



UNITED STATES  
**SECURITIES AND EXCHANGE COMMISSION**  
100 F STREET, N.E.  
WASHINGTON, D.C. 20549

OFFICE OF THE  
GENERAL COUNSEL

STEPHEN SILVERMAN  
202-551-6150  
SILVERMANST@SEC.GOV

July 10, 2024

Lyle W. Cayce  
Clerk of Court  
U.S. Court of Appeals for the Fifth Circuit  
F. Edward Hebert Building  
600 S. Maestri Place  
New Orleans, LA 70130

Re: *Nat'l Assoc. of Private Fund Managers, et al. v. SEC*, No. 23-60626

Dear Mr. Cayce:

Neither of the authorities referenced in petitioners' July 3, 2024 Rule 28(j) letter provides any basis to support vacating the Short Sale and Securities Lending rules at issue in this case. Petitioners cite *Ohio v. EPA*, No. 23A349 (S. Ct. June 27, 2024), and *National Association of Manufacturers v. SEC*, No. 22-51069 (5th Cir. June 26, 2024), for the well-established proposition that agencies must provide reasoned responses to significant comments in the rulemaking process. The Commission provided such reasoned responses to commenters here (Br. 24-31, 47-49), and petitioners have not shown otherwise.

Indeed, petitioners' reliance on this Court's *NAM* decision is particularly misplaced. In that case, this Court held that, in rescinding a prior policy regarding proxy voting advice, the Commission "failed adequately to explain its decision to disregard [a] prior factual finding" that "underlay" that earlier policy. Op. 10 (citation omitted). But the Commission did not rescind any prior policy when it adopted the Short Sale and Securities Lending rules. Instead, the rules are the types of "new polic[ies] created on a blank slate" that *NAM* specifically recognized are distinguishable. *Id.* (citation omitted). Nor are there any "inconsistent conclusions" (Ltr. 1) regarding the rules' risks to the short sale market. Rather, both rules acknowledge and address this risk: the Short Sale Rule does so by requiring the anonymized monthly reporting and aggregated public dissemination of all data; the Securities Lending Rule does so by requiring all disseminated data to be anonymized

and the subset of that data that poses the greatest risk of revealing short sellers' strategies (loan size data) to be published only after a significant delay. And while petitioners cite *NAM* for the proposition that courts should ignore agencies' *post hoc* rationalizations first raised in litigation, the Commission did not rely on any *post hoc* rationalizations here: the Short Sale Rule's economic analysis expressly incorporated the Securities Lending Rule into its economic baseline. Br. 33-37; Short Sale R. 75,148-49, 75,155-56, 75,158-59, 75,162.

Sincerely,

/s/ Stephen Silverman  
Stephen Silverman

cc: Counsel for petitioners (service via ECF)