UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CRYPTO FREEDOM ALLIANCE OF TEXAS and BLOCKCHAIN ASSOCIATION,

Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION and GARY GENSLER, in his official capacity as Chairman of the Securities and Exchange Commission,

Defendants.

Case No. 4:24-cv-00361-O

PLAINTIFFS' COMBINED REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Nothing the Commission says in its Opposition solves the two fundamental problems with the Dealer Rule: (1) its attempt to redefine the term "dealer" to expand its jurisdiction conflicts with Congress's definition of that term in the Exchange Act, and (2) the Commission irrationally insisted on applying that new definition to digital asset markets without offering any meaningful explanation of why it made sense to do so given the vast technological and practical differences between the trading activity that happens in digital asset markets as compared to traditional markets. Both problems cause the Rule to violate the APA, and each provides an independent basis for this Court to set the Rule aside.

Remarkably, the Commission openly acknowledges that the purpose of its new interpretation of "dealer" in the Dealer Rule was to empower it to regulate entities that were not previously subject to the Commission's "regulatory regime," specifically those "engaging in strategies such as 'high frequency trading.'" Opp. 1. The Commission claims that redefinition of a statutory term enacted 90 years ago is appropriate because Congress gave it a "broad grant of authority . . . to define terms used in the Exchange Act," and the Rule simply reflects the Commission's "balancing [of] competing policy objectives." Opp. 14. That approach might have had some purchase in the past, but it has none in 2024 following the Supreme Court's instruction that "courts, not agencies, will decide '*all* relevant questions of law' arising on review of agency action." *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2261 (2024) (quoting 5 U.S.C. § 706 (emphasis in original)). The law here is clear, and the Commission has no authority to redefine who constitutes a "dealer" as it wishes under the guise of balancing policy objectives.

As for the Commission's lack of statutory authority, the Commission cannot show that its new interpretation of what it means to "engage[] in the business" of dealing is consistent with the Exchange Act. Never before has the Commission or anyone else understood that a person becomes a securities dealer by simply engaging in a sufficient volume of trading activity to have the "effect of providing liquidity" to the market. Indeed, the notion that engaging in "trading patterns" alone makes someone a dealer (Opp. 1) is itself inconsistent with the well-established "trader exception" carving out those who do not engage in the "regular business" of dealing. *See* 15 U.S.C. § 78c(a)(5)(B).

The Commission tries to find support for its interpretation in a smattering of cases, regulations, and other sources noting that dealers traditionally provide liquidity, but that cherrypicking exercise conflates the *effect* that a dealer's activity may have on the market with what kinds of business services make someone a dealer in the first place. And none of the Commission's sources provide any support for classifying a person as a dealer based solely on trading that has the effect of providing liquidity. Instead, those sources confirm that the Commission, courts, and the industry itself have long understood that engaging in the "regular business" of dealing means affirmatively holding oneself out to the public as offering certain services to customers—such as completing trades with customers seeking to buy or sell securities, underwriting, soliciting clients, handling clients' money and securities, rendering investment advice, carrying a dealer inventory, and quoting two-sided prices. The Commission cannot refute that well-established understanding, so it spends most of its brief responding to a strawman.

As for the second fundamental problem with the Rule, the Commission's violation of the APA's reasoned decisionmaking requirement with respect to the Rule's application to the digital asset industry is also abundantly clear. As many comment letters explained (*see* Mot. 7-14), it was far from clear whether, how, and why the Rule's new qualitative tests for trading activities that have the "effect of providing liquidity" would apply to the novel decentralized finance (DeFi) trading model, which facilitates peer-to-peer trading and direct access to liquidity *without* dealer intermediaries through automated liquidity pools that crowdsource traders' assets and automatically adjust prices to reflect demand. But in both the rulemaking and its brief, the Commission all but ignores these unique innovations and the serious questions and concerns raised by the digital asset industry, highlighting the Commission's unreasoned approach in deciding to apply the Rule to that industry with little thought and even less explanation:

- The Commission can say little more than that it "acknowledged" the numerous comments from digital asset market participants questioning whether and how the Rule's tests could apply to the digital asset industry. *See, e.g.*, Opp. 35. But simply acknowledging and then ignoring comments does not satisfy the APA; the Commission must meaningfully *respond* to them.
- To explain why it deemed it necessary to apply the Dealer Rule to digital asset market participants whose trading activities bear no resemblance to trading in traditional markets, the Commission can only point to conclusory assertions in the Rule that digital asset markets are no different than traditional financial markets. *See* Opp. 12-13, 30-33. The Commission now seeks additional support

outside the rulemaking record, but well-established law dictates that agency rules cannot be sustained based on *post hoc* rationalizations. In any event, the Commission's new arguments still provide no justification for the Rule.

- As for its statutory economic-analysis obligation, the Commission again can only assert, without any support or analysis, that the Rule's effects on the digital asset markets will be similar to those in other markets. *See* Opp. 44-45.
- The Commission claims that a lone footnote in the Proposed Rule provided adequate notice to the digital asset industry of the Rule's application to DeFi trading activities, and that industry members' comments prove as much. Opp. 49. But courts have repeatedly rejected such attempts to rely on commenters' prescience as an excuse for an agency's failure to provide adequate notice.

Because of these deficiencies, the Dealer Rule should be vacated in its entirety. The Fifth Circuit and this Court have repeatedly held that vacatur is the default remedy for unlawful rulemaking, and the Commission provides no reason to deviate from that rule.

ARGUMENT

I. THE COMMISSION CANNOT REFUTE THAT THE DEALER RULE EXCEEDS ITS STATUTORY AUTHORITY (COUNTS I, IV).

Plaintiffs explained in their Motion that the Dealer Rule exceeds the Commission's statutory authority because the Commission's redefinition of "dealer" turns solely on whether a person engages in trading activities that the Commission determines have the effect of providing market liquidity. Mot. 18-27. Instead, the "business of dealing" has for 90 years been understood to entail a variety of traditional dealer *services* that a person

chooses to affirmatively offer to customers. By its own admission, the Commission adopted the Dealer Rule to *expand* the universe of market participants who could be considered dealers, to include mere trading activities (such as high frequency trading strategies) that have no connection to the history or purpose of the dealer regulatory framework. The Court should reject the Commission's unlawful attempt to expand its jurisdiction beyond what Congress provided and set the Rule aside.

A. The Rule Conflicts With The Statute By Making "Dealer" Status Turn On Liquidity Provision Alone.

The fundamental problem with the Dealer Rule is that the Commission has purported to make market participants "dealers" under the Exchange Act based solely on its assessment of the impact of their trading activities. Specifically, in its own words, the Rule now deems a person a securities dealer if they "engage in two specific trading patterns that have the effect of providing liquidity." Opp. 1. But *trading alone* has never been considered dealing. Indeed, as the Commission recognizes, Congress enacted an express "trader exception" to its definition of dealer to carve out those who buy and sell securities for their "own account," but "not as part of a regular business" of dealing. Opp. 6 (quoting 15 U.S.C. § 78c(a)(5)(b)). That "plain language 'part of a regular business' means that 'a dealer must be engaged in the securities business, *and* be buying and selling from his own account.'" *Discover Growth Fund, LLC* v. *Camber Energy, Inc.*, 602 F. Supp. 3d 982, 989 (S.D. Tex. 2022) ("If it were possible for an entity whose only activities are buying and selling securities for its own account to be a dealer, the statute would have said 'all or part of' rather than 'part of' a regular business.") (citation omitted).

Thus, as plaintiffs explained (at 19-23) and this Court has recognized, the "regular business" of dealing is not merely making a business out of trading; it entails affirmatively offering a variety of dealer services to investors, "such as soliciting investor clients, handling investor clients' money and securities, rendering investment advice to investors, and sending investors subscription agreements for their review and execution." *Chapel Invs., Inc.* v. *Cherubim Interests, Inc.*, 177 F. Supp. 3d 981, 990 (N.D. Tex. 2016). The Commission's brief offers no persuasive response to this argument, but instead spends most of its space responding (unpersuasively) to *other* plaintiffs' briefs.

1. The Commission's argument that the Exchange Act permits defining "dealer" based entirely on trading activities that have the effect of liquidity provision is wrong. Congress could have stated in the Exchange Act that anyone who trades in a way that happens to provide liquidity to the market is a dealer, but it did not do so. Instead, the Act defines "dealer" to mean those who are "engaged in the business" of dealing. That "business" has long been understood to entail the affirmative offer of various services to investors, such as underwriting, carrying a dealer inventory, or quoting two-sided prices. *See* Mot. 6-7, 19-22, 27-28. The problem with the Dealer Rule is that the new definition, in seeking to expand the Commission's regulatory reach, would make a person a dealer even though he offers none of these services to the investor public, but instead simply engages in certain "trading patterns." None of the Commission's attempts to defend its expansive redefinition based on historical sources, case law, and its own past interpretations support the Commission's new interpretation. *See* Opp. 15-21, 23-26.

a. The Commission fails to muster any support for its position that Congress intended the "business of dealing" under the Exchange Act to include any person engaging in "trading patterns" that have the "effect of providing liquidity." Tellingly, the Commission begins its statutory argument by trying to load the dice in its favor. Pointing to a provision authorizing the Commission to "by rules and regulations . . . define technical, trade, accounting, and other terms," the Commission claims that the Dealer Rule simply defines the "technical, trade, [or] other" term "as part of a regular business." Opp. 15 (citing 15 U.S.C. § 78c(b)). But "the business" of dealing is not a technical term that Congress left to the Commission to define; that term is the very core of Congress's definition of "dealer," on which its scheme of dealer regulation rests. And that term has had a "settled meaning" from the time of the Exchange Act's enactment until the Commission proposed this redefinition in the Dealer Rule in an express effort to expand its regulatory reach. *See* Mot. 19-20, 25. Whatever authority Section 78c(b) confers, the Commission "cannot use its definitional authority" under that provision "to expand" the settled meaning of the dealer definition. *See Am. Bankers Ass'n* v. *SEC*, 804 F.2d 739, 755 (D.C. Cir. 1986); *see also FAIC Sec., Inc.* v. *United States*, 768 F.2d 352, 362 (D.C. Cir. 1985) ("A general authority to define terms and the extent of insurance coverage resulting from those terms, does not confer power to *redefine* those terms that the statute itself defines."). In fact, Section 78c(b) itself sets those limits, instructing that the Commission can only define technical terms "consistently with the provisions and purposes of this chapter."

The Commission's attempt to show that its expansion of the dealer definition to include mere trading is consistent with the "'historical' understanding of the dealer

definition" fares no better. Opp. 16. The Commission relies on a reference in Louis Loss's treatise from two decades after the Exchange Act was enacted to argue that the "business" of dealing "connotes a certain regularity of participation" in buying and selling securities "rather than a few isolated transactions." Opp. 16 (quoting D. App. 2). That is of course true as far as it goes, but Professor Loss was simply distinguishing the *amount* of activity that constitutes a regular business, not setting forth an entire definition of the *type* of activity that constitutes "business of dealing." Indeed, just a few pages later, Professor Loss recognizes that a trader, unlike a dealer, "does not furnish the services which are usually provided by dealers, such as quoting the market, rendering incidental investment advice, extending or arranging for the extension of credit and lending securities to customers." D. App. 4. Those kinds of services affirmatively offered to investors have always been what characterized the "business of dealing." *See* Mot. 20; *see also* App. 212 (dealers quote prices on both sides of the market); App. 273 (same); App. 272 ("Among those who ordinarily act as stock *dealers*" are "investment bankers who float or sell new issues"—*i.e.*, underwriters).

In fact, the Commission points to *no* historical precedent for treating trading activities that provide liquidity alone as dealing activity. The Commission brushes aside a contemporaneous 1933 treatise by Charles Meyer, only to point to a different publication by Meyer describing the enacted Exchange Act, in which he surmised that a "fair interpretation of the Act would seem to indicate that" a "trader who has no customers" can still be a dealer if his "operations . . . are sufficiently extensive to be regarded as a regular business." Opp. 19-20 (quoting D. App. 40). But Meyer was not attempting to describe the

settled industry understanding of what the "business" of dealing meant. He was simply offering an initial opinion of how the brand new Act *might* be interpreted, and he specifically "caution[ed]" that his initial views "may ultimately be found not to be in accord with decisions of courts or rulings of government regulatory agencies." Supp. App. 374. And as a matter of fact, just six years later, Congress adopted the Investment Company Act of 1940 in order to separately regulate a company "engaged primarily . . . in the business of . . . trading in securities," 15 U.S.C. § 80a-3(a) (defining "investment company")—a statute that would have been entirely superfluous if any person engaged in extensive trading operations was already a "dealer" under the Exchange Act.

The Commission also wrongly claims (at 16) that it has "long recognized" that "acting as a *de facto* market maker whereby market professionals or the public look to the firm for liquidity" is enough to be considered a dealer. But it bases this argument on preamble language from an adopting release from the early 2000s that exempted banks from certain dealer requirements—hardly indicative of any longstanding recognition of what constitutes the business of dealing. *See* Opp. 16 (quoting *Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934*, 67 Fed. Reg. 67,496, 67,499 (Nov. 5, 2002)).[1] Moreover, when it adopted *this* Rule, the Commission expressly *departed*

[1] Even that release does not purport to identify dealers based *solely* on whether their trading patterns have the effect of providing liquidity. The release explains that, as one part of analyzing the "totality of its securities activities," the Commission considers whether a firm's conduct is such that the public "*look[s] to the firm* for liquidity." 67 Fed. Reg. at 67,499 (emphasis added); *see* Opp. 23 ("Dealer activity may include, but is not limited to . . . acting as a *de facto* market maker.") (quoting *Regulation Best Interest*, 83 Fed. Reg.

from its prior interpretations of what constitutes "market maker" activity, so that prior release is not relevant even on the Commission's own terms. *See* App. 67-68 & n.156 (rejecting comments urging Commission to use its existing *bona fide* market-maker test instead of the Rule's two new qualitative factors).[2]

Finally, the Commission relies heavily on two recent decisions from the Eleventh Circuit as supporting its understanding of the statute, but neither endorses the Commission's unprecedented position that engaging in trading activities that result in providing liquidity alone is enough to qualify as a dealer. *See* Opp. 16-17 (citing *SEC* v. *Almagarby*, 92 F.4th 1306 (11th Cir. 2024) and *SEC* v. *Keener*, 102 F.4th 1328 (11th Cir. 2024)). Importantly, neither case involved the Dealer Rule or the Commission's new interpretation that liquidity provision alone renders someone a "dealer." They instead involved enforcement actions against individuals engaged in an entirely different sort of activity, and the decisions expressly limited their holdings to the specific facts of those cases. *Almagarby*, 92 F.4th at 1318 ("Our holding that Almagarby operated as an unregistered 'dealer' in violation of the Exchange Act is based on his specific conduct.");

21,574, 21,653 (May 9, 2018)). In other words, even the Commission has (until now) understood that *de facto* market making, when affirmatively offered in such a way that the market looks to the firm for liquidity, is at most one activity that, among others, may be part of the business of dealing.

[2] Nor does the Dealer Rule conform to the definition of "market maker" in Section 78c(a)(38) or the definition of that term as it appears in other Commission rules. *See, e.g.*, 15 U.S.C. § 78c(a)(38); 17 C.F.R. § 240.15c3-1(c)(8) (defining a market maker as a "dealer who, with respect to a particular security, (i) regularly publishes bona fide, competitive bid and offer quotations in a recognized interdealer quotation system; or (ii) furnishes bona fide competitive bid and offer quotations on request; and, (iii) is ready, willing and able to effect transactions in reasonable quantities at his quoted prices with other brokers or dealers").

Keener, 102 F.4th at 1335 ("Keener operated as an unregistered Exchange Act 'dealer.'"). But even in that context, neither decision provides any support for the Commission's attempt to redefine "dealer" to turn solely on providing liquidity.

In *Almagarby*, for instance, the Commission brought a civil enforcement action against an individual engaged in so-called "toxic lending" and alleged that his business amounted to unregistered dealing. 92 F.4th at 1312-13. The court began its analysis by determining that Almagarby "engaged in the kind of activity characteristic of securities dealers"—specifically, acquiring assets "at a discount" in order to immediately sell, and "underwriting" new securities issuances. *Id.* at 1316. The court then acknowledged that the "volume and regularity" of Almagarby's transactions were *other* indicia supporting the conclusion that he was engaged in the regular business of dealing. *Id.* at 1317. Ultimately, based on "the fact that [Almagarby's] *entire* business was predicated on flipping penny stocks," "buying convertible debt for the purpose of immediate conversion and resale," and "underwriting microcap share issues," the court concluded that Almagarby's "activities [were] characteristic" of "dealers." *Id.* at 1316. The court never suggested that merely engaging in extensive trading activities was alone sufficient; in fact, the court specifically recognized that both traders and dealers "[p]rovid[e] market liquidity," and that not "*every* professional investor who buys and sells securities in high volumes is a 'dealer.'" *Id.* at 1315-16, 1318.

Keener is no different. Keener employed a similar business model of buying convertible debt, converting it, and rapidly selling the newly issued shares, and the court found it even clearer that Keener was acting as a dealer because he affirmatively offered

other traditional dealer services. 102 F.4th at 1334. Again, to the extent relevant at all, *Keener* confirms that it is the nature of the services a person chooses to offer to other market participants (in that case, to issuers) that determines whether he is a dealer, not merely trading in a way that incidentally provides liquidity.

b. Tacitly recognizing the lack of support for its new interpretation, the Commission backtracks and asserts that the Dealer Rule "does not render 'liquidity provision alone . . . dealing activity.'" Opp. 23 (quoting Mot. 22). This argument is difficult to understand, because it contradicts the text of the Dealer Rule's adopting release, which expressly states that the standards for defining who constitutes a trader are intended to capture those whose conduct "*has the effect* of providing liquidity to other market participants." App. 60 (emphasis added). Indeed, one of the dissenting commissioners explained that the Rule "'categorically' states for the first time 'that liquidity provision alone by a person trading for its own account constitutes dealing activity." Mot. 22 (quoting App. 203 (Peirce, *Dissenting Statement*)). And the Commission's brief elsewhere confirms that its new definition is singularly focused on reaching persons whose trading activity has the effect of providing liquidity. *See, e.g.*, Opp. 8 (explaining that the new definition was intended to capture "persons whose trading activity in the market 'has the effect of providing liquidity' to other market participants"); Opp. 27 (explaining that the new standard was designed to capture "automated, algorithmic liquidity provision").

The Commission contends that the two new qualitative tests for dealing activity "involve consideration of a person's conduct, not just whether that conduct 'has the *post hoc* effect of providing market liquidity.'" Opp. 23 (quoting Mot. 3). Of course, traders

necessarily choose to engage in the "trading patterns" that the Commission has now deemed to be dealing, but that is beside the point. Never before has the decision to engage in certain trading activities that have the "effect" of providing liquidity, without affirmatively providing any traditional *dealer service* to customers, been sufficient standing alone to make someone a dealer under the Exchange Act. And the Commission has identified nothing to the contrary in the statute, contemporaneous historical sources, or its own enforcement history. Instead, such inquiry has always focused on whether a person chooses to offer certain services to market participants that constitute the business of dealing.

2. The bulk of the Commission's statutory arguments seek to rebut an argument set forth in a different brief filed by private-fund advisers in a different case—namely, that the dealer definition is "limited to persons who effectuate customer orders." Opp. 17; *see id.* (incorrectly quoting plaintiffs as arguing that the statute "require[s] that a 'dealer' act on behalf of customers"). As explained in plaintiffs' motion, plaintiffs agree with the private-fund advisers that dealers "buy[] and sell[] securities to customers for the profit thereon." *Schafer* v. *Helvering*, 299 U.S. 171, 174 (1936); *see* Mot. 20 ("a dealer 'buys a given security from one customer and sells it to another'") (quoting App. 210). And the Commission's departure from that core component of dealer conduct is fatal to the Rule.[3]

[3] Indeed, in responding to the private-fund advisers' argument, the Commission attacks a strawman of that strawman. In fixating on whether a "customer requirement" exists, the Commission argues that a dealer obviously need not always act directly on behalf of a "customer" because investors act through their own brokers. *See* Opp. 17 (emphasizing that the investors in *Eastside Church* were "not customers" of the defendant because they acted "through a broker-dealer"). Of course a dealer can provide services to customers

But plaintiffs here focused on an *additional* aspect of the fundamental problem with the Rule's expansive reinterpretation of "dealer": specifically, that the "business" of dealing has always encompassed certain "services offered" to investors—whether to a dealer's direct customers or to customers transacting through brokers—*not* merely engaging in trading activities for a person's own investing or trading objectives, which is not a service of any sort. *See* Mot. 20. And the Dealer Rule's complete departure from that long-held understanding is an additional reason this Rule is invalid. As the Supreme Court has recognized since the 1930s, there is a distinction between when a dealer "purchase[s] to create a stock of securities to take care of future buying orders in excess of selling orders," and when a mere trader purchases "for the firm's own account solely in expectation of a rise in the market, for sale to anyone at a profit." *Schafer*, 299 U.S. at 174; *see also Discover Growth*, 602 F. Supp. 3d at 989 ("Discovery and Antilles are not dealers because their only activity is investing their own money in securities.") The Rule impermissibly eliminates that distinction.

Unsurprisingly, the Commission's attempts to refute a different argument provide no rebuttal to "the business of dealing" argument that plaintiffs here made. For instance, the Commission relies heavily on *Almagarby* and *Keener*, two cases decided 90 years after the Exchange Act's adoption, as "squarely reject[ing]" plaintiffs' "efforts to read a customer requirement into the statute." Opp. 17. But as explained above, if they are relevant at all, those cases *support* plaintiffs' argument that the business of dealing involves affirmatively

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"through a broker or otherwise." 15 U.S.C. § 78c(a)(5). The Commission's resort to that hyper-technical distinction only underscores its deficiencies.

offering certain services, not merely engaging in trading activities that provide liquidity. *See Almagarby*, 92 F.4th at 1316-18 (assessing whether the individual "engaged in the kind of activity characteristic of securities dealers," including underwriting); *Keener*, 102 F.4th at 1334 ("the Act defines dealers by their function" and the activities that constitute a part of their regular business).

The same goes for the Commission's arguments that the statutory phrase "own account" does not necessarily refer to persons who "effectuate customer orders" (Opp. 18-19), or that the "historical sources plaintiffs cite (at 11-12) likewise do not support their argument that the term 'dealer' means one who effectuates customer orders." Opp. 19. Neither point is responsive to plaintiffs' argument about what it means to engage in the "business of dealing," *i.e.*, affirmatively offering dealer services to customers. Mot. 19-23.

Finally, due to the Commission's failure to grapple with plaintiffs' argument, it cannot distinguish the numerous cases plaintiffs cited in support of their argument. The Commission contends that none of those cases expressly held that a dealer *must* have customers (Opp. 21-22), but in attempting to "distinguish" those cases by pointing out that the courts considered various indicia of dealer activity, the Commission reinforces plaintiffs' argument.[4] *See* Opp. 22 (asserting that cases "assessed the totality of facts and

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[4] In any event, the Commission entirely fails to explain how those cases—which identify exclusively client-facing conduct as traditional hallmarks of dealer activity—can reasonably be read to stand for anything other than the proposition that a "dealer" under the Exchange Act provides services to *customers*. *See, e.g.*, *Chapel Invs.*, 177 F. Supp. 3d at 990 (business of dealing includes "soliciting investor clients, handling investor clients' money and securities, rendering investment advice to investors"); *Discover Growth Fund*, 602 F. Supp. 3d at 989 ("a dealer buys and sells securities from its customer and to its customer for a relatively small markup or fixed commission").

circumstances bearing on whether a firm acted as a dealer"). And the Commission's attempt to minimize the reasoning of a subset of those cases because they involved "settlement[s] to which the Commission was not a party" does not undermine the fact that the courts in those cases still examined the definition of "dealer" under the Exchange Act. Opp. 21-22.

In sum, just as the Commission avoided addressing the concerns of the digital asset industry throughout the rulemaking process (*see infra* Part II), the Commission's effort to defeat summary judgment here by arguing that the Exchange Act does not impose a strict requirement that dealers effectuate trades on behalf of customers merely ducks the issues.

B. The Substantial Overreach Of The Rule Confirms Its Conflict With Congress's Definition.

1. As plaintiffs explained (at 23-26), the Commission's drastic reinterpretation of the Exchange Act's "dealer" definition represents an unlawful attempt to expand its regulatory reach beyond what Congress provided in the statute—similar to an attempt the D.C. Circuit previously rejected in a different context. *See Goldstein* v. *SEC*, 451 F.3d 873, 882-83 (D.C. Cir. 2006). Tellingly, the Commission literally offers no response to this argument. It does not even *mention Goldstein*, much less try to explain how its attempted expansion of its statutory authority through this rulemaking is any different from what the D.C. Circuit held unlawful in that case. Simply put, the Commission cannot expand the scope of the regulatory authority Congress gave it by redefining established definitional terms.

2. When the Commission does attempt to defend how far the Rule expands the statutory definition, its responses are unpersuasive.

a. As one sign of how far astray the Rule veers, plaintiffs explained that the Commission had to exempt from its new definition various actors—*e.g.*, registered investment companies, central banks, sovereign entities—that, although captured by the new definition because of their extensive trading activities, plainly were never considered "dealers" under any prior understanding of that term. Mot. 24-25. The Commission responds to this point by asserting that it was reasonable for it to exempt those entities because "existing oversight of these entities accomplishes similar purposes as would dealer regulation." Opp. 27; *see* Opp. 26 ("entities that are part of the Federal Reserve System do not implicate 'the primary concerns animating' the rule") (quoting App. 75). That argument entirely misses the point. The fact that, due to the breadth of its Rule, the Commission *had* to specifically exempt entities that no one has ever considered dealers under the Exchange Act—such as the *Federal Reserve*—confirms that the Commission "ha[s] taken a wrong interpretive turn." *Chamber of Com. of U.S.* v. *U.S. Dep't of Labor*, 885 F.3d 360, 383 (5th Cir. 2018) (citation omitted). Of course it was reasonable to exempt those entities from regulation as "dealers," because no one ever thought they could be dealers in the first place. That is because they trade solely to accomplish their own objectives, not as a business service to customers.

Remarkably, the Commission resists the notion that the exemptions underscore that its new definition is inconsistent with congressional intent, asserting that "Congress broadly defined the term 'dealer'" to include a "company, government, or political subdivision, agency, or instrumentality of a government." Opp. 25-26 (quoting 15 U.S.C. § 78c(a)(5)(A)-(B)). That argument is misleading and unpersuasive, because that breadth

comes only from Congress's *separate*, general definition of "person" for purposes of the entire Exchange Act. The fact that Congress used the general term "person" in its specific definition of "dealer" in no way indicates, as the Commission suggests, that Congress meant that a "government," "agency," or any "instrumentality of a government" should be regulated by the Commission as dealers unless the Commission determines otherwise. *See Utility Air Regul. Grp.* v. *EPA*, 573 U.S. 302, 320 (2014) ("[A] statutory term—even one defined in the statute—'may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.'") (citation omitted). Tellingly, none of the Commission's prior interpretations of "dealer" required it to clarify that its definition does not apply to actors that have never been considered dealers, which confirms how far the Dealer Rule has gone beyond any prior understanding of that term.

And Congress knows how to handle circumstances where the dealer definition might capture a person already registered in a different capacity and thus subject to adequate "oversight." The Exchange Act expressly excludes banks from the "dealer" definition to the extent they are engaged in specified banking activities that involve dealing in securities. *See* 15 U.S.C. § 78c(a)(5)(C). The fact that Congress saw no need to adopt similar exceptions for investment companies, central banks, or sovereign entities makes clear that Congress did not understand the trading activities of those entities—no matter the "volume and regularity"—to constitute the "business" of dealing under its definition.

The Commission likewise contends that the Dealer Rule's "no presumption" residual clause does not in fact expand the meaning of dealer, because its new rule will still be "limited by Congress's definition of dealer as well as the longstanding judicial and agency

pronouncements." Opp. 27. But that is not what the Rule says: it broadly redefines "dealer" to encompass certain trading activities that have the effect of providing liquidity, then simply warns that there is "no presumption" that a person is *not* a dealer if they do *not* engage in those activities. In doing so, market participants are "left 'to feel their way on a case-by-case basis" and guess what other conduct the Commission might sweep in next. *Sackett* v. *EPA*, 598 U.S. 651, 681 (2023) (citations omitted). And whatever substance those purported "limits" of Congress's definition and the Commission's interpretations might have had in the past, they provide cold comfort to market participants now that the Commission has taken the position in this rulemaking that deeming a firm a securities "dealer" based solely on the effect of its trading activities has always been within the scope of Congress's and the Commission's understanding of that term.

b. The Commission does not dispute that the purpose of the dealer regulatory regime is to protect against the information disparities, potential conflicts, and other risks inherent in the traditional services that dealers provide to market participants. Nor does the Commission explain how the Dealer Rule—a rulemaking apparently aimed at expanding the Commission's oversight and control of market liquidity, particularly in the Treasuries market—serves that regulatory aim. Instead, the Commission again sidesteps the issue, arguing that some of its existing regulations reference dealers who "do[] not carry customer accounts," and the Dealer Rule purportedly is no different. Opp. 20 (citation omitted). Obviously, the fact that the Commission has imposed some regulations on dealers who do not "carry customer accounts" does nothing to explain how its new Rule advances any of the underlying purposes of dealer regulation under the Exchange Act.

In any event, this argument conflates the act of taking *custody* of customer assets with the broader notion of providing dealer services to customers. The regulations that the Commission cites refer to dealers who do not hold or have control over customer assets. *See, e.g.*, 17 C.F.R. § 240.15c3-1(a)(2)(vi) (setting net capital requirements for brokers and dealers that do "not receive, directly or indirectly, or hold funds or securities for, or owe funds or securities to, customers and do[] not carry accounts of, or for, customers"); *id.* § 240.15c3-1(a)(6)(ii) (providing exclusions for a dealer "who does not carry customer accounts"); *id.* § 240.15b9-1(b) (same); *id.* § 240.15c3-3(k)(2)(i) (same).[5] None of these provisions purport to describe dealers that offer no services at all to customers; in fact, many *presume* that these dealers will otherwise have customers and simply will not take custody of their assets. *See, e.g.*, *id.* § 240.15c3-3(k)(2)(i) (exempting dealers who "promptly transmit[] all *customer funds*" (emphasis added)). These regulations are thus consistent with the notion that the Exchange Act's definition of "dealer" turns on the services the person provides to its direct customers or customers acting through their brokers. The fact that the Dealer Rule, by contrast, is completely detached from the "overall statutory

[5] Section 240.15c3-1(a)(6)(ii) was also enacted as an "elective provision" to allow firms already registered as broker-dealers to engage in certain specialist trading activities without otherwise having to meet existing net capital requirements. Those firms registered as broker-dealers in order to become exchange members, which provides a separate reason to register even if a person does not fall within the dealer definition. *See* Securities Acts Amendments of 1975, Pub. L. No. 94-29, sec. 4, § 6(c)(1), 89 Stat. 97, 105 (1975) (codified at 15 U.S.C. § 78f(c)(1)). And in any event, these specialists and market makers *do* effectuate the orders of other members' customers, as a result of their legal obligations to maintain "continuous" markets. *See Equitec Proprietary Mkts.*, SEC Release No. 59502, 2009 WL 536632, at *2 ¶ 6 (SEC Mar. 4, 2009). The Commission was not purporting to identify an existing category of broker-dealers who do not hold customer accounts. *See* SEC Release No. 34-11969, 1976 WL 160350, at *2 (Jan 2, 1976).

scheme . . . and the problem Congress sought to solve" confirms that the Commission has run afoul of its statutory authority in adopting it. *Goldstein*, 451 F.3d at 878.

C. The Commission Cannot Square The Dealer Rule With Its Past Practice.

In its Opposition, the Commission insists that the Dealer Rule does not reflect a departure from the Commission's prior practice, asserting that "the Commission has consistently recognized that the dealer definition contains no customer requirement." Opp. 24. Again, that is not responsive to plaintiffs' arguments that the Rule for the first time labels someone a dealer based on trading activity that incidentally provides liquidity. The Commission identifies *no* prior instance in which it has previously taken that position.

In fact, the agency releases cited by the Commission (Opp. 23-24) simply prove plaintiffs' point. For example, the Commission relies heavily on a 2012 release defining a different statutory term—"security-based swap dealer" under the 2010 Dodd-Frank Wall Street Reform Act—where the Commission expressly declined to require the existence of a "customer relationship." *See Further Definition of Swap Dealer*, 77 Fed. Reg. 30,596, 30,619 (May 23, 2012). But in adopting that interpretation, the Commission acknowledged that the Exchange Act defines "security-based swap dealer" *more broadly* than "dealer." *Id.* at 30,616 (citing 15 U.S.C. § 78c(a)(71)(A)) (defining "security-based swap dealer" to include not only a "dealer," but also any person who "regularly" executes swaps with any "counterpart[y]"). The Commission thus concluded that "the dealer-trader distinction need[ed] to be adapted to apply to security-based swap activities in light of" that statutory difference and "the special characteristics of security-based swaps." *Id.* at 30,616. The Commission explained that many participants "in the swap markets" view themselves as trading with "counterparties" rather than "customers," such that a "definition that is

predicated on the existence of a customer relationship may lead to an overly narrow construction of the definition." *Id.* at 30,619 n.282. In other words, that rule expressly recognized that it was *departing* from the dealer-trader distinction at the core of the definition of "dealer"—all of which would have been entirely unnecessary if, as the Commission now contends, that definition included extensive trading activities all along.

And even in that distinct context, the Commission still explained that whether a person constitutes a "security-based swap dealer" turns on whether the person affirmatively chooses to engage in certain activities, including some of the traditional features of being a "dealer" such as "[p]roviding advice in connection" with swaps, the "[p]resence of regular clientele and actively soliciting clients," and "[a]cting as a market maker." *Id.* at 30,618. As to considerations of liquidity provision being an "indication of dealer activity" in the swap markets, the Commission explained that a person "might manifest" intent to "accommodat[e] demand or facilitat[e] interest expressed by other market participants" or "seek[] compensation in connection with providing liquidity involving security-based swaps." *Id.* at 30,617. Again, all of these activities—just like the business of dealing in general—involve services that a person chooses to offer to the public, not merely the *effect* of that person's trading activities. *See id.* at 30,618 n.274 ("recogniz[ing] that routine activity in the security-based swap market is not necessarily indicative of making a market").

The other releases cited by the Commission likewise demonstrate that, before this Rule, the Commission has looked to the kinds of services a person chooses to offer to investors to determine whether he or she is engaged in the business of dealing. *See, e.g.*,

67 Fed. Reg. at 67,499 (explaining that, as part of analyzing the "totality of its securities activities," the Commission considers whether the firm's conduct is such that the public "*look[s] to the firm* for liquidity") (emphasis added); *see also* SEC Release No. 11742, 1975 WL 163406, at *3 (Oct. 15, 1975) ("underwriting," "carrying a dealer inventory," and "holding itself out . . . as a dealer" are characteristic dealer activities). In no instance did mere trading patterns in isolation render someone a dealer.

The Commission tries to distance itself from the long line of no-action letters cited by plaintiffs, *see* Mot. 27-28, on the basis that these letters are "not the position of the Commission." Opp. 25. That may be true as a formal matter, but the Commission does not deny that these staff letters are intended to provide guidance to market participants on the Commission's interpretation of the Act and the applicable regulations. For that reason, courts have recognized that "consistent, longstanding staff positions may signal Commission approval of these positions." *Trinity Wall Street* v. *Wal-Mart Stores, Inc.*, 792 F.3d 323, 342 n.11 (3d Cir. 2015) (citation omitted). Tellingly, the Commission cannot cite a single no-action letter where the staff has endorsed the position now reflected in the Dealer Rule: that a person's trading activity alone qualifies that person as a securities dealer if the Commission determines that the activity had the effect of providing liquidity.

The Commission also dismisses the reliance interests of market participants who have long engaged in their business outside the dealer regulatory regime, arguing that plaintiffs "cite no Commission statement, court precedent, or other authority indicating that the entities engaged in the specific trading patterns described in the [Rule] would not be required to register." Opp. 25. The Commission appears to suggest that, because (in

the Commission's view) it *could* have regulated this conduct all along but simply chose not to, any newly affected party should have seen this coming. That is not the law. *See Wages & White Lion Invs., LLC* v. *FDA*, 90 F.4th 357, 384 (5th Cir. 2024) ("[I]t might very well be true that the agency has the power to impose the policy it wants to impose . . . . But again, that does not matter under the change-in-position doctrine. All that matters here is that the agency unquestionably changed its position and then pretended otherwise."). The Commission's abrupt change in position without sufficient justification (or even acknowledgment) and utter disregard of the reliance interests of affected market participants provide additional reasons that the rulemaking is unlawful. *See id.* at 381; *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position.").

II. THE COMMISSION CANNOT DEFEND ITS ARBITRARY AND CAPRICIOUS ADOPTION OF THE DEALER RULE (COUNTS II, III, V, VI).

The Commission likewise fails to show that its adoption of the Dealer Rule without sufficiently addressing its application to digital asset markets satisfied the reasoned decisionmaking requirements of the APA. Nothing in its brief refutes that the Commission violated the APA in at least four ways, by failing to (a) meaningfully respond to significant comments from the digital asset industry, (b) provide a reasoned explanation for why or how the Dealer Rule should be applied to the unique features of DeFi, (c) sufficiently perform an economic analysis as required by the Exchange Act, or (d) give fair notice to digital asset market participants of the Dealer Rule's application to them. The Commission instead can only point to bare acknowledgements of commenters' concerns and conclusory

(and nonsensical) assertions that the Rule will affect digital asset markets in the exact same way as traditional financial markets, neither of which meets any standard for reasoned agency decisionmaking.

A. The Commission Failed To Respond To Significant Comments From The Digital Asset Industry (Count II).

In its Opposition, just as in the Dealer Rule itself, the Commission does no more than give inadequate "[n]od[s] to concerns raised by commenters" from the digital asset industry. *Texas* v. *Biden*, 10 F.4th 538, 556 (5th Cir. 2021) (citation omitted). The Commission claims to have "acknowledged" (Opp. 35, 37), "observed" (Opp. 36), and "recognized" (Opp. 36) industry comments, but tellingly cannot point to anything in the Dealer Rule demonstrating that the Commission actually substantively engaged with and responded to these comments. That does not cut it: "[B]are acknowledgement is no substitute for reasoned consideration." *Louisiana* v. *U.S. Dep't of Energy*, 90 F.4th 461, 473 (5th Cir. 2024). The Commission's (lack of) response certainly cannot satisfy the APA's requirement that an agency consider "all relevant factors raised by the public comments and provide a response to significant points." *Chamber of Com. of U.S.* v. *SEC*, 85 F.4th 760, 774 (5th Cir. 2023).

1. As plaintiffs explained in their opening brief (at 12-14, 30-34), multiple commenters raised significant questions and concerns about two fundamental ambiguities presented by the Dealer Rule's potential application to digital asset markets: (i) which digital asset transactions constitute securities transactions, and (ii) how the Rule's new qualitative tests for trading that purportedly has the "effect of providing liquidity" would apply to the innovative features of DeFi. The Commission's brief (at 33-38) merely confirms

the Commission failed to adequately address these substantial comments in the final Rule, but instead decided to "bury its head in the sand" in violation of its APA obligations. *See Mexican Gulf Fishing Co.* v. *U.S. Dep't of Com.*, 60 F.4th 945, 973 (5th Cir. 2023).

Which digital asset transactions constitute securities transactions.—The threshold question underlying the Dealer Rule's application to the digital asset markets is which digital asset transactions are transactions in securities. Contrary to the Commission's assertion in its brief, it did not "reasonably describe[]" which digital asset transactions constitute securities transactions simply through its boilerplate statement that "the rule's application 'turns on whether a particular crypto asset is a security, as defined under the U.S. Federal Securities laws.'" Opp. 33 (quoting App. 66 n.134).

The Commission points to a footnote in the Rule referencing the "test first articulated by the Supreme Court in *SEC* v. *W.J. Howey Co.*, 328 U.S. 293, 301 (1946)," (Opp. 33-34 (quoting App. 66 n.134)), as well as a Commission "report discussing the application" of *Howey* "to crypto assets." Opp. 34-35. But the *Howey* test and the referenced report create the very ambiguities that led commenters to raise these concerns. How the *Howey* test applies to given digital asset transactions is far from clear or settled, as there remains substantial ongoing litigation about this very question. *See* Mot. 30. Indeed, within the past year alone, multiple courts have disagreed with the Commission's assertion that secondary trading of certain digital assets constituted securities transactions under *Howey*. *See SEC* v. *Binance Holdings Ltd.*, 2024 WL 3225974, at *17-22 (D.D.C. June 28, 2024) (holding that "the complaint does not include sufficient facts to support a plausible inference that any particular secondary sales satisfy the *Howey* test for an

investment contract"); *SEC* v. *Ripple Labs, Inc.*, 682 F. Supp. 3d 308, 328-31 (S.D.N.Y. 2023) ("having considered the economic reality and totality of circumstances, the Court concludes that Ripple's Programmatic Sales of XRP did not constitute the offer and sale of investment contracts" and therefore did not satisfy the *Howey* test). Because of this substantial uncertainty and the Commission's refusal to specify in the Dealer Rule which digital asset transactions it believes are securities transactions, digital asset participants are left to guess "whether they are dealers under the [Rule], and thus subject to dealer registration requirements." App. 66; *see* App. 208 (Peirce, *Dissenting Statement*) (the Commission's failure to address this issue means that "the tired questions about when a crypto asset is a security remain" at the core of the Dealer Rule's ambiguous application).

Now attempting to bolster its position, the Commission in its brief references a footnote in a different regulation stating that "as of April 2023, 'five offerings of crypto asset securities have been registered or qualified under the Securities Act of 1933, and five classes of crypto asset securities have been registered under the Exchange Act.'" Opp. 35 (quoting *Regulation Systems Compliance and Integrity*, 88 Fed. Reg. 23,146, 23,167 n.223 (Apr. 14, 2023)). But the Dealer Rule itself did not reference this other regulation, nor did the Rule (or the Commission's brief) attempt to explain how the fact that *five* digital asset securities have been registered under the Exchange Act provides clear guidance to digital asset industry participants about the Dealer Rule's application to the thousands of other digital assets. Though the Commission may prefer to maintain its posture of strategic ambiguity as to which transactions in which of those assets are securities transactions, the

APA does not tolerate such fundamental lack of clarity in rules, particularly those that (like the Dealer Rule) impose serious consequences for any violation.

How the Dealer Rule's new qualitative tests apply to digital asset markets.—The Commission's argument (at 35-38) that it adequately "respond[ed] to comments about how the rule's qualitative standards" apply to digital assets fares even worse. Those new tests are triggered by certain "trading patterns," but trading in DeFi markets is entirely different from trading in traditional markets, particularly in terms of how liquidity is maintained. *See* Mot. 7-11 (describing operation of liquidity pools that rely on crowdsourced assets and automatic market-making software). So digital asset industry commenters raised numerous questions about how the new tests set forth in the Rule "would be (or even could be) applied to [those] unique aspects of DeFi." Mot. 31; *see* Mot. 13-14, 31-33; *see also, e.g.*, App. 133 (Consensys Comment at 7) (asking who would be required to register when AMM protocols—*i.e.*, software—facilitate trades); App. 187-188 (DEF Comment at 7-8) (raising numerous questions about the application of the Dealer Rule, including whether participants in a liquidity pool would be considered dealers).

Again, the Commission's brief cannot identify anything in the Dealer Rule that meaningfully responds to these concerns. The Commission can only reiterate the Rule's nonresponsive statements that the "dealer framework is a functional analysis based on the securities trading activities undertaken by a person, not the type of security being traded," or that "[t]here is nothing about the technology used, including distributed ledger technology-based protocols using smart contracts, that would preclude crypto asset securities activities from falling within the scope of dealer activity." Opp. 36 (quoting

App. 66, 76). But the questions and concerns raised by commenters were not about "preclud[ing]" the application of the overall dealer framework to the digital asset industry; they asked whether and how the Rule's qualitative tests would apply to the unique ways DeFi market participants trade that bear no resemblance to trading in traditional markets, such as the use of unique execution methods and the lack of market intermediaries. Even the amicus supporting the Commission acknowledges that digital asset markets behave differently, including that "trading activity" occurs "without intermediation." *See* ECF No. 43 (Amicus Brief of Better Markets, Inc.) at 14-15. Yet the Commission's vague and nonresponsive statements entirely failed to grapple with those issues. Instead, as Commissioner Peirce noted, the Rule's treatment of those comments merely "raise[d] new questions about how the rule will apply" to the features of DeFi. App. 208 (Peirce, *Dissenting Statement*); *see id.* ("AMM is a software protocol, who will have to register?").

Nor can the Commission gloss over this deficient reasoning by claiming that it reasonably declined to create special rules for "so-called DeFi." Opp. 2-3, 32, 36-37, 40. The Commission repeatedly suggests that it satisfied its APA obligations simply by adopting a "general, technology-neutral" approach that applies "to *all* securities, regardless of the technologies used or the trading platforms' varying structures." Opp. 38; *see also* Opp. 12, 32-33, 36-37, 39-40. But that is exactly the problem. The Commission cannot simply assert that its one-size-fits-all Rule can be applied equally to "all securities" in the face of substantial comments explaining why unique DeFi innovations render digital asset markets fundamentally different from traditional markets in ways that are directly implicated by the Rule's new qualitative tests. Its failure to even acknowledge—much less address—

these differences confirms the Commission's serious failure to consider "all relevant factors" and "significant points" raised during the notice-and-comment process. *Chamber of Com.*, 85 F.4th at 774.

2. The Commission likewise cannot defend its lack of response to commenters' serious concerns about the impact the Dealer Rule would have on the digital asset industry. *See* Mot. 33-36. Contrary to the Commission's claim that it "thoroughly analyzed and responded to comments" about the Dealer Rule's impacts on liquidity, price efficiency, and innovation in the industry and its markets (Opp. 38), the Commission again conflates merely acknowledging comments with substantively responding to them. "Stating that a factor was considered . . . is not a substitute for considering it." *Texas*, 10 F.4th at 556 (citation omitted).

Impacts on liquidity.—Digital asset industry commenters raised substantial concerns that, if the Rule were applied to digital asset market participants, it would have the effect of *reducing* the very liquidity that the Rule seeks to protect. *See* Mot. 33-34. The Commission responds that it *acknowledged* in the Rule that "'[c]ommenters expressed concerns that the uncertainty of whether' the rule applies to particular crypto asset market participants 'could lead to less liquidity in the crypto asset markets.'" Opp. 38 (quoting App. 76). And the Commission repeats the Rule's recognition that "'[i]f affected [proprietary trading firms]' in crypto asset markets 'curtail their crypto asset trading activities, then trading volumes in crypto asset markets could fall, harming the liquidity and efficiency of these markets.'" Opp. 38 (quoting App. 112). But that statement (at best) merely acknowledges the validity of commenters' concerns with respect to *one* significant potential

harm from the Rule—it does not purport to address those concerns or take them into consideration in fashioning the Rule, much less address the fuller extent of the liquidity concerns commenters raised. *See* Mot. 33-34. The APA requires agencies to *engage with* commenters' legitimate concerns, not (selectively) summarize them. *See Louisiana*, 90 F.4th at 473 (merely "acknowledg[ing] the concern and mov[ing] on . . . is no substitute for reasoned consideration").

The Commission also suggests that it responded to commenters' concerns by making "modifications" to the Final Rule, which purportedly meant the "potential harm to liquidity in *all* securities markets was 'likely to be smaller than commenters suggested.'" Opp. 39 (quoting App. 110 (emphasis added)). But as the Commission acknowledges, the referenced "modifications" to the tests in the final Rule had nothing to do with comments from the digital asset industry; they were across-the-board changes to the initial tests set forth in the Proposed Rule. *See* Opp. 9-11. Those modifications thus do not provide any evidence that the Commission meaningfully considered and responded to comments from the digital asset industry.

Ultimately, the Commission tries to dismiss any concerns about reduced liquidity by asserting that the Dealer Rule's goal was to "protect the 'stability and resiliency' of liquidity provision," not "merely to maximize the amount of liquidity provided." Opp. 38 (quoting App. 55.). That is another non-response. Whatever the goal of the Rule, it does not excuse the Commission from its obligation under the APA to respond to comments. And the Commission never analyzed whether the exodus of participants from the digital asset markets that would be caused by forcing them to register as securities dealers would *harm*

the "stability and resiliency of liquidity provision" in the digital asset markets, undermining even the Commission's own articulation of its goal.

Harm to digital asset market participants.—The Commission likewise failed to respond to commenters' concerns that subjecting digital asset market participants to the dealer regulatory framework could drive U.S. participants out of those markets altogether. *See* Mot. 34-35. As to the effect of the substantial costs of the Rule on digital asset market participants, the Commission can again say no more than that the Commission "*acknowledged* comments that 'aspects of the dealer regulatory framework, including registration,' could 'substantially raise the costs, or would be unworkable, for crypto asset security participants.'" Opp. 40 (quoting App. 76).

The Commission suggests that the Rule's $50 million threshold ameliorates any concerns about the effects that the Rule would have on smaller digital asset market participants. *See* Opp. 40. But the Commission did not develop that threshold for the digital asset markets; it applies to the entire Rule, which predominantly focuses on traditional market participants. Unsurprisingly, the Commission never explained why the $50 million threshold is appropriately calibrated for digital asset markets. As a matter of fact, such a threshold makes no sense as a limitation for digital asset markets because of the way liquidity pools *combine* assets of *multiple* participants. *See* Mot. 9-11; *see also* ECF No. 35 (Amicus Brief of Paradigm Operations) at 10-11 (explaining how the $50 million threshold "leads to even more questions for digital assets industry participants" because of the difficulties in applying the threshold to digital assets). But because the Commission never

specifically considered how that threshold would apply to digital asset markets, it did not confront (much less address) this core problem.

The Commission likewise has no response to commenters' concerns about the Dealer Rule tilting the competitive playing field away from U.S. digital asset markets to foreign markets. *See* Mot. 34 (quoting App. 174). The Commission instead mischaracterizes commenters' concerns as relating to foreign firms operating in *U.S.* markets. It claims that, because "'foreign firms that deal in U.S. markets are not excluded from' the final rule," the Commission did "not expect the final rule[] to create competitive disadvantages for U.S. liquidity providers." Opp. 40 (quoting App. 112). That misses the point, which is that liquidity providers will *leave* U.S. markets in favor of foreign markets due to the regulatory uncertainty resulting from the Dealer Rule, thus harming U.S. market liquidity. Like the Rule itself, the Commission's brief fails to address that concern.

In the end, the Commission rests its case on the Dealer Rule's statement that "the rule's 'effect on competition in crypto asset markets would be similar to the effects on competition . . . for other markets.'" Opp. 41 (quoting App. 112). But the Commission made that conclusory statement without engaging in *any* analysis of the digital asset markets. It instead simply lumps together digital asset markets and traditional financial markets together, without any explanation of why it was appropriate to do so despite the unique characteristics of digital asset markets. That does not meet any conceivable standard for reasoned decisionmaking.

Harms to innovation in digital asset markets.—Finally, the Commission claims that it "acknowledged and responded to commenters' concerns" about the Dealer Rule's

harmful effects on innovation when it "referenced commenters' views that requiring certain crypto asset security market participants to register as dealers 'could hinder U.S. innovation in the crypto asset market.'" Opp. 41 (quoting App. 76). Again, if merely making a single generalized reference to comments raising concerns about negative consequence of a rule is sufficient, then the "the opportunity to comment" would be "meaningless." *Texas*, 10 F.4th at 554 n.4 (citation omitted). The Commission thus resorts to assurances that it "consider[ed] these and other comments" and then "concluded that the rule as adopted 'appropriately balance[s] the concerns of the various commenters in a way that will best achieve the Commission's important goals to protect investors and support fair, orderly, and resilient markets.'" Opp. 41-42 (quoting App. 61). But merely asserting that the Commission "considered" comments without pointing to any analysis of those comments or of the Commission's purported balancing of concerns in the Rule does not come close to meeting the Commission's obligation to substantively respond to commenters' concerns. The APA requires agencies to show their work, not simply give their say-so.

B. The Commission Cannot Rely On Rationalizations Invented For Litigation To Defend The Dealer Rule's Application To Digital Asset Markets (Count III).

The Dealer Rule also violates the APA because the Commission did not "reasonably explain[]" the need to apply the Dealer Rule to digital asset markets, as opposed to the traditional markets that were the principal target of the Rule. *FCC* v. *Prometheus Radio Project*, 592 U.S. 414, 423 (2021).

As the Commission acknowledges (at 28-29), the Rule was primarily aimed at expanding the Commission's oversight over proprietary trading firms (or PTFs) in the U.S. Treasuries market. The Commission perceived a "need for the rule" based on its

determination that "proprietary trading firms 'perform[] critical market functions, in particular liquidity provision, that historically have been performed by dealers.'" Opp. 10 (quoting App. 56); *see* Opp. 28-29 ("[A]lthough proprietary trading firms accounted for 'about half of the daily volume in the interdealer market' in the U.S. Treasury market . . . many of these firms 'are not registered as dealers'") (quoting App. 56). The Commission's attempts to show that those concerns led to an equivalent need to extend its jurisdiction over digital asset markets are based entirely on rationalizations developed for litigation, rather than the Rule itself. The APA requires courts to disregard such "*post hoc* rationalizations" of agency action. *See, e.g.*, *Data Mktg. P'ship, LP* v. *U.S. Dep't of Lab.*, 45 F.4th 846, 856 (5th Cir. 2022) ("In reviewing an agency's action, [a court] may consider only the reasoning 'articulated by the agency itself'; [it] cannot consider *post hoc* rationalizations.") (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50, (1983)); *Nat'l Ass'n of Mfrs.* v. *SEC*, 105 F.4th 802, 815 (5th Cir. 2024) ("SEC did not offer reasonable or reasonably explained justifications" for decisionmaking because it only offered "*post hoc* rationalizations" on appeal); *Hicks* v. *Comm'r of Soc. Sec.*, 909 F.3d 786, 808 (6th Cir. 2018) ("[A]n agency's actions must be upheld, if at all, on the basis articulated by the agency itself," not "counsel's post hoc rationalizations.") (citations omitted).

Stringing together separate quotes from the Rule, the Commission claims that it perceived the same "regulatory gap" in the digital asset markets that exists in the Treasuries market because "'some [proprietary trading firms] in crypto asset markets' *may* 'provide significant liquidity in crypto asset markets' but *may* not be registered with the

Commission." Opp. 30 (quoting App. 90) (emphasis added). But that was not the reasoning the Commission gave in the Rule. The Rule simply stated that the Commission thinks some undefined number of "crypto asset platforms . . . may already be dealers," and thus the Rule "might affect only a few of the[se] entities that provide significant liquidity in crypto asset markets." App. 90. And the Commission separately acknowledged the possibility that "the rule[] may affect some PTFs in crypto asset markets." App. 90. So the Rule itself was not even attempting to show any "regulatory gap" in the digital asset markets. Unsurprisingly, then, unlike the Treasuries market—where the Commission actually made the effort to quantify the volume of trading attributable to PTFs, *see* App. 29—the Commission never even attempted to quantify the volume of PTFs' participation in digital asset markets, much less explain why those activities in the digital asset markets present the same risks as in the Treasuries market or justify applying the Dealer Rule to digital asset market participants.

Plaintiffs also pointed out that the Rule's "[t]wo examples" illustrating its concern about the risks of "[m]arket participants engaged in dealing activities but without being registered" had nothing to do with digital asset markets. Mot. 37 (quoting App. 92). The Commission deems those examples irrelevant, claiming that it did not need to "point to specific failures of significant liquidity providers in crypto asset securities" because the Rule is "prophylactic." Opp. 31. That excuse does not work either. For the Commission "to rely solely on a theoretical threat," it must "justify the promulgation of" such a "costly prophylactic rule[]." *Nat'l Fuel Gas Supply Corp.* v. *FERC*, 468 F.3d 831, 844-45 (D.C. Cir. 2006) (Kavanaugh, J.). The Commission did no such thing here, because it neither

substantiated the "threat" in the digital asset markets *nor* analyzed the range of costs that the Rule would impose on those markets and their participants. Plaintiffs are not substituting their judgment for the Commission's, *see* Opp. 31, because the Commission made no judgment at all.

Recognizing the deficient rulemaking record, the Commission's brief now points to new evidence in an attempt to justify the Dealer Rule's application to the digital asset markets. Specifically, the Commission cites two SEC settlements (at 12-13) concerning alleged unregulated dealer activity by certain entities in digital asset markets as a purported justification for applying the Rule to digital asset markets writ large. As noted, the Commission's after-the-fact reliance on these settlements is impermissible. *See Data Mktg. P'ship, LP*, 45 F.4th at 856. In any event, the Commission still never explains why settlements involving two discrete entities who were engaged in trading activities distinct from what the Rule covers justify applying the Rule's brand new tests broadly to all digital asset markets.

The Commission also tries to explain for the first time in its brief how "the record" purportedly refutes commenters' and plaintiffs' assertions that digital asset markets and their innovative features are inherently different from, and do not present the same risks as, traditional markets. Opp. 32. The Commission points (at 32-33) to a December 2023 Board of International Organizations of Securities Commissions ("IOSCO") report—cited in a single footnote in the Dealer Rule, App. 66 n.135—that discusses the well-publicized 2022 "insolvency of FTX." The Commission's goal seems to be to depict all digital asset markets as inherently risky and in need of more regulation. But FTX was a cryptocurrency

exchange, not a trader, so it is entirely unclear what its fraudulent activities have to do with the Commission's failure to analyze the relevant differences between traditional markets and digital asset markets in terms of dealer activities. That is presumably why the Rule itself does not even reference the IOSCO report's discussion of FTX. Nor does the Rule cite the IOSCO report for the proposition that digital asset markets and their underlying technologies are analogous to traditional markets, as the Commission now urges in its brief.

All told, none of the Commission's after-the-fact attempts to justify the Dealer Rule's application to the digital asset markets can remedy the fact that the Commission failed to "reasonably explain" *in the Rule* why a rule seeking to expand the Commission's oversight of PTFs in the Treasuries market should apply in such a blunt fashion to the digital asset markets. *Prometheus Radio Project*, 592 U.S. at 423.

C. The Commission Cannot Defend Its Failure To Conduct Its Statutorily Required Economic Analysis (Count V).

Nothing in the Commission's brief establishes that it "satisfied its obligations under the Exchange Act" (Opp. 42) to assess the effects of the Dealer Rule on "efficiency, competition, and capital formation" as applied to the digital asset markets. 15 U.S.C. §78c(f); *see also id.* § 78w(a)(2). The Commission offers a series of excuses (at 44-46) for why it was not required to analyze the effects of the Rule on the digital asset markets, but all are unavailing.

1. The Commission first attempts to avoid altogether its obligation to analyze the effects of the Dealer Rule on the digital asset markets through two primary arguments, but neither justifies the Commission's inadequate analysis.

a. First, the Commission contends that it had no obligation to analyze the Rule's effects on the digital asset markets because the Exchange Act only "obligates the Commission to consider the effects of proposed rules and regulations on the market as a whole, not just narrow sections of the market." Opp. 44 (quoting *Bloomberg L.P.* v. *SEC*, 45 F.4th 462, 474 (D.C. Cir. 2022)). But digital asset markets are not "narrow sections of the market"—they are *separate* markets affected by the same Rule. Digital asset markets are substantially different from traditional markets, as they involve fundamentally different assets, different participants, different mechanisms of trading, and different market structures.

Bloomberg does not help the Commission for other reasons as well. In that case, Bloomberg argued that a new "quasi-governmental monopoly" created to provide information about corporate bond underwriting would harm "competitive private providers" of that information (like Bloomberg). *Id.* at 474 (citation omitted). The Commission considered those comments, but determined that "any limited burden on competition" in the markets for such information was outweighed by the benefits of the rule to the market "as a whole." *Id.* In other words, the Commission actually responded to comments and nonetheless concluded that the benefits to the market as a whole outweighed any risk of competitive harms to a specific subset of market participants. Here, the Commission failed to respond to comments or substantively evaluate the harms on the digital asset markets at all. The Commission cannot skirt its obligation to analyze the costs of the Rule by characterizing those digital asset markets as a "narrow section" of some

unidentified broader market, only to ignore them entirely when analyzing the Rule's impact on the market "as a whole."

b. Second, the Commission relies on the assertion in the Rule that the Commission "was 'unable to estimate the number of crypto asset market participants who would be affected by'" the Dealer Rule. Opp. 46 (quoting App. 90). And the Commission contends that it did not need to "undertake a quantitative analysis to determine" the Rule's "economic implications." Opp. 45 (quoting *Chamber of Com.*, 85 F.4th at 773). These arguments likewise do not withstand scrutiny.

To begin, the Commission fails to refute plaintiffs' showing that the Commission *did* have the ability to estimate the number of digital asset market participants affected by the Rule. The Commission puzzlingly maintains that there was "no discernible path for the Commission to track crypto asset transactions on the scale necessary to ascertain" which participants would be impacted by the Dealer Rule. Opp. 46; *see also* Opp. 29. This rings hollow. Plaintiffs both explained and provided examples of how the Commission could have estimated that number based on publicly available data—as other components of the U.S. Government have often found means to do. *See* Mot. 40. The Commission protests that the "publicly accessible" data is "difficult to access and interpret," again citing the IOSCO report. Opp. 47. The Commission's professed inability to "interpret" the relevant industry data only underscores the Commission's unwillingness to understand the industry that the Commission insists on nevertheless sweeping into this regulatory regime. And it is well settled that the "difficult[y]" of assessing and interpreting data "does not excuse the

Commission from its statutory obligation to do what it can to apprise itself" of the Rule's effects. *Chamber of Com. of U.S.* v. *SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005).

The Commission then attempts to shift the blame to commenters for not providing the data the Commission suggests it would have needed to perform an adequate analysis. Opp. 47. The Commission claims it "request[ed]" such data in the Proposed Rule, but can point only to a blanket request in the Proposed Rule for "comment on all aspects of the initial economic analysis," including the provision of "data and information to assist [the Commission] in analyzing the economic consequences of the Proposed Rule[]." App. 43. Unsurprisingly, digital asset market participants were unable to divine from that general, boilerplate request the information the Commission believes it needed to estimate the number of digital asset market participants who would be impacted by the Rule. And placing that burden on digital asset market participants is particularly unreasonable given (i) that the Commission only mentioned digital assets in a single footnote in the Proposed Rule and (ii) the tremendous uncertainty about which digital assets and features of digital asset transactions would even be captured by the Rule. *See supra* pp. 26-28. Had the Commission taken those comments seriously, it easily could have reopened the comment period or otherwise specifically requested information specific to the digital asset industry, which the Commission has done before. *See* Opp. 2 (citing *Supplemental Information and Reopening of Comment Period for Amendments Regarding the Definition of "Exchange"*, 88 Fed. Reg. 29,448 (May 5, 2023)); 88 Fed. Reg. at 29,452 (reopening comment period to solicit information from the digital asset industry "relevant to the Commission's analysis of New Rule 3b–16(a) Systems for crypto asset securities").

2. The Commission next contends (at 43) that it did adequately evaluate the effects of the Dealer Rule on efficiency, competition, and capital formation, but its recitation of the isolated, conclusory assertions in the Rule undermine its own argument.

Efficiency.—The Commission asserts that it sufficiently considered the impact of the Rule on efficiency because the Rule acknowledged that it "may affect [proprietary trading firms] in crypto asset markets," and that if PTFs "curtail[ed] their crypto asset trading activities," then "trading volumes in crypto asset markets could fall, harming the liquidity and efficiency of these markets." Opp. 44 (quoting App. 112). As explained, these statements merely acknowledge commenters' concerns, rather than reflect any actual analysis of the anticipated effects of the Rule on efficiency in digital asset markets. The Commission fell short of its statutory obligation "[b]y ducking serious evaluation of the[se] costs." *Bus. Roundtable* v. *SEC*, 647 F.3d 1144, 1152 (D.C. Cir. 2011). Moreover, this single sentence said nothing about commenters' host of concerns about liquidity provision, including that the Rule would come with harms like "market concentration," "volatility," and "[s]ystemic [r]isk," and that the Rule would hinder "trading strategies and market structures designed to promote liquidity." Mot. 42 (quoting App. 189 (DEF Comment at 9)). Nor did the Commission acknowledge the threat the Rule posed to the development of web3-based innovations that add efficiencies to digital asset markets. *See* Mot. 42.

Competition.—As noted above, with respect to effects on competition, the Commission ignores all of the differences between traditional financial markets and digital asset markets and summarily states "that '[t]he effect on competition in crypto asset markets would be similar to the effects on competition already discussed for other

markets.'" Opp. 44 (quoting App. 12). Again, the Commission offers no support for this conclusory statement. Nor can the Commission point to any response to commenters' warnings that the Dealer Rule would have a litany of consequences on competition specific to digital asset markets, including reducing "competition in the digital asset markets by favoring well-funded incumbents in these markets over smaller entities" and benefiting "foreign digital asset markets over their American counterparts," among many others. Mot. 42. Having failed to respond to these concerns, the Commission's bare assertion that the "effect on competition in crypto asset markets would be similar to the effects" on other markets is contrary to the record before it. *See Nat'l Ass'n of Home Builders* v. *Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (agency acted arbitrarily and capriciously when it "offered an explanation for its decision that runs counter to the evidence before the agency") (citation omitted); *Fred Meyer Stores, Inc.* v. *NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017) ("Having carefully examined both the Board's findings and its reasoning, we conclude the Board's opinion is more disingenuous than dispositive; it evidences a complete failure to reasonably reflect upon the information contained in the record and grapple with contrary evidence—disregarding entirely the need for reasoned decisionmaking.").

Capital formation.—Finally, with respect to capital formation, the Commission once again falls back on a false equivalence between digital asset markets and traditional markets, arguing that the Rule adequately justified the "mixed" effect that the Dealer Rule will have on capital formation across all markets. Opp. 45 (quoting App. 13). Yet again, this summary conclusion fails the Commission's obligation to address significant concerns raised by commenters.

All told, the Commission's attempt to defend its statutorily required economic analysis rests on a single statement acknowledging a potential harm to one class of participants in the digital asset markets (PTFs), and an unjustified (and inaccurate) equivalence of digital asset markets to traditional markets. That analysis is insufficient under the Exchange Act. *See Bus. Roundtable*, 647 F.3d at 1148 (Commission's "failure to 'apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation' makes promulgation of the rule arbitrary and capricious and not in accordance with law") (citation omitted).

D. The Commission Fails To Show That A Single Footnote Provided Fair Notice As Required By The APA (Count VI).

The Commission's claim that the Proposed Rule provided adequate notice to the digital asset industry makes a mockery out of the APA's requirement that agencies give affected parties "fair notice," *Tex. Ass'n of Mfrs.* v. *U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 381 (5th Cir. 2021), of "the terms or substance of the proposed rule or a description of the subjects and issues involved," 5 U.S.C. § 553(b)(3). As the Commission acknowledges (at 48), the *only* notice that the industry received was a single, brief footnote in a 194-page Proposed Rule, which stated that the Proposed Rule would apply to "any digital asset that is a security or a government security within the meaning of the Exchange Act." App. 4. It blinks reality to consider this passing reference buried in a footnote as fair notice in any rulemaking, let alone one like this with such sweeping consequences, an expansive new interpretation of a 90-year-old statutory definition, and substantial unanswered questions about the Rule's application to an entirely distinct and unique marketplace. *See Prometheus Radio Project* v. *FCC*, 652 F.3d 431, 449 (3d Cir. 2011)

(APA's procedural requirements are meant "to ensure that agency regulations are tested via exposure to diverse public comment," "ensure fairness to affected parties," and to "give affected parties an opportunity to develop evidence") (citation omitted).

The Commission argues that the footnote "provided sufficient notice that the final rule would apply to all securities, including crypto asset securities." Opp. 48. But courts have held that a "mere mention" of a party or topic in a rulemaking does not constitute fair notice. *CSX Transp., Inc.* v. *Surface Transp. Bd.*, 584 F.3d 1076, 1082 (D.C. Cir. 2009). Not only did the Commission devote little space to alerting the digital asset industry that the Proposed Rule might apply to it, but the substance of the footnote itself also failed to inform the digital asset industry of how the Rule would apply to the industry. The entire focus of the Proposed Rule was on traditional markets. App. 7-8. Viewed in its entirety, the Proposed Rule did not "adequately frame the subjects for discussion" for the digital asset industry. *Mexican Gulf Fishing Co.*, 60 F.4th at 975.

The Commission thus pivots to language in the "*adopting* release" about the Dealer Rule's applicability to the digital asset industry. Opp. 48 (emphasis added). But "notice must come from the [proposed rule]." *Chesapeake Climate Action Network* v. *EPA*, 952 F.3d 310, 320 (D.C. Cir. 2020) (quoting *CSX Transp., Inc.*, 584 F.3d at 1082). The whole point of the notice requirement is to adequately apprise "interested persons" so that they have an informed "opportunity to participate in the rule making through submission of written data, views, or arguments" *in advance* of the final rule. 5 U.S.C. § 553(c). Allowing an agency to satisfy the notice requirement by pointing to purportedly clarifying language in the adopting release makes no sense. In any event, the language from the final Dealer

Rule cited by the Commission provides no clarity at all; it simply repeats the same tautological statement that individuals trading in "[digital] asset securities" who meet the Commission's new definition will have to register as a dealer. Opp. 48.

For the same reason, the Commission is wrong to claim that the Dealer Rule constitutes a "logical outgrowth" of the Proposed Rule. Opp. 48. In support of this argument, the Commission repeats its familiar refrain that the "[Dealer Rule] takes exactly the same approach to crypto asset securities" as the Proposed Rule based on the proposition that some transactions in digital assets might constitute securities transactions. Opp. 48. As discussed at length (*supra* pp. 26-28), that refrain is itself the problem because of the uncertainties the Commission refuses to address about which digital asset transactions are securities transactions. And the Commission's emphasis on a "technology neutral" approach in the Dealer Rule skirts the serious questions raised by commenters about how the Rule could or should apply to the unique ways that DeFi technology allows participants to trade in a manner distinct from traditional markets. Opp. 12. Simply ignoring these complexities does not make the final Rule a "logical outgrowth" of the footnote in the Proposed Rule.

Finally, the Commission claims (at 49) that the fact that "companies and interest groups involved in the crypto asset industry submitted comments . . . demonstrate[s] that the proposal gave commenters adequate notice." Setting aside that the Commission largely ignored those comments in the Final Rule, that argument is squarely foreclosed by binding precedent. Although members of the public need not "divine [the agency's] unspoken thoughts," if they do show such prescience and submit comments, those comments "do not

satisfy the [agency's] obligation to afford the general public an opportunity to respond to clearly stated proposals." *Mexican Gulf Fishing Co.*, 60 F.4th at 975 (citation omitted); *see also Chesapeake Climate Action Network*, 952 F.3d at 320 ("[A]n individual's comment in and of itself [does not] demonstrate[] sufficient notice from [an agency] to the individual."); *Fertilizer Inst.* v. *EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) ("Commenting parties cannot be expected to monitor all other comments submitted to an agency. . . . [T]he agency must *itself* provide notice of a regulatory proposal.") (citation omitted).

The Commission refuses to engage with that case law, and instead relies (at 49) on a single case—*Huawei Techs. USA, Inc.* v. *FCC*, 2 F.4th 421 (5th Cir. 2021)—for the proposition that comments evidence adequate notice. *Huawei* stands for no such thing. As the Fifth Circuit explained, in that case, "the final rule's adoption of changes *responsive* to Huawei's comments underlines that the rule logically emerged from the rulemaking." *Id.* at 449 (emphasis added). Because the proposed rule provided enough specifics, the Fifth Circuit reasoned that Huawei was "fairly acquainted . . . with the subject and issues" in the rule to the point that it could thoughtfully raise proposed changes that the agency eventually adopted. *Id.* at 448-49. But that obviously did not happen here. Because of the ambiguity of the Proposed Rule, members of the digital asset industry were forced to throw darts in the dark, raising all manner of questions as well as urging the Commission to exempt them from a final rule. *See* Mot. 12-14. In finalizing the Dealer Rule, the Commission ultimately ignored all of these comments. *Huawei* does not remotely sanction that failure to provide reasonable notice and then respond to relevant comments. Simply put, the Commission cannot "bootstrap notice from . . . comment[s]," *Small Refiner Lead*

Phase-Down Task Force v. *EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983), and its lack of notice violated the APA.

III. THE APPROPRIATE REMEDY IS VACATUR.

The necessary remedy for the numerous deficiencies in the Rule is for the Court to set aside—*i.e.*, vacate—the Dealer Rule in full. "The default rule is that vacatur is the appropriate remedy" for unlawful agency action under the APA. *Data Mktg. P'ship*, 45 F.4th at 859; *see Nat'l Ass'n for Gun Rights, Inc.* v. *Garland*, 2024 WL 3517504, at*22 (N.D. Tex. July 23, 2024) ("The proper remedy upon determining that an agency has exceeded its authority is vacatur of the unlawful agency action."). The Commission urges this Court to depart from that default rule and either remand the Dealer Rule to the agency without vacatur or "apply a severability analysis" to enjoin application of the Rule only as to participants in DeFi markets. Opp. 49-50. Both arguments fail.

1. Remand without vacatur "is justifiable only in 'rare cases,'" *i.e.*, where there is a "'serious possibility' that the agency will be able to correct the rule's defects on remand" *and* "vacating the challenged action would produce 'disruptive consequences.'" *Chamber of Com. of U.S.* v. *SEC*, 88 F.4th 1115, 1118 (5th Cir. 2023) (citation omitted). The Commission tellingly does not even attempt to show that this case meets those requirements. The Commission of course cannot remedy the fact that the Rule exceeds the Commission's statutory authority. *See Texas* v. *Cardona*, 2024 WL 2947022, at *46 (N.D. Tex. June 11, 2024) ("[T]he Department will not be able to justify its decision to create law that Congress did not pass."); *Nat'l Ass'n of Gun Rights*, 2024 WL 3517504, at *23 (same). Nor can it cure its failure to comply with the APA's notice requirements. *See Chamber of*

Com., 88 F.4th at 1118 n.2. And the Commission never explains how the record supports a "serious possibility" that the Commission can cure its failures to adequately consider the issues raised by the digital asset industry when the Commission did not even respond to, let alone try to consider, many of those issues at all.

The Commission also conclusorily asserts that vacating the Rule would "needlessly undermine market stability and harm the investing public." Opp. 50. To the contrary, disruption would result from allowing the Rule to go into effect and sweep in numerous market participants whom the Commission acknowledges were not previously required to register as dealers. *See, e.g.*, App. 89 (acknowledging comments that the number of market participants affected by the Proposed Rule "would be much higher than the Proposing Release suggested" and stating that "the changes to the final rule[]…largely responded to commenters' concerns by reducing the number of entities that the final rule[] would potentially require to newly register as dealers"); App. 103 (discussing costs to newly registered dealers who will be subject to the Rule). Vacatur would thus be "minimally disruptive because [it] simply 'establish[es] the status quo' that existed for decades." *Cardona*, 2024 WL 2947022, at *47 (citation omitted).

2. The Commission alternatively argues that, instead of vacatur, the Court should determine whether application of the Dealer Rule to digital asset markets can be "sever[ed]." Opp. 49-50. As an initial matter, the Commission appears to confuse severability with as-applied injunctive relief. Severability concerns whether the court can "set aside the offending parts of the rule while keeping the remaining parts of the rule intact." *Texas* v. *United States*, 691 F. Supp. 3d 763, 788 (S.D. Tex. 2023). There is no

portion of the Rule that exclusively applies to digital asset markets. *Cf. Loan Syndications & Trading Ass'n* v. *SEC*, 882 F.3d 220, 222, 229 (D.C. Cir. 2018) (vacating provisions that expressly applied the rulemaking to CLO managers). What the Commission appears to advocate is that the Court enjoin the Commission from enforcing the Rule against digital asset market participants. But given Fifth Circuit law that vacatur is the required remedy for an APA violation and the fact that vacatur is a "less drastic remedy" than an injunction, the Commission has not shown why that more intrusive relief is appropriate. *Monsanto Co.* v. *Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010); *see also Texas* v. *United States*, 40 F.4th 205, 220 (5th Cir. 2022).

CONCLUSION

For the foregoing reasons, the Dealer Rule should be set aside.

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Respectfully submitted,

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