UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

PETITIONERS' OPPOSITION TO THE SECURITIES AND EXCHANGE COMMISSION'S MOTION TO DISMISS

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INTRODUCTION

The Securities and Exchange Commission ("SEC" or "Commission") approved a rule proposed by the Municipal Securities Rulemaking Board ("MSRB"). This new rule restricts the constitutional right of municipal advisors, brokers, and dealers to make political contributions to candidates for federal and state office. Violations of the rule can subject municipal advisors and dealers to penalties from the SEC, criminal fines, and even imprisonment.

This Court has jurisdiction over Petitioners' challenge to the SEC's approval of the MSRB's proposed rule. The Exchange Act makes clear that when the MSRB proposes a rule, the SEC must either "approve or disapprove the proposed rule." 15 U.S.C. §78s(b)(2)(A)(i)(I). And the SEC can carry out its duty in only one way, "by order." *Id.* Thus, whether the SEC explicitly approves a proposed rule or simply declines to disapprove one, the result is the same—the proposed rule is "approved by the Commission" and becomes law. §78s(b)(2)(D)(i). This "final disposition" constitutes an "order" and is judicially reviewable. 5 U.S.C. §551(6).

If the SEC's approval of the proposed rule is not an order, it is either "the equivalent" of an order or a "failure to act" and is thus reviewable "agency action" under the Administrative Procedure Act (APA). The SEC's approval marks the end of its decisionmaking process and is already having repercussions for Petitioners.

The SEC admits that the Appropriations Act for FY 2016 barred it from using

funds to "finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions" and that the MSRB's rule is such a rule. Mot. 1, 4, 11-12. The Appropriations Act did not require or allow the SEC just to sit back and let the MSRB's proposed rule become law after 45 days. Since the Act did not allow the SEC to approve the rule, the SEC was required to disapprove the rule.

The SEC offers no support for its radical position that the Exchange Act allows the MSRB to enact rules free from either SEC or judicial review. Because Congress clearly intended MSRB rules as approved by the SEC to be subject to judicial review, and the SEC's contrary position raises substantial constitutional concerns, the Court should deny the SEC's motion to dismiss and review Petitioners' challenge to the MSRB's political contribution rule.

BACKGROUND

A. Under the Exchange Act, the SEC Must, "By Order, Approve or Disapprove" Rules Proposed by the MSRB.

The Securities Exchange Act of 1934 grants the SEC authority to regulate municipal securities brokers and dealers and municipal advisors. 15 U.S.C. §78o-4. The SEC has the authority to, "censure, place limitations on the activities, functions, or operations, suspend for a period not exceeding twelve months, or revoke the registration of any municipal securities dealer or municipal advisor" who violates certain provisions the Exchange Act or related rules. §78o-4(c)(2). And those who violate SEC regulations regarding municipal securities dealers and advisors risk not

just their livelihoods, but also their liberty, as any willful violation of an SEC rule is punishable by a fine of up to $5,000,000 and a prison term of up to 20 years. §78ff(a).

The SEC is assisted in its work by the MSRB. The MSRB is a self-regulatory organization (SRO) created under the Securities Acts Amendments of 1975 that proposes rules to the SEC regarding the regulation of municipal securities brokers and dealers and municipal advisors. *See generally* 15 U.S.C. §78o-4. The MSRB's proposed rules, however, cannot "take effect unless approved by the Commission." 15 U.S.C. §78s(b)(1).[1] Thus, the SEC is required to, "by order, approve or disapprove the proposed rule change" or institute further proceedings to review the rule before issuing its order. §78s(b)(2)(A)(i).

Congress has set "[s]tandards for approval and disapproval" of proposed rules. §78s(b)(2)(C). The SEC must "approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this chapter and the rules and regulations issued under this chapter that are applicable to such organization." §78s(b)(2)(C)(i). Conversely, if the SEC "does not make [such] a finding," it must "disapprove a proposed rule change." §78s(b)(2)(C)(ii).

[1] Section 78s(b)(3) provides that certain types of rules—e.g., those "concerned solely with the administration of the" MSRB, §78s(b)(3)(A)—can take effect without Commission approval, but those types of rules are not implicated here.

In 2010, Congress "streamline[d] [the] SRO rule filing procedures" by amending section 78s to "requir[e] the SEC to complete the process of reviewing and taking action on proposed SRO rules within [a] specified time frame[]." H.R. Rep. 111-517, at 200 (2010) (Conf. Rep.), *as reprinted in* 2010 U.S.C.C.A.N. 722, 727. As a result, the SEC must now determine whether to, "by order, approve or disapprove" a proposed rule change "not later than 45 days after the date of publication of a proposed rule change …." 15 U.S.C. §78s(b)(2)(A)(i)(I). After that time, if the SEC does not institute proceedings "to determine whether the proposed rule change should be disapproved," §78s(b)(2)(A)(i)(II), the "proposed rule change shall be deemed to have been approved by the Commission," §78s(b)(2)(D).

B. The 2016 Appropriations Act Requires the SEC to Disapprove Proposed MSRB Rules Requiring the Disclosure of Political Contributions.

The Appropriations Act for FY 2016 expressly forbids the SEC from using any funds "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. The SEC admits that the Act applies to the MSRB's rule. Mot. 1, 11-12.

C. The MSRB Proposes, and the SEC Approves, a Rule Regulating Political Speech and the Disclosure of Political Contributions.

On August 14, 2014, the MSRB published its draft political contribution rule.

AR1 at 175.[2] The rule restricts the First Amendment right of municipal advisors to make or solicit political contributions by barring them from working for any government entity whose public official has received political contributions from the advisor in the previous two years. *Id*. at 178. The rule also requires advisors to disclose information about their political contributions. *Id*. at 180.

The MSRB received 13 comment letters in response to its proposal. *Id*. at 235. Multiple commenters noted that the rule violated First Amendment protections on political speech. *See id.* at 247-55, 260, 295-96, 298, 301-02. The MSRB responded to these comments, maintaining that its proposed cap on political donations by municipal advisors would be consistent with the Exchange Act and constitutional. *See*, *e.g.*, *id*. at 44-54, 57-60.

On December 16, 2015, the MSRB proposed the rule to the SEC, and on December 30, the SEC posted notice of the proposed rule in the Federal Register. *See* 80 Fed. Reg. 81,709. Several parties commented on the proposed rule, including Petitioners the Tennessee Republican Party and New York Republican State Committee. *See* AR3. Petitioners urged the SEC to disapprove the proposal, noting that the regulation was inconsistent with the Exchange Act because campaign finance regulation is the exclusive province of Congress and the Federal Election

[2] "AR" refers to the entry number for documents included on the certified list the SEC filed with the Court in lieu of filing the administrative record.

Commission, not the SEC or MSRB, *id.* at 2, and that the proposed cap on contributions to elected officials violated the First Amendment, *id.* at 7. The SEC did not respond to these comments or "institute any proceedings … to determine whether the proposed rule change should be disapproved." 15 U.S.C. §78s(b)(2)(A)(i)(II). Instead, by waiting 45 days, the SEC guaranteed the proposed rule would be "deemed to have been approved by the Commission." §78s(b)(2)(D)(i). Thus, the proposed rule was "approved by the Commission" on February 13, 2016, and it will take effect on August 17, 2016, before there has been any chance for meaningful judicial review. *See* Mun. Sec. Rulemaking Bd., *Amendments to MSRB Rule G-37 on Political Contributions and Prohibitions on Municipal Securities Business and Related Amendments are Deemed Approved Under the Securities Exchange Act of 1934* (Feb. 17, 2016).

On April 12, 2016, the Tennessee Republican Party filed a petition for review in this Court seeking review of the SEC's approval of the MSRB's proposed rule. The Eleventh Circuit transferred a petition filed by the Georgia Republican Party and New York Republican State Committee to this Court, where it was consolidated with the Tennessee Republican Party's challenge. On July 19, 2016, the SEC moved to dismiss these petitions for lack of jurisdiction.

ARGUMENT

I. The Court Has Jurisdiction To Review The SEC's Approval Of The MSRB's Rule.

A. The SEC's Approval of the MSRB Rule Constitutes a Reviewable "Final Order" Under the Exchange Act.

There is a "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). When it comes to SEC approval of SRO-proposed rules, Congress made clear its preference for review. If a rule is proposed, the SEC must, "by order, approve or disapprove the proposed rule change," 15 U.S.C. §78s(b)(2)(A)(i)(I), and "[n]o proposed rule change shall take effect unless approved by the Commission," §78s(b)(1). Thus, the SEC must act to either "approve or disapprove"—sitting on the sidelines is not an option. And the SEC has only one means to carry out its charge—"by order." In this way, Congress guaranteed that any rule proposed by an SRO would become law only after obtaining the SEC's approval and becoming subject to the judicial review that comes with it. *See* §78y(a)(1) ("A person aggrieved by a final order of the Commission … may obtain review of the order ….").

Congress has also set standards the SEC must follow when evaluating proposed rules, further confirming the SEC's obligations to both review proposed rules and issue reviewable orders. The Exchange Act requires the SEC to "approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements" of the Act and related rules and

regulations. §78s(b)(2)(C)(i). The Act likewise requires the SEC to disapprove any rule inconsistent with this standard. §78s(b)(2)(C)(ii). Again, the SEC is required to approve or disapprove a proposed rule.

Section 78s(b)(2)(D), enacted in 2010, puts the SEC on the clock, requiring it to approve or disapprove a proposed rule no later than 45 days after the SEC publishes it. If the SEC finds no reason to "institute proceedings … to determine whether the proposed rule change should be disapproved," §78s(b)(2)(A)(i)(II), or otherwise extend the period for review, §78s(b)(2)(A)(ii), and the time limit is reached, the proposed rule receives the SEC's approval. And as the entire structure of section 78s shows, the only way the SEC can approve a rule is "by order." §78s(b)(2)(A)(i)(I) (SEC shall "by order, approve or disapprove the proposed rule change" within 45 days of its publication).

The APA likewise demonstrates that the Commission's decision to allow the MSRB rule to gain SEC approval is a reviewable "order." Courts often "look to the Administrative Procedure Act, … when an agency's direct-review statute d[oes] not define" key terms like "'order.'" *Watts v. SEC*, 482 F.3d 501, 505 (D.C. Cir. 2007). The APA defines an "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making." 5 U.S.C. §551(6). The SEC's approval of the MSRB rule doubtless constitutes the agency's "affirmative" and "final disposition." Without the

SEC's approval, "no proposed rule change shall take effect," 15 U.S.C. §78s(b)(1), thus the SEC necessarily "affirmed" the rule. Nor can the SEC dispute that its approval constitutes a "final disposition," as the rule has already had "determinate consequences for the party to the proceeding." *Int'l Tel. & Tel. Corp. v. Local 134, Int'l Bd. of Elec. Workers, AFL-CIO*, 419 U.S. 428, 443 (1975) (defining "final disposition"). The SEC's approval is an "affirmative" and "final disposition" of "an agency matter," and is therefore a "final order." 15 U.S.C. §78y(a).

The SEC nevertheless contends that the new political contribution rule is beyond judicial review because the MSRB rule was not approved by the Commission, but was instead "deemed to have been approved by the Commission." Mot. 6. In short, the SEC's position is that because it "took no action on the MSRB rule," its hands-off lawmaking is beyond challenge. Mot. 8. But the Supreme Court has repeatedly recognized that a court must find "clear and convincing evidence of [congressional] intent" before precluding judicial review. *Bowen*, 476 U.S. at 671-72. Here, we have just the opposite. The entire statutory scheme is designed to force SEC orders of approval or disapproval on proposed rules, which ensures that, before any proposal from an SRO becomes binding law, it is approved by the SEC and made subject to judicial review.

The SEC offers no evidence that Congress wanted to create a loophole that allows the SEC to turn proposed rules by SROs into unreviewable law. Indeed, the

SEC admits that when Congress added section 78s(b)(2)(D), it "sought to '… requir[e] the SEC to complete the process of *reviewing* and *taking action*'" on the proposed rules, Mot. 3 (emphasis added), not to allow the SEC to regulate free from judicial review. The SEC nevertheless argues that two cases (decided by a different circuit court) support its position that—though the MSRB's rule must be treated as if it was "approved by the Commission," 15 U.S.C. §78s(b)(2)(D)—"it is Congress, not the Commission, that approved the rule" and made it unreviewable. *Id.* at 11. But both cases are inapposite, and neither stands for the radical position that the SEC can implement unreviewable rules.

The SEC principally relies on *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129 (D.C. Cir. 2007), but the stark contrasts between the Exchange Act and the law at issue in that case underscore that Congress intended orders "approved by the Commission" under section 78s(b)(2)(D) to be reviewable. *Sprint* involved a statutory scheme in which the FCC is required to grant a telecommunications provider forbearance from certain regulations if the regulated party can show that enforcement of the regulations is not necessary to protect consumers and forbearance would promote the public interest. *See* 508 F.3d at 1131; 47 U.S.C. §160(a). Moreover, this exception to regulation "shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance …." 47 U.S.C. §160(c). Verizon petitioned the FCC for relief from certain regulations, the FCC

deadlocked with a 2–2 vote on the petition, and the petition was thus deemed granted. *Sprint*, 508 F.3d at 1131. Several of Verizon's competitors petitioned for review of the FCC's failure to deny the petition, but the court held that the deemed approval was not the FCC's decision because "Congress made the decision in §160(c) to 'grant' forbearance whenever the Commission 'does not deny' a carrier's petition." *Id*. at 1132. Thus, "[w]hen the Commission failed to deny Verizon's forbearance petition," and the regulations were rolled back, "Congress's decision—not the agency's—took effect." *Id*.

The "deemed approval" in *Sprint* differs markedly from that of the Exchange Act. To begin, the Exchange Act provides that a proposed rule "shall be deemed to have been approved *by the Commission*," 15 U.S.C. §78s(b)(2)(D) (emphasis added), language that is pointedly absent from section 160(c). "Different words usually convey different meanings, and that is just the case here." *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 315 (6th Cir. 2012). The Act's requirement that a proposed rule be deemed "approved *by the Commission*," which can only approve such rules "by order," §78s(b)(2)(A)(i)(I), evinces Congress's clear intent to ensure that regulations that are "deemed approved" are still subject to judicial review.

The statutes likewise operate in different manners reflecting their different purposes. Section 160 creates a presumption that parties will be *exempted* from *existing* regulations unless the agency affirmatively *disapproves*. It codifies agency

discretion to *not* enforce regulations, an exception akin to the "prosecutorial discretion" that is "presumptively committed to agency discretion by law." *Drake v. FAA*, 291 F.3d 59, 71 (D.C. Cir. 2002). In contrast, the Exchange Act creates a presumption that *new* regulations will not be enacted unless the SEC affirmatively *approves*. The SEC, however, would read the Act to allow either it or the MSRB to promulgate *new*, *unreviewable* rules that can subject citizens to imprisonment. This position is inconsistent with the Act and bedrock constitutional law. *See infra* p.13.

The SEC's reliance on *AT&T Corp. v. FCC* is similarly misplaced. 369 F.3d 554 (D.C. Cir. 2004). In that case, the relevant statute provided that certain regulations "shall cease to apply" to Bell operating companies "unless the [FCC] extends such 3-year period by rule or order." 47 U.S.C. §272(f)(1). When the sunset date arrived, the FCC did nothing, the regulations ceased to apply, and AT&T petitioned for review. *AT&T*, 369 F.3d at 559-60. The court held there was no agency decision to review because the statute "clearly indicate[d] that Congress intended for the statute's protections to expire by operation of law on a date certain," and "nothing in the statutory provision … require[d] the [FCC] to consider whether to allow the sunset provision to go into effect." *Id*. at 560. The Exchange Act, on the other hand, not only makes clear that "[n]o proposed rule change shall take effect unless approved by the Commission," 15 U.S.C. §78s(b)(1), but also requires the SEC to disapprove proposed rules that are inconsistent with current law,

§78s(b)(2)(C). Thus, review of any proposed rule is plainly required. And the SEC offers no support for its notion that Congress enacted a "sun*rise* provision" that would create new law through agency inaction.

The SEC's argument for a "sunrise provision" not only lacks support in the Act; it raises serious constitutional concerns. The SEC argues, in effect, that Congress gave the MSRB—an SRO run largely by participants in the municipal securities market—the power to implement rules without the approval of the SEC or the possibility of judicial review. But this broad delegation of lawmaking authority to an SRO would violate the non-delegation doctrine, as Congress cannot "delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935). "Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress." *Id*. The Court thus should reject the SEC's interpretation of "final order" to avoid this serious constitutional concern. *See Jones v. United States*, 529 U.S. 848, 857 (2000) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.").

B. The Appropriations Act Required the SEC to Disapprove the MSRB's Proposed Rule, Not Allow It to Take Effect.

The Appropriations Act for FY 2016 prohibits the SEC from using any funds "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. As the SEC concedes, the MSRB's rule requires the "disclosure of political contributions." *Id*.; *see* Mot. 1, 11-12. Thus, the SEC should have disapproved the proposed rule rather than allow it to take effect.

In arguing otherwise, the SEC turns the Appropriations Act language on its head, asserting that the Act required the SEC to do precisely what it was barred from doing. Ignoring the statutory language, the SEC contends that the Act prohibited it from "issu[ing] an order regarding the disclosure of political contributions," Mot. at 11, or otherwise "acting on the MSRB's rule," *id*. at 12. But the language in the Act is far more precise. The SEC is prohibited only from using funds to "finalize, issue, or implement" the MSRB's proposed rule, terms that demonstrate a clear intention to prevent proposed rules like the one at issue here from taking effect. Had the SEC disapproved the MSRB's rule, it would not have "finalized, issued, or implemented" the rule; it would have prevented those very outcomes. Thus, both the language and purpose of the Act refute the SEC's perverse contention that, because it could not act

to finalize or issue the MSRB's rule, the SEC had to sit back until the rule was finalized and issued.

The SEC cites *United States v. Bean*, 537 U.S. 71 (2002), to support its self-serving reading of the Appropriations Act, but *Bean* only highlights the flaws in the SEC's position. *Bean* involved a federal law that prohibits a person convicted of a felony from possessing firearms. *Id*. at 74 (citing 18 U.S.C. §922(g)(1)). The law allowed persons convicted of felonies to apply to the Secretary of the Treasury for relief from that prohibition on the grounds that they had satisfied certain preconditions, *id*., but the law gave the Secretary "broad authority … to grant or deny relief, even when the statutory prerequisites are satisfied," *id*. at 77. If the application was "'denied by the Secretary,'" the applicant could seek judicial review. *Id*. at 74 (quoting 18 U.S.C. §925(c)). Bean applied for relief, but the Secretary declined to act on his application because Congress had passed an appropriations bar that prevented the Secretary from "using 'funds appropriated herein ... to investigate or act upon applications for relief from Federal firearms disabilities ….'" *Id*. at 74-75. Bean argued that the Secretary's refusal to act was a "denial" of his application, but the Court disagreed, noting that the broad authority granted the Secretary and the statutory procedure "la[id] out for seeking relief make clear that an actual decision by ATF on an application is a prerequisite for judicial review …." *Id.* at 76.

Unlike the statute in *Bean*, the Exchange Act requires the SEC to act on

proposed rules by approving or disapproving of them. *See* 15 U.S.C. §78s(b)(2)(A). More important still, the appropriations act in *Bean* extended far more broadly than the Appropriations Act at issue in this case. The Secretary in *Bean* could not "act upon applications for relief," whereas the 2016 Appropriations Act prohibits only actions that "finalize, issue, or implement" proposed rules. These "[d]ifferent words … convey different meanings," *Lewis*, 681 F.3d at 315, putting to rest the SEC's argument that it could not "act[] on the MSRB's rule," Mot. 12. Had Congress intended to institute an appropriations bar against "acting on" MSRB rules, it knew how to do so. Because it did not, the SEC could have "acted on" the proposed rule, so long as it did not finalize, issue, or implement the rule. And the SEC's decision to allow the rule to be finalized, issued, and implemented violated the Appropriations Act. Because the SEC could not under the Act approve the MSRB rule, the SEC had to disapprove the rule.

II. At A Minimum, The SEC Has Taken Final, Reviewable Agency Action Under The APA.

Even if the Court finds that the SEC's decision to allow the MSRB's rule to be "deemed approved by the Commission" is not an "order," the SEC has engaged in final agency action reviewable under the APA. "[T]wo conditions … generally must be satisfied for agency action to be 'final' under the APA. First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *U.S. Army Corps of Eng'rs v. Hawkes*

Co., 136 S. Ct. 1807, 1813 (2016). "And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id*. The SEC does not dispute that legal consequences flow from its decision to allow the MSRB's rule to "have been deemed approved by the Commission." It argues only that these consequences are unreviewable because the SEC has not taken any "agency action." Mot. 13. But the APA's text and clear precedent establish that the SEC engaged in reviewable final agency action.

Congress gave the term "agency action" a capacious definition that "includes 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). The term was intended "'to assure the complete coverage of every form of agency power, proceeding, action, or inaction.'" *FTC v. Standard Oil Co. of Cal*., 449 U.S. 232, 238 n.7 (1980) (quoting S. Doc. No. 79-248, 255 (1946)). Thus, if the SEC did not issue an order, it either (1) issued "the equivalent … thereof" when the proposed rule was "deemed approved" or (2) "fail[ed] to act" to disapprove the proposed rule. In either instance, the Court should review this "final agency action."

The D.C. Circuit reached this same conclusion in *Amador County v. Salazar*, 640 F.3d 373, 375 (D.C. Cir. 2011). *Amador* involved the Indian Gaming Regulatory Act (IGRA), which regulates compacts between Indian tribes and states related to gaming. *Id*. at 376 (citing 25 U.S.C. §§2701, 2702). Before tribes can offer certain

types of casino games, they must form a tribal-state compact that is approved the Secretary of the Interior. *Id*. (citing 25 U.S.C. §2710(d)(1)(C)). When the tribe submits a compact for approval, the Secretary must (1) approve the compact, 25 U.S.C. §2710(d)(8)(A); (2) disapprove the compact, but only if it violates the IGRA or other federal law or trust obligations, §2710(d)(8)(B); or (3) wait 45 days, after which "the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter," §2710(d)(8)(C). In *Amador*, after a compact was "considered to have been approved by the Secretary," the petitioner sought review alleging that the Secretary should have disapproved the compact because it was inconsistent with IRGA. 640 F.3d at 377. The Secretary—just like the SEC here—relied on *Sprint* to argue that there was no "agency action" "because approval came via inaction." *Id*. at 381-82.

The court rejected the agency's reasoning, holding that the agency had engaged in reviewable action. The "essential difference" between the statute in *Sprint* and IGRA was that IGRA required agency action to be consistent with the rest of the Act. *Id*. at 382. In contrast, because the statute in *Sprint* had no such limitation, "Congress provided that if the FCC failed to act, a forbearance request would be granted by operation of law without limitation." *Id*. But the limitation in IGRA "impos[ed] an obligation on the Secretary to affirmatively disapprove any compact exceeding that limit." *Id*. Because "the plaintiff challenge[d] a compact

on the grounds that it conflicts with another provision of IGRA," the court held there was "a discrete agency inaction to review—the Secretary's failure to disapprove the compact despite its inconsistency with the Act." *Id*.

Here, as in *Amador*, Congress has forbidden the SEC from approving any proposed rule unless it "is consistent with the requirements" of the Exchange Act. 15 U.S.C §78s(b)(2)(C). And Petitioners have alleged that the SEC had "an obligation … to affirmatively disapprove" the MSRB's proposed rule as inconsistent with the Exchange Act and Constitution. *Amador*, 640 F.3d at 382. Because the Act states that the proposed rule "'shall be considered to have been approved by the [Commission]'" it "transforms a regulated entity's [proposed] rule change into an action of the Commission," *DTCC Data Repository LLC v. CFTC*, 25 F. Supp. 3d 9, 18 (D.D.C. 2014) (quoting *Amador*, 640 F.3d at 375), which is subject to review.

Amador likewise refutes the SEC's contention that there are too many "practical problems" to review its action. Mot. 16-18. Petitioners' primary challenges are that the SEC's decision was inconsistent with the Exchange Act and First Amendment. "Because of the nature of this particular challenge, we need no agency reasoning. Either the [adopted rule] meets the requirements of [the Exchange Act and Constitution], in which case we must reject the challenge, or it does not, in which case we must direct the [SEC] to disapprove the [proposed rule]." *Amador*, 640 F.3d at 382. And even if some of Petitioners' arguments require the Court to

assess the SEC's reasoning, that hardly makes the agency's action unreviewable. As explained above, Congress added the 45-day time limit to "require[e] the SEC to complete the process of reviewing … proposed SRO rules," H.R. Rep. 111-517, at 727, which the SEC presumably did here. And when the time elapsed, section 78s(b)(2)(D) "transform[ed]" the MSRB's proposed "rule change into an action of the Commission." *DTCC Data*, 25 F. Supp. 3d at 18. Thus, the Court can review the records compiled and reasons given by the MSRB as if they were the SEC's.

This Court reached a similar conclusion in a case in which the Board of Immigration Appeals (BIA) affirmed an immigration judge's (IJ) opinion without providing any rationale. *Denko v. INS*, 351 F.3d 717, 729 (6th Cir. 2003). The Court held that because the BIA could affirm without an opinion only if it "'determine[d] that the result reached in the decision under review was correct,'" *id.* (quoting 8 C.F.R. §1003.1(a)(7) (2003)), the Court could review the IJ's decision instead, *id.* at 730. Here, the SEC could approve the MSRB's rule only if it was "consistent with the requirements" of the Exchange Act. 15 U.S.C. §78s(b)(2)(C)(i). The Court thus can review the MSRB's decision when determining whether the SEC's decision should stand. *See Yuk v. Ashcroft*, 355 F.3d 1222, 1230 (10th Cir. 2004) (holding that court could "mak[e] the IJ's decision the final agency decision").

CONCLUSION

For the foregoing reasons, the SEC's motion to dismiss should be denied.

Respectfully submitted,

s/H. Christopher Bartolomucci

JASON BRETT TORCHINSKY
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
(540) 341-8808
jtorchinsky@hvjt.law

H. CHRISTOPHER BARTOLOMUCCI
EDMUND G. LACOUR JR.
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
cbartolomucci@bancroftpllc.com

Counsel for Petitioners

July 27, 2016

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2016, 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 CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/H. Christopher Bartolomucci
H. Christopher Bartolomucci