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

NATIONAL ASSOCIATION OF MANUFACTURERS and NATURAL GAS SERVICES GROUP, INC., PLAINTIFFS, v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION and GARY GENSLER in his official capacity as Chair of the Securities and Exchange Commission, DEFENDANTS.	No. 7:21-cv-00183-DC-RCG

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

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INTRODUCTION

Plaintiffs' Complaint and highly unusual pre-Answer motion for summary judgment challenge an action that the Commission has not taken. Their sole claim rests on the premise that the Commission has suspended the compliance date of recently adopted amendments to its proxy rules. Because that premise is plainly wrong, their arguments and authorities are irrelevant, and the relief they seek from this Court would be an advisory opinion affirming a proposition that is not in dispute.

In July 2020, the Commission adopted amendments to certain of its proxy rules by a divided vote. The amendments went into effect in November 2020, but some of them had a December 1, 2021 compliance date. Following his confirmation by the Senate in April 2021, the new Chair of the Commission directed Commission staff to consider whether the Commission should revisit the rule amendments. In light of the Chair's direction, the Commission's Division of Corporation Finance (the "Division")—which is responsible for overseeing the implementation of the proxy rules—issued a statement that it would not recommend that the Commission take enforcement action based on the amendments while the Commission considers further regulatory action in the area. In addition, the Commission moved to hold in abeyance a case challenging the amendments in federal district court in the District of Columbia. The motion was granted. And on November 17, 2021, the Commission proposed to rescind some, but not all, of the rule amendments.

Plaintiffs allege that the Division's no-action statement effectively suspended the December 1, 2021 compliance date without notice and comment in violation of the Administrative Procedure Act. But the no-action statement did not, and could not, do so. With limited exceptions not relevant here, the Commission as an agency can only act by a vote of the five members of the Commission itself. The no-action statement, in contrast, merely reflects an informal determination by the staff of the Division of Corporation Finance that it would not recommend use of the

Commission's limited resources to enforce newly effective amendments while the Commission is actively reconsidering them. Courts have uniformly recognized that such informal staff statements have no legal force and are not reviewable. The no-action statement thus does not alter the legal obligation to comply with the amendments by December 1, 2021, prevent the Commission from bringing any enforcement action that it determines is appropriate, or affect the private right of action that courts have recognized under the proxy rules.

Plaintiffs do not cite, let alone engage with or dispute, the case law establishing that the staff no-action statement has no binding legal effect. Remarkably, their argument relies entirely on an out-of-context phrase from the Commission's abeyance motion that they *interpret* as stating that the no-action statement relieved regulated parties of the obligation to comply with the amendments. As discussed below, that is not what the motion says. And in any event, a statement by Commission counsel in a legal filing—here, an unopposed procedural motion—could not suspend a duly adopted regulation. Even more remarkably, plaintiff National Association of Manufacturers ("NAM") understood all of this at the time. In its response to the Commission's abeyance motion, NAM—who had sought to intervene in the case—emphasized that the Division's statement did not prevent the Commission from enforcing the amendments or NAM from taking legal action against firms that do not comply with them, and that NAM would oppose a suspension of the compliance date.

NAM was right then and it is wrong now. The challenged statements by staff and litigation counsel do not constitute a legislative rule requiring notice and comment. Nor are they final agency action subject to APA review. Accordingly, plaintiffs' claim should be dismissed.

BACKGROUND

The proxy voting process is the principal means by which shareholders in companies with dispersed share ownership can exercise their voting rights on corporate matters. Section 14(a) of the Securities Exchange Act of 1934 ("Exchange Act") makes it unlawful for any person to "solicit . . .

any proxy or consent or authorization" with respect to certain securities "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78n(a)(1). Regulation 14A sets forth those rules and regulations by defining relevant terms (Rule 14a-1), establishing information and filing requirements for certain proxy solicitations (Rules 14a-3 to 14a-15), establishing exemptions from those requirements (Rule 14a-2), and prohibiting false or misleading statements (Rule 14a-9), among other things. 17 CFR § 240.14a-1, *et seq.*

In September 2019, the Commission issued an interpretation and guidance addressing the application of the proxy rules to firms (proxy voting advice businesses ("PVABs")) that advise investment advisers and institutional investors on how to vote their shares on corporate matters presented at shareholder meetings. *Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice*, 84 Fed. Reg. 47,416 (Sept. 10, 2019) ("2019 Interpretation and Guidance"). On October 31, 2019, Institutional Shareholder Services Inc. ("ISS"), a leading PVAB, filed an action in federal district court in the District of Columbia challenging the 2019 Interpretation and Guidance. *Institutional Shareholder Services, Inc. v. SEC*, No. 1:19-cv-3275 (D.D.C.) ("ISS Litigation"). On January 17, 2020, the court granted a motion by the Commission to hold that case in abeyance while the Commission considered proposed amendments to its proxy rules regarding proxy voting advice. *Id.* at Dkt. 14.

On July 22, 2020, the Commission adopted amendments to Rules 14a-1(l), 14a-2(b), and 14a-(9). *See Exemptions from the Proxy Rules for Proxy Voting Advice*, 85 Fed. Reg. 55,082 (Sept. 3, 2020) ("2020 Rule Amendments"). The amendments: codified the Commission's view, as expressed in the 2019 Interpretation and Guidance, that proxy voting advice generally constitutes a "solicitation" as defined in Rule 14a-1(l); adopted Rule 14a-2(b)(9) to add new conditions to two exemptions from the proxy rules' information and filing requirements commonly used by PVABs; and amended the

Note to Rule 14a-9 to include specific examples of material misstatements or omissions related to proxy voting advice. In particular, the amendments condition PVABs' eligibility for the exemptions on their making certain conflict-of-interest disclosures (Rule 14a-2(b)(9)(i)) and adopting policies and procedures reasonably designed (1) to make their advice available to the registrant that is the subject of the advice at or before the time the advice is delivered to their clients and (2) to provide clients a mechanism by which they can reasonably be expected to become aware of any written response the registrant might subsequently file (Rule 14a-2(b)(9)(ii)). The amendments became effective on November 2, 2020, but the Commission set a compliance date of December 1, 2021 for the new Rule 14a-2(b)(9) exemption conditions.

Shortly thereafter, ISS filed an amended complaint challenging the 2019 Interpretation and Guidance, the amendment to Rule 14a-1(l) defining "solicitation" to include proxy voting advice, and the new exemption conditions in Rule 14a-2(b)(9)(ii). ISS contends that Section 14(a) does not give the Commission authority to regulate proxy voting advice and that the Rule 14a-2(b)(9)(ii) conditions are arbitrary and capricious under the Administrative Procedure Act and violate the First Amendment. On October 15, 2020, NAM moved to intervene in support of the Commission; that motion has not yet been decided.

On June 1, 2021, the new Chair of the Commission issued a statement directing the staff to consider whether to recommend further regulatory action regarding proxy voting advice. *See* Chair Gary Gensler, Statement on the Application of the Proxy Rules to Proxy Voting Advice (June 1, 2021), *available at* https://www.sec.gov/news/public-statement/gensler-proxy-2021-06-01 (Hughes Decl. Ex. A). In particular, the Chair directed the staff to consider whether the Commission should revisit the 2020 codification of the definition of solicitation as encompassing proxy voting advice, the 2019 Interpretation and Guidance regarding that definition, and the new exemption conditions adopted in 2020. *Id.*

On the same day, the Commission's Division of Corporation Finance issued a statement that, in light of the Chair's direction, the Division would not recommend enforcement action to the Commission based on the 2019 Interpretation and Guidance or the 2020 Rule Amendments during the period in which the Commission is considering further regulatory action in this area. *See* SEC Division of Corporation Finance, Statement on Compliance with the Commission's 2019 Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice and Amended Rules 14a-1(l), 14a-2(b), 14a-9 (June 1, 2021), *available at* https://www.sec.gov/news/public-statement/corp-fin-proxy-rules-2021-06-01 ("Staff No-Action Statement") (Hughes Decl. Ex. B). The Division also stated that, in the event that new regulatory action leaves the 2020 exemption conditions in place with the current December 1, 2021 compliance date, the staff would not recommend any enforcement action based on those conditions for a reasonable period of time after any resumption of the ISS litigation. *Id.* The Division cautioned, however, that its statement "is subject to any further action that may be taken by the Commission, expresses the Division's position on enforcement action only, and does not express any legal conclusion." *Id.*

In light of these developments, the Commission moved to hold the ISS Litigation in abeyance until the earlier of December 31, 2021, or the promulgation of final rule amendments addressing proxy voting advice. ISS Litigation Dkt. 53 (Hughes Decl. Ex. C). ISS consented to the Commission's motion. NAM did not take a position on the motion, but filed a response emphasizing that the Staff No-Action Statement was "only about *staff recommendations* on enforcement, and does not mean that the *Commission* can't or won't take enforcement actions." *Id.* Dkt. 54 at 2 (emphasis in original) (Matro Decl. Ex. 1). NAM correctly understood that neither the Staff No-Action Statement nor the Commission's motion suspended the December 1, 2021 compliance date, stating that it "*would* oppose any change to the compliance date." *Id.* (emphasis added). And it further "reserve[d] its rights to take appropriate legal action to ensure that" PVABs

comply with the amendments by December 1, 2021. On June 2, 2021, the court ordered the case to be held in abeyance on the ground that the new regulatory action the Chair directed the staff to consider "could substantially narrow or eliminate the issues" in the case. ISS Litigation Dkt. 56 (Matro Decl. Ex. 2).

On November 17, 2021, the Commission proposed to rescind two of the new exemption conditions—the Rule 14a-2(b)(9)(ii) conditions—and the addition to the Note to Rule 14a-9. *Proxy Voting Advice*, Securities Exchange Act Release No. 93595 (Nov. 17, 2021), published at 86 Fed. Reg. 67,383 (Nov. 26, 2021). In its economic analysis of the proposed changes, the Commission explained that PVABs may have already modified their systems because the "compliance date for the Rule 14a-2(b)(9)(ii) conditions is December 1, 2021," and that the Staff No-Action Statement "does not alter" that compliance date. *Id.* at 67,393 n.120. The Commission requested comment on the proposed changes and other potential actions in this area. *Id.* at 67,388-89, 67,390-91.

LEGAL STANDARD

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "When assessing a summary judgment motion in an APA case, the district judge sits as an appellate tribunal," and "[t]he entire case on review is a question of law." *Permian Basin Petroleum Ass'n v. Dep't of the Interior*, 127 F. Supp. 3d 700, 706 (W.D. Tex. 2015).

ARGUMENT

I. The Commission has not suspended the December 1, 2021 compliance date.

With limited exceptions, an agency may not delay the effective or compliance date of a rule without providing notice and comment. *See* Mot. 6-7 (citing authorities). The Commission has not attempted to do so here. Rather, this case involves only an informal determination by the staff of the Division of Corporation Finance not to recommend that the Commission bring certain

enforcement actions for a limited time period. Such informal staff statements have no legal force and do not require notice and comment. And there is no merit to plaintiffs' unprecedented contention that a single sentence in a legal filing by Commission counsel can transform a staff no-action statement into a binding legislative rule by judicial estoppel. Because the Commission has not suspended the December 1, 2021 compliance date, plaintiffs' arguments do not support their claim and their authorities are plainly distinguishable.

A. The Division's informal determination not to recommend enforcement action to the Commission did not—and could not—suspend the compliance date.

The Commission is composed of five Commissioners and, as a general matter, takes action by majority vote. 15 U.S.C. § 78d(a); *see also, e.g.*, 17 C.F.R. 202.1, 202.5-6, 201.192, 200.400 *et seq.* While the Commission can delegate some of its functions, the Exchange Act prohibits delegation of the Commission's rulemaking authority (including its rulemaking authority over proxy solicitation, 15 U.S.C. § 78n(a)(1)) to the staff or to any individual Commissioner. *Id.* § 78d-1(a). Nor has the Commission delegated its authority to formally institute an enforcement action. *See id.* § 78u(d); 17 C.F.R. 200.30-4; 17 C.F.R. 202.5. Rather, such action is instituted by a vote of the full Commission, typically based upon a recommendation presented to the Commission by the staff of the Division of Enforcement. *See* 17 C.F.R. 202.5. Here, there is no question that the Commission itself has not acted to alter the December 1, 2021 compliance date that applies to certain of the 2020 Rule Amendments.

Plaintiffs rely instead on statements by the Chair, Commission staff, and Commission counsel. *See* Mot. 4-5. But those statements do not purport to—and in any event, could not—suspend the December 1, 2021 compliance date. The Chair's statement directing Commission staff to *consider* whether to recommend that the Commission revisit the 2020 Rule Amendments did not even mention the compliance date. *See* Hughes Decl. Ex. A; *cf.* 15 U.S.C. § 78d-2 (transferring to the Chair "the functions of the Commission with respect to the assignment of Commission personnel").

Similarly, the Staff No-Action Statement says only that "the Division [of Corporation Finance]" will not "recommend enforcement action to the Commission" based on the 2020 Rule Amendments while the Commission is considering further regulatory action. Hughes Decl. Ex. B. It does not address PVABs' obligation to comply with the amendments; nor does it bind either the Division of Enforcement (which would be responsible for investigating and bringing any enforcement action) or the Commission itself. If there were any doubt on that score, the statement makes clear that it "expresses *the Division [of Corporation Finance]'s* position on enforcement only" and "does not express any legal conclusion." *Id.* (emphasis added); *cf. Sanitary Bd. of Charleston v. Wheeler*, 918 F.3d 324, 338 (4th Cir. 2019) ("[W]hen a letter clearly states that the comments contained therein 'do not constitute approval or disapproval decisions,' they do not, in fact, reflect the agency's final position."). And non-binding staff statements are expressly contemplated by Commission regulations, which make clear the distinction between such statements and actions by the Commission itself. *See* 17 C.F.R. 202.1(d) (distinguishing between staff and Commission statements and stating that "opinions expressed by members of the staff do not constitute an official expression of the Commission's views").

NAM thus got it right when it acknowledged that the Staff No-Action Statement is "only about *staff recommendations* on enforcement" and does not suggest "that the *Commission* can't or won't take enforcement actions." Ex. 1. And that fact is fatal to its APA claim here. Under the APA, only legislative rules—those with the force and effect of law—require notice and comment. *See Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 250-51 (D.C. Cir. 2014) (citing 5 U.S.C. § 553). And no-action statements are not legislative rules because, as courts have uniformly recognized, they "merely express[] the view of the Division's staff" and "do not oblige or prevent action by the SEC, the parties, or the courts." *N.Y. City Employees' Ret. Sys. v. SEC*, 45 F.3d 7, 13-14 (2d Cir. 1995); *see also Amalgamated Clothing & Textile Workers Union v. SEC*, 15 F.3d 254, 257 (2d Cir. 1994) (staff no-action

letters "do[] not bind the SEC to a particular course of action" and "have no binding effect on the parties addressed in the letters"); *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 427 n.19 (D.C. Cir. 1992) (staff no-action letters concerning shareholder proposals are neither agency adjudication nor rule-making); *Kixmiller v. SEC*, 492 F.2d 641, 642, 644 (D.C. Cir. 1974) (no-action letters reflect the staff's "informal[]" determination "not [to] recommend action by the Commission"); *Bd. of Trade v. SEC*, 883 F.2d 525, 529 (7th Cir. 1989) (the Commission may "proceed no matter what the [staff] recommends" in a no-action letter). Plaintiffs do not even try to reconcile their notice-and-comment claim with this case law.

Plaintiffs separately argue that the Staff No-Action Statement is not "committed to agency discretion by law," 5 U.S.C. 701(a)(2), because it is not limited to "an individual case." Mot. 11-13. But they do not argue that the statement's scope is relevant to whether it is a legislative rule. And for good reason: the cases recognizing that staff no-action statements have no binding legal effect do not turn on the scope of the staff recommendation. In *New York City Employees' Retirement System*, for example, the Second Circuit held that a staff no-action letter was not a legislative rule, even though it "expressly abandoned a previous SEC rule," because, like the Staff No-Action Statement here, it merely reflected the staff's informal views. *N.Y. City Employees' Ret. Sys.*, 45 F.3d at 13-14.[1] And any claim that the staff statement at issue here is functionally equivalent to a general Commission policy of non-enforcement is unfounded. The Commission itself has not made any determinations regarding enforcement since the December 1, 2021 compliance date for the Rule 14a-2(b)(9)(ii) conditions.

[1] Moreover, although it may be broader in scope, the Staff No-Action Statement is more limited in duration than no-action letters in the Rule 14a-8 context, which have no expiration. It will expire when the new rulemaking process concludes, or a "reasonable period of time" after ISS resumes litigation, whichever comes first. *See* Hughes Decl. Ex. 2.

B. None of the cases cited by plaintiffs supports their assertion that the Division's statement suspended the compliance date.

In arguing that the Staff No-Action Statement "effectively suspended the compliance date for the [2020 Rule Amendments]," plaintiffs rely on cases involving agency actions that bear no resemblance to an informal staff determination not to recommend enforcement action. Mot. 5, 6-7. Several involve final agency rules explicitly delaying the effective or compliance dates of recently adopted rules. *See Natural Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 113 (2d Cir. 2018); *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 194 (2d Cir. 2004); *Louisiana v. Dep't of Commerce*, 2021 WL 4125058, at *1 (E.D. La. Sept. 9, 2021); *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 964 (D.S.C. 2018); *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5, 15 (D.D.C. 2017). Others involve *agency* notices or memoranda postponing a rule's compliance dates. *See Open Cmtys. Alliance v. Carson*, 286 F. Supp. 3d 148, 162-63 (D.D.C. 2017); *Becerra v. U.S. Dep't of Interior*, 276 F. Supp. 3d 953, 965-66 (N.D. Cal. 2017); *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1118 (N.D. Cal. 2017). And *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017), involved an EPA decision to impose a stay that suspended a rule's effective and compliance dates. *Id.* at 6-7. None of these authorities supports the proposition that the *staff* statement at issue here—which the Commission's own regulations recognize does not carry the force of law, *see* 17 C.F.R. 202.1(d)—modified the compliance date of the 2020 Rule Amendments.

The cases cited by plaintiffs involving agency actions that had the substantive effect of suspending or amending a rule are likewise inapposite. For example, in *Environmental Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802 (D.C. Cir. 1983), the EPA decided not to accept permit applications that were a necessary prerequisite to the implementation of recently adopted regulations. *Id.* at 814. Although this decision "was not expressed as a suspension of the regulations," the court concluded that it "effectively suspend[ed] the[ir] implementation." *Id.* at 816, 818. Similarly, in *Public Citizen Health Research Group v. Acosta*, 363 F. Supp. 3d 1 (D.D.C. 2018), the court ruled that the plaintiffs

had plausibly alleged that OSHA's announcement that it was "not accepting" forms that one of its rules required employers to submit, and that employers were "only required" to submit certain other forms, was "tantamount" to a suspension of the rule. *Id.* at 18 (quotation omitted). And *American Academy of Pediatrics v. FDA*, 379 F. Supp. 3d 461 (D. Md. 2019), involved an FDA guidance document that, contrary to "the plain language of the statute," delayed the timeframe in which manufacturers of certain new tobacco products were required to seek FDA approval and permitted the pre-approval marketing and distribution of those products. *Id.* at 468, 485. Here, by contrast, the Staff No-Action Statement does not have the necessary effect of halting implementation of the 2020 Rule Amendments (*Environmental Defense Fund*), and it neither speaks for the Commission itself nor purports to relieve PVABs of any regulatory or statutory obligations (*Public Citizen Health Research Group* and *American Academy of Pediatrics*).

For similar reasons, plaintiffs derive no support from cases holding that an agency's statement of a general enforcement policy may be reviewable. *See* Mot. 12. The Commission has not "consciously and expressly adopted" *any* general enforcement policy with respect to PVABs, let alone one 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) (quotation omitted), or one that is premised on a contested statutory interpretation, *see NAACP v. Trump*, 298 F. Supp. 3d 209, 226-34 (D.D.C. 2018) (discussing *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671 (D.C. Cir. 1994) and *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808 (D.C. Cir. 1998)). On the contrary, the Commission's only pronouncement on the matter since adopting the 2020 Rule Amendments affirms that the December 1, 2021 compliance date has not been altered. 86 Fed. Reg. at 67,393 n.120.

C. The brief reference to the Division's statement in the Commission's abeyance motion in the ISS Litigation did not transform it into a suspension of the compliance date.

Perhaps recognizing that they cannot prevail on the basis of the Staff No-Action Statement alone, plaintiffs center their argument that the compliance date has been suspended on a cursory reference to the statement in the Commission's abeyance motion in the ISS Litigation. *See* Mot. 5, 9. The Commission argued that an abeyance was appropriate because the further regulatory action that the Chair directed staff to consider "could substantially narrow or moot some or all of ISS's claims." Hughes Decl. Ex. C at 3. In separately addressing whether an abeyance would cause substantial hardship, the Commission observed that ISS could resume the litigation if further regulatory action failed to resolve its claims, and that "in the meantime, *as noted above*, 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 (emphasis added).

This sentence does not say that PVABs are "affirmatively" relieved "from having to comply with the [2020 Rule Amendments] starting December 1, 2021." Mot. 5, 9, 11. It does not describe the nature or extent of the "relief from the December 1, 2021 compliance date" provided by the staff statement at all, much less expand the statement's effect in the way plaintiffs incorrectly assert. Rather, it merely references the motion's earlier description of the statement, which accurately describes the "relief" provided not as a delay of the compliance date, but rather the Division of Corporation Finance's informal determination that, if the Commission has not yet acted and the ISS Litigation is still in abeyance when the December 1, 2021 compliance date arrives, the Division will not recommend that the Commission bring an enforcement action on the basis of amendments it is actively reconsidering. And even if Commission counsel had suggested that PVABs were relieved of their obligation to comply with the December 1, 2021 deadline, such a representation would not have constituted final agency action with any legal effect. *See, e.g.*, *Syngenta Crop Prot., Inc. v. EPA*, 202

F. Supp. 2d 437, 446-47 (M.D.N.C. 2002) (holding that statements in legal briefs filed by agency counsel did not constitute final agency action because they "were made in support of the [agency] and there is nothing on the record to establish that the [agency] itself endorsed the statements"); *Querim v. EEOC*, 111 F. Supp. 2d 259, 269-70 (S.D.N.Y. 2000) (holding that agency's "legal brief" in the context of litigation "cannot be construed as a regulation or as 'final agency action' of any kind"); *cf. State v. Biden*, 10 F.4th 538, 552 (5th Cir. 2021) (in reviewing agency action, courts "can consider only the reasoning articulated by the agency itself") (quotation omitted).

Nor can judicial estoppel salvage plaintiffs' claim. "[I]t is well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 60 (1984); *see also SEC v. Badian*, No. 06 Civ. 2621, 2010 WL 1028256, at *2 (S.D.N.Y. Mar. 11, 2010) (citing numerous decisions holding that "the SEC cannot be subject to estoppel at all") (quotation omitted). The Supreme Court has cautioned, for example, that judicial estoppel is not appropriate where it would "compromise a governmental interest in enforcing the law." *New Hampshire v. Maine*, 532 U.S. 742, 755 (2001). Yet that would be the result if an agency could be estopped from disputing that a statement by its litigation counsel suspended a duly adopted regulation. *See Heckler*, 467 U.S. at 60 ("When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined.").

In any event, none of the prerequisites of judicial estoppel are present. For judicial estoppel to apply, "the estopped party's position must be clearly inconsistent with its previous one" and "that party must have convinced the court to accept that previous position." *Gabarick v. Laurin Mar. (Am.) Inc.*, 753 F.3d 550, 553 (5th Cir. 2014) (quotation omitted). In addition, "the party [must] not [have] act[ed] inadvertently." *Trinity Marine Prods., Inc. v. United States*, 812 F.3d 481, 490 (5th Cir. 2016) (quotation omitted). Here, the Commission has not taken "clearly inconsistent" positions with

respect to the effect of the Staff No-Action Statement. *Gabarick*, 753 F.3d at 553. As noted above, the sentence on which plaintiffs rely does not specify the nature of the relief that the Staff No-Action Statement provides. *See* Hughes Dec. Ex. C at 4. It explicitly refers to an earlier discussion of the Staff No-Action Statement that does not suggest that the staff had relieved PVABs of their obligation to comply with the 2020 Rule Amendments and is thus consistent with the Commission's argument here. *Id.* at 3.

Nor is there any basis to conclude that the Commission "convinced the court to accept" that it had relieved PVABs of their obligation to comply with the amendments. *Gabarick*, 753 F.3d at 553. In granting the motion, the court cited only the Chair's statement and the prospect that further regulatory action "could substantially narrow or eliminate the issues" in that case, without even mentioning the Staff No-Action Statement. Ex. 2. Plaintiffs' theory (Mot. 10-11) that ISS and the court must have understood the Commission to have suspended the compliance date, and relied on that understanding, is pure speculation—indeed, it presumes that a sophisticated party and experienced district judge acted on the basis of a likely violation of the APA. And to the extent Commission counsel's statement can be read to suggest that the Commission had done so, any such suggestion was clearly "inadvertent." *Trinity Marine Prods.*, 812 F.3d at 490.

II. The Division's informal determination not to recommend enforcement action to the Commission is not reviewable under the APA.

The APA authorizes suit by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Where, as here, no other statute authorizes judicial review, APA review is limited to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Plaintiffs' APA claim is unreviewable because the Staff No-Action Statement does not constitute "agency action," and even if were agency action, it is not "final." Accordingly, this Court lacks jurisdiction.

See Am. Airlines, Inc. v. Herman, 176 F.3d 283, 287 (5th Cir. 1999) (a court lacks subject matter jurisdiction if there is no "final agency action" as required by the controlling statute).

A. Plaintiffs do not challenge an "agency action" under the APA.

The Staff No-Action Statement was neither issued by the "agency" nor an "action" within the meaning of the APA. As noted above, the Commission as an agency may only act by a majority vote of its members or through a lawful delegation of its authority. The staff statement was not issued pursuant to either method. Moreover, "[t]he term 'action' as used in the APA is a term of art that does not include all [government] conduct." *Louisiana v. Texas*, 948 F.3d 317, 321 (5th Cir. 2020) (quotation omitted). The APA's definition includes "five categories of decisions made or outcomes implemented by an agency—'agency rule, order, license, sanction [or] relief.'" *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004) (quoting 5 U.S.C. § 551(13)).

The Staff No-Action Statement does not fall within any of these categories. It is not a rule because it "does not 'implement, interpret, or prescribe law or policy.'" *Independent Equipment Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (quoting 5 U.S.C. § 551(4)). It "neither announced a new interpretation of the [2020 Rule Amendments] nor effected a change in the [amendments] themselves." *Id.* at 427, *see also supra* 7-9. Nor does it constitute "relief" as defined by the APA—a type of agency action not subject to notice and comment—as it "does not bind" the Commission, the parties, or the courts, *Amalgamated Clothing*, 15 F.3d at 257, and thus cannot be said to "grant" an "exemption, exception, privilege, or remedy," 5 U.S.C. § 551(11)(A).

B. Plaintiffs do not challenge any agency action that is "final."

Even if plaintiffs challenged some "agency action," it is not "final" agency action. Agency action is "final" under the APA only when it both "mark[s] the consummation of the agency's decisionmaking process" and is "one by which rights or obligations have been determined, or from

which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotation omitted).

Here, "there was simply no decisionmaking process that culminated in the publication of the [Staff No-Action Statement]." *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 432 (4th Cir. 2010). No-action statements reflect the staff's "informal advice," *Amalgamated Clothing*, 15 F.3d at 257, and "do[] not amount to an official statement of the SEC's views," *N.Y. City Employees' Ret. Sys.*, 45 F.3d at 12. *See also, e.g.*, *Bd. of Trade*, 883 F.2d at 529-30 (finding no-action letter "tentative," not "final" within the meaning of Section 25 of the Exchange Act); *Apache Corp. v. N.Y. City Employees' Ret. Sys.*, 621 F. Supp. 2d 444, 448 n.3 (S.D. Tex. 2008) (a staff no-action letter is an "informal response"). The Commission thus retains the discretion to decide whether to bring enforcement actions for any future violations of the 2020 Rule Amendments. Indeed, the Staff No-Action Statement specifically cautions that it "expresses the Division's position on enforcement only" and "is subject to any further action that may be taken by the Commission." Hughes Decl. Ex. B; *see Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1268 (D.C. Cir. 2018) (advice that is "issued by staff under a regulation that distinguishes between Commission and staff advice," is "subject to rescission at any time without notice," and is "not binding on the Commission" is not "final").

Moreover, as discussed above, the Staff No-Action Statement does not determine or alter any legal rights or obligations. *See supra* 8-9 (citing cases); *see also, e.g., Apache Corp. v. Chevedden*, 696 F. Supp. 2d 723, 735 (S.D. Tex. 2010) (staff no-action letters are "nonbinding"); *Apache Corp.*, 621 F. Supp. 2d. at 449 (same). Unless and until the Commission modifies the amendments through a valid legislative rule—by, for example, adopting amendments pursuant to the proposal on which it is currently seeking comment, *see* 86 Fed. Reg. 67,383—the amendments remain in effect, and the Commission "might elect to proceed" against a proxy voting advice business that fails to comply with them "no matter what the [staff] recommends." *Bd. of Trade*, 883 F.2d at 529; *accord N.Y. City*

Employees' Ret. Sys., 45 F.3d at 12 (same). Nor does the Staff No-Action Statement affect the availability of the private right of action that courts have recognized under Section 14(a). *See, e.g.*, *Amalgamated Clothing*, 15 F.3d at 257; *Kixmiller*, 492 F.2d at 645-46.

The Staff No-Action Statement thus lacks any "direct and appreciable legal consequences" that would render it final for APA purposes. *Bennett*, 520 U.S. at 178; *see Amalgamated Clothing*, 15 F.3d at 258 (holding that a staff no-action letter was not reviewable); *Bd. of Trade*, 883 F.2d at 529-30 (same); *Kixmiller*, 492 F.2d at 644 (same). And because the same is true of the Commission's motion in the ISS Litigation, *see Syngenta Crop Prot.*, 202 F. Supp. 2d at 446-47, *Querim*, 111 F. Supp. 2d at 269-70, plaintiffs' APA claim is unreviewable. Plaintiffs' contrary arguments (Mot. 8-9, 11-13) fail because they rest entirely on the erroneous premise that the Commission has suspended the December 1, 2021 compliance deadline. *See supra* Part I.

CONCLUSION

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

Dated: December 8, 2021

Respectfully submitted,

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