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July 3, 2024

Via CM/ECF

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:

Pursuant to Federal Rule of Appellate Procedure 28(j), I write to call the Court's attention to *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). In *Ohio*, the Supreme Court stayed an EPA plan to address States' compliance with the Clean Air Act, finding the States likely to prevail on their argument that the plan was arbitrary and capricious. Op. 11-13. In *NAM*, this Court held that the SEC violated the APA by insufficiently explaining its rescission of a rule imposing requirements on businesses that provide proxy voting advice to shareholders. Op. 1-2. These decisions are relevant in three respects.

First, in *Ohio*, the Supreme Court found that the EPA's plan was likely arbitrary and capricious because the agency offered "no reasoned response" to comments identifying a fundamental flaw in its reasoning. Op. 12-14. In *NAM*, this Court held that a failure to "address commenters'" concerns is a "clear indicator[]" of arbitrary and capricious rulemaking." Op. 15. Here, the Commission refused to provide *any* response to comments explaining that it had proposed contradictory disclosure regimes for the same market activity.

Second, in *NAM*, this Court explained that an agency must provide "a more detailed explanation" when adopting a policy that contradicts a prior risk assessment. Op. 10-11. Here, the Short Sale Rule and the Securities Lending Rule reach fundamentally inconsistent conclusions as to the "risk of chilling the short sale market" created by each rule, Resp. Br.

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21, yet the Commission never even *acknowledged* its contradictory conclusions about the same risk, let alone “explain *why* it had changed its mind,” Op. 13.

Third, in *NAM*, this Court made clear that courts should ignore agencies’ “*post hoc* rationalizations” first raised in litigation. Op. 17. Here, the Commission argues in its brief (at 37) that the substantive economic impacts of the Securities Lending Rule were “baked into the baseline” of the Short Sale Rule, but the rule itself said only that the Commission considered “overlap between the compliance period(s)” of the two rules. Short Sale R. 75,149.

Sincerely,

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(Attachment)

**CERTIFICATE OF SERVICE**

I hereby certify that on July 3, 2024, I electronically filed the foregoing letter with the Clerk of Court using the CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished through the CM/ECF system.

/s/ Jeffrey B. Wall  
Jeffrey B. Wall

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