No. 22-51069

In the United States Court of Appeals for the Fifth Circuit

NATIONAL ASSOCIATION OF MANUFACTURERS
and NATURAL GAS SERVICES GROUP, INC.,

Plaintiffs-Appellants,

– v. –

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
and GARY GENSLER, in his official capacity as Chair of the SEC,
Defendants-Appellees.

On appeal from the United States District Court
for the Western District of Texas, Case No. 7:22-cv-163-DC
Hon. David Counts

UNNOPOSED BRIEF OF AMICUS CURIAE, THE SOCIETY FOR CORPORATE GOVERNANCE, IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Under Fifth Circuit Rule 29.2, the undersigned counsel certifies that The Society for Corporate Governance ("Society") is a non-profit organization (pursuant to Section 501(c)(6) of the Internal Revenue Code) that is based in New York, New York. The Society does not have any parent corporation and there is no publicly held corporation that owns 10 percent or more of its stock.

The undersigned counsel also provides the following supplemental statement of interested persons to fully disclose all those with an interest in this brief:

Amicus Curiae:

The Society of Corporate Governance

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Kathryn Z. Gonski

By: /s/ Kathryn Z. Gonski
Counsel for the Society of Corporate Governance

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AMICUS CURIAE'S IDENTITY, INTEREST, AND AUTHORITY TO FILE

Founded in 1946, the Society is a professional membership association of more than 3,600 corporate and assistant secretaries, in-house counsel, outside counsel, and other governance professionals who serve approximately 1,000 public companies of almost every size and industry.

The Society has a history of providing testimony and comment letters on behalf of the public companies that are the subject of proxy advisory firms (also known as proxy voting advice businesses ("PVABs")) since 2010. Based on our members' substantial experience in this area, the Society seeks to provide additional context in support of Plaintiffs-Appellants' assertion that proxy advisors have not been providing transparent, accurate, and complete information to their clients. *See* Plaintiffs-Appellants' Brief at 8-9. Indeed, the Society's specific comments on the prevalence of factual mistakes, omissions, and analytical flaws in PVAB reports, which were carefully weighed by the Defendant-Appellee, the Securities and Exchange Commission ("Commission"), when it adopted its 2020 rulemaking (*Exemptions From the Proxy Rules for Proxy Voting Advice*, 85 Fed. Reg. 55,082 (Sept. 3, 2020) ("2020 Rule"), were not adequately addressed by the Commission in its 2022 rulemaking (*Proxy Voting Advice*, 87 Fed. Reg. 43,168 (July 19, 2022)("2022 Rescission"). As

described below, the prevalence of such errors had spurred a bipartisan effort to impose modest regulatory oversight on the proxy advice industry, one that the Commission departed from in adopting the 2022 Rescission.

For these reasons, the Society seeks to file an *Amicus* brief in support of Plaintiffs-Appellants and urging reversal. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no persons other than the Society or its counsel contributed money to fund the preparation or submission of this brief. The Society has notified counsel for the parties in this case that it intends to file this Amicus Curiae in support of Plaintiffs-Appellants, and there is no opposition to the filing.

INTRODUCTION

Over the last decade and more, the Society, public company issuers, and other business groups have raised numerous concerns about PVAB research and business practices – from conflicts of interest, to the need for a pre-publication review by issuers to ensure accuracy, to the PVABs' lack of transparency in how their voting policies are created and applied, to repeated factual mistakes and inaccuracies in proxy reports, to the inability of corporate officials to review reports on their companies without paying for them, to the lack of effective SEC regulation or oversight, to the largest proxy advisor's aggressive practice of soliciting companies to purchase its consulting services or pay other fees in order to "fix" mistakes. The accuracy and

completeness of proxy advice research is closely followed by U.S. public companies as an estimated three quarters of their shares are managed by pension funds, mutual funds, and other institutional investors, many of whom are PVAB clients. Proposed 2019 Rule, 84 Fed. Reg. at 66,519.

The Commission, in adopting its 2020 Rule following a robust regulatory process, repeatedly cited concerns about the accuracy, transparency, and completeness of PVAB research (and the importance of allowing companies to respond to PVAB reports) as among the primary reasons for its rulemaking. 2020 Rule, 85 Fed. Reg. at 55,102.

In response to these concerns about research quality as well as the SEC's recognition of the value of corporate feedback, the Commission's 2020 Rule included a modest issuer-engagement mechanism as a condition to the PVABs' exemption from the SEC's more extensive proxy solicitation rules, which apply to companies and activist investors. Under these conditions (codified as Rule 14a-2(b)(9)(ii)), PVABs were required to: (1) allow all companies that are the subject of their voting advice to be able to access that advice prior to or at the same time as the advice is disseminated to clients; and (2) provide a mechanism for proxy advice clients to access any response that the issuer provides to the voting advice. However, these engagement provisions were not as robust as those included in the Commission's 2019 Proposed

Rule, which would have required proxy advice businesses to provide public companies "a limited amount of time to review and provide feedback on the advice **before** it is disseminated to the business's clients" (emphasis added). In the 2020 rulemaking release, the SEC said it opted not to mandate an advance review process after PVAB clients raised concerns about the "timing and the risk of affecting the independence of the [proxy voting] advice." In response, the SEC determined that PVABs could provide a simultaneous review process whereby their clients and companies would receive final reports at the same time. 85 Fed. Reg. at 55,112. While the Society and other organizations were disappointed that the SEC had materially watered down its 2019 engagement proposal, the Society was encouraged that the SEC had recognized the importance of proxy research accuracy and completeness and the need for a corporate feedback mechanism.

In a surprising reversal, the Commission failed to give this modest compromise an opportunity to take effect. In November 2021, the Commission voted 3-2 to propose a new rulemaking. After a 31-day public comment period that overlapped with the December holidays, the Commission voted 3-2 in July 2022 to rescind the issuer engagement conditions and other key safeguards of the 2020 Rule. In the 2022 Rescission, the SEC primarily relied on the concerns about independence that PVAB clients had raised about the advance review mandate in the 2019 Proposed Rule (that was not included in the final 2020 Rule) but did not adequately address the corporate

concerns about research accuracy, transparency, and completeness that the Society has raised over the last 10 years, and which were cited by the Commission just two years earlier.

In adopting the 2020 Rule, the Commission concluded that the issuer engagement process was necessary to ensure research accuracy, transparency, and completeness. As the Society will explain below, the 2022 Rescission ignored these factual findings when rescinding those key engagement innovations in the 2020 Rule. As the U.S. Supreme Court explained in *FCC v. Fox Television Stations*, Inc., 556 U.S. 502, 515 (2009), an agency that wishes to change a rule or policy – where the "new policy rests upon factual findings that contradict those which underlay [the] prior policy," -- must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *See* Plaintiffs-Appellants Brief at 24-25. The Commission failed to meet this burden under Administrative Procedure Act ("APA"), relied on PVAB client concerns that were inapplicable to the 2020 Rule, and reached a regulatory conclusion that ran counter to the extensive evidence shared with the agency by the Society and other organizations regarding PVAB research errors and omissions. Accordingly, the Court should reverse the District Court's decision with instructions to vacate the 2022 Rescission.

ARGUMENT

I. THE 2022 RESCISSION FAILED TO ADDRESS THE WIDESREAD CONCERNS ABOUT FLAWED PVAB RESEARCH PRACTICES THAT THE SEC CONSIDERED BEFORE ADOPTING ITS 2020 RULE

A. The Society Has Long Documented the Errors and Omissions in PVAB Research.

For more than a decade, the Society has documented the concerns that public companies have voiced about inaccurate, misleading, or incomplete PVAB research and shared those views with the Commission and Congressional lawmakers. Often, public companies are hesitant to complain publicly about PVAB errors, in part because of fear of retaliation during future proxy seasons, but these companies do regularly share their concerns with the Society.

During the Obama administration, the Commission announced its intent in 2010 to update its rules governing the proxy voting process. In particular, the Commission raised "concerns about the role of proxy advisory firms," including apparent "conflicts of interest" and a "lack of accuracy and transparency in formulating voting recommendations." Release No. 34-62495, *Concept Release on the U.S. Proxy System* at 114, 118 (July 2010). In her remarks on the Concept Release, then-Chair Mary Schapiro observed that: "Both companies and investors have raised concerns that proxy advisory firms may be subject to undisclosed conflicts of interest, may fail to conduct adequate research, or may base recommendations on erroneous or incomplete facts." Chair Mary L. Schapiro, Opening Statement at the SEC Open Meeting

(July 14, 2010).

In response, the Society (which was then known as the Society of Corporate Secretaries and Governance Professionals) submitted a comment letter that discussed our members' concerns about proxy advisory firms' influence on voting outcomes, PVAB conflicts of interest, factual errors/inaccuracies, application of "one-size-fits-all" policies, and the lack of transparency in their voting recommendations. The letter also included member survey data and anecdotes on proxy advice firms' proxy voting influence, factual and/or analytical errors that supported their vote recommendations, and timing challenges for those companies that were (at that time) provided an opportunity to review ISS proxy reports. That letter reported that 65% of Society survey respondents said their companies had received a PVAB vote recommendation that was based on materially inaccurate or incomplete information. One quarter of the respondents reported inaccurate or incomplete information on several occasions. *See* Society Letter on the Concept Release on the U.S. Proxy System, File No. S7-14-10 (Proxy Advisory Firms) (Dec. 27, 2010).

The Society continued to participate in the bipartisan legislative and regulatory review process that followed. In June 2013, Darla C. Stuckey, who was then the Society's Senior Vice President, Policy & Advocacy, testified before the U.S. House Financial Services Committee's Subcommittee on Capital Markets. In her testimony, Ms. Stuckey explained: (i) the bases for and prevalence of outsourced

voting by institutional investors; (ii) the lack of proxy advisory firm regulation and accountability notwithstanding their significant role and influence in the proxy process and their corresponding influence on corporate behavior; (iii) proxy advisory firm conflicts of interest; (iv) proxy advisory firms' one-size-fits-all approach to vote recommendations; (v) and factual inaccuracies and analytical errors that form the bases for often significant vote recommendations without the opportunity for impacted companies to review the reports to identify and seek to correct errors. *See* Society Testimony, "Examining the Market Power and Impact of Proxy Advisory Firms," to the U.S. House Financial Services, Subcommittee on Capital Markets (June 5, 2013).

In December 2013, then-Chair Mary Jo White convened a Commission roundtable on proxy advisory services. In her welcoming remarks, Chair White explained that the roundtable would address the "transparency and accuracy of the recommendations made by proxy advisory firms," as well as potential conflicts of interest. She specifically noted her interest in learning about "the process by which proxy advisory firms formulate their voting positions and governance ratings, the transparency of the process, and whether and how additional transparency may be introduced into the process." Chair Mary Jo White, Welcoming Remarks at Proxy Advisory Services Roundtable (Dec. 5, 2013).

In May 2016, the Society and the National Investor Relations Institute

("NIRI") submitted a joint statement to the House Capital Markets Subcommittee in connection with a hearing on the bipartisan "Proxy Advisory Firm Reform Act of 2016," which was co-sponsored by then-Reps. John Carney (D-Delaware) and Sean Duffy (R-Wisconsin). The statement provided an overview of public company concerns with proxy advisory firms including, among other things, processes that would enable issuers to identify and correct factual errors underlying the firms' vote recommendations, and provisions to address conflicts of interest.

In December 2017, the Society submitted a letter to then-U.S. House Speaker Paul Ryan and Minority Leader Nancy Pelosi in support of H.R. 4015, the "Corporate Governance Reform and Transparency Act." The bill, which passed the U.S. House with bipartisan support in a 238-to-182 vote, would have required proxy advisory firms to register with the SEC; have sufficient staff to support accurate voting recommendations; implement procedures allowing companies sufficient time to receive and respond to vote recommendations before they are finalized and transmitted to PVAB clients; and employ an ombudsman to address complaints about the accuracy of information used in making vote recommendations. *See* Congress.gov, *H.R. 4015, Corporate Governance Reform and Transparency Act of 2017* (115th Congress, 2017-18).

In June 2018, Ms. Stuckey, in her capacity as President and CEO of the Society, testified before the U.S. Senate Banking Committee at a hearing on corporate

governance legislation that included H.R. 4015. In her testimony, Ms. Stuckey explained the significant influence of proxy advisory firms in the proxy voting process, as well as problems with the accuracy of information/uncorrected errors underlying the firms' voting recommendations. Her testimony included details on proxy research errors, including an account of how one mid-cap transportation company was negatively impacted by repeated PVAB research errors regarding the company's executive compensation and engagement with investors.

In November 2018, in advance of a Commission Roundtable on the Proxy Process, the Society submitted a comment letter on proxy advisory firms that reiterated the issuer concerns that Ms. Stuckey mentioned in her Senate testimony. *See* Society Comment Letter on File Number 4-725 on Roundtable on the Proxy Process -- Proxy Advisory Firms (Nov. 9, 2018).

In February 2020, the Society submitted a comment letter in response to the SEC's 2019 Proposed Rule. *See* Society Comment Letter on File Number S7-22-19 (*Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*) (Feb. 3, 2020). That letter listed 36 examples of specific research errors and material omissions shared by public company members through a Society survey conducted in December 2019. In that survey, 134 members responded to the following question: "Are you aware of any factual errors, omissions of material facts, or errors in analysis in your proxy advisor recommendations with respect to your company in the

past three years?" Fifty-six corporate members, or 42% of respondents, answered yes, and most of them shared specific examples of those errors. Nineteen of those errors or omissions are summarized below:

- Errors in company director information are routine (e.g., incorrect current employment, number of outside boards, independence status, committee memberships/chairs, and failing state that a director was retiring).
- Incorrect statement that a company would have no lead independent director when the current lead director retired, even though the company stated in its proxy statement that it would appoint one at the board meeting immediately following the annual meeting.
- Incorrect number of shares outstanding (as of the company's record date) based on third-party data, instead of using correct number of shares found in the company's proxy statement.
- Incorrect non-GAAP financial information because the proxy advisory firm uses financial data from a third party that adjusts the data to "normalize" it.
- Incorrect statement that benchmarking targets for various components of company's executive compensation program were not disclosed when the proxy statement stated that company does not use benchmarking targets.
- Errors in the description of the company's equity compensation due to aggregating different types of equity with different terms into one category.
- Repeated errors year after year on the terms of the company's performance-based restricted stock.
- In recommendations on shareholder proposals related to political activity and/or lobbying reporting, ISS understated what the company publicly discloses.
- Error in reporting that the CEO's pay increased year over year when it had actually decreased; ISS failed to update the report from the prior year's language. (This was corrected when pointed out during the advance review.)
- Error in the required number of anti-takeover votes.
- Inconsistent application year over year of ISS's own method on how to compute the value of CEO performance equity awards. (A few days before the annual meeting, ISS finally corrected this error and changed its recommendation from "Against" to "For" (for the Dodd-Frank Act mandated "say on pay" shareholder advisory votes that U.S. companies must hold on their executive pay practices)).
- Omitted facts that had been reported in the company's Form 8-K and Form 4

filings; the proxy advisor relied on media articles rather than issuer filings.

- Error in understanding why a performance target was lower than in previous year.
- Error concerning an outside directorship for one director.
- Error in reporting that a CEO served only for a partial year rather than a full year.
- Inaccurate information on director related-party transactions.
- Flawed ISS "say on pay" recommendation based on a failure to account for a one-time item, an incorrect statement that an EBITDA target was set below forecast, and a misunderstanding of a revised ROIC methodology. (After the company flagged these errors, ISS issued a revised report and changed its recommendation from "Against" to "For.")
- Incorrect fact about director attendance, leading to a change in the vote recommendation.
- Incorrect statement of the percentage of vote required for shareholders to call special meeting.

In its final 2020 Rule, the Commission cited the Society's comment letter dozens of times as part of its comprehensive rulemaking process, which attracted 650 separate letters from investors, corporate groups, companies, and other stakeholders. In addition, SEC commissioners and staff held 84 separate meetings or calls with interested parties as they were considering the 2020 Rule. Unfortunately, the 2020 Rule never took effect.

In December 2021, the Society submitted a comment letter in response to the SEC's proposed 2021 amendments (*Proxy Voting Advice*, 86 Fed. Reg. 67,383 (Nov. 26, 2021) to the 2020 proxy advisor rules. The Society reiterated the points made in its February 2020 comment letter, including the continuing problem of mistakes and material omissions in PVAB reports. The letter included a copy of the Society's February 2020 letter and accompanying member survey with the list of 36 examples

of mistakes or omissions. *See* Society Comment Letter on File No. S7-17-21 (Proxy Voting Advice) (Dec. 30, 2021). The Society's 2021 comment letter also explained why certain proxy firm industry-developed "oversight" and accountability standards and associated firm practices would be an inadequate remedy for the numerous research concerns that companies had raised with the Commission for more than a decade, which the 2020 Rule sought to address.

However, in concluding that the PVAB error rate "appears to be low," the Commission's 2022 Rescission ignored the detailed analysis and survey data from the Society and other organizations. 2022 Rescission at 43,187. Because the Commission did not sufficiently consider the evidence provided by commenters, its conclusion simply "ran counter to the evidence before the agency" and was therefore arbitrary and capricious under the APA. *See Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 658 (2007). For this reason alone, the Court should reverse the District Court's decision and provide instructions to vacate the 2022 Rescission.

B. In Attempting to Justify its Change in Position, the Commission's 2022 Rescission Mischaracterized Record Evidence and Failed to Rebut the Administrative Record Regarding PVAB Research Flaws.

In the 2022 Rescission, the Commission attempted to explain its regulatory reversal by discounting the factual record of proxy research errors and omissions that the Commission considered before finalizing the 2020 Rule. While the 2022

Rescission acknowledged the Society's 2019 survey, as well as separate survey reports submitted by the American Council for Capital Formation ("ACCF") and Willis Towers Watson (a compensation consultant), the 2022 Rescission rulemaking mischaracterized how this information was considered by the Commission in 2020. In Footnote 127, the 2022 Rescission attempted to rewrite the administrative record, asserting: "The Commission, however, did not rely on either survey as support for adopting the Rule 14a-2(b)(9)(ii) conditions. We also do not find those surveys to be persuasive indicators of systemic inaccuracies in proxy voting advice, as neither survey identified any specific instances of errors in proxy voting advice." 87 Fed. Reg. at 43,175-76.

As explained earlier, the SEC's assertion that "neither survey identified any specific instances of errors in proxy voting advice," is wrong, as the Society's February 2020 comment letter reported that 42% of public company survey respondents said they were aware of errors or omissions of material facts, and that letter listed 36 specific examples of errors or material omissions. The Society's comment letter did not disclose the names (or affiliations) of the survey respondents, as many Society members are fearful of PVAB retaliation if their companies publicly expose PVAB errors. Nevertheless, the Society's letter and survey provided sufficient details to inform the SEC about the variety and extent of research errors that public companies were noticing. Based on the Society's survey, as well as surveys from the ACCF and

other groups, the SEC was certainly on notice that errors and omissions were not an isolated problem.

The Commission also claimed that the SEC "did not rely on either [the Society or Willis Towers Watson] survey as support for adopting the Rule 14a-2(b)(9)(ii) conditions." To the contrary, there were repeated references throughout the 2020 rulemaking release that indicate that the Commission adopted the Rule 14a-2(b)(9)(ii) primarily because of stakeholders' concerns over the accuracy, transparency, and completeness of proxy research, as well as the importance of ensuring that PVAB clients would be notified if an issuer provided a response to correct the mistakes made.

While the incidence of PVAB research errors was not the sole factor that prompted the SEC to mandate issuer-engagement procedures, it is undisputed that issuer complaints about factual inaccuracies and omissions were among the important considerations that prompted the 2020 Rule. As the SEC explained in its overview of that rule, "We are also mindful that the efficacy and effectiveness of the proxy voting system depend on the ability of shareholders to obtain **transparent, accurate, and materially complete** information from an array of relevant parties before making their proxy voting decisions." 85 Fed. Reg. at 55,084 (emphasis added). Later in the release, the Commission again mentioned its objective of "en-

suring that shareholders have **transparent, accurate, and materially complete** information upon which to make their voting decisions." 85 Fed. Reg. at 55,085 (emphasis added). As the 2020 Rule further explained, "In light of the significant role proxy voting advice plays in the voting decisions of institutional investors and others, however, we also believe that the exemptions need to be fashioned both to elicit adequate disclosure and to enable proxy voting advice businesses' clients to have reasonable and timely access to **transparent, accurate, and complete information** material to matters presented for a vote. . . " 85 Fed. Reg. at 55,085 (emphasis added).

In support of the issuer-engagement mechanism in the 2020 Rule, the Commission also cited the challenges issuers face in obtaining proxy advice reports (which are not filed publicly with the SEC) and getting errors or omissions corrected on a timely basis after investors start voting. As the Commission explained: "Without notice of the proxy voting advice business's recommendations, registrants are often unable to provide a response prior to votes being cast. Also, given the high incidence of voting that takes place very shortly after a proxy voting advice business's advice is distributed to its clients, without a mechanism by which clients can reasonably be expected to become aware of any response in a timely manner . . . votes may be cast on less complete information." 85 Fed. Reg. at 55,108.

While the PVABs and reform opponents tried to minimize corporate complaints about report accuracy, the SEC nevertheless concluded in the 2020 Rule that an issuer-engagement mechanism would be beneficial to public companies, PVAB clients, and other stakeholders because investors would receive "more complete and robust information" to inform their proxy voting decisions. As the SEC explained in its 2020 Rule:

> *Indeed, the principle that* ***more complete and robust information*** *and discussion leads to more informed investor decision-making, and therefore 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. Regardless of the incidence of errors in proxy voting advice,* ***we believe it is appropriate to adopt reasonable measures designed to promote 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 (emphasis added).

The 2022 Recission acknowledged the 2020 Rule's intent to provide more complete proxy research to investors but then disregarded this policy objective summarily. The Commission's reversal of its prior policy position and disregard for the ample evidence of proxy advice flaws without adequate explanation is another reason for setting aside the 2022 Recission as arbitrary and capricious.

C. The Society's Public Company Members Continue to Notice Errors and Omissions in PVAB Research.

The 2022 Rescission optimistically suggested that "any negative effects of rescinding the Rule 14a-2(b)(9)(ii) conditions will be mitigated, to some extent, by

existing mechanisms," and referenced several voluntary engagement channels overseen by the PVABs. 87 Fed. Reg. at 43,176. Of course, these voluntary mechanisms existed in 2019-20 when the Commission concluded that it was necessary to mandate an issuer engagement process. The 2022 Recission's reliance on these voluntary mechanisms is undermined by the reality that the largest PVAB has discontinued any mechanisms to mitigate errors in draft reports. ISS discontinued its advance review process for S&P 500 companies in January 2021 after suing the SEC in an attempt to invalidate the 2020 Rule. Glass Lewis, the second-largest proxy advisor, has never provided any companies with full draft reports.

The recent experiences of the Society's public company members suggest that many errors and omissions in PVAB research are still occurring. In a member survey in September 2022, 37% percent (44 out of 119 respondents) replied "yes" when asked if they "were aware of any factual errors, omissions of material facts, or errors in analysis in proxy advisor recommendations during the past two proxy seasons." Among members from S&P 500 companies, almost 44% reported they had to ask ISS to make a correction or clarification after a report was published. Thirty-seven of respondents said they engaged privately with their investors about these research errors or omissions, while 10 percent opted to incur the additional expense of making a supplemental proxy filing to set the record straight.

In response to this Society survey, public company members again described mistakes in compensation plan analysis, director qualifications and characteristics, CEO pay, officer pay, inaccurate descriptions of lawsuits against companies, and omissions of corporate disclosures on cybersecurity or shareholder engagement. Here are some of the examples provided by Society members in September 2022:

- Mistakes related to executive compensation plans:
  - failure to understand compensation plan
  - mistake on amount (and incorrect calculations of) CEO compensation
  - errors in the "burn rate" (for equity incentives)
  - errors in the terms of an award.
- Incorrect description of basic governance facts, such as bylaws, size of the board, including officers as board members, who sits on which committee, and gender of certain directors.
- Missed cybersecurity disclosures in the proxy statement.
- Incorrect description about virtual shareholder meeting practices (during COVID-19), leading to a negative recommendation against a board committee chair.
- Inaccurate information on directors' service on other public boards.
- Double-counted executive pay by combining the compensation of two executives and presenting it as one person's compensation.
- Included a lawsuit against the company that did not exist or described a lawsuit without noting that it had been dismissed.
- Overlooked the company's disclosure regarding shareholder engagement that the company conducted, which resulted in a negative PVAB recommendation on "say on pay."
- Errors in facts regarding shareholder proposals.
- Inaccurate description of stock performance after a stock split.
- Mischaracterized executive officer salary as increasing year over year when in fact the increase was due to an extra pay period in calendar year 2021 (which was footnoted in the proxy statement).

Of the Society members who reported errors or material omissions, 86% said they brought the mistakes to the attention of the proxy advisors. However, just 35% of respondents were able to get those errors or omissions addressed, while 26% were unable to persuade the PVABs to make the necessary corrections or clarifications. Another 28% reported that the proxy advisors agreed to make only partial corrections. Even in those cases where corrections were made, it was likely too late for some investors, as many PVAB clients use automated proxy voting systems that cast their ballots quickly after of the release of PVAB research. 85 Fed. Reg. at 55,108.

This Society survey indicated that corporate concerns about PVAB research accuracy have not diminished and further suggests that the SEC was justified when it adopted Rule 14a-2(b)(9)(ii) as part of the 2020 Rule. While this September 2022 survey was not part of the administrative record before the SEC when it adopted the 2022 Rescission, the survey results are consistent with the PVAB research concerns that the Society and other organizations have raised for the past decade, which prompted bipartisan legislation and the SEC's 2020 rulemaking.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's decision with instructions to vacate the 2022 Rescission.

CONSENT DECREE

I hereby certify that The Society has notified counsel for the parties in this case that it intends to file this Amicus Curiae in support of Plaintiffs-Appellants, and there is no opposition to the filing.

Dated: January 13, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing instrument has been served via the Court's ECF filing system in compliance with Rule 25(b) and (c) of the Federal Rules of Appellate Procedure, on January 13, 2023, on all registered counsel of record, and has been transmitted to the Clerk of Court.

/s/ Kathryn Z. Gonski
Counsel for The Society of Corporate Governance

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fifth Circuit Rule 29.3, Federal Rules of Appellate Procedure 29(a)(5) because this brief contains **4724** words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font, 14-point type face.

/s/ Kathryn Z. Gonski
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