

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Petitioners,

v.

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,

Respondent.

No. _____

PETITION FOR REVIEW

Pursuant to 5 U.S.C. §§ 702-704, 706, 15 U.S.C. § 78y, and Federal Rule of Appellate Procedure 15(a), the National Association of Private Fund Managers, Managed Funds Association, and Alternative Investment Management Association hereby petition this Court for review of (i) the order of the U.S. Securities and Exchange Commission issuing a final rule in *Reporting of Securities Loans*, Release No. 34-98737, a copy of which is attached as Exhibit A (the Securities Loan Reporting Rule); and (ii) the order of the U.S. Securities and Exchange Commission issuing a final rule in *Short*

Position and Short Activity Reporting by Institutional Investment Managers, Release No. 34-98738, a copy of which is attached as Exhibit B (the Short Position Reporting Rule), both of which were entered by the Commission on October 13, 2023.

These two closely related rules present a particularly stark example of arbitrary and capricious agency rulemaking in violation of the Administrative Procedure Act. Both rules impose extensive new requirements for the reporting and public disclosure of information pertaining to short sales of securities, whether of the short-sale activity itself (as in the Short Position Reporting Rule) or of the loans of securities to facilitate that short-sale activity (as in the Securities Loan Reporting Rule). The Commission solicited public comment on the interaction between the two rules, and ultimately finalized them on the same day. Remarkably, however, in the final rules, the Commission entirely disregarded the interconnected nature of the two rules and adopted fundamentally contradictory approaches to the new disclosure requirements.

In particular, in the Short Position Reporting Rule, the Commission acknowledged that frequent, detailed disclosures about short-sale activity can impose substantial harms on markets (including by impairing price discovery,

liquidity, and detection of corporate waste or misconduct) and on market participants (including by revealing confidential investment strategies and potentially facilitating retaliation or other manipulative activities). Seeking to avoid those harms, the Commission adopted a delayed, aggregate public disclosure regime for short-sale activity. Yet the Commission then contradicted and undermined those very same considerations in the Securities Loan Reporting Rule by requiring *daily* public disclosure of *individual* transaction information pertaining to loans of securities in a manner that effectively serves as a proxy for short-sale activity. The Commission did not even attempt to explain its starkly different approaches, and it inexplicably refused to consider the rules' cumulative economic impact despite adopting them on the same day.

The rules also are invalid on their own terms for multiple reasons, including that they conflict with the Commission's statutory authority; impose substantial costs that outweigh their purported benefits; and insufficiently comply with the APA's procedural rulemaking requirements. In the case of the Short Position Reporting Rule, it also impermissibly purports to apply extraterritorially to securities traded outside the United States. For these and other reasons, this Court should grant the petition; hold unlawful, vacate, and

set aside both rules; and grant such additional relief as may be necessary and appropriate.

Dated: December 12, 2023

Respectfully submitted,

/s/ Jeffrey B. Wall

JEFFREY B. WALL

JUDSON O. LITTLETON

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 ELECTRONIC SUBMISSION

I certify that: (1) any required privacy redactions have been made; (2) the electronic submission of this document is an exact copy of any corresponding paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free from viruses.

Dated: December 12, 2023

/s/ Jeffrey B. Wall

JEFFREY B. WALL

Counsel for Petitioners

CERTIFICATE OF SERVICE

I certify that on December 12, 2023, the foregoing petition was electronically filed with the United States Court of Appeals for the Fifth Circuit using the CM/ECF system and two copies were sent to the Clerk of the Court by overnight Federal Express.

I further certify that there are no parties “admitted to participate in the agency proceedings” for purposes of Federal Rule of Appellate Procedure 15(c)(1) other than the respondent.

Dated: December 12, 2023

/s/ Jeffrey B. Wall

JEFFREY B. WALL

Counsel for Petitioners