IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

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 Securities and Exchange Commission, DEFENDANTS.	No. 7:22-cv-163-DC

DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The rulemaking below represents the latest step in the Securities and Exchange Commission's efforts to strike an appropriate balance in regulating proxy voting advice businesses ("PVABs")—who play an increasingly important role in the proxy voting process—while protecting the timeliness and independence of the advice those businesses provide to investors. In 2020, the Commission adopted a package of proxy rule amendments aimed at striking this balance. But those amendments contained provisions overwhelmingly opposed by the investors they were intended to benefit. In 2022, the Commission rescinded two of those provisions, finding that doing so more appropriately balanced the competing concerns.

The rescinded provisions conditioned PVABs' eligibility for certain proxy rule exemptions on their making their advice available to companies at or prior to the time that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

Plaintiffs and others in the registrant community had long argued that new regulations were needed to address alleged factual and analytical errors in proxy voting advice. But the original version of the conditions proposed in 2019 triggered a firestorm of criticism from a broad swath of

investors and investor advocates, including a majority of the Commission's Investor Advisory Committee, who argued that there was no compelling evidence of material deficiencies in proxy voting advice, that registrants already have ample means to convey their views to shareholders without PVABs' help, and that the proposed conditions would significantly impair the cost, timeliness, and independence of proxy voting advice.

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

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

Plaintiffs' assertion that a more detailed justification was required is incorrect. Settled law establishes that agencies have significant discretion to reevaluate prior policy choices, even where (unlike here) the record is entirely the same. Plaintiffs seek to recast disagreements about the significance of competing policy interests as contradictory factual findings requiring more substantial explanation, but their arguments either misunderstand or mischaracterize the Commission's analysis. And contrary to Plaintiffs' contention, the Commission addressed all significant issues raised by commenters and dissenting Commissioners.

Plaintiffs' procedural objections are also meritless. The 31-day comment period in this targeted rulemaking exceeded the length that courts have held is generally sufficient even for significant rule changes. Plaintiffs had even more time—at least 39 days—to file their comments. The Commission received dozens of extensive comments from supporters and opponents of the notice-and-awareness conditions. And after more than half a year of consideration, the Commission rescinded the conditions in a reasoned release. No more was required.

BACKGROUND

A. Market Overview

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

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

Institutional investors have increasingly turned to PVABs for assistance in making these voting determinations. 2020 Rules, 85 Fed. Reg. at 55,083. PVABs provide research and analysis on matters subject to a vote, as well as specific voting recommendations. *Id.* Their recommendations may be based on a generally applicable benchmark voting policy, specialty voting policies (such as a socially responsible investment policy), or custom voting policies that are proprietary to their clients. *Id.* PVABs may also assist clients in handling the administrative tasks of the voting process by, for example, providing an electronic platform that enables clients to efficiently cast votes or, in some cases, directly executing votes on their clients' behalf. *Id.* PVABs typically have a matter of weeks to formulate and distribute their advice in time for clients to decide and enter their votes, which clients may change at any time prior to the meeting date. *Id.* at 55,109 n.342, 55,136 n.607.

PVABs play a critical role in the proxy voting process, "help[ing] facilitate the participation of shareholders in corporate governance through the exercise of their voting rights." *Id.* at 55,084. To fulfill their duties, investors "depend on receiving independent proxy voting advice in a timely manner." *Proxy Voting Advice*, 87 Fed. Reg. 43,168, 43,175 (July 19, 2022) (2022 Amendments).

B. Statutory and Regulatory Scheme

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

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

C. Proceedings Before the Commission

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

In July 2020, by a 3-1 vote, the Commission adopted amendments to its proxy rules. 85 Fed. Reg. 55,082. The 2020 Rules codified the Commission's view that proxy voting advice by PVABs generally constitutes a "solicitation" under the rules. *Id.* at 55,154. The 2020 Rules also conditioned PVABs' exemption from the proxy rules' information and filing requirements on three new requirements. To qualify for either exemption, PVABs were required to make certain conflicts-of-interest disclosures and to adopt policies and procedures reasonably designed (1) to make their advice available to the registrant that is the subject of the advice at or before the time the advice is

disseminated to their clients and (2) to provide clients a mechanism by which they can reasonably be expected to become aware of any written response the registrants might subsequently file. *Id.* The Commission also adopted two non-exclusive "safe harbor" provisions to provide PVABs "greater legal certainty" in complying with the notice-and-awareness conditions. *Id.* at 55,113. Finally, in an attempt to clarify its application, the 2020 Rules added explanatory Note (e) to Rule 14a-9 giving specific examples of material misstatements or omissions related to proxy voting advice. *Id.*[1]

In adopting the 2020 Rules, the Commission recognized that "introducing new rules into a complex system like proxy voting . . . could inadvertently disrupt the system and impose unnecessary costs if not carefully calibrated." *Id.* at 55,107. As originally proposed in 2019 (by a 3-2 vote), the rules would have required that PVABs give registrants an opportunity to review and provide feedback on their advice *before* disseminating it to their clients and include in their advice a hyperlink to the registrant's response. *Id.* at 55,102, 55,103-05. But the Commission acknowledged in 2020 that investors (including PVABs' own clients) overwhelmingly opposed that aspect of the proposal. Many argued that those requirements would adversely affect the cost, timeliness, and independence of proxy voting advice and were not justified by any credible evidence that errors in proxy voting advice occur frequently. *Id.* at 55,103-04. A majority of the Commission's Investor Advisory Committee ("IAC"), an advisory body established by Congress in 2010 that represents a range of investor views (15 U.S.C. 78pp), similarly argued that although "some corporate managers and their lawyers and trade group representatives . . . claim problems with proxy advisors exist," they "provide no reliable basis for concluding material problems actually do exist" or that "government-mandated regulations of the type proposed" are justified. Matro Decl. Ex. 1 at 4, 5 (IAC Recommendation).

[1] The amendments became effective on November 2, 2020, but the Commission set a compliance date of December 1, 2021, for the new exemption conditions. 85 Fed. Reg. at 55,082, 55,122.

The Commission attempted to mitigate these concerns by replacing the proposed requirements with the notice-and-awareness conditions. The Commission concluded that the conditions would impose "lower compliance costs and result in fewer disruptions for [PVABs] and their clients" and would "substantially address, if not eliminate altogether," the "objectivity and timing" concerns raised by the proposed advance review mechanism. *Id.* at 55,137, 55,138-39; *see also id.* at 55,112, 55,133. On the benefit side, the Commission acknowledged that commenters disagreed about the incidence of errors in proxy voting advice and that the empirical evidence on both the quality of such advice and the influence it has on voting decisions was "inconclusive." *Id.* at 55,103-04, 55,107, 55,124-25. But the Commission found that the conditions would nonetheless "facilitat[e] investor access to enhanced discussion of proxy voting matters" and thus "improv[e] the mix of information available to shareholders." *Id.* at 55,107, 55,110. And it made a policy judgment that these informational benefits justified any potential adverse effects. *Id.* at 55,142.

In voting against the 2020 Rules, one Commissioner argued that the notice-and-awareness conditions "still raise all of the infirmities that investors identified" with the proposed requirements, including that they "increase issuer involvement" and "impose significant new costs and delays" despite "almost universal opposition from investors, the supposed beneficiaries . . . who have emphatically stated that no rule is needed or wanted." Matro Decl. Ex. 2 (Lee 2020 Dissent). And she disagreed with the assumption that "the current mix of information is incomplete without more input from issuers." *Id.*

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

investment advisers in complying with their proxy voting responsibilities. *Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, 84 Fed. Reg. 47,420 (Sept. 10, 2019).[2]

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

On June 1, 2021, the new Chair of the Commission issued a statement directing the staff to consider whether the Commission should revisit the policy choices in the 2020 Rules. *See* Chair Gary Gensler, *Statement on the Application of the Proxy Rules to Proxy Voting Advice* (June 1, 2021), perma.cc/AZK5-6LND.[3] After such consideration, on November 17, 2021, the Commission proposed (by a 3-2 vote) to rescind the notice-and-awareness conditions and to delete Note (e) to Rule 14a-9, while retaining the codification of the Commission's interpretation of solicitation and the conflicts-disclosure condition. *Proxy Voting Advice*, Securities Exchange Act Rel. No. 93595, Nov. 17, 2021, published at 86 Fed. Reg. 67,383 (Nov. 26, 2021) (2021 Proposed Amendments). The comment period for the proposal closed on December 27, 2021. *Id.* at 67,383.

After considering the comments received, on July 13, 2022, the Commission adopted the proposed amendments (by a 3-2 vote). 87 Fed. Reg. 43,168; *see also* Matro Decl. Exs. 3-5 (statements

[2] The 2020 Rules were challenged by Institutional Shareholder Services Inc. ("ISS"), a leading PVAB. *See Institutional Shareholder Services, Inc. v. SEC*, No. 1:19-cv-3275 (D.D.C.). ISS argued, among other things, that Section 14(a) of the Exchange Act does not give the Commission authority to regulate proxy voting advice and that the notice-and-awareness conditions were arbitrary and capricious under the APA and violated the First Amendment. Oral argument on the parties' cross-motions for summary judgment is pending.

[3] On the same day, the staff of the Commission's Division of Corporation Finance issued a statement that the Division would not recommend enforcement action to the Commission based on the 2020 Rules during the period in which the Commission considered further regulatory action. 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(l), 14a-2(b), 14a-9* (June 1, 2021), perma.cc/GH2B-YSJ4. In a separate case brought by Plaintiffs, this Court ruled that the staff statement, combined with the Chair's statement and a related filing in the ISS litigation, constituted final agency action unlawfully suspending the compliance date of the 2020 Rules. *See* Mem. Op., *Nat'l Ass'n of Mfrs. v. SEC*, No. 7:21-cv-183-DC (Sept. 28, 2022).

of supporting commissioners). The Commission explained that the 2020 Rules "reflected an effort to balance competing policy concerns," including the Commission's interests in "facilitating more informed proxy voting decisions" and in avoiding "adverse effects on the cost, timeliness, and independence of proxy voting advice." *Id.* at 43,169-70. The Commission "revisited" its assessment of the competing concerns, however, and struck a different "policy balance." *Id.* It was not persuaded that there are systemic inaccuracies in proxy advice, and it agreed with "the vast majority of PVABs' clients and investors that expressed views" that "the potential informational benefits" of the conditions "do not sufficiently justify the risks they pose to the cost, timeliness, and independence of proxy voting advice on which many investors rely." *Id.* at 43,175.

The Commission also concluded that Note (e) had exacerbated, rather than alleviated, legal uncertainty and should be deleted. *Id.* at 43,181. And the Commission rescinded the 2020 Supplemental Guidance adopted together with the notice-and-awareness conditions. *Id.* at 43,178. The Commission emphasized that it was not altering the definition of "solicitation" or the conflicts-disclosure condition from the 2020 Rules and that PVABs were still subject to liability under Rule 14a-9 for any misstatements or omissions of material fact in their proxy voting advice. *Id.* at 43,170.

ARGUMENT

I. The 2022 Amendments are reasonable and reasonably explained.

The APA's arbitrary-and-capricious standard is "narrow and highly deferential." *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 449 (5th Cir. 2021) (quotation omitted). A court applying it "simply ensures that the agency . . . has reasonably considered the relevant issues and reasonably explained the decision." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). "If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Clean Water Action v. EPA*, 936 F.3d 308, 312 (5th Cir. 2019)

(quotation omitted). "Even a decision based on an administrative record of less than ideal clarity will be upheld if the agency's path may reasonably be discerned." *Id.* (quotation omitted).

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

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

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

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

Plaintiffs do not dispute that the notice-and-awareness conditions could have increased the cost of proxy voting advice. *See id.* at 43,186 ("PVABs may pass through a portion of the costs of modifying, developing, or maintaining systems to satisfy the [conditions]"); *id.* at 43,171, 43,175 & n.118 (crediting commenter's concern that the conditions would "increase compliance costs which get passed on to clients"); 2020 Rules, 85 Fed Reg. at 55,139 (noting that clients could face "higher fees for proxy advice").[4] Rather, they incorrectly argue (at 14-15, 18-19) that the Commission offered "*no* explanation" for its conclusion that the conditions could also adversely affect the timeliness and independence of proxy voting advice and that there can be no rational explanation because the conditions did not require any action until after PVABs delivered their advice.

But the Commission reasonably identified the basis for its concerns. The conditions required PVABs to provide their advice to each registrant at or prior to the time they delivered it to clients and, at a minimum, provide clients a mechanism to access each registrant's response. *See* 2020 Rules, 85 Fed. Reg. at 55,154. PVABs relying on the safe harbors may also have had to send "two separate notices" to clients regarding a registrant's intent to file and actual filing of a response. *Id.* at 55,114 n.381. Given that PVABs "may engage with hundreds of issuers regarding thousands of shareholder proposals during a critical shareholder season," the Commission rationally credited concerns that these "additional compliance burdens" could "disrupt[] the preparation and delivery of proxy voting advice" to PVABs' clients. 2022 Amendments, 87 Fed. Reg. at 43,171 & n.45, 43,175 & n.118 (quotation omitted). And it further noted that any resulting delays "could impair the ability of PVABs' clients to receive and process . . . advice sufficiently in advance" of the vote. *Id.* at

[4] *See also, e.g.*, Matro Decl. Ex. 6 at 2 (MFA Comment); Matro Decl. Ex. 7 at 3 (IAA Comment); Matro Decl. Ex. 8 at 2 (New York Comptroller Comment).

43,176 n.139. Contrary to Plaintiffs' assertion (at 15), it is entirely plausible that managing all of the required communications with registrants and clients could make it more difficult for PVABs to provide their advice in a timely manner. *Cf.* Hughes Decl. Ex. I, App. A at 7 (Nasdaq Comment) (indicating that up to 15% of surveyed companies may have acknowledged that the conditions could "create unnecessary delays or confusion"), perma.cc/5FY3-V84X.

Similarly, the Commission rationally credited widespread investor concern that forcing PVABs to facilitate registrants' communications to their clients risked compromising the independence of their advice as well as "investors' confidence in the integrity of such advice." 2022 Amendments, 87 Fed. Reg. at 43,189. Investors rely on PVABs for independent advice about how to vote their shares. 2022 Amendments, 87 Fed. Reg. at 43,175. Yet the notice-and-awareness conditions used that relationship as a mechanism to help disseminate the views of *registrants*—and only registrants—about proxy voting advice. *See, e.g.*, Matro Decl. Ex. 9 at 3-4 (NASAA Comment). The Commission shared concerns that this could have "tilt[ed] the playing field in favor of company management and create[d] unequal access to the proxy solicitation process because th[e] conditions do not require a PVAB to afford these opportunities to any other stakeholders." *Id.* at 43,171-72 & nn.43, 59-60, 43,175 & n.118 (quotation omitted).[5]

The Commission also shared the concern that PVABs "may feel pressure to tilt voting recommendations in favor of management more often, to avoid critical comments from companies that could draw out the voting process and expose the firms to costly threats of litigation." *Id.* at 43,175 & n.118 (quotation omitted); *cf.* Matro Decl. Ex. 4 (Lee 2022 Statement) (arguing that the

[5] *See also, e.g.*, Matro Decl. Ex. 10 at 1 (ICGN Comment) (conditions "provid[e] company management greater insight and control of the agents that investors hire"); Matro Decl. Ex. 11 at 3 (NASAA Comment) (conditions "still inordinately privilege the viewpoints of company management"; Matro Decl. Ex. 12 at 1 (US IIA Comment) (conditions "create[] a power imbalance, unfairly advantaging the perspectives of corporate management").

conditions "enhance[d] management's influence over proxy voting advice"). Contrary to Plaintiffs' assertions (14, 19), the concern that the conditions could have caused PVABs to "err[] on the side of caution in complex or contentious matters" is entirely plausible given that registrants are most likely to file a response—and thus trigger PVABs' obligation to alert their clients—when they disagree with the PVAB's recommendation. 2022 Amendments, 87 Fed. Reg. at 43,189.[6]

Plaintiffs contend (at 14) that the Commission's analysis is deficient because the Commission "agree[d]" with investors' concerns rather than articulating its own. *Id.* at 43,175. But by agreeing with those concerns, the Commission adopted them as its own. And the Commission's action must be upheld "if [its] path may reasonably be discerned." *Clean Water Action*, 936 F.3d at 312. Here, the Commission pointed to the specific comments, and the specific reasoning within those comments, that it found persuasive. *See, e.g.*, *Oakbrook Land Holdings, LLC v. Comm'r of Internal Revenue*, 28 F.4th 700, 712-13, 721 (6th Cir. 2022) (discerning agency's rationale from its citations to the record); *Aera Energy LLC v. FERC*, 789 F.3d 184, 192 (D.C. Cir. 2015) (discerning agency's rationale from the record). It thus based its reasonable predictive judgment on substantial evidence in the record. *See Nasdaq Stock Mkt. LLC v. SEC*, 38 F.4th 1126, 1142-43 (D.C. Cir. 2022) (upholding the Commission's reliance on comments to substantiate a potential future risk); *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (upholding agency judgment that "found support in various comments"). And while Plaintiffs may not think the risks specified by the

[6] The Commission's reasonable explanation of the risks to the timeliness and independence of proxy voting advice satisfied its obligation to "consider and respond" (Mot. 18) to commenters who argued that no such risks existed. *See, e.g.*, *Huawei*, 2 F.4th at 450 (APA requires only that the agency have "thought about commenters' objections and offered reasoned replies" (quotation and alteration omitted)); *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993) (an "agency's response to comments need only enable us to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did" (quotation omitted)). Nor must the Commission, in responding to dissenting Commissioners, do more than address any significant issues they raise (as it did here). *Contra* Mot. 20; *see infra* 16-18, 24-26; *cf. Thompson v. Clark*, 741 F.2d 401, 408-09 (D.C. Cir. 1984).

Commission will materialize, it is not the Court's role—nor that of Plaintiffs—to "substitute [its] judgment for that of the agency." *Fox*, 556 U.S. at 530 (quotation omitted); *see also Brackeen v. Haaland*, 994 F.3d 249, 357-58 (5th Cir. 2021).

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

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

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

Commenters in favor of retaining the conditions principally argued that they were justified by the prevalence of errors in proxy voting advice, citing their own experiences, anecdotal evidence, and certain studies or surveys. *See id.* at 43,173. But as the Commission noted, it found much of this same evidence to be inconclusive in 2020 and based its adoption of the conditions on a different rationale. *Id.* at 43,175-76 & n.127. It was thus reasonable for the Commission to conclude that the same evidence did not necessitate retaining the conditions now; to the contrary, "the error rate in proxy voting advice appears to be low." *Id.* at 43,175-76 & n.127, 43,187.[7]

[7] Numerous comments, including from investors subject to fiduciary obligations in exercising their voting authority, support this assessment. *See, e.g.*, Matro Decl. Ex. 12 at 2 (T. Rowe Price

For example, one study relied on by many opposing commenters actually showed that "only 0.90% of all registrants disputed a PVAB's proxy voting advice in supplemental filings in 2021, which is only a 0.11% increase" from 2020. *Id.* at 43,173, 43,175-76 n.127; *see also id.* at 43,187 (noting that these filings "represented less than one percent of the proxy materials filed by registrants that year"). And even these percentages "may not reflect the error rates in proxy voting advice, as the fact that a registrant raises a dispute regarding proxy voting advice in a supplemental filing does not necessarily indicate that an error exists in such advice." *Id.* at 43,175-76 n.127; *see also id.* at 43,172 n.58 (noting that "much of the registrant feedback [one institutional investor] had observed 'involve[d] differences of opinion'"). Similarly, two surveys relied on by opposing commenters were not "persuasive indicators of systemic inaccuracies . . . as neither survey identified any specific instances of errors in proxy voting advice." *Id.* at 43,175 n.127.

The Commission also explained that rescinding the notice-and-awareness conditions would not leave registrants without any ability to consider and respond to proxy voting advice. Neither the adoption of the conditions nor their rescission altered the pre-existing mechanisms issuers have long had to communicate with shareholders in the proxy process. Indeed, the Commission pointed to evidence that registrants have been able "to identify [purported factual or analytical errors in proxy voting advice] and respond using pre-existing mechanisms." *Id.* at 43,176. Moreover, the Commission observed that "leading PVABs have voluntarily adopted practices that provide their

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Comment) ("We have not seen any empirical evidence of widespread market abuse or failure that warranted the [notice-and-awareness] conditions."); Matro Decl. Ex. 13 at 1 (WSIB Comment) ("[T]here has been no evidence of a material 'error rate' in the research released by proxy advisory firms"); Matro Decl. Ex. 14 at 4 (OPERS Comment) ("OPERS . . . has never had any reason to believe that the advice or information it was purchasing was biased, misleading, or otherwise flawed."); Matro Decl. Ex. 15 at 3 (CalPERS Comment) (data in 2019 proposing release "confirms that company votes had an accuracy rate of 99.7%" and that "[t]here is hardly any evidence that registrants lose votes they would have won but for errors by a proxy advisor"); Matro Decl. Ex. 16 at 6 (Better Markets Comment) (discussing "vanishingly small" error rate).

clients and registrants with some of the opportunities and access to information that would have been required" under the 2020 Rules. *Id.* at 43,176; *see also id.* at 43,176-77 n.142 (noting that ISS "allow[s] any registrant to request a copy of its [benchmark advice] free of charge after ISS has disseminated the advice to its clients"); 2021 Proposed Amendments, 86 Fed. Reg. at 67,386-87 (describing ISS's and Glass Lewis's practices).

In their motion, Plaintiffs do not challenge the Commission's conclusion that there is no compelling evidence of systemic deficiencies in proxy voting advice. Instead, they contend (at 15-18) that the Commission disregarded its prior conclusion that PVABs' voluntary practices did not "suffice to achieve [its] goal of ensuring . . . timely access to a more complete mix of relevant information." 2020 Rules, 85 Fed. Reg. at 55,108. But contrary to Plaintiffs' assertions, the Commission did not find that PVABs' voluntary practices rendered the conditions "unnecessary" to achieve that goal. *See* 2022 Amendments, 87 Fed. Reg. at 43,176-77, 43,189 (repeatedly acknowledging that PVABs' voluntary practices "do not replicate" the notice-and-awareness conditions). Rather, as discussed, the Commission was not persuaded that this goal sufficiently justified the conditions in the first place. *Id.* at 43,175. And because PVABs' voluntary practices provide at least "some" of the same benefits, the Commission explained that they further "reinforce[d]" its policy determination that the conditions "should be rescinded, especially when balanced against the risks that th[e] conditions present." *Id.* at 43,177.

Plaintiffs fail to establish that considering PVABs' voluntary practices in this limited respect was unreasonable. The Commission did not simply assume that PVABs would continue their voluntary practices. *Contra* Mot. 15. It acknowledged that it did not "know for sure whether these voluntary practices will continue" but explained that PVABs have "financial[]" and other "market-based" incentives to maintain such practices, that numerous investors and PVAB clients expected PVABs to maintain them, and that, in any event, it would "continue to monitor the PVAB market,"

including "changes in PVABs' policies and procedures" or "new entrants that do not adopt policies and procedures consistent with best practices," and would "take further action" if necessary. *Id.* at 43,177 & n.151, 43,187. Neither Plaintiffs' nor dissenting Commissioners' disagreement with that approach renders it unreasonable.

Similarly, Plaintiffs gain no traction by highlighting that ISS limits use of the advice that it shares with registrants (Mot. 16) or that the voluntary principles outlined by the Best Practices Principles Group ("BPPG") fall short of what the 2020 Rules would have required (Mot. 17), because, as discussed, the Commission never claimed otherwise. *See* 2021 Proposed Amendments, 86 Fed. Reg. at 67,386 (recognizing BPPG's principles are "recommend[ations]"); *id.* at 67,388 n.59 (recognizing ISS's restrictions "may inhibit a registrant's ability to adequately respond to ISS' proxy voting advice").[8] Nor was it "irrational" for the Commission (Mot. 15-16) to conclude that PVABs' voluntarily adopted practices are "less likely to adversely affect the independence, cost, and timeliness of proxy voting advice than any additional measures that PVABs may have needed to implement to satisfy the [notice-and-awareness] conditions." 2022 Amendments, 87 Fed. Reg. at 43,187-88. As the Commission reasonably explained, PVABs are likely to voluntarily implement only those practices that they believe generate benefits that exceed their costs. *Id* at 43,177.

The Commission also addressed comments pointing out that ISS has ended its practice of giving some U.S. registrants an opportunity to review draft advice and arguing that ISS is generally resistant to engaging with registrants. *See* Mot. 16, 19-20. The Commission acknowledged ISS's

[8] Plaintiffs misread the adopting release in asserting that the Commission itself concluded that PVABs "have met standards for 'communication with and feedback from registrants.'" Mot. 17 (quoting 87 Fed. Reg. at 43,184). The Commission was merely summarizing the BPPG Independent Oversight Committee's finding that member firms had "met the standards established in the BPPG's" voluntary principles. 87 Fed. Reg. at 43,184 & n.263. And those principles *do* address "communications with and feedback from registrants." *Id.*; *see* BPPG Independent Oversight Committee, Annual Report 2021 34, 42 (July 1, 2021), perma.cc/Q44E-CFH8.

policy change but explained that the notice-and-awareness conditions "do not require that PVABs provide registrants with draft proxy voting advice," so their rescission "should not impact the availability of such opportunities." 2022 Amendments, 87 Fed. Reg. at 43,176-77 n.142. The Commission reasonably found it "more relevant" that ISS continues to make its benchmark advice available to registrants "after" disseminating it to clients. *Id.*; *cf. id.* at 43,176 (noting that no commenters asserted that PVABs had altered any other practices described in the proposing release).

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

The Commission had no further obligation to respond to general concerns raised by commenters and a dissenting Commissioner about PVABs' willingness to engage with registrants because, even "if true" and "if adopted," these comments would not have "require[d] a change in [the] proposed rule." *Huawei*, 2 F.4th at 449. Plaintiffs' suggestion that the notice-and-awareness conditions were a "regulatory mandate for engagement" is incorrect. The conditions were intentionally designed *not* to require PVABs to "negotiate or otherwise engage in a dialogue with the registrant." 2020 Rules, 85 Fed. Reg. at 55,112. And as discussed, while the Commission reasonably explained why it thought PVABs were likely to maintain certain voluntary practices that provide at least some of the same benefits as the conditions, its decision to rescind the conditions did not rest on that prediction, let alone any finding that PVABs are generally "open to meaningful engagement with issuers," as Plaintiffs incorrectly suggest (Mot. 19-20).

3. No "more detailed justification" was required.

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

Plaintiffs argue that the Commission's analysis contradicts its prior determination that the notice-and-awareness conditions "do[] not create the risk that [proxy voting] advice would be delayed or that the independence thereof would be tainted ***as a result of a registrant's pre-dissemination involvement***" because the conditions "do[] not require" such involvement. 2020 Rules, 85 Fed. Reg. at 55,112 (emphasis added). But that statement does not address, let alone "flatly reject[]" (Mot. 13), investors' arguments in this rulemaking that the conditions may compromise the timeliness and independence of proxy advice *in other ways*. And regardless, the more-detailed-justification requirement is triggered by disregard of "*facts* and *circumstances*." *Fox*, 556 U.S. at 516 (emphases added). The policy concern that a PVAB's independence may be compromised by a mandate to help disseminate registrants' views is "not susceptible to the same type of verification or refutation by reference to the record as are factual questions." *Superior Oil Co. v. FERC*, 563 F.2d 191, 201 (5th Cir. 1977). It is thus different from the determinations of past or present fact in cases cited by Plaintiffs (at 12). *See Texas v. Biden*, 20 F.4th 928, 991 (5th Cir. 2021)

(agency "failed to discuss . . . much less explain" prior "factual findings" regarding a policy's success in deterring noncitizens from remaining in the country); *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1139 (5th Cir. 2021) (agency "ignored" prior findings regarding disposable e-cigarettes).

Moreover, elsewhere in the 2020 release, the Commission explained that the conditions mitigated, but did not necessarily eliminate, risks to timeliness and independence. For example, the Commission stated that the conditions would "result in *fewer* disruptions for [PVABs] and their clients" and would not "*unduly* encumber[] the ability of [PVABs] to provide their clients with timely and reliable voting advice." 2020 Rules, 85 Fed. Reg. at 55,137 (emphases added). Similarly, it observed that the conditions "should *reduce* concerns that registrants will lobby proxy voting advice businesses for changes to recommendations," and would "*limit* the presence and *ameliorate* the possible effects" on PVAB independence. *Id.* at 55,139, 55,141 (emphases added); *cf. id.* at 55,138-39 (the conditions "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)). These assessments informed the Commission's judgment that the informational benefits of the conditions justified any potential adverse effects. *See, e.g.*, *id.* at 55,137, 55,142.

In this rulemaking, the Commission weighed the potential risks and corresponding benefits differently in light of comments from investors raising specific concerns about the notice-and-awareness conditions as adopted, as well as its own policy views. And it provided the "reasoned explanation" that *Fox* requires for recalibrating the policy balance it struck in 2020. *See supra* 11-18.

B. The Court lacks jurisdiction to consider Plaintiffs' challenge to the deletion of explanatory Note (e), which in any event is without merit.

Rule 14a-9 prohibits misstatements or omissions of "material fact" in proxy solicitations. 17 C.F.R. 240.14a-9. Rule 14a-9's explanatory note, which is not part of the operative rule text, sets forth a list of "examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of" the rule. *Id.* Note (e) added to this list "[f]ailure to disclose

material information regarding proxy voting advice . . . , such as the [PVAB's] methodology, sources of information, or conflicts of interest." 2020 Rules, 85 Fed. Reg. at 55,155. Plaintiffs challenge the deletion of this Note, but that deletion was not final agency action and Plaintiffs lack standing to challenge it. *See Louisiana v. U.S. Army Corps of Eng'rs*, 834 F.3d 574, 584 (5th Cir. 2016) (final agency action is a "jurisdictional prerequisite").

Note (e) was intended to "clarify the potential implications of Rule 14a-9 for proxy voting advice" and did not "change[] its application or scope." *Id.* at 55,121; *see also id.* at 55,140; 2022 Amendments, 87 Fed. Reg. at 43,180-81. Thus the Note's deletion does not fall within any of the "five categories" of "agency action" under the APA. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004) (citing 5 U.S.C. § 551(13)). And even if it did, it does not "determine 'rights or obligations' or give rise to 'direct and appreciable legal consequences.'" *Louisiana*, 834 F.3d at 582 (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)). Moreover, the Supreme Court has made clear that "standing is not dispensed in gross" but needs to be established for "each claim [a plaintiff] seeks to press." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quotation omitted). Yet Plaintiffs do not even assert—let alone establish through "specific facts"—that they face a "certainly impending" injury from the deletion of an explanatory note that they concede had no legal force or effect. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 412 (2013) (quotation omitted).

In any event, Plaintiffs' challenge fails on the merits. The Commission reasonably concluded that Note (e) had not accomplished its intended purpose. Rather, it had "created a risk of confusion" in at least two ways. 2022 Amendments, 87 Fed. Reg. at 43,181. First, Note (e) was the only example that singled out "a particular type of solicitation," which "unintentionally could imply that proxy voting advice poses heightened concerns and should be treated differently than other types of solicitations under Rule 14a-9." *Id.* Second, "singling out a PVAB's methodology, sources of information, and conflicts of interest as examples of material information regarding proxy voting

advice unintentionally could suggest that PVABs have a unique obligation to disclose that information with their advice." *Id.* But Note (e) "was not intended to impose any such affirmative requirement." *Id.* As the Commission explained, just "like any other person that engages in a solicitation, a PVAB may, depending on the facts and circumstances, be subject to liability under Rule 14a-9 for a material misstatement of fact in, or an omission of material fact from, its proxy voting advice, including with regard to its methodology, sources of information, or conflicts of interest." *Id.* at 43,180.

Plaintiffs argue erroneously (at 20-21) that this explanation is "substantively identical" to Note (e) itself, and thus deleting the Note was "irrational." By referring to "material information . . . such as the [PVAB's] methodology, sources of information, or conflicts of interest," Note (e) implied that a PVAB's methodology and sources of information *are* material information (or, at a minimum, are likely to be). *See id.* at 43,181 (noting that Note (e) singles out such information as "examples of material information"). But the Commission's explanation cannot be construed to address whether such information is material and must be disclosed. Instead, it reaffirms that Rule 14a-9 prohibits *any* material misstatement or omission by *any* person engaged in solicitation—from which it follows that, *if material*, a misstatement or omission of fact with regard to methodology, sources of information, or conflicts of interest would be prohibited under the rule. *Id.* at 43,180-81.

Plaintiffs also contend that the Commission "addressed" any risk of confusion when it adopted the 2020 Rules. Mot. 22 (citing 85 Fed. Reg. at 55,121). But the Commission could reasonably conclude that the cited statements in the release adopting Note (e)—not in the text of the note itself—had not dispelled all confusion. Indeed, as the Commission observed, several commenters in this rulemaking interpreted Note (e), or expressed concern that Note (e) could be interpreted, to impose a unique obligation on PVABs to disclose their methodologies, sources of information, and conflicts of interest. 87 Fed. Reg. at 43,179 & nn.181-85. And confusion has not

been limited to Note (e)'s opponents. Despite similarly definitive statements in the proposing release affirming that PVABs are subject to Rule 14a-9 just like any other soliciting person, 86 Fed. Reg. at 67,390, several supporters of Note (e) argued that its proposed deletion would "weaken antifraud provisions" as applied to PVABs. 87 Fed. Reg. at 43,179 & nn.192, 195.

The record thus amply supports the Commission's conclusion that Note (e) was a potential source of confusion. And while it considered the concern that deleting Note (e) could also cause confusion (*see* Mot. 21), the Commission made a reasonable judgment that "returning to the *status quo* that existed before the addition of Note (e)" was the appropriate course. *Id.* at 43,181 n.222.

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

Plaintiffs urge the Court to set aside the rescission of the 2020 Supplemental Guidance if it sets aside the rescission of the notice-and-awareness conditions. For the reasons discussed above, the Court should affirm the rescission of the conditions. But regardless, Plaintiffs have not come close to establishing their independent standing to challenge the rescission of the guidance. The 2020 Supplemental Guidance addressed the obligations of investment advisers, not registrants. And unlike the notice-and-awareness conditions, it did not confer a benefit on registrants such as the right to receive a copy of proxy voting advice. As a result, Plaintiffs' standing is "substantially more difficult" to establish. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quotation omitted).

Here, the obstacles are insurmountable. The 2020 Supplemental Guidance discussed the circumstances in which an investment adviser that exercises proxy voting authority on behalf of a client may have to consider registrants' responses to proxy voting advice in order to demonstrate that the adviser is making voting determinations in the client's best interest. 85 Fed. Reg. at 55,155-56. But existing guidance from 2019 also bears on these responsibilities, stating, for example, that advisers must "conduct a reasonable investigation into matters on which the adviser votes" and must "vote in the best interest of the client." 84 Fed. Reg. at 47,423. It further suggests that

advisers "consider policies and procedures that provide for consideration of additional information that may become available," including additional proxy materials filed by registrants. *Id.* at 47,424.

Plaintiffs' claim of injury thus rests on a speculative chain of events: (1) a plaintiff (or member) is the subject of proxy voting advice containing a factual or analytical error; (2) the plaintiff (or member) identifies the error and files a timely response; (3) despite the 2019 guidance, an investment adviser overlooks or disregards the response due to the rescission of the 2020 Supplemental Guidance; and (4) the investment adviser's failure to consider the response causes the adviser to vote against the registrant. This "highly attenuated chain of possibilities" is insufficient to confer standing. *Clapper*, 568 U.S. at 410; *see also Lujan*, 504 U.S. at 562 ("much more" is needed when standing depends on "choices made by independent actors not before the court[]").

In any event, Plaintiffs err in asserting (at 23) that the rescission of the 2020 Supplemental Guidance was "based entirely" on the rescission of the notice-and-awareness conditions. As Plaintiffs note, the Commission rescinded the guidance in light of the comments it received, which largely favored rescission. 2022 Amendments, 87 Fed. Reg. at 43,178. Many of the commenters argued that the guidance should be rescinded because it was "tied to" the conditions. *Id.* at 43,178 n.161. But commenters also argued that the guidance was "too prescriptive" and "could contribute to uncertainty and delays in voting" and that pre-existing guidance on the subject was "sufficient." *Id.* And the Commission agreed that existing guidance, including the 2019 guidance, in conjunction with advisers' fiduciary duty, was sufficient. *Id.* Plaintiffs do not explain why it was unreasonable to rescind the 2020 Supplemental Guidance for these additional reasons.

II. The 2022 Amendments are procedurally valid.

A. The Commission provided a sufficient opportunity for public participation.

Plaintiffs' claim that the Commission did not provide a meaningful opportunity for public comment lacks merit. The APA requires that an agency "give interested persons an opportunity to

participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. 553(b)-(c). It does not specify a minimum amount of time that agencies must provide. Here the Commission determined that a 30-day comment period was appropriate in light of the "targeted nature" of the rulemaking. 2022 Amendments, 87 Fed. Reg. at 43,173 n.71. And the comment period actually closed 40 days after the Commission issued the proposal on its website, and 31 days after it was published in the Federal Register.

In arguing that this amount of time was insufficient, Plaintiffs rely on non-binding authorities recommending at least a 60-day comment period as best practice. Mot. 24-25 & n.4. But under both Fifth Circuit and D.C. Circuit precedent, as long as a comment period is at least 30 days, it is generally sufficient to provide a meaningful opportunity to comment even on substantial rule changes. *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1117 (D.C. Cir. 2019); *Chem. Mfrs. Ass'n v. EPA*, 899 F.2d 344, 347 (5th Cir. 1990); *see also Fleming Cos., Inc. v. U.S. Dep't of Agric.*, 322 F. Supp. 2d 744, 764 (E.D. Tex. 2004) ("[A] thirty-day notice and comment period is sufficient."), *aff'd* 164 F. App'x 528 (5th Cir. 2006); *Conn. Light and Power Co. v. NRC*, 673 F.2d 525, 534 (D.C. Cir. 1982) (holding that a 30-day comment period was reasonable even though a "longer comment period might have been helpful" due to "the technical complexity of the regulations"); *cf. Coal. for Workforce Innovation v. Walsh*, 2022 WL 1073346, at *9 (E.D. Tex. Mar. 14, 2022) (holding that a 19-day comment period was not sufficient, but "a comment period of at least 30 days" would have been).

Plaintiffs object (at 24-25) that the comment period was "functionally" shorter than 31 days because it spanned two holidays. But courts do not subtract holidays (or weekends) from comment periods. *Cf. Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 102 (2015) ("Beyond the APA's minimum requirements, courts lack authority to impose upon an agency its own notion of which procedures are best" (quotations and alterations omitted)). And the comment period was functionally *longer* for Plaintiffs, because they received notice of the proposal, at the latest, one day after it was issued. *See*

NAM News Room, *SEC Reverses on Proxy Firm Rule* (Nov. 18, 2021) (Matro Decl. Ex. 17). Thus, as a practical matter, they had at least 39 days in which to file comments. *See Omnipoint Corp. v. FCC*, 78 F.3d 620, 629-30 (D.C. Cir. 1996) (considering comment period from the date challengers received notice); *cf. Pangea Legal Servs. v. DHS*, 501 F. Supp. 3d 792, 820 (N.D. Cal. 2020) (emphasizing that the proposed rule was not "previously published in any form" in assessing the sufficiency of a 30-day comment period that spanned holidays). Plaintiffs neither explain why that period of time was inadequate under the circumstances nor cite any cases that would support such a finding.

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

And in the other cases, the findings rested on a combination of two factors. First, the significance and complexity of the rules prompted concern that a 30-day comment period was "already short." *Centro Legal de la Raza v. Exec. Office for Immigration Rev.*, 524 F. Supp. 3d 919, 955 (N.D. Cal. 2021) (rule made "extensive changes to the immigration court system that altered long-established policy and practice."); *see also Catholic Legal Immigration Network, Inc. v. Exec. Office for Immigration Rev.*, 2021 WL 3609986, at *1 (D.D.C. Apr. 4, 2021) (describing same rule in similar terms); *Pangea Legal Servs.*, 501 F. Supp. 3d at 798, 814, 819 (rule dramatically "change[d] asylum law," "upend[ing] decades of precedent"). Second, the courts also found it critical that the already short comment period overlapped with the comment periods of other significant, interrelated rules

in a way that made it impossible to meaningfully comment. *See Catholic Legal Immigration Network*, 2021 WL 3609986, at *3 ("[W]here the executive branch engages in a slew of interrelated rulemaking activity, 30 days is likely insufficient to provide a meaningful opportunity to comment on a highly technical and complex regulation."); *Centro Legal*, 524 F. Supp. 3d at 958, 962 (holding that the 30-day comment period "combined with the timing of" other "intertwined rules" that obscured the "true impact" of the rule "deprived [the public] of a meaningful opportunity to comment"); *Pangea Legal Servs.*, 501 F. Supp. 3d at 819-22 (finding notice likely insufficient "under the facts presented," which included a "staggered rulemaking process" involving "several other related proposed rules" that "deprived the public of meaningful opportunity to participate").

This rulemaking has neither of those features. Unlike the highly complex and disruptive rules above, the 2022 Amendments rescinded a few discrete proxy rule provisions that were recently adopted. The policy question before the Commission was a narrow one: whether concerns raised by investors about the newly adopted provisions counseled in favor of rescinding them. The Commission reasonably concluded (and Plaintiffs do not contest) that there were no significant reliance interests at stake. 2022 Amendments, 87 Fed. Reg. at 43,177, 43,188. And unlike in *Centro Legal*, *Catholic Legal Immigration Network*, and *Pangea Legal Services*, the public was not forced to comment on multiple interrelated rules simultaneously, let alone interrelated rules that obscured the implications of the 2022 Amendments.

Plaintiffs' argument thus boils down to the fact that the 2022 Amendments had a shorter comment period and generated fewer comments than the 2020 Rules. Mot. 25-26. But neither of the cases they cite suggests that such a comparison, standing alone, could be dispositive here. In *North Carolina Growers' Association*, the agency provided only 10 days—well below the recognized minimum—to comment on the repeal of regulations that were adopted after a 60-day comment period. 702 F.3d at 770. In *Becerra*, the discrepancy in comment period was also much starker—30

days for repeal versus 120 days for adoption—*and* the agency refused to consider substantive comments. 381 F. Supp. 3d at 1176-77.

Moreover, the rulemakings compared in these cases had the same scope, thereby permitting an apples-to-apples comparison. Not so here. *See* 2022 Amendments, 87 Fed. Reg. at 43,173 n.71. The 2020 Rules were the first in decades to address the regulation of proxy voting advice, codifying for the first time the Commission's authority to regulate such advice under the proxy rules and thus confirming that Rule 14a-9's antifraud proscriptions apply. And they imposed an industry-wide conflicts disclosure standard. These important provisions generated significant commenter discussion in the prior rulemaking, *see* 2020 Rules, 85 Fed. Reg. at 55,089-90, 55,097-98, but were not revisited in this one. Many commenters in the prior rulemaking also focused on the proposed requirement that PVABs allow registrants to review drafts of their advice. *See id.* at 55,103-06.

Finally, and importantly, Plaintiffs fail to show any prejudice. *See* 5 U.S.C. 706. Lack of adequate notice and comment is harmless if "it is clear that [the deficiency] did not prejudice the petitioner." *City of Arlington v. FCC*, 668 F.3d 229, 244 (5th Cir. 2012) (quotation omitted). Here, Plaintiffs plainly received notice of the proposed rules, submitted extensive comments, and met with the Chair and Commission staff regarding the rules. The Commission also "received and considered comments from dozens of interested parties," which "raised the very issues now raised before this court," and it "considered [those issues] in the agency proceedings below." *Id.* at 244-45; *see also United States v. Johnson*, 632 F.3d 912, 931-32 (5th Cir. 2011) (no prejudice where agency "considered [challenger's] arguments and responded to them" in the rulemaking). Moreover, Plaintiffs "fail[] to identify any substantive challenges [they] would have made had [they] been given additional time." *Omnipoint Corp.*, 78 F.3d at 630; *see also Johnson*, 632 F.3d at 932 (similar); *cf. Centro Legal*, 524 F. Supp. 3d at 956 (highlighting declarations explaining why plaintiffs were unable to meaningfully comment). Any procedural deficiency is thus "plainly harmless." *City of Arlington*, 668 F.3d at 245.

B. The APA imposes no open-mindedness test, and in any event, Plaintiffs' claim that the Commission was close-minded is meritless.

Plaintiffs also claim that the Commission was not sufficiently "open-minded." Mot. 27. But the Supreme Court has rejected any "open-mindedness test" under the APA. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2385 (2020); *see also Biden v. Texas*, 142 S. Ct. 2528, 2547 (2022); *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 558 F. Supp. 3d 350, 367-68 (W.D. Tex. 2021). Except in narrow circumstances that Plaintiffs do not (and cannot) claim apply here, "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Texas*, 142 S. Ct. at 2547 (quotation and alteration omitted).

In any event, Plaintiffs' criticisms do not hold water. Plaintiffs incorrectly assert (at 27) that the statements by the Chair and staff on June 1, 2021, prove that the 2022 Amendments were "preordained." Those statements indicated that the Commission might reconsider *all* of the 2020 Rules. But in the end, the Commission adopted rules targeting only a subset of provisions, reflecting a good-faith effort to "strike a more appropriate balance." 2022 Amendments, 87 Fed. Reg. at 43,170. And even if the Chair had signaled an "*ex ante* preference for" rescinding the 2020 Rules, that "should not be held against the [2022 Amendments]." *Texas*, 142 S. Ct. at 2547. "It is hardly improper for an agency head to come into office with policy preferences and ideas, discuss them with affected parties, . . . and work with staff attorneys to substantiate the legal basis for a preferred policy." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2574 (2019). This is particularly true where, as here, the Chair provided only one of three votes needed to rescind the conditions.

Nor was it improper for the Chair and staff to meet with investor groups after announcing the staff's reconsideration. Mot. 27-28. Such meetings are permitted under the APA and serve important policymaking functions. *See, e.g.*, *Tex. Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 327 (5th Cir. 2001); *Sierra Club v. Costle*, 657 F.2d 298, 400-01 (D.C. Cir. 1981). Plaintiffs do not claim that they were denied a similar opportunity; indeed, NAM later met with the Chair and staff. AR-63,

AR-64 (Dkt. 17). Plaintiffs' insinuation (at 27) that the Commission sought to keep the June 11, 2021 meeting "secret" is baseless. Although agencies are not required to disclose pre-proposal meetings, *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977), the Commission disclosed the meeting, its participants, and subject matter as soon as it issued a proposed rule. 2021 Proposed Amendments, 86 Fed. Reg. at 67,385-86 & n.24. And the views of the meetings' participants are outlined in their public comments. *See* 2022 Amendments, 87 Fed. Reg. at 43,171-72.

Finally, contrary to Plaintiffs' assertion (at 28), the Commission fairly presented the arguments raised by commenters in favor of retaining the notice-and-awareness conditions, *id.* at 43,172-74, and responded to them at length, *id.* at 43,175-78.

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

If the Court finds any APA violation, it should remand without vacatur. "Remand, not vacatur, is generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Tex. Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389 (5th Cir. 2021). Here, there is a "serious possibility that the [Commission] will be able to remedy [any] failures"—including, if necessary, explaining its policy judgment in greater detail. *Id.*; *see also Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1049 (D.C. Cir. 2002) (vacatur inappropriate where it is not "unlikely" the agency "will be able to justify a future decision to retain the Rule").

CONCLUSION

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

Dated: October 21, 2022

Respectfully submitted,

/s/ Daniel E. Matro

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2022, I electronically filed the foregoing document using the Court's CM/ECF system, which will send notice to all the parties.

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