IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

NATIONAL ASSOCIATION OF MANUFACTURERS and NATURAL GAS SERVICES GROUP, INC., Plaintiffs, v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION and GARY GENSLER, in his official capacity as Chair of the SEC, Defendants.	No. 7:21-cv-183-DC-RCG

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Administrative Procedure Act (APA) prevents agencies from governing by executive fiat; instead, it imposes mandatory procedural constraints on agencies' exercise of power, including the requirement to engage the public when adopting or amending regulations that carry the force of law. Here, however, the Securities and Exchange Commission (SEC) has flouted those procedures. In 2020, the SEC issued a regulation—through notice-and-comment rulemaking—to ensure the accuracy and transparency of information available to investors as part of the proxy voting process through which most shareholders cast their votes. *See Exemptions from the Proxy Rules for Proxy Voting Advice*, 85 Fed. Reg. 55,082 (Sept. 3, 2020) (Proxy Advice Rule). Following the change in administration, the SEC made an abrupt about-face, stating both publicly and in court filings that the regulated entities do *not* need to comply with the Rule's substantive requirements by December 1, 2021, as the Rule itself provides.

The Court should set aside the SEC's action. It is well established that agencies may not suspend or delay properly promulgated rules as they see fit. Rather, an agency wishing to change the effective or compliance date of a lawfully issued regulation must abide by the APA's notice and comment procedures. Because the SEC did not do so here, its attempt to suspend the Proxy Advice Rule—indefinitely and without limitation—is unlawful.

BACKGROUND

A. The SEC's decision to regulate proxy firms.

Public companies make many of their most important corporate governance decisions via votes at shareholder meetings—yet few shareholders vote their own shares directly. To the contrary, "today's financial markets . . . are characterized by significant intermediation and institutional investor participation," and "proxies have become the predominant means by which shareholders of publicly traded companies exercise their right to vote on corporate matters." Proxy Advice Rule, 85 Fed. Reg. at 55,083.

With the increasing importance of proxy voting, particularly by institutional investors and intermediaries, proxy advisory firms "have come to play an important role in the proxy voting

process." Proxy Advice Rule, 85 Fed. Reg. at 55,083. Such firms "typically provide investment advisers, institutional investors, and other clients with a variety of services that relate to the substance of voting decisions," including "research and analysis regarding the matters subject to a vote," promulgating "benchmark voting policies" or "specialty voting policies . . . such as a socially responsible policy," and "making specific voting recommendations to their clients on matters subject to a shareholder vote," including "based on the proxy voting advice business's benchmark or specialty policies." *Id.* "This advice is often an important factor in the clients' proxy voting decisions." *Id.* In addition to voting policies and voting recommendations, in some instances the firms "are given authority to execute votes on behalf of their clients." *Id.*

Because of the ubiquity of proxy voting and the sheer number of votes that must be taken by institutional investors and large intermediaries, proxy advisory firms "have become uniquely situated in today's market to influence, and in many cases directly execute, these investors' voting decisions." Proxy Advice Rule, 85 Fed. Reg. at 55,083. That level of routine involvement in corporate governance, however, has led to widespread concern about the practices and influence of the proxy advisory industry, "focused on the accuracy and soundness of the information and methodologies used to formulate proxy voting advice businesses' recommendations as well as potential conflicts of interest that may affect those recommendations." *Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*, 84 Fed. Reg. 66,518, 66,520 (Dec. 4, 2019) (Proposed Rule)

B. The Proxy Advice Rule.

Particularly "[g]iven proxy voting advice businesses' potential to influence the voting decisions of investment advisers and other institutional investors, who often vote on behalf of others," the SEC in 2019 became "concerned about the risk of proxy advice businesses providing inaccurate or incomplete voting advice (including the failure to disclose material conflicts of interest) that could be relied upon to the detriment of investors." Proposed Rule, 84 Fed. Reg. at 66,520. In 2020, therefore, the SEC decided to provide proxy advisory firms with modest conflict-of-interest disclosure and transparency compliance options, "so that investors who use proxy voting advice receive more transparent, accurate, and complete information on which to make their

voting decisions." Proxy Advice Rule, 85 Fed. Reg. at 55,082. That is, the Rule is not an attempt to regulate "all aspects of the proxy advice businesses' role in the proxy process"; rather, it is narrowly focused on "certain specific concerns about proxy voting advice businesses and would help to ensure that the recipients of their voting advice make voting determinations on the basis of materially complete and accurate information." Proposed Rule, 84 Fed. Reg. at 66,521.

In particular, the Rule "codif[ied]" the SEC's existing "interpretation that proxy voting advice generally constitutes a solicitation within the meaning of [Securities Exchange Act of 1934] Section 14(a) and therefore is subject to the Federal proxy rules." Proxy Advice Rule, 85 Fed. Reg. at 55,083; *see* 17 C.F.R. § 240.14a-1(*l*)(1)(iii)(A). And it "condition[ed] the availability of certain existing exemptions from the information and filing requirements of the Federal proxy rules commonly used by proxy voting advice businesses upon compliance with additional disclosure and procedural requirements." Proxy Advice Rule, 85 Fed. Reg. at 55,083-55,084. As the SEC explained in litigation brought by proxy firms to challenge the new requirements (*see* pages 4-5, *infra*), "[t]hese conditions establish industry-wide minimum conflict of interest disclosure standards. And they help ensure that investors who use proxy voting advice have access to more transparent, accurate, and complete information, as well as the kind of robust discussion that would occur if all parties attended a shareholder meeting in person." Cross-Mot. for S.J. at 2, *Institutional Shareholder Services Inc. v. SEC*, No. 19-cv-3275 (D.D.C. Oct. 30, 2020) (*ISS*), Dkt. 35-1.

Specifically, the Rule requires proxy advisory firms wishing to avoid complying with the proxy rules' information and filing requirements to (a) disclose to their clients "any information regarding an interest, transaction, or relationship . . . that is material to assessing the objectivity of the proxy voting advice"; (b) disclose their proxy voting advice to the public companies that are the subject of the advice; and (c) provide their clients a mechanism through which they can become aware when a company responds to the firm's advice. 17 C.F.R. § 240.14a-2(b)(9)(i), (ii). That is, the proxy advisory firm need only disclose potential conflicts of interest and permit the company that is the subject of its voting advice to view and provide timely responses to its recommendations to the firm's clients.

The Rule also clarifies that proxy advisory firms' voting advice is generally subject to the federal proxy rules' antifraud provisions and that the firms' "failure to disclose certain material information about proxy voting advice, specifically information about the proxy voting advice business's methodology, sources of information, and conflicts of interest" could be considered "misleading." Proxy Advice Rule, 85 Fed. Reg. at 55,139.

Recognizing that proxy firms would need time to adapt to the new requirements, the Rule allowed a "transition period." Proxy Advice Rule, 85 Fed. Reg. at 55,122. While the Rule's codification that the definition of "solicitation" generally encompasses proxy voting advice, as well as the Rule's antifraud standards, took effect on November 2, 2020, the Rule provided that "proxy voting advice businesses will not be required to comply" with its disclosure and other requirements "until December 1, 2021," more than a year after the Rule was published and became effective. *Id.* at 55,082, 55,122.

C. The SEC's suspension of the Rule.

The proxy advisory industry responded adversely and aggressively to these modest efforts to enhance accuracy and transparency. ISS, one of the largest proxy advisory firms, sued the SEC, seeking to set aside the Rule. *See generally Institutional Shareholder Services Inc. v. SEC*, No. 19-cv-3275 (D.D.C.). At that time, the SEC vigorously defended its Rule.

Shortly after Defendant Gary Gensler was sworn into office as the new Chair, however, the SEC abruptly changed course through a series of concerted actions on June 1, 2021.

First, Defendant Gensler issued a public statement "directing [SEC] staff to . . . consider whether to recommend that the Commission revisit its 2020 codification of the definition of solicitation as encompassing proxy voting advice, the 2019 Interpretation and Guidance regarding that definition, and the conditions on exemptions from the information and filing requirements in the 2020 Rule Amendments." Gary Gensler, SEC Chair, *Statement on the Application of the Proxy Rules to Proxy Voting Advice* (June 1, 2021), perma.cc/AZK5-6LND (Hughes Decl. Ex. A).

Second, the SEC's Division of Corporation Finance issued a statement that same day, stat-

ing that "the Division of Corporation Finance has determined that it will not recommend enforcement action based on . . . the 2020 Rule Amendments"—that is, the Proxy Advice Rule—"during the period in which the Commission is considering further regulatory action in this area." SEC Division of Corporation Finance, *Statement on Compliance with the Commission's 2019 Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice and Amended Rules 14a-1(1), 14a-2(b), 14a-9* (June 1, 2021), perma.cc/GH2B-YSJ4 (Hughes Decl. Ex. B). In other words, the SEC effectively suspended the compliance date for the Proxy Advice Rule.

Third—also that same day—the SEC moved to hold the *ISS* litigation in abeyance, pending the SEC's reconsideration of the Proxy Advice Rule. Critically, the SEC represented that, "in the meantime . . . the Division's no-action statement provides ISS (as well as other proxy voting advice businesses) *relief from the December 1, 2021 compliance date*." Mtn. for Abeyance, *Institutional Shareholder Services Inc. v. SEC*, No. 19-cv-3275 (D.D.C. June 1, 2021), Dkt. 53, at 4 (emphasis added) (Hughes Decl. Ex. C). No doubt based on this representation, the SEC reported that "ISS consents to holding the case in abeyance" (*id*. at 1) and the court granted the SEC's motion (*see ISS* Dkt. 56). Thus, the SEC has effectively announced that, despite the Rule's disclosure and other provisions coming into effect by their own terms on December 1, 2021, proxy firms need not comply with those legal requirements, indefinitely.

ARGUMENT

"In the context of a challenge to an agency action under the APA, '[s]ummary judgment is the proper mechanism for deciding, as a matter of law, whether an agency's action is supported by the administrative record and consistent with the APA standard of review.'" *Delta Talent, LLC v. Wolf*, 448 F. Supp. 3d 644, 650 (W.D. Tex. 2020) (quoting *Am. Stewards of Liberty v. U.S. Dep't of Interior*, 370 F. Supp. 3d 711, 723 (W.D. Tex. 2019)). In other words, "[w]hen a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal," and "[t]he entire case on review is a question of law." *Id.*

Applying that standard of review here, the SEC's action is plainly unlawful. As numerous courts have held, it is a fundamental principle of administrative procedure that agencies have no power to simply delay or suspend compliance with duly promulgated regulations that they now find inconvenient. But that is just what SEC has attempted to do here. Its effort to suspend the compliance date of the Proxy Advice Rule must therefore be set aside.

I. THE SEC'S SUSPENSION OF THE RULE IS UNLAWFUL.

To begin, the SEC's suspension of the Proxy Advice Rule is plainly unlawful on the merits. Under the APA, agencies must "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance"—that is, notice and comment rulemaking. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015); *accord, e.g.*, *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) ("[A]n agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked and may not alter such a rule without notice and comment.") (quotation marks omitted; alteration incorporated); *Clean Water Action v. EPA*, 936 F.3d 308, 313-314 (5th Cir. 2019) ("[A]dministrative agencies possess the inherent authority to revise previously-promulgated rules, *so long as* they follow the proper administrative requirements," including "notice-and-comment rulemaking.") (emphasis added).[1]

The effective and compliance dates announced in a binding legislative rule are just as much part of the rule as its substantive provisions—and therefore similarly cannot be revised without notice and comment rulemaking. As the Fifth Circuit has explained, "courts have rejected [agency] delay actions without notice and comment precisely because they recognize that the modification

[1] APA Section 705 permits an agency to "postpone the effective date of an action taken by it, pending judicial review." 5 U.S.C. § 705. But that is not what the SEC has done here; to the contrary, it has purported to suspend the compliance date of the Proxy Advice Rule pending *its own reconsideration of that Rule*, and has held the "judicial review" of the Rule (that is, the *ISS* case) in abeyance as well. *See* pages 4-5, *supra*. And in any event, this procedural mechanism is unavailable where, as here, the agency's purported stay is issued after the effective date of a regulation, but before the compliance date. *See California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1118 (N.D. Cal. 2017) (collecting authorities).

of effective dates is itself a rulemaking." *Clean Water Action*, 936 F.3d at 314 (collecting authorities). That legal principle is by now beyond dispute. *See Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 113 (2d Cir. 2018) (notice-and-comment "requirements apply with the same force when an agency seeks to delay or repeal a previously promulgated final rule," because "altering the effective date of a duly promulgated standard could be, in substance, tantamount to an amendment or rescission of the standards.") (quoting *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 194 (2d Cir. 2004)); *Envt'l Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983) ("The suspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under APA § 553," thus requiring "notice and comment"); *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5, 15 (D.D.C. 2017) ("'An agency . . . may not alter [a legislative] rule without notice and comment,' nor does it have any inherent power to stay a final rule.") (quoting *Clean Air Council*, 862 F.3d at 9).[2]

Moreover, that commonsense requirement applies even when (perhaps, especially when) the justification for the suspension or delay is that the agency is considering changing the underlying rule: "[A] decision to reconsider a rule does not simultaneously convey authority to indefinitely delay the existing rule pending that reconsideration." *Nat. Res. Def. Council*, 894 F.3d at 111-112; *see also Clean Air Council*, 862 F.3d at 9 (rejecting agency's argument that it "has 'inherent authority' to 'issue a brief stay' of a final rule—that is, not to enforce a lawfully issued final rule—while it reconsiders it").

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[2] *See also, e.g.*, *Open Communities Alliance v. Carson*, 286 F. Supp. 3d 148, 162-163 (D.D.C. 2017) (same); *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 964 (D.S.C. 2018) ("[T]he suspension of a rule requires the same substantive requirements of notice and comment rule making as the promulgation of that rule."); *California*, 277 F. Supp. 3d at 1121 ("The APA does not permit an agency to guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date.") (quoting *Nat. Res. Def. Council v. EPA*, 683 F.2d 752, 762 (3rd Cir. 1982)); *Becerra v. U.S. Dep't of Interior*, 276 F. Supp. 3d 953, 965-966 (N.D. Cal. 2017) (same).

These well-settled principles doom the SEC's action here. The overwhelming consensus of authority holds that, for an agency to delay the effective or compliance date of a duly promulgated regulation, notice and comment rulemaking is required. Because the SEC did not even attempt to follow the APA's notice and comment process here, its purported suspension of the Proxy Advice Rule's compliance date must be set aside.

II. THE COURT CAN AND SHOULD SET ASIDE THE SEC'S ACTION.

Given the overwhelming strength of Plaintiffs' case that the SEC has unlawfully amended the compliance date of the Rule (*see* pages 6-8, *supra*), the government can be expected to focus on potential bars to reviewability rather than on the merits. But no such impediment exists here: The SEC's action is final; *Heckler v. Chaney* is no bar to review; and Plaintiffs have standing to bring this suit.

A. The SEC's suspension of the Rule's compliance date is final agency action.

To begin, the SEC's decision to suspend the Rule's compliance date is reviewable as final agency action. *See, e.g.*, *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 659 (2007) ("The federal courts ordinarily are empowered to review only an agency's final action.") (citing 5 U.S.C. § 704) (emphasis omitted). "[F]or an agency action to qualify as final, the action must (1) 'mark[] the consummation of the agency's decisionmaking process,' and (2) either determine 'rights or obligations' or produce 'legal consequences.'" *Texas v. Biden*, 10 F.4th 538, 549-550 (5th Cir. 2021) (quoting *Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019)); *see Bennett v. Spear*, 520 U.S. 145, 177-178 (1997).

1. Courts have repeatedly held that decisions to stay or otherwise delay the effective date of regulations—even where that delay is only temporary pending reconsideration of the underlying regulations—satisfy the two prongs of the *Bennett* test for finality. As the D.C. Circuit recently explained, agency action "suspend[ing] [a] rule's compliance deadline . . . is essentially an order delaying the rule's effective date, and this court has held that such orders are tantamount to amending or revoking a rule." *Clean Air Council*, 862 F.3d at 6. Because such an action "relieves regulated parties of any obligation to meet the [rule's] deadline," it has "legal consequences" within

the meaning of *Bennett*. *Id.* at 7. And even though the agency's "proceedings concerning the *[underlying] rule* are ongoing," the agency's "decisionmaking process" with regard to the *suspension of the effective date* has been "consummate[ed]," absent any "indication that the [agency] intends to reconsider" the suspension *during* the "period of time that [reconsideration of the underlying rule] is pending." *Id.* at 6 (quoting *United Mine Workers of Am. v. Mine Safety & Health Admin.*, 823 F.2d 608, 614-615 & n.5 (D.C. Cir. 1987)) (emphasis added). Thus, such an order "is sufficiently final to warrant review." *Id.* at 7 (quotation marks omitted).

Other circuit cases reach the same conclusion. *See Nat. Res. Def. Council*, 894 F.3d at 100, 108 n.5 (concluding that an order "indefinitely delaying the effective date of [a] new civil penalty promulgated by the agency several months prior" was "a 'final rule' for purposes of our review" because "it is well settled that 'an order delaying [a] rule's effective date . . . [is] tantamount to amending or revoking [the] rule.") (quoting *Clean Air Council*, 862 F.3d at 6). District courts within this Circuit do as well. *See Louisiana v. Dep't of Commerce*, 2021 WL 4125058, at *3 (E.D. La. Sept. 9, 2021) (holding that a "Delay Rule," which amended "the date on which [the regulated parties] are required to be in compliance with the Final Rule" was "a final, reviewable, agency action"); *cf. Louisiana v. Biden*, __ F. Supp. 3d ___, 2021 WL 2446010, at *12-13 (W.D. La. June 15, 2021) (collecting extensive authority, explaining that "a 'final agency action' does not have to be permanent," and holding that an agency's "[p]ause" of an existing regulatory program "mark[ed] the consummation of the decision-making process" and was therefore "final").

2. Those cases govern the result here. As the SEC itself explained in the *ISS* litigation, its decision to suspend compliance with the Rule "during the period in which the Commission is considering further regulatory action in this area" (Hughes Decl. Ex. B, at 1) affirmatively "provides ISS (as well as other proxy voting advice businesses) *relief from the December 1, 2021 compliance date*." Hughes Decl. Ex. C, at 4 (emphasis added). That is, by SEC's own admission, its action "relieves regulated parties of any obligation to meet the [Rule's] deadline." *Clean Air Council*, 862 F.3d at 7. It is thus final for purposes of review. *Id.*; *accord, e.g.*, *Nat. Res. Def. Council*, 894 F.3d at 108 n.5; *Dep't of Commerce*, 2021 WL 4125058, at *3.

3. Indeed, not only is the SEC's suspension of the Rule's compliance date self-evidently the consummation of a process that "alter[ed] the legal regime" (*Texas*, 10 F.4th at 550) by relieving proxy firms of their obligation to comply with the Rule's substantive provisions while the agency reconsiders them, but—having obtained relief in the *ISS* litigation by relying on that very factual premise—the SEC is now judicially estopped from arguing otherwise.

The equitable doctrine of judicial estoppel provides that "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001); *see also id.* ("[A]bsent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.") (quoting 18 Charles Alan Wright et al., *Federal Practice & Procedure* § 4477, p. 782 (1981)). The Fifth Circuit has further explained that the doctrine "has three elements: (1) the party against whom estoppel is sought has asserted a position plainly inconsistent with a prior position, (2) a court accepted the prior position, and (3) the party did not act inadvertently." *Fornesa v. Fifth Third Mortg. Co.*, 897 F.3d 624, 627 (5th Cir. 2018). Those elements are met here.

The *ISS* case was brought by Institutional Shareholder Services—one of the largest proxy advisory firms—to challenge the legality of the Proxy Advice Rule. *See generally* Am. Compl., *Institutional Shareholder Servs. v. SEC*, No. 19-cv-3275 (D.D.C. Sept. 18, 2020), Dkt. 19. On the same day that Chair Gensler directed SEC staff to "consider whether to . . . revisit" the Rule's substance (Hughes Decl. Ex. A, at 1), and that the Division of Corporation Finance announced it would not be enforcing the Rule in the meantime (Hughes Decl. Ex. B, at 1), the SEC moved to hold the *ISS* litigation in abeyance. *See* Hughes Decl. Ex. C. In addition to noting that the agency's reconsideration of the Rule's substance could moot some of ISS's challenges, the SEC argued that "[h]olding the case in abeyance will not cause substantial hardship" precisely *because* "the Division's no-action statement provides ISS (as well as other proxy voting advice businesses) relief from the December 1, 2021 compliance date." *Id.* at 4. Surely relying on the SEC's assurance that

it would not need to comply with the Proxy Advice Rule in the meantime, ISS consented to the abeyance (*see id.*), and the court granted the SEC's motion (*ISS* Dkt. 56).[3]

The SEC thus obtained a stay of litigation from the *ISS* district court based at least in part on the factual proposition that its June 1 actions "provide[d] . . . relief from the December 1, 2021 compliance date" to both ISS and "other proxy voting advice businesses." Hughes Decl. Ex. C, at 4. Having successfully maintained that position in the *ISS* litigation—and thus "gain[ed the] advantage" of not having to defend the *ISS* case (*New Hampshire*, 532 U.S. at 749)—it will not now be heard to argue that its action does *not* "provide[] . . . proxy voting advice businesses[] relief" from having to comply with the Rule as of December 1. Hughes Decl. Ex. C, at 4; *see New Hampshire*, 532 U.S. at 749-751; *Fornesa*, 897 F.3d at 627-628. And with that proposition established, so too are the two prongs of the *Bennett* test for finality. Ultimately, the SEC's action here "is sufficiently final to warrant review." *Clean Air Council*, 862 F.3d at 7.

B. The *Heckler v. Chaney* non-reviewability doctrine does not apply.

Similarly, the SEC cannot avoid review of its action through the non-reviewability doctrine of *Heckler v. Chaney*, 470 U.S. 821 (1985). *See generally DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1905-1906 (2020) (discussing *Chaney*).

The starting point for any question of reviewability is that "[t]he APA creates a 'basic presumption of judicial review.'" *Texas*, 10 F.4th at 550 (quoting *Regents*, 140 S. Ct. at 1905). Thus, statutory exceptions to judicial review of agency action are read "quite narrowly." *Id.* One such limited exception is contained in 5 U.S.C. § 701(a)(2), which bars review where "agency action is committed to agency discretion by law," a category that is "confin[ed] to those rare 'administrative decisions traditionally left to agency discretion.'" *Regents*, 140 S. Ct. at 1905 (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)). "This limited category of unreviewable actions includes an agency's decision not to institute enforcement proceedings" in an individual case (*id.*),

[3] Plaintiff NAM, having moved to intervene in the *ISS* litigation, filed a response to the government's motion, expressing its position that a unilateral pause of the compliance date by the SEC, without notice and comment, would be unlawful. *See ISS* Dkt. 54, at 2.

a principle attributed to the Supreme Court's decision in *Heckler v. Chaney*, 470 U.S. 821 (1985). By its own terms, that principle does not apply here.

First, *Chaney* itself "left open the possibility that an agency nonenforcement decision may be reviewed if 'the agency has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities.'" *Citizens for Responsibility & Ethics in Wash. v. FEC*, 892 F.3d 434, 440 n.9 (D.C. Cir. 2018) (quoting *Chaney*, 470 U.S. at 833 n.4). And relatedly, the D.C. Circuit has repeatedly held that, while a "*single-shot* nonenforcement decision" is unreviewable under *Chaney*, "an agency's statement of a *general enforcement policy*" is subject to judicial review. *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) (quoting *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676-77 (D.C. Cir. 1994)) (emphases added).

Courts have therefore found *Chaney* to be no bar to judicial review where an agency indefinitely delays compliance with a duly issued legal requirement. As one court recently explained, *Chaney* does not apply, and "an agency enforcement decision, including a refusal to take enforcement action, may be reviewed in court . . . if it amounts to a rule amendment or revocation." *Am. Acad. of Pediatrics v. FDA*, 379 F. Supp. 3d 461, 481 (D. Md. 2019) (rejecting the application of *Chaney* to FDA's decision unilaterally to extend the industry compliance date set out in a prior regulation); *see also Pub. Citizen Health Res. Grp. v. Acosta*, 363 F. Supp. 3d 1, 17-19 (D.D.C. 2018) (rejecting application of *Chaney* where the agency's informal statements made clear that it "did not simply exercise its discretion not to enforce the Rule, but suspended its reporting requirement entirely such that covered employers are not legally obligated to submit the forms, regardless of whether [the agency] decides to take action against them for not doing so").

Just so here: As the SEC has represented in court, its actions are more than passive nonenforcement; rather, they affirmatively "provide . . . proxy voting advice businesses[] *relief* from the December 1, 2021 compliance date." Hughes Decl. Ex. C, at 4 (emphasis added); *cf. Texas*, 10

F. 4th at 552 ("[T]he termination of . . . a government program" cannot "be dismissed as mere 'non-enforcement'" for *Chaney* purposes).[4]

Indeed, that this action must be reviewable is only common sense: It is *not* "traditionally left to agency discretion" (*Regents*, 140 S. Ct. at 1905) to delay or effectively rescind duly promulgated regulations wholesale. While an agency may decide *in a particular case* whether to bring an enforcement action as a matter of its prosecutorial discretion, it may not simply announce to *all* regulated entities that *no one* will be required to comply with the law, indefinitely. Were that the case, the well-settled principles that "'[a]n agency . . . may not alter [a legislative] rule without notice and comment,' nor does it have any inherent power to stay a final rule" (*Nat'l Venture Capital Ass'n*, 291 F. Supp. 3d at 15 (quotation marks omitted); *see* pages 6-8, *supra*) would be a dead letter. Thus, as the cases discussed above hold, *Chaney* is no bar to review where, as here, an agency effectively suspends compliance with a lawfully promulgated regulation—particularly when it does so unconditionally and for an indefinite timeframe. This lawsuit may therefore proceed.

C. Plaintiffs have standing.

Plaintiffs also enjoy Article III standing to bring this suit. "[T]he 'irreducible constitutional minimum' of standing consists of three elements[:] The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-561 (1992)). The harm need not have already

[4] Notably, the agency's use of the *language* of enforcement discretion in its announcement does not insulate its action from review, if that action is *in fact* "tantamount to amending or revoking a rule." *Acosta*, 363 F. Supp. 3d at 18 (quoting *Clean Air Council*, 862 F.3d at 6) (rejecting argument that *Chaney* applies where suspension was phrased as "[the agency will] not enforce the July 1, 2019 deadline without further notice") (alteration incorporated); *accord Am. Acad. of Pediatrics*, 379 F. Supp. 3d at 493 (rejecting *Chaney* despite agency document's statement "that it is an exercise of 'enforcement discretion'"); *cf. Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022-1023 (D.C. Cir. 2000) (rejecting boilerplate disclaimer set out in an agency document as determinative of the "legal consequences" of that document).

happened; it is sufficient that the threatened injury is "imminent"; that is, that there is "a 'substantial risk' that the injury will occur." *Stringer v. Whitley*, 942 F.3d 715, 721 (5th Cir. 2019) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)).

Plaintiffs are injured by the SEC's suspension of the Proxy Advice Rule because the Rule would have prevented precisely the type of harm Plaintiffs have previously suffered at the hands of unregulated proxy advisory firms. For example, Plaintiff Natural Gas Services Group, Inc. (NGS) has repeatedly been forced to issue rebuttals to proxy firms' inaccurate and misleading reports on artificially compressed timeframes, necessitating both direct expenditures and diversion of NGS's resources—including significant time and effort of its top executives—away from running its business. Taylor Decl. ¶¶ 3-11; *see, e.g.*, *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) ("[E]conomic injury is a quintessential injury upon which to base standing."); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) ("If a defendant has caused . . . monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III."); *N.A.A.C.P. v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010) ("[A]n organization may establish injury in fact by showing that it had diverted significant resources to counteract the defendant's conduct.").

These imminent harms—*i.e.*, similar monetary expenditures and diversion of resources in future proxy seasons, absent the Rule—are "fairly traceable to the challenged conduct of the defendant" in suspending the Rule (*Spokeo*, 578 U.S. at 338), for the straightforward reason that the Rule's provisions would ameliorate or eliminate them. For example, the Rule's provision requiring proxy firms to both provide their analysis to the registrant (that is, the company in question) "at or prior to the time when such advice is disseminated to" shareholders, and "provide [their] clients with a mechanism by which they can reasonably be expected to become aware" of any rebuttal statements by the registrant "in a timely manner" (17 C.F.R. § 240.14a-2(b)(9)(ii)(A)-(B)), would lessen the mad scramble that NGS currently must undertake to make its position known to shareholders in the wake of a misleading proxy firm analysis, thereby reducing the financial costs of that response. *See* Taylor Decl. ¶¶ 12-15.

Finally, those imminent harms are "likely to be redressed by a favorable judicial decision." *Spokeo*, 578 U.S. at 338. That is, if and when the Court sets aside the SEC's unlawful suspension of the Proxy Advice Rule, no barriers will remain to the Rule's effectiveness, and proxy firms will be required to adhere to its requirements. Absent evidence to the contrary, the law presumes that the proxy firms will do so. *See, e.g.* 31A C.J.S. Evidence § 225 ("In general, every person has a right to presume that every other person will perform their duty and obey the law."); *Donlavey v. Smith*, 426 F.2d 800, 801 (5th Cir. 1970) ("[I]t is presumed that people will obey the law."); *United States v. Norton*, 97 U.S. 164, 168-169 (1877) ("It is a presumption of law that officials and citizens obey the law and do their duty; and although it cannot supply the place of proof of a substantive fact, he who disputes it must furnish the requisite evidence to overcome its effect."). And with the Rule's protections in place, the monetary injury to Plaintiffs will be diminished—just as the Rule itself intends.

In sum, Plaintiff NGS is a publicly traded company, and it has suffered the very sort of harms that the SEC sought to ameliorate in promulgating the Proxy Advice Rule. NGS thus undoubtedly has standing to challenge SEC's unlawful suspension of that Rule.

The NAM also has standing. "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 (5th Cir. 2010) (quoting *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)). Here, the NAM's members would have standing to sue in their own right, because they have likewise suffered harms due to proxy advisory firms' opaque methodologies, undisclosed conflicts of interest, and misleading recommendations. For example, they possess injuries similar to those asserted by Plaintiff NGS, as they have frequently been forced to divert their resources to rebutting misleading proxy advice in a manner that would be alleviated by the Rule if it were to become effective. Netram Decl. ¶¶ 9-10 & n.2. The second prong of the associational standing test is also met, as

strengthening and protecting the governance mechanisms of its corporate members is germane to the NAM's purpose. *Id.* ¶¶ 2-5; *see also Ass'n of Am. Physicians*, 627 F.3d at 550 n.2 ("[T]he germaneness requirement is 'undemanding' and requires 'mere pertinence' between the litigation at issue and the organization's purpose."). And as to the third element, this litigation does not require the participation of individual NAM members.

Both the NAM and NGS, accordingly, possess Article III standing to bring this case and set aside the SEC's unlawful suspension of the Proxy Advice Rule.

III. TIME IS OF THE ESSENCE IN RESOLVING THIS DISPUTE.

Finally, Plaintiffs respectfully request that the Court act expeditiously in resolving this matter. As noted above, the Proxy Advice Rule gave proxy firms until December 1, 2021—fifteen months after the final Rule was promulgated—to comply with its disclosure and procedural requirements. Proxy Advice Rule, 85 Fed. Reg. at 55,122. As the Rule itself explained, this particular date was chosen "to sufficiently precede the typical commencement of the proxy season for 2022"—which "typically occurs during the spring each year"—"so as to minimize disruption to the normal functioning of the proxy system." *Id.*

The issues posed by this litigation are purely legal, and thus Plaintiffs have moved promptly for summary judgment. Plaintiffs respectfully request that the Court resolve this motion sufficiently in advance of the Spring 2022 proxy season as to permit compliance by proxy firms, thereby achieving the beneficial policy outcomes the Rule was designed to elicit.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in favor of Plaintiffs, and set aside the SEC's suspension of the Rule's compliance date.

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Respectfully submitted,

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