**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

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| TENNESSEE REPUBLICAN PARTY; GEORGIA REPUBLICAN PARTY; NEW YORK REPUBLICAN STATE COMMITTEE, | ) | |
| Petitioners, | ) | |
| v. | ) | Nos. 16-3360/16-3732 |
| UNITED STATES SECURITIES AND EXCHANGE COMMISSION, and | ) | |
| MUNICIPAL SECURITIES RULEMAKING BOARD, | ) | |
| Respondents. | ) | |

**SECURITIES AND EXCHANGE COMMISSION'S**
**MOTION TO DISMISS FOR LACK OF JURISDICTION**

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## INTRODUCTION

Three state political parties seek review of a rule of the Municipal Securities Rulemaking Board (MSRB) and name the Securities and Exchange Commission as a respondent. Petitioners invoke this Court's jurisdiction by citing a provision of the Securities Exchange Act of 1934 that provides for direct appellate review of a "final order" of the Commission, but the Commission did not issue an order regarding the MSRB's rule. Rather, the rule went into effect by operation of law—by Congress's will—after the Commission did not act. The Commission did not act because Congress precluded it from using appropriated funds to finalize, issue, or implement an order regarding the disclosure of political contributions, and the MSRB's rule requires the disclosure of certain political contributions.

Since the jurisdictional provision of the Exchange Act requires the existence of a "final order" of the Commission, and the Commission did not issue such an order because Congress prohibited it from using appropriated funds to "finalize * * * any * * * order" of the kind that petitioner challenges here, this Court should dismiss the petitions for lack of jurisdiction. Moreover, because the same appropriations provision that prevented the Commission from issuing a "final order" may also be construed to preclude the Commission from using funds to defend the MSRB rule on its merits, the Commission requests that the Court hold briefing in abeyance pending the resolution of this motion.

## BACKGROUND

### A. Under the Dodd-Frank Act, rules proposed by self-regulatory organizations, such as the MSRB, are deemed approved if the Commission does not act on them.

Section 15B of the Securities Exchange Act of 1934 establishes the MSRB and charges it with regulating municipal securities brokers and dealers. 15 U.S.C. 78*o*-4(b). Congress added the regulation of municipal advisors to the MSRB's purview in 2010. Dodd-Frank Wall Street Reform and Consumer Protection Act, Title IX, Subtitle H, § 975, Pub. L. No. 111-203, 124 Stat. 1376, 1915–23 (2010). The MSRB is not a division or office of the Securities and Exchange Commission; it is an independent entity with its own staff and its own Board. Exchange Act Section 15B(b)(1), 15 U.S.C. 78*o*-4(b)(1); *see also* http://www.msrb.org.

The MSRB is authorized to propose rules regulating municipal securities and municipal advisors. These rules "shall be designed" to "prevent fraudulent and manipulative acts and practices," to "promote just and equitable principles of trade," and "to remove impediments to and perfect the mechanism of a free and open market in municipal securities." Exchange Act Section 15B(b)(2)(C), 15 U.S.C. 78*o*-4(b)(2)(C). The MSRB has proposed, and the Commission has issued, orders regarding these types of rules. *See* http://www.sec.gov/rules/sro/msrb.shtml# (listing orders).

The process for Commission review of proposed MSRB rules is governed by Exchange Act Section 19(b). 15 U.S.C. 78s(b); *see* Exchange Act Section 3(a)(26),

15 U.S.C. 78c(a)(26) (defining "self-regulatory organization" to include the MSRB "for purposes of" Section 19(b)). Before 2010, Section 19(b) did not address what would happen if the Commission did not act upon a proposed rule within a certain time period. 15 U.S.C. 78s(b)(2) (2006). Congress addressed this circumstance when it enacted the Dodd-Frank Act. Title IX, Subtitle A, § 916, 124 Stat. at 1833–35. Congress sought to "streamline SRO rule filing procedures by requiring the SEC to complete the process of reviewing and taking action on proposed SRO rules within [a] specified time frame." H.R. CONF. REP. 111-517, at 727 (Jun. 29, 2010); *see also Rules of Practice*, Rel. No. 63723, 76 FED. REG. 4066 (Jan. 24, 2011) (discussing Dodd-Frank and amending the Commission's rules to implement the statutory changes).

Under the current version of Section 19(b), an SRO such as the MSRB commences the review process by filing a proposed rule change with the Commission, which triggers a requirement that the Commission "publish notice" of the proposal and give "interested persons an opportunity" to comment on the proposed rule change. 15 U.S.C. 78s(b)(1). Within 45 days "after the date of publication of a proposed rule change," the Commission "shall * * * by order, approve or disapprove the proposed rule change; or * * * institute proceedings under subparagraph (B) to determine whether the proposed rule change should be disapproved." Exchange Act Section 19(b)(2)(A)(i), 15 U.S.C. 78s(b)(2)(A)(i). "A proposed rule change shall be deemed to have been approved by the Commission, if * * * the Commission does not approve or disapprove the proposed rule change or begin proceedings under

subparagraph (B) within the period described in subparagraph (A)." Exchange Act Section 19(b)(2)(D), 15 U.S.C. 78s(b)(2)(D).

### B. In appropriations legislation for 2016, Congress precluded the Commission from using funds to finalize, issue, or implement orders regarding the disclosure of political contributions.

For the current fiscal year, Congress enacted appropriations legislation that contains language restricting the Commission's authority to take certain actions regarding the disclosure of political contributions. In the 2016 Appropriations Act, Congress stated that "[n]one of the funds made available" by the Act could be used by the Commission "to finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions, contributions to tax exempt organizations, or dues paid to trade associations." Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. O, Title VII, § 707, 129 Stat. 2242, 3029–30. President Obama signed the statute into law on December 18, 2015.[1]

### C. The MSRB submitted a proposed rule, which was deemed approved by operation of law pursuant to Section 19(b)(2).

The MSRB submitted proposed amendments to MSRB Rule G-37 on December 16, 2015. *Notice of Filing of a Proposed Rule Change*, 80 FED. REG. 81710

[1] The Appropriations Act also states that "none of the funds provided in this Act, provided by previous appropriations Acts to the agencies or entities funded in this Act that remain available for obligation or expenditure in fiscal year 2016, or provided from any accounts in the Treasury derived by the collection of fees and available to the agencies funded by this Act, shall be available for obligation or expenditure through a reprogramming of funds that * * * increases funds or personnel for any program, project, or activity for which funds have been denied or restricted by the Congress." Appropriations Act, Div. E, Title VI, § 608, 129 Stat. at 2465.

(Dec. 30, 2015). The MSRB originally proposed—and the Commission approved—Rule G-37 in 1994. *See Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995) and *Wagner v. FEC*, 793 F.3d 1, 16–17 , 26 (D.C. Cir. 2015) (en banc), *cert. denied sub. nom Miller v. FEC*, 136 S. Ct. 895 (2016) (describing Rule G-37). As the MSRB explained in its December 2015 filing, Rule G-37 addresses "'pay-to-play practices" in the municipal securities context, which typically involve a person or entity making political contributions as a quid pro quo for the receipt of government contracts. 80 FED. REG. at 81710. Rule G-37(e) requires that certain covered entities publicly disclose information about some political contributions to certain government officials. 80 FED. REG. at 81723.

The MSRB described its proposed amendments as part of a congressionally mandated "process of developing a comprehensive regulatory framework for municipal advisors and their associated persons." 80 FED. REG. at 81710. Included among the amendments was a proposal to extend Rule G-37(e)'s disclosure requirements to municipal advisors. *Id.* at 81723.

After the MSRB submitted its proposed rule change, the Secretary of the Commission, pursuant to Section 19(b)(1), published notice of the filing on December 23, 2015. *See* http://www.sec.gov/rules/sro/msrb/2015/34-76763.pdf. The notice, which consists almost entirely of material prepared by the MSRB, appeared in the Federal Register on December 30. 80 Fed. Reg. at 81710. The

Commission received five comments regarding the MSRB filing. *See* http://www.sec.gov/comments/sr-msrb-2015-14/msrb201514.shtml.

The Commission did not approve or disapprove the proposed rule change, nor did it institute proceedings to determine whether to disapprove it, within the relevant time frame. *See* Exchange Act Section 19(b)(2)(A)(i), 15 U.S.C. 78s(b)(2)(A)(i); Exchange Act Section 19(b)(2)(E), 15 U.S.C. 78s(b)(2)(E). Accordingly, the proposed rule change was "deemed to have been approved by the Commission" on February 13, 2016. Exchange Act Section 19(b)(2)(D)(i), 15 U.S.C. 78s(b)(2)(D)(i). The Commission did not issue an order regarding the amendments to Rule G-37 and it did not publish any further notice regarding the rule. On February 17, 2016, the MSRB announced that the proposed amendments to Rule G-37 had been "deemed approved."

The Tennessee Republican Party filed a petition for review of amended Rule G-37, naming the Commission and the MSRB as respondents. Dkt. 1-1. The following day, the Georgia Republican Party and the New York Republican State Committee challenged the same MSRB rule (and also named the Commission and MSRB as respondents) in the Eleventh Circuit. *See Georgia Republican Party v. SEC*, No. 16-11656 (11th Cir. Apr. 13, 2016). The Eleventh Circuit transferred the case to this Court pursuant to 28 U.S.C. 2112, where it was docketed as No. 16-3732 and consolidated with this case.

## ARGUMENT

This Court lacks jurisdiction over the petitions for review because there is no Commission "order" or other "agency action" to review. The Commission did not act upon the MSRB's proposed rule, and consequently the MSRB rule was "deemed to have been approved" by operation of law, which means that there is neither a "final order" under the Exchange Act nor an "agency action" under the APA. The Commission did not act because Congress precluded it from doing so by denying it funds to issue an "order regarding"—*e.g.*, an order approving or disapproving—the MSRB's proposed rule. In similar circumstances, courts have dismissed for lack of jurisdiction. This Court should do the same here, particularly given the practical impediments to this Court's review created by the Appropriations Act's spending prohibition, including the absence of an agency rationale to review and the Commission's likely inability to expend funds to address the MSRB's rule on the merits.

### I. There is no jurisdiction under Section 25(a)(1) of the Exchange Act because the Commission did not issue a "final order."

Petitioners invoke this Court's jurisdiction by citing Section 25(a)(1) of the Exchange Act, which provides that a person aggrieved by "a final order" of the Commission may obtain review "of the order" by filing a petition for review in the appropriate court "within sixty days after the entry of the order." 15 U.S.C. 78y(a)(1). When the Commission approves or disapproves an SRO rule in a final order issued by

the Commission, Section 25(a)(1) is the appropriate and exclusive vehicle for judicial review because there is a "final order." *See, e.g., NetCoalition v. SEC*, 715 F.3d 342, 346–47 (D.C. Cir. 2013); *Domestic Secs., Inc. v. SEC*, 333 F.3d 239, 245–46 (D.C. Cir. 2003); *Blount*, 61 F.3d at 940.

But this review mechanism is unavailable here because there is no "final order." The Commission took no action on the MSRB rule because Congress used a funding restriction to preclude it from acting. And because the Commission took no action on that SRO rule filing, it was deemed approved by operation of law. In these circumstances, there is no jurisdiction to review under Section 25(a)(1).

### A. The approval by operation of law of the MSRB's amendments to Rule G-37 does not give rise to a "final order" that this Court has jurisdiction to review.

There is no reviewable agency order where the challenge is premised on the operation of a statutory "deemed granted" provision, such as Section 19(b)(2)(D) of the Exchange Act. In *Sprint Nextel v. FCC*, the D.C. Circuit considered whether a petition that went into effect by operation of law constituted a "final orde[r]" for appellate jurisdictional purposes. 508 F.3d 1129, 1131 (D.C. Cir. 2007), citing 28 U.S.C. 2342(1) and 47 U.S.C. 402(a).[2] Verizon requested that the FCC refrain (or "forbear") from applying certain regulations, which the FCC was required to do if

[2] While *Sprint Nextel* is not binding in this Circuit, its holding is directly on point and this Court frequently cites the D.C. Circuit's decisions for their persuasive value on administrative law issues. *E.g.*, *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 290–92 (6th Cir. 2015); *Howard v. Solis*, 570 F.3d 752, 756–57 (6th Cir. 2009); *Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 779–80 (6th Cir. 2008).

Verizon complied with various requirements. *Id.* at 1331, citing 47 U.S.C. 160(a). In the event that the FCC did not deny the request within a specified amount of time, the relevant statute commanded that the "'petition shall be granted.'" *Id.*, quoting 47 U.S.C. 160(c). As to Verizon's forbearance petition, the FCC deadlocked in its vote, it did not act within the time period, and Verizon's petition "'was deemed granted by operation of law.'" *Id.*

Several other telecommunications providers sought judicial review of the FCC's disposition of Verizon's request for forbearance, but the court dismissed their appeal because there was no "order" to review, which was a prerequisite for the invocation of the statutory provisions granting exclusive appellate review. The court explained that "[i]n those instances in which the [FCC] does not deny a forbearance petition, Congress has spelled out the legal effect: the petition 'shall be deemed granted.'" *Id.* at 1132, quoting 47 U.S.C. 160(c). The grant did "not result in reviewable agency action" because "Congress, not the [FCC], 'granted'" the request to forebear. *Id.* at 1132. When the FCC "failed to deny Verizon's forbearance petition within the statutory period, Congress's decision—not the agency's—took effect." *Id.*

The D.C. Circuit stated that its holding in *Sprint Nextel* was "compelled" by another relevant decision. *Id.* at 1132, citing *AT&T Corp. v. FCC*, 369 F.3d 554 (D.C. Cir. 2004) (per curiam). In *AT&T*, Verizon was subject to congressionally imposed restrictions that would expire unless the FCC extended them "by rule or order." *Id.* at 556. The FCC did not extend them, and AT&T, a competitor, filed a petition for

review of the FCC's "decision to permit the sunset to occur." *Id.* at 559. The court dismissed the petition, holding that AT&T had "incorrectly assume[d] that the decision whether to sunset the [relevant] safeguards lies with the FCC." *Id.* at 560. This assumption, the court explained, was "simply wrong" because it was "Congress"—not the FCC—that "made the decision to extinguish the protections of [the safeguards] *by operation of law*." *Id.* (emphasis in original).

The decisions in *Sprint Nextel* and *AT&T* should guide this Court because Section 19(b)(2) closely resembles the federal laws at issue in those cases. The Exchange Act's process for Commission review of proposed SRO rules provides that a "proposed rule change shall be deemed to have been approved by the Commission" if the Commission does not act on the proposed rule change within the relevant time period. 15 U.S.C. 78s(b)(2)(D). Notably, Section 19(b)(2) of the Exchange Act does not state that a proposed rule change will be deemed to have been approved "by a Commission order" if the Commission does not act. Congress knew how to create such language when it wanted to, such as in Section 25(d)(2) of the Exchange Act, which states that a Commission order denying registration to a clearing agency or disapproving a proposed rule change by such an agency "shall be deemed to be an order of the appropriate regulatory agency for such clearing agency." 15 U.S.C. 78y(d)(2). But it did not do so in Section 19(b)(2), and there is no final order here, which is crucial because jurisdiction under Section 25(a)(1) is premised upon the existence of an "order," similar to the provisions for judicial review of FCC decisions.

As in *Sprint Nextel* and *AT&T*, because the Commission did not act on the MSRB's proposed rule, it is Congress, not the Commission, that approved the rule. *Sprint Nextel*, 508 F.3d at 1132; *AT&T*, 369 F.3d at 560. Petitioner seeks review of the Commission's supposed "approval" of the MSRB's amendments to Rule G-37, Pet. at 1, but, as the D.C. Circuit rhetorically asked in *Sprint Nextel*, "where is the Commission 'order'"? 508 F.3d at 1131. There is none, which is why this petition should be dismissed for lack of jurisdiction.

### B. There is no "final order," and no jurisdiction here, because Congress used an appropriations provision to preclude the Commission from acting on the amendments to Rule G-37.

The reason for the Commission's inaction—the appropriations language barring the Commission from using funds to issue an order regarding the disclosure of political contributions—also demonstrates why this Court should dismiss for lack of jurisdiction. When comparable appropriations language has barred the issuance of an agency order, the Supreme Court and this Court have held that jurisdiction is lacking. *United States v. Bean*, 537 U.S. 71 (2002); *Mullis v. United States*, 230 F.3d 215 (6th Cir. 2000) (pre-*Bean* decision reaching the same result as *Bean*). *Bean* involved a statute that permitted felons who applied for relief from a prohibition on possessing firearms to seek judicial review of the ATF's "'denial'" of their applications. 537 U.S. at 74, quoting 18 U.S.C. 925(c). Congress, however, used an appropriations provision to prevent the ATF from using funds "'to investigate or act upon applications for relief from Federal firearms disabilities.'" *Id.* at 74–75. As a consequence, the ATF

returned Bean's application without acting upon it. *Id.* at 75. Bean sought judicial review under section 925(c), arguing that ATF's "failure to act constitute[d] a 'denial'" of the relief he sought. *Id.* at 75–76.

The Supreme Court unanimously disagreed, holding that "[i]naction by the ATF does not amount to a 'denial'" that could constitute agency action because "an actual decision by ATF on an application is a prerequisite for judicial review." *Id.* at 76. The Court held that the "broad authority" to grant or deny relief in the statute showed that "judicial review" cannot "occur without a dispositive decision by ATF," particularly because the APA's standard of review that a court would apply "is predicated upon ATF's dispositive decision" and "the 'arbitrary and capricious' test in its nature contemplates review of some action by another entity." *Id.* at 77. There was no dispositive decision or agency action because Congress used a funding provision to prevent such a decision or action from occurring. *See McHugh v. Rubin*, 220 F.3d 53, 58 (2d Cir. 2000) (interpreting the same statutory language and holding that when an appropriations provision bars an agency from spending appropriated funds, the "effect on the agency is obvious"—it cannot act "within the scope of the funding restriction").

The statutory context is nearly identical here. Congress prohibited the Commission from acting on the MSRB's rule by prohibiting it from using any funds to "finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions." Appropriations Act, § 707. The breadth of this language

means that there could be no "dispositive decision" by the Commission approving or disapproving the MSRB's amendments to Rule G-37(e) because they require municipal advisors to publicly disclose certain political contributions. *Bean*, 537 U.S. at 77.[3] Just as the judicial review provision in *Bean* required a "denial," the review provision here requires a "final order" as a "prerequisite for judicial review," and Congress precluded the Commission from entering such an order.

## II. The Commission has not taken any "agency action" under the APA.

Petitioners also cite the APA as a basis for review of the MSRB rule, but the APA turns on the existence of "agency action" and there was none here. Section 702 states that a person "adversely affected or aggrieved by agency action * * * is entitled to judicial review," and Section 706(2)(A) authorizes reviewing courts to "hold unlawful and set aside agency action" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 702, 706(2)(A). The APA defines "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. 551(13). Except for a "failure to act," which is addressed below, each "agency action"

[3] The Appropriations Act applies to a "rule, regulation, or order regarding *the disclosure* of political contributions," but it has no application to rules, regulations, or orders that are not regarding the disclosure of such contributions. Thus, while the Commission could not act on the MSRB's proposed rule, it instituted proceedings under Section 19(b)(2)(B) to consider a proposed FINRA pay-to-play rule, which does not have any public disclosure requirement. Order Instituting Proceedings, Release No. 34-77465, available at http://www.sec.gov/rules/sro/finra/2016/34-77465.pdf (Mar. 29, 2016).

requires an affirmative and discrete act "of an agency." *See* 5 U.S.C. 551(4), (6), (8), (10), (11); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004) (*SUWA*).

The reasoning of *Bean*, *Sprint Nextel*, and *AT&T* resolve the question of whether there has been an "agency action" under the APA just as they resolve the question of whether there has been a "final order" under Section 25. The Commission did not issue an order or take any other action that this court could "hold unlawful and set aside" under Section 706. 5 U.S.C. 706. The Commission did not approve the MSRB's rule; rather, Congress "spelled out the legal effect" of the Commission's failure to act on the MSRB's proposed rule change. *Sprint Nextel*, 508 F.3d at 1132–33; *see also DTCC Data Repository LLC v. CFTC*, 25 F. Supp. 3d 9, 16–18 (D.D.C. 2014) (applying *Sprint Nextel* and holding that there was no reviewable agency action under the APA when a rule proposed by a derivative clearing organization went into effect by operation of law). Nothing in the text of Section 19(b)(2)(D) suggests that when a proposed SRO rule is "deemed approved" by operation of law, it is also deemed an "agency action." Adopting such a reading would be erroneous for the same reasons that the Supreme Court and the D.C. Circuit rejected the assertion that agency inaction created a reviewable "order" or a "dispositive decision."[4]

The Commission's commencement of the Section 19(b) process does not mean that the eventual approval of the MSRB rule by operation of law is a reviewable

[4] The lack of "agency action" would also negate an APA claim brought in district court. The problem with petitioners' challenge is not the forum but the absence of any reviewable agency action.

agency action. Upon receiving the MSRB's proposed rule, the Commission, as required by Section 19(b)(1), published notice of the proposal, which mostly consists of material prepared by the MSRB, in the Federal Register. The Commission also posted the proposal on its website and invited submission of comments. These ministerial acts, which Congress commanded and which were not an attempt to finalize, issue, or implement a rule, regulation, or order, do not constitute the type of agency action that is suitable for review under the APA. Courts have held that neither a press release announcing that a petition is "deemed granted by operation of law" nor a public notice that a statute had expired constitute reviewable agency action. *Sprint Nextel*, 508 F.3d at 1131–32; *AT&T Corp.*, 369 F.3d at 561. Likewise, a notice of the receipt of a proposed SRO rule is not an agency action, let alone the type of "final agency action" that is a prerequisite for APA review. *See Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (a "'final'" agency action "must mark the 'consummation' of the agency's decisionmaking process").

The APA's inclusion of "failure to act" in the definition of "agency action" does not mean that the Commission's inaction, which triggers a statutory approval, is reviewable under the APA as if it were an affirmative agency action. The Supreme Court has held that "'failure to act'" means a failure to take an action that the agency was required to take, and that this language must be read in conjunction with Section 706(1), which authorizes courts to "'compel agency action unlawfully withheld.'" *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62–63 (2004), quoting 5 U.S.C.

551(13) and 5 U.S.C. 706(1). A claim under Section 706(1) "to compel agency action" can proceed only "where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Id.* at 63 (emphases in original). The "failure to act" language is not relevant here because petitioner does not seek to compel the Commission to act—and the Court could not order such agency action in any event because of the Appropriations Act. *See Mullis*, 230 F.3d at 219 ("Because Congress clearly has the power to prevent the ATF from acting on applications made pursuant to § 925(c) if it chooses, there is no agency action for a federal court to compel or review."); *McHugh*, 220 F.3d at 57 ("The ATF has been placed in a virtual straightjacket by the plain language of Congress's appropriations statutes.").

## III. Dismissal will avoid the practical problems of reviewing an SRO rule that was deemed approved without any Commission action.

Absent dismissal of the petition, reviewing the merits of the MSRB rule will be problematic. *See Sprint Nextel*, 508 F.3d at 1132 ("That the Commission took no action in this case is clearer still in light of the implications of a contrary ruling."). Under the APA, which "instructs courts to set aside agency action 'found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,'" courts "require more than a result"—they also "need the agency's reasoning for that result." *Sprint Nextel*, 508 F.3d at 1132, quoting 5 U.S.C. 706(2)(A); *accord Bean*, 537 U.S. at 77 ("[J]udicial review is predicated upon ATF's dispositive decision."). But if this Court "found reviewable action in this case, where would [it] find the

Commission's reasoning?" *Sprint Nextel*, 508 F.3d at 1133. Nowhere; it does not exist because Congress effectively ordered the Commission not to act upon the proposed MSRB rule when it deprived it of the funds to issue an order regarding the amendments to Rule G-37(e).

If the Court does not dismiss the petition, the Court and the Commission will face three main difficulties. *First,* the "ground[s] upon which an administrative order must be judged are those upon which the record discloses that its action was based.'" *Atrium Med. Ctr. v. United States HHS*, 766 F.3d 560, 568 (6th Cir. 2014), quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 87(1943); *accord SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency."). But because of the Appropriations Act, there is no order and there is no record; judicial review would run headlong into *Chenery*. *See NetCoalition*, 715 F.3d at 346 (noting that the Commission's "refusal to join the merits issue is well-taken" because the Commission "conducted no proceeding and created no administrative record documenting its decision-making process or explaining its reasoning"). And the usual relief for a failure to provide reasoning—remand to the Commission—is not an option here because as long as the Appropriations Act's restriction remains in effect, it would preclude the Commission from issuing an order regarding Rule G-37(e), including an order disapproving the rule. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("[If the

reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.").

*Second*, and related, because the Commission has been precluded from offering any reasoning in a final order, appellate counsel is limited in how it can address the MSRB rule on appeal. Courts "may not accept appellate counsel's *post hoc* rationalizations for agency action because *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168–69 (1962). Because there is no order and no basis articulated, any argument by counsel on the merits will likely be rejected as "*post hoc* rationalizations."

*Finally*, the far-reaching language in the Appropriations Act would likely prohibit counsel for the Commission from addressing the MSRB rule on the merits. Defending the MSRB rule may potentially run afoul of the appropriations language regarding "implementation" of "any rule." This broad language does not distinguish between implementing Commission rules and SRO rules, and affirmative acts to uphold the MSRB's rule in litigation could be viewed as the first step in implementing it. In light of this language, which goes directly to the Commission's use of budgeted funds, including funds spent on appellate litigation, it is unlikely that the Commission would be able to brief the merits issues presented in this case.

## CONCLUSION

The Court should dismiss the petitions for review. In light of the issues discussed in this motion, the Commission respectfully requests: (1) that the Court assign this motion for disposition instead of holding the jurisdictional question for a merits panel; and (2) hold briefing in abeyance pending the resolution of this motion. *See* 6th Cir. IOP 27(a)(1); Dkt. No. 14 (May 9, 2016) (ruling letter holding briefing in abeyance pending resolution of transfer motions); Dkt. No. 29 (Jul. 19, 2016) (letter establishing briefing schedule).

Respectfully submitted,

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Date: July 19, 2016

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on July 19, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*/s/ Daniel Staroselsky*
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