No. 23-60626

In the United States Court of Appeals for the Fifth Circuit

NATIONAL ASSOCIATION OF PRIVATE FUND MANAGERS;
MANAGED FUNDS ASSOCIATION;
ALTERNATIVE INVESTMENT MANAGEMENT ASSOCIATION,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for Review of Orders of the
Securities and Exchange Commission

REPLY BRIEF FOR PETITIONERS

JEFFREY B. WALL
JUDSON O. LITTLETON
MADELINE B. JENKS
COOPER F. GODFREY
SULLIVAN & CROMWELL LLP
1700 New York Avenue, N.W.
Washington, DC 20006
(202) 956-7500
wallj@sullcrom.com

Counsel for Petitioners

May 28, 2024

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel of record certifies that there are no corporations that are parents of any petitioner or that own stock in the petitioners.

A. Petitioners

National Association of Private Fund Managers

Managed Funds Association

Alternative Investment Management Association

Others who are not participants in this matter but may be financially interested in its outcome include members of the National Association of Private Fund Managers, Managed Funds Association, and Alternative Investment Management Association.

B. Attorneys for Petitioners

Jeffrey B. Wall
Judson O. Littleton
Madeline B. Jenks
Cooper F. Godfrey
SULLIVAN & CROMWELL LLP
1700 New York Avenue, N.W.
Suite 700
Washington, DC 20006

C. Respondent

Securities and Exchange Commission

D. Attorneys for Respondent

Megan Barbero
Michael A. Conley
Dominick V. Freda
Emily T. Parise
Stephen A. Silverman
SECURITIES AND EXCHANGE COMMISSION
100 F Street, N.E.
Washington, DC 20549

E. Amici

Committee on Capital Markets Regulation

The Chamber of Commerce of the United States of America

Securities Industry and Financial Markets Association

Investor Choice Advocates Network

California Alternative Investments Association

Jeffrey H. Harris, former SEC Chief Economist and Director of the Division of Economic and Risk Analysis

S.P. Kothari, former SEC Chief Economist and Director of the Division of Economic and Risk Analysis

Craig Lewis, former SEC Chief Economist and Director of the Division of Economic and Risk Analysis

Jim Overdahl, former SEC Chief Economist and Director of the Office of Economic Analysis

Chester Spatt, former SEC Chief Economist and Director of the Office of Economic Analysis

F. Attorneys for Amici

Hal S. Scott
COMMITTEE ON CAPITAL MARKETS
REGULATION
134 Mount Auburn Street
Cambridge, MA 02138

C. Wallace DeWitt
ALLEN & OVERY LLP
1101 New York Ave. NW
Washington, DC 20005

Counsel for Amicus Curiae Committee on Capital Markets Regulation

Andrew R. Varcoe
Tyler S. Badgley
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Roman Martinez
Peter E. Davis
Peter A. Prindiville
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

Kevin Carroll
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1099 New York Avenue, NW
Washington, DC 20001

Mark A. Perry
Robert Stern
Joshua M. Wesneski
WEIL, GOTSHAL & MANGES LLP
2001 M Street NW, Suite 600
Washington, DC 20036

Mark I. Pinkert
WEIL, GOTSHAL & MANGES LLP
1395 Brickell Ave.
Miami, FL 33176

Counsel for Amicus Curiae Securities Industry and Financial Markets Association

Angela Laughlin Brown
GRAY REED & MCGRAW LLP
1601 Elm Street, Suite 4600
Dallas, TX 75201

Counsel for Amici Curiae Investor Choice Advocates Network and California Alternative Investments Association

Jonathan Y. Ellis
Katherine Richardson
MCGUIREWOODS LLP
501 Fayetteville St.,
Suite 500
Raleigh, NC 27601

Kathryn M. Barber
MCGUIREWOODS LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219

Counsel for Amici Curiae Jeffrey H. Harris, S.P. Kothari, Craig Lewis, Jim Overdahl, and Chester Spratt

Dated: May 28, 2024

/s/ *Jeffrey B. Wall*
JEFFREY B. WALL

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

The Commission acknowledges that the two rules at issue in this case are related and ultimately reveal the same information. It also admits that it reopened one rule's comment period for the express purpose of soliciting public comment on how the two rules would interact. In those comments, parties pointed out that the proposed rules would adopt fundamentally inconsistent regimes for disclosure of the same market activity. Yet when the Commission ultimately finalized the two rules—on the same day only minutes apart—it literally ignored those comments. It did not even address the readily apparent inconsistency between the rules' disclosure regimes. Sometimes silence is telling; given the sequence of events here, it is damning. This is a textbook example of unreasoned and arbitrary agency action.

In trying to defend the rules, the Commission resorts to semantics. It acknowledges that the two rules are "related," Br. 21, but argues that it did not need to consider them together because they are "not interrelated," Br. 38. Whatever that means, it is wrong. The Commission admits that securities loans are proxies for short sales, and thus that the new disclosures under the Securities Lending Rule will effectively disclose short-sale information. Yet the Commission made no effort in the rules themselves to explain why they adopt fundamentally inconsistent regimes for such disclosure. Even in its brief here, the Commission glosses over that key question. The overlap between the rules is obvious, and the Commission's failure to address it in the rules violates the APA.

On the substance, the Commission does not dispute that the rules take starkly different approaches to the disclosure of information reflecting short-sale activity. In the Short Sale Rule, the Commission determined that it was necessary to publish such information on an *aggregated* and *delayed* basis in order to avoid harm to markets and investors. But in the Securities Lending Rule, the Commission required publication of granular information reflecting short-sale activity on a *transaction-by-transaction*, *next-day* basis. The Commission tries to minimize these contradictions by pointing to the 20-day publication delay for one data point about securities loans. That single adjustment is itself inconsistent with the Short Sale Rule—which rejected *any* transaction-level short-sale disclosure—and does nothing to address the many other contradictions between the two rules or explain the Commission's inconsistent assessments of the rules' costs and benefits.

The Commission does not have anything better to say about its failure to do a cumulative economic analysis of the two related rules. The Commission repeats its argument that the Securities Lending Rule did not need to take account of the Short Sale Rule because the latter was not yet final—even though the Commission knew that it would be finalized *minutes later*. The Commission now claims that the Short Sale Rule actually does take into account the Securities Lending Rule, but it cannot identify a single instance where the Short Sale Rule mentions the cumulative *costs* of the two rules. The APA and the Exchange Act required the Commission to assess whether the combined costs of these two obviously overlapping rules were justified, and to explain the basis for its conclusion. The Commission's abject failure to do so renders both rules invalid.

Finally, the two rules are unlawful even when assessed separately. For the Securities Lending Rule, the Commission contends that it has no obligation to ensure that its loan disclosure regime does not conflict with the statute authorizing limited short-sale disclosures. That argument violates basic interpretive principles requiring that courts harmonize separate provisions and prefer the specific over the general. And the Commission cannot dispute that it gave the public *no* chance to comment on the "one critical exception," Br. 2, that the Commission believes resolved the numerous concerns about excess short-sale disclosure. For the Short Sale Rule, the

Commission *still* does not explain why it could not have amended the existing FINRA reporting regime as a less costly and risky alternative to creating an entirely new reporting regime through EDGAR. And in now attempting to moot petitioners' extraterritoriality objection to the Short Sale Rule by rewriting its scope, the Commission directly contradicts the rule itself and only raises more questions.

ARGUMENT

I. THE SECURITIES LENDING RULE AND THE SHORT SALE RULE ARE BOTH INVALID WHEN CONSIDERED TOGETHER.

Having conceded that the two rules are "related" and that "each is designed to minimize the risk of chilling the short sale market," Br. 21, the Commission offers no reasoned explanation for its failure to *even consider* whether the rules are consistent with each other. Instead, the Commission "bur[ies] its head in the sand," *Mexican Gulf Fishing Co.* v. *U.S. Dep't of Com.*, 60 F.4th 956, 973 (5th Cir. 2023), resulting in two fundamentally inconsistent disclosure regimes for the same market activity. On top of that, the Commission cannot identify a single instance where it considered the cumulative *costs* of these two related rules, in violation of the Exchange Act and the APA.

A. The Commission Failed To Consider Or Justify Its Contradictory Approaches To Disclosure Of The Same Market Activity.

1. The Commission's brief repeatedly acknowledges the close relationship between the two rules. *See, e.g.*, Br. 15-16 (securities loan data is "directly related to short selling activity" and there is a "'close correlation' between customer loan size information and short interest") (quoting Sec. Lend. R. 75,710-75,711, 75,696). As the Commission puts it, "revealing the size of an individual loan in real-time could reveal the size of individual short positions." Br. 27.[1]

When the Commission proposed the Short Sale Rule, it simultaneously reopened the comment period for the Securities Lending Rule for the express purpose of soliciting comments on the interaction between the two rules. A.R.2 (Sec. Lend. R. Reopening); *see* Br. 12-13. Multiple commenters responded to point out that the two rules required disclosure of the same information, but with inconsistent approaches. For example, petitioner MFA explained that data disclosed under the proposed Securities Lending Rule

---

[1] The Commission's observation (at 2) that the two rules "apply to different market participants and require the collection and dissemination of different data" does not change the fact that—as the Commission acknowledges—both rules publish information that can reveal short-sale positions and strategies.

"would effectively serve as a proxy disclosure for actual short selling activity and short positions"—information the Commission was specifically attempting *not* to disclose in the proposed Short Sale Rule. A.R.316:3 (MFA Comment, Apr. 1, 2022); *see* Pet. Br. 17-18.

Yet the Commission finalized the two rules without *any* consideration of how they interact. The Commission did not even address the comments that it had specifically invited. *See Perez* v. *Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) ("An agency must consider and respond to significant comments received."). Even in its brief, the Commission does not address the reopened comment period, other than to acknowledge that it occurred. Br. 12-13. "By failing to consider the combined impact of these rules," the Commission "either failed to consider an important aspect of the problem and disregarded 'inconvenient facts' about the combined impact of these rules or . . . reached a conclusion that defies common sense." *Immigrant Legal Res. Ctr.* v. *Wolf*, 491 F. Supp. 3d 520, 541 (N.D. Cal. 2020) (quoting *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009)); *see Centro Legal de la Raza* v. *EOIR*, 524 F. Supp. 3d 919, 962 (N.D. Cal. 2021) ("[B]y failing to consider the combined impact of all of these rules, EOIR 'entirely failed to consider an important aspect of the problem[.]'") (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Just like the rules themselves, the Commission's brief seeks only to justify each individual rule in a vacuum. The Commission argues separately that it "reasonably explained its approach to disclosure of securities lending data," Br. 25, and that it "reasonably explained its approach to the disclosure of short sale data," Br. 30. In the Commission's view, "[t]hat is all the APA requires." Br. 24 (internal quotations omitted). No, it is not. An agency must demonstrate that it "has at least understood the relevant factors to be considered and has provided an adequate explanation of its reasoning process," including the interactions between "concurrent proceeding[s]." *Off. of Comm'n of United Church of Christ* v. *FCC*, 707 F.2d 1413, 1440-1442 (D.C. Cir. 1983) (finding it "seriously disturbing" and "almost beyond belief" that an agency would take rulemaking action undercutting another "concurrent" rulemaking with an "apparent failure to consider the problem"). That obligation plainly required the Commission to explain the fact that it was taking inconsistent approaches to addressing the same concern in two rules finalized mere minutes apart. *See Encino Motorcars, LLC* v. *Navarro*, 579 U.S. 211, 219 (2016) ("When an agency changes its existing position, it . . . must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'") (quoting *Fox*, 556 U.S. at 515).

The only attempted explanation the Commission ever offers for not considering whether the rules conflict is that the "later-adopted Short Sale Rule" "remain[ed] at the proposal stage" when the Securities Lending Rule was adopted. Br. 33. According to the Commission, it simply happened to adopt the two rules "sequentially on the same day," not "'concurrently' as part of an interrelated package." Br. 41. That timing game makes a mockery of the APA's reasoned-decisionmaking requirement. An agency cannot avoid considering how two closely related rules interact simply by characterizing their finalization—minutes apart, at the same open meeting—as "sequential" rather than "concurrent." *See Dist. Hosp. Partners, L.P.* v. *Burwell*, 786 F.3d 46, 59 n.7 (D.C. Cir. 2015) ("Although [a 2003 Notice of Proposed Rulemaking] was not technically part of the 2004 rulemaking record, it was sufficiently similar to, and contemporaneous with, the 2004 rulemaking as to require the Secretary to explain inconsistencies in the data.").

2. The Commission repeatedly admits that both rules raise the same concern—namely, "revealing proprietary short sale strategies" and thereby "chilling the short sale market," which will harm market-wide liquidity and

efficiency. Br. 21, 25, 29-30. The Commission also admits that the rules "take different approaches" to that concern. Br. 22; *see* Br. 31 (Commission "considered the same concerns" in the two rules "and addressed them in a different . . . manner"). The Short Sale Rule only requires disclosing *aggregated* and *delayed* data, whereas the Securities Lending Rule requires *transaction-by-transaction*, *next-day* data. *See* Pet. Br. 32-36. Nowhere in the rules did the Commission even acknowledge this difference in approach, much less attempt to justify it. If the Commission "preferred [not to] address the downside risks to the short selling market in the same way," Br. 3, it needed to explain why. *See West Deptford Energy, LLC* v. *FERC*, 766 F.3d 10, 22 (D.C. Cir. 2014) ("[T]he last time the Commission addressed . . . the question . . . the Commission gave the exact opposite answer. That is the very essence of unreasoned and arbitrary decisionmaking[.]").

The Commission's only response is to point to a single element of the Securities Lending Rule—a 20-business-day delay of the publication of transaction-size data. The Commission claims (at 25) that this "one exception is key" and makes the rules fully consistent. Not so. At best, delaying the publication of a single data point by 20 business days simply substitutes one inconsistency for another.

First, publishing *any* transaction-level securities loan data conflicts with the Commission's findings in the Short Sale Rule. That rule does not require publication of any transaction-level data—even with a month's delay—because the Commission determined that "the anticipated benefit[s] of enhanced transparency" from transaction-level data would "not justify the costs." Short Sale R. 75,132-75,133. And the Commission acknowledges that "revealing the size of an individual loan . . . could reveal the size of individual short positions," Br. 27, meaning that even delayed publication of transaction-level data "could provide information about short sellers' strategies." Sec. Lend. R. 75,711. The Commission offers no explanation for why it changed its mind in the Securities Lending Rule and required publication of transaction-level data. That unaddressed contradiction alone is reason enough to vacate the two rules.

Second, the Securities Lending Rule separately requires the publication of *aggregate* loan-size data on a next-day basis (*i.e.*, without benefiting from any 20-day exception). *See* Br. 14, 26. FINRA recently confirmed that this aggregate loan-size data can be filtered to isolate the "customer" loans that directly relate to short sales.[2] *Notice of Filing of a Proposed Rule Change to*

[2] The Commission incorrectly claims (at 27) that petitioners "omit[ted] the Commission's finding" that the data published under the Securities

Adopt the FINRA Rule 6500 Series, FINRA 115 (May 1, 2024) (FINRA Proposed Rule 6540(c)(1)(D)), https://www.finra.org/sites/default/files/2024-05/SR-FINRA-2024-007.pdf.; *see id.* at 107 (FINRA Proposed Rule 6530(a)(2)(N)). As FINRA explains, this aggregate data can "provide insight into short selling sentiment." *Id.* at 35. This requirement therefore also conflicts with the Short Sale Rule, which provides that aggregate data will be published only on *a month's delay* to avoid "the risk of short squeezes or other manipulative activities that could interfere with the price discovery function of equity markets." Br. 31 (quoting Short Sale R. 75,119); *see* Br. 18. Again, the Commission has no explanation for why it nonetheless required disclosure of that same underlying information on a dramatically accelerated basis under the Securities Lending Rule.

Third, the Commission continues to ignore the Securities Lending Rule's contradictory approach in publishing the numerous other data points besides loan size. *See* Pet. Br. 18-19. Under the Short Sale Rule, all data is aggregated and published with approximately a one-month delay. The

Lending Rule "would be inherently noisy." As petitioners already explained (and FINRA's proposed rule confirms), any such "noise" can easily be eliminated by filtering the data to identify "customer" loans that are related to short sales. *See* Pet. Br. 37-38.

Commission concluded that these precautions were necessary because the disclosure of confidential trading strategies would "increase[] the costs of short selling," which "may harm price efficiency" and "lead[] to lower liquidity." Short Sale R. 75,163, 75,165; *see id.* at 75,166, 75,173.

In the Securities Lending Rule, by contrast, the Commission required all transaction-level data other than loan size to be published on a daily basis. *See* Pet. Br. 22-23, 33-36. As petitioners explained (and the Commission does not contest), these other data elements will reveal significant information about short-sale activity, including which stocks are shorted each day, the number of short-sale transactions for each stock, and whether certain stocks are hard to borrow. *See* Pet. Br. 36-37; *see also* CCMR Amicus Br. 23 ("The daily transaction-level details mandated under the Securities Lending Rule provide sufficient information to allow for public identification of short positions without the individual loan amounts.").[3] Again, the Commission

[3] The Commission claims that "the risk of revealing short sellers' strategies is further mitigated if . . . short sellers borrow securities from multiple prime brokers." Br. 28-29; *see* Br. 16. This speculative workaround does not excuse the Commission's inconsistent approaches, particularly given the Commission's acknowledgment that only "*[s]ome* entities, such as *some* hedge funds, have multiple prime brokers." Sec. Lend. R. 75,703 n.806 (emphasis added). And that workaround would only lead to additional costs. For example, if short sellers seeking to protect their confidential strategies

never addresses these concerns, but instead dismissively asserts that loan data other than transaction size "is less likely to risk revealing proprietary short sale strategies." Br. 21.

Finally, the Commission offers no explanation for the two rules' contradictory conclusions about the consequences of publishing short-sale information. The Short Sale Rule is premised on the notion that public disclosure would "*increase[]* the costs of short selling," Short Sale R. 75,163 (emphasis added), but the Securities Lending Rule confusingly asserts that its excessive disclosure regime "will *lower* the cost of short selling," Sec. Lend. R. 75,707 (emphasis added); *see* Br. 17. In short, the Commission tries to "have it both ways," by "simultaneously . . . accept[ing] and . . . reject[ing]" the importance of confidentiality to the short-sale market. *Chamber of Com. of U.S.* v. *SEC*, 85 F.4th 760, 778 (5th Cir. 2023). Such "analytical incoherence" is "fatal by itself" to agency action. *Am. Petroleum Inst.* v. *EPA*, 684 F.3d 1342, 1351 (D.C. Cir. 2012).

---

must use several prime brokers instead of one, that will increase the risk of disclosing their trading strategies. It also will expose them to the inherent costs of engaging with multiple service providers for the same service. The Commission never considered these costs when it finalized the rule.

B. The Commission Never Assessed The Cumulative Economic Impact Of The Two Interrelated Rules.

1. The Commission likewise failed to "determine as best it can the economic implications" of the two rules before adopting them. *Chamber of Com. of U.S.* v. *SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005); *see* 15 U.S.C. § 78c(f) (Exchange Act mandate). For these interrelated rules, that analysis required the Commission to assess the combined benefits *and costs* of the two rules taken together. *See All. for Hippocratic Med.* v. *FDA*, 78 F.4th 210, 246 (5th Cir.) (considering the "cumulative effect" of interrelated agency actions is "unquestionably" part of the duty to analyze "an important aspect of the problem"), *cert. granted*, 144 S. Ct. 537 (2023); Exec. Order No. 13,563, *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011) (agencies must "tak[e] into account . . . the costs of cumulative regulations").

The Commission wrongly maintains that it did not have to assess the cumulative costs of the two rules in *either* rule. For the first-finalized Securities Lending Rule, the Commission argues (at 33, 38) that it did not need to consider cumulative costs because the second rule was not yet final—until a few minutes later. This argument asks the Court to "exhibit a naiveté from which ordinary citizens are free." *Dep't of Com.* v. *New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States* v. *Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)). Courts have long required "that an agency's right hand take account of what its left hand is doing." *Portland Cement Ass'n* v. *EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011). Accepting the Commission's "contrived reasons" for avoiding its obligation to conduct a cumulative economic analysis "would defeat the purpose of the [judicial] enterprise" and invite evasion and abuse. *Dep't of Com.*, 139 S. Ct. at 2576.

In the Short Sale Rule, finalized a few minutes later, the Commission acknowledges that it was required to consider the economic impact of the Securities Lending Rule, but claims that it did so by "bak[ing] [the Securities Lending Rule] into the baseline of the Short Sale Rule." Br. 37. As a result, the Commission says, "the analysis of the likely economic consequences of the Short Sale Rule considers the economic impact of both rules." *Id.*

No such analysis appeared in the rule itself, and the Commission cannot now pretend that it did. *See SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943). The Commission does not point to a single instance where the Short Sale Rule takes into account the cumulative *costs* of both rules. Instead, the Commission can refer only to instances where the Short Sale Rule discusses purported cumulative *benefits* of the second rule in light of the first. *See* Br. 36 (Short

Sale Rule provides "incremental economic benefits . . . over an economic baseline that includes the Securities Lending Rule"); Short Sale R. 75,154-75,157, 75,161 (assessing the benefits of the Short Sale Rule disclosures on top of "[e]xisting short selling data," including the new Securities Lending Rule disclosures). Notably, the Commission posits that the "information collected by each rule 'enhances the usefulness of the other,'" and that the "Commission may use [the combined] data in an attempt to match securities lending with actual short positions taken." Br. 35 (alteration in original). These purported "benefits" only *highlight* petitioners' concerns that the two datasets are additive and will impose cumulative costs that the Commission refused to even consider. *See* Pet. Br. 45 ("The combined data . . . provide more clues about the identity of . . . managers and their investment strategies than would have been possible under either rule by itself.").

Again, the Commission received numerous comments imploring it to take into account the cumulative costs of the rules. But the Commission's only "response to [these] commenters" was to "consider[] potential economic effects arising from any overlap between the *compliance period[s]*." Short Sale R. 75,149 (emphasis added); *see id.* at 75,171. The Commission accuses petitioners of taking those "words out of context," Br. 37, but tellingly cannot point to any other consideration of cumulative costs of the two rules.

2. None of the Commission's other arguments holds water.

First, the Commission claims that, unlike the EPA rules at issue in *Portland Cement*, the Securities Lending Rule and Short Sale Rule "are not interrelated." Br. 38. But the Commission repeatedly acknowledges the two rules are "related." Br. 21. The Commission's new position that rules are only "interrelated" when each "depends on the other to function," Br. 38-39, is invented out of whole cloth. Nothing in *Portland Cement* or any other case cited by the Commission cabins an agency's obligation to analyze the cumulative costs and benefits of related rules in that way. Nor would such a limit make sense, as it would allow an agency to avoid conducting a cumulative economic assessment simply by claiming that the rules are technically independent. *See Zen Magnets, LLC* v. *Consumer Prod. Safety Comm'n*, 841 F.3d 1141, 1150 (10th Cir. 2016) ("[A]n agency must have a similar obligation to acknowledge and account for a changed regulatory posture the agency creates—especially when the change impacts a contemporaneous and closely related rulemaking.") (quoting *Portland Cement*, 665 F.3d at 187); *see also* Chamber Amicus Br. 18-19 & n.5.

Second, the Commission unpersuasively attempts to distinguish previous times when it *has* conducted a cumulative economic analysis of multiple rules finalized on the same day. For instance, the Commission says that it only conducted a cumulative analysis of multiple rules finalized on the same day in 2019 because those rules "were considered as an interrelated 'package of rulemakings.'" Br. 42 (citing *Regulation Best Interest: The Broker-Dealer Standard of Conduct*, 84 Fed. Reg. 33,318, 33,345 (July 12, 2019), and *Form CRS*, 84 Fed. Reg. 33,492, 33,559 (July 12, 2019)).

But putting labels aside, the Commission acknowledged at the time that the two rules entailed "*separate* obligations with significant individual value," and that they "[would] complement each other" by "provid[ing] different levels of key information." 84 Fed. Reg. at 33,347 (emphasis added). That is exactly what the Commission said about the two rules at issue here. *See* Jaime Lizárraga, *Adopting Statement on Short Sale Disclosure: Striking the Right Balance* (Oct. 13, 2023) ("The [Short Sale Rule] *complements* the action the Commission has taken today to address transparency in the securities lending market, especially the public disclosure of securities lending information.") (emphasis added), https://www.sec.gov/news/statement/lizarraga-statement-short-sale-101323; *see also* Br. 19, 35.

Similarly, with respect to a set of 2016 rules finalized at the same open meeting, *see* Pet. Br. 42-43, the Commission asserts that *those* rules were "concurrently adopted rules" because the rules were "necessary to implement" each other, Br. 40 (emphasis omitted). But again, those rules followed the same rulemaking process as these two: the first rule was proposed months before the second rule, reopened to address the second rule, and then adopted at the same open meeting as the second rule.[4] At the end of the day, the Commission has no reasoned basis to distinguish the Securities Lending and Short Sale Rules from its past practice of considering the cumulative costs of related rules adopted on the same day, as required by the APA and Exchange Act. *See* Former SEC Chief Economists Amicus Br. 6 (the Commission's decision not to conduct a cumulative economic analysis "departed from its usual practice of considering the rules' economic analyses in connection with each other").

Third, the Commission builds a straw man, worrying that under petitioners' arguments it will have to "assess the likely economic consequences

---

[4] *Compare Investment Company Reporting Modernization*, 80 Fed. Reg. 33,590 (June 12, 2015), *with Open-End Fund Liquidity Risk Management Programs; Swing Pricing; Re-Opening of Comment Period for Investment Company Reporting Modernization Release*, 80 Fed. Reg. 62,274 (Oct. 15, 2015).

of multiple pending proposals that it might never adopt or might adopt with alterations." Br. 40. That is a substantial exaggeration. Simply put, when the Commission acknowledges that two rules are "related," specifically reopens a comment period to solicit feedback on the rules' overlap, and elects to finalize both rules on the same day at the same open meeting, its economic analysis must respond to commenters and consider the cumulative costs of both rules. No one is arguing that the Commission has to consider inconsistencies that it does not know about or rules that it does not ultimately adopt.

When conducting the statutorily required cumulative economic analysis of two interrelated rules, the APA and Exchange Act require the Commission to show its work, not to simply assert that the relevant costs are somehow "baked in." Its failure to do so here requires that both rules be set aside.

II. THE SECURITIES LENDING RULE IS INVALID IN ITS OWN RIGHT.

A. The Securities Lending Rule Is Contrary To Law And The Commission's Prior Determinations.

The Commission incorrectly argues (at 43-44) that, in adopting the Securities Lending Rule pursuant to Section 984(b) of the Dodd-Frank Act, it was not required to consider Section 929X, which "governs only short sales." To be sure, Section 984(b) provides the Commission a high-level directive to "promulgate rules that are designed to increase the transparency of information available" about "the loan or borrowing of securities." Pub. L. No. 111-203, sec. 984(b) (codified at 15 U.S.C. § 78j note). But it says nothing about *how* the Commission must advance that goal, and it certainly does not *require* the daily transaction-level disclosures that the Commission adopted in the Securities Lending Rule.

Under established principles of statutory interpretation, that general directive does not authorize the Commission to contradict the more specific directives in Section 929X, *i.e.*, to publish only the "*aggregate* amount of the number of short sales of each security," and to do so after a "reporting period" that could span up to a "month." Pub. L. No. 111-203, sec. 929X(a) (codified at 15 U.S.C. § 78m(f)(2)) (emphasis added); *see In re Prescription Home Health Care, Inc.*, 316 F.3d 542, 548 (5th Cir. 2002) ("[I]t is well established that a more specific statute controls over a more general one."). Courts construe separate statutory provisions "in harmony," not in a way that "set[s] them at cross-purposes." *Jones* v. *Hendrix*, 599 U.S. 465, 478 (2023); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012) (describing "[t]he imperative of harmony among provisions" as "more categorical than most other canons of construction").

That would be true of any two statutes that happened to touch on related subject matter, but it is particularly applicable here, where the two statutes are part of the same "comprehensive scheme" in the Dodd-Frank Act. *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012). And contrary to the Commission's argument, which treats these as separate statutory provisions that have nothing to do with each other, Section 929X itself draws that link: Section 929X, though titled "Short Sale Reforms," contains a provision addressing "notices to customers regarding *securities lending*." Pub. L. No. 111-203, sec. 929X(c) (codified at 15 U.S.C. § 78o(e)) (emphasis added).

The Commission next asserts (at 45) that Section 929X "set[] a floor (not a ceiling)" for what short-sale data the Commission may publish, because it references "any additional information determined by the Commission." But the provision specifically instructs the Commission to publish only "aggregate" data, and the Commission's reliance on a residual clause to override that term conflicts with the statutory construction canon of *ejusdem generis*. *See United States* v. *Kaluza*, 780 F.3d 647, 660-661 (5th Cir. 2015) ("Under the principle of *ejusdem generis*, 'where general words follow an enumeration of specific terms, the general words are read to apply only to other items like those specifically enumerated.'") (quoting *Garcia* v. *United States*, 469 U.S. 70, 74 (1984)). The Commission may have the power to *add* to the enumerated list in Section 929X, but it cannot *contradict* that provision by publishing transaction-level data when the statute specifically requires aggregate data.

Moreover, as petitioners explained (with no response by the Commission), Pet. Br. 47, Congress *rejected* a more granular short-sale disclosure regime. A prior draft of Section 929X would have required investment managers to report transaction-level information regarding short sales to the Commission "on a daily basis," H.R. 4173 § 7422 (Dec. 11, 2009), but Congress removed that provision and adopted an aggregate, periodic disclosure regime. The Commission's next-day securities-loan-disclosure regime would effectively undo that legislative choice.

The Commission also does not explain the Securities Lending Rule's conflict with prior determinations by the Commission's staff that publication of trade-by-trade short-sale data could be "harmful to price efficiency" and "may tend to reduce liquidity." *Short Sale Position and Transaction Reporting*, SEC Division of Economic and Risk Analysis 80, 83 (June 5, 2014), https://www.sec.gov/files/short-sale-position-and-transaction-reporting0.pdf.

The Commission faults petitioners (at 46) for relying on "a staff report," but the Commission itself cited that report twice in the Securities Lending Rule. Sec. Lend. R. 75,705 n.824, 75,728 n.1090. And the Commission's prior practice was consistent with the report's recommendation: "most currently available sources of short selling information only contain information about *aggregated* short selling activity." *Id.* at 75,711 (emphasis added). The Commission again offers no reason why it "depart[ed] from [its] prior policy *sub silentio*." *Fox*, 556 U.S. at 515.

B. The Commission Deprived The Public Of A Meaningful Opportunity To Comment.

By immediately finalizing the Securities Lending Rule rather than reopening the comment period, the Commission deprived the public of a meaningful opportunity to comment on its purported panacea of delaying the publication of transaction-level loan-size information by 20 business days. The Commission tries to excuse this failure by asserting (at 47) that the 20-business-day delay was adopted "in response" to comments, but that misses the point. The public had no opportunity to comment on whether that specific change *would* in fact address the concerns regarding copycat trading, manipulation, and retaliation.

And as petitioners have explained, that supposedly "critical exception," Br. 2, of delaying disclosure of individual loan size does *not* solve the problem. *See* Pet. Br. 51-52; *see also supra* pp. 9-13. The Commission does not respond to petitioners' explanation that "the remaining data points published on a next-day basis" under the Securities Lending Rule (including aggregate loan-size data) still "will reveal significant and sensitive information about short-sale activity." Pet. Br. 36-37; *see id.* at 44-45. Perhaps the Commission has no response to these points because it never sought comment on them.

III. THE SHORT SALE RULE IS INVALID IN ITS OWN RIGHT.

A. The Commission Never Meaningfully Explained Why It Could Not Modify The FINRA Reporting Regime.

Contrary to the Commission's suggestions, it did not "cogently explain," *State Farm*, 463 U.S. at 48, why it chose to create a brand new reporting regime through EDGAR rather than adopt the "less burdensome approach" of amending the existing FINRA reporting regime, Peirce, *Dissenting Statement on Short Sale Disclosure*. A cogent explanation requires "adequate reasons" for "abandon[ing]" a reasonable alternative. *State Farm*, 463 U.S. at 48. That standard is particularly high when "dissenting commissioners" "articulate[] a well-defined, serious option" as a reasonable alternative. *Am. Gas Ass'n* v. *FERC*, 593 F.3d 14, 20 (D.C. Cir. 2010); *see Chamber of Com.*, 412

F.3d at 144-145 (holding that Commission failed to adequately consider alternative disclosure requirement proposed by commenters and endorsed by "dissenting Commissioners").

The Commission points (at 51) to statements in the Short Sale Rule about the purported inadequacies of a FINRA reporting regime. Specifically, the Commission notes that FINRA's current regime applies only to broker-dealers and involves reporting of less granular and less timely information as compared to the new Short Sale Rule disclosures.

But as explained in petitioners' opening brief (at 55-56), the Commission's argument misses the core point raised by commenters and Commissioner Peirce: that the Commission could have simply *modified* the existing FINRA reporting regime to implement the Short Sale Rule disclosures in a significantly more cost-effective manner. The Commission never addresses this argument in either its rule or its brief. Nor does the Commission have any response to the point that, just months before the Commission proposed the Short Sale Rule, FINRA itself sought comment about potential amendments to its short-sale reporting requirements. FINRA Regulatory Notice 21-19, *FINRA Requests Comment on Short Interest*

Position Reporting Enhancements and Other Changes Related to Short Sale Reporting (June 4, 2021), https://finra.org/rules-guidance/notices/21-19.

The Commission also wrongly brushes aside cybersecurity concerns, pointing (at 52) to enhancements and upgrades to the EDGAR platform. But those purported upgrades and enhancements did not assuage the serious cybersecurity concerns raised by Commissioners Peirce and Uyeda in their dissenting statements. Peirce, *Dissenting Statement on Short Sale Disclosure* (explaining that the rule is "too cavalier in its treatment of the risks" because "[e]xposure could come through a breach of EDGAR"); Uyeda, *Dissenting Statement on Short Sale Position and Short Activity Reporting by Institutional Investment Managers*; *see* Pet. Br. 25, 57-58. And as a matter of common sense, protecting two platforms for highly confidential information is more difficult (and thus riskier) than protecting only one.

B. The Commission's Concession Does Not Solve The Short Sale Rule's Extraterritoriality Problem.

Finally, in an attempt to moot petitioners' extraterritoriality argument, the Commission now asserts (at 53-55) that "the Short Sale Rule does not apply to short sale transactions of foreign equity securities effected outside of the United States." The Court should vacate the rule despite this concession.

The Commission claims in its brief (at 54) that the rule did not "state that the Short Sale Rule would apply to short sale transactions effected outside the United States." To the contrary, the Short Sale Rule said exactly that. In rejecting a comment arguing against extraterritorial application of the rule, the Commission expressly stated: "Transparency regarding short selling by Managers of securities of U.S. and non-U.S. issuers is important *regardless of where those sales occur*." Short Sale R. 75,109 (emphasis added). The Commission's articulation of this new, contradictory position in its brief is effectively an admission that the rule's extraterritorial reach is indefensible. And of course, a statement in an appellate brief—rather than the rule itself—leaves the door open for the Commission to take a contrary position at some future date.

In any event, the Commission's new position raises more questions than answers. The Commission says (at 53) that the Short Sale Rule does not apply to transactions "effected outside of the United States" because these transactions "are not subject to the requirements of Regulation SHO." But drawing that link between the Short Sale Rule and Regulation SHO only makes things more confusing. Regulation SHO applies to individual *transactions*, depending on whether they were agreed to in the United States.

See Responses to Frequently Asked Questions Concerning Regulation SHO, Question 1.3 (Oct. 15, 2015), https://www.sec.gov/divisions/marketreg/mrfaqregsho1204.htm. But the Short Sale Rule requires reporting of "a monthly average of daily gross short *positions*"—which can be the sum of *multiple* individual transactions. Short Sale R. 75,104 (emphasis added). The Commission's brief fails to explain how a manager is to apply this new transaction-by-transaction test to positions resulting from multiple U.S. and non-U.S. transactions. And the Short Sale Rule makes no mention of this question, let alone the compliance costs and practical issues associated with applying the new test.

In short, rather than solve the problem, the Commission's attempted concession merely confirms that the Short Sale Rule should be vacated as impermissibly extraterritorial.

CONCLUSION

The Court should grant the petition for review and vacate the orders on review.

Dated: May 28, 2024

Respectfully submitted,

/s/ *Jeffrey B. Wall*
JEFFREY B. WALL
JUDSON O. LITTLETON
MADELINE B. JENKS
COOPER F. GODFREY
SULLIVAN & CROMWELL LLP
1700 New York Ave., N.W.
Suite 700
Washington, D.C. 20006
(202) 956-7500
wallj@sullcrom.com

Counsel for Petitioners

CERTIFICATE OF SERVICE

I certify that on May 28, 2024, the foregoing brief was electronically filed with the United States Court of Appeals for the Fifth Circuit using the CM/ECF system.

Dated: May 28, 2024

/s/ *Jeffrey B. Wall*
JEFFREY B. WALL

Counsel for Petitioners

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts exempted under Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2, it contains 6,014 words.

I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Expanded BT.

I further certify that (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13, and (2) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

Dated: May 28, 2024

/s/ *Jeffrey B. Wall*
JEFFREY B. WALL

Counsel for Petitioners