("[A]n agency that bypassed required notice and comment rulemaking obviously could not ordinarily keep in place a regulation while it completed that fundamental procedural prerequisite."). In other words, "[w]hen an agency bypasses a fundamental procedural step, the vacatur inquiry asks not whether the *ultimate action* could be justified, but whether the agency could, with further explanation, justify its decision *to skip that procedural step*." *Id.* (emphasis added). As we have explained, the SEC cannot justify its decision to employ an irregularly shortened comment period here, as the 2020 Rule had been unlawfully suspended and never took effect, so there was no timing pressure requiring a compressed comment opportunity. *See* Pls. Br. 25-26. The "exceptional remedy" of "remand without vacatur" (*Am. Great Lakes Ports Ass'n*, 962 F.3d at 519) is thus unwarranted, even if the Court were to set aside the 2020 Rescission solely on Plaintiffs' procedural challenge.[11]

CONCLUSION

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

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[11] Notably, the SEC does not argue, under the second prong of the remand-without-vacatur test, that vacatur here would cause disruptive consequences. SEC Br. 30; *see, e.g.*, *Texas v. United States*, 50 F.4th 498, 520 (5th Cir. 2022) ("Two factors determine whether vacatur is warranted: (1) the seriousness of the deficiencies of the action, that is, how likely the agency will be able to justify its decision on remand; and (2) the disruptive consequences of the vacatur.") (quotation marks omitted). Any argument along those lines is therefore forfeited. *See, e.g.*, *Paez v. Wal-Mart Stores Tex., LLC*, 2022 WL 3216343, at *2 (W.D. Tex. Aug. 9, 2022) ("[W]hen a litigant fails to develop an argument before this Court, that litigant waives that argument."). And indeed, there would simply be no disruptive consequences from vacating the 2020 Rescission. *Cf. United Steel*, 925 F.3d at 1287 (defendant agency "explains neither how [its action] can be saved nor how vacatur will cause disruption. We therefore take the normal course and vacate the [action].").

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that that on November 4, 2022, I filed the foregoing document via the Court's CM/ECF system, which effected service on all registered parties to this case.

Dated: November 4, 2022 /s/ *Paul W. Hughes*