# United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

**FILED**

August 25, 2026

Lyle W. Cayce
Clerk

No. 25-60330

Apex Clearing Corporation,

*Petitioner*,

*versus*

Securities and Exchange Commission,

*Respondent*.

Petition for Review of an Order of the
Securities and Exchange Commission
Agency No. 102860

Before King, Southwick, and Haynes, *Circuit Judges*.

Per Curiam:[*]

Petitioner Apex Clearing Corporation ("Apex"), a registered broker-dealer, petitions for review of the denial of its motion to modify a settlement between itself and Respondent Securities and Exchange Commission ("Commission"). For the following reasons, we DENY the petition.

[*] This opinion is not designated for publication. *See* 5th Cir. R. 47.5.

## I.

Under section 17(a)(1) of the Securities Exchange Act of 1934, regulated entities and their employees are required to "make and keep for prescribed periods such records, [and] furnish such copies thereof, . . . as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the Act]." 15 U.S.C. § 78q(a)(1). The Commission promulgated Rule 17a-4 under this authority, mandating that broker-dealers preserve required records for specified periods of time. *E.g.*, 17 C.F.R. 240.17a-4(b)(4). In other words, regulated entities are required to maintain and preserve their employees' business-related communications located on personal devices ("off-channel communications").

In 2021, the Commission began an enforcement sweep[1] targeting the failures of regulated entities, including broker-dealers, and their employees to preserve and maintain off-channel communications. Between December 2021 and September 2024, the Commission engaged in waves of settled orders as part of its off-channel enforcement sweep.[2] Apex contends that, in enforcement sweeps, the Commission insists on "take-it-or-leave-it" (*i.e.*, non-negotiable) standard settlements "[d]ue to the commonality of issues and equitable considerations." The Commission provided that "[m]any (though not all) of the settled orders contained similar remedial

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[1] As a former Director for the Commission's Division of Enforcement explained in an October 2016 address, "[a] sweep is a group of enforcement actions brought simultaneously against different parties who have engaged in similar violations. Sweeps can be particularly effective where there is widespread misconduct." While the Commission disclaims that "staff speeches . . . do not reflect the views of the Commission itself, this explanation for enforcement sweeps is informative here.

[2] The Commission announced these settled orders in batches in multiple press releases.

undertakings, but civil penalty amounts varied widely based on various factors[.]"

One of the settled actions involved Apex, who submitted an offer of settlement to the Commission "in anticipation of public administrative and cease-and-desist proceedings to be instituted against [Apex] by the Commission." The Commission accepted Apex's offer in August 2024 ("Settled Order"), and included Apex in its August 2024 announcement of charges against, and settlements with, twenty-six broker-dealers and other regulated entities.

The Settled Order imposed penalties and remedial "undertakings," which as Apex explains are "affirmative actions" imposed by the Commission that are "not otherwise required by federal securities law." The Settled Order required that Apex comply with the undertakings, which, as both parties acknowledge, "ha[d] the effect of subjecting [Apex] to heightened supervision by the Financial Industry Regulatory Authority" ("FINRA").[3]

There is no dispute that, in January 2025, the Commission announced settled orders against twelve firms, including three broker-dealers, that were overall less severe than the pre-2025 settled orders. The January 2025 settled orders did not require compliance with the specified undertakings; thus, the January 2025 firms were not subjected to heightened supervision from FINRA.

[3] Broker-dealers, such as Apex, must maintain FINRA membership, FINRA Rule 1220(a)(2)(A), but those that are ordered to comply with Commission undertakings are immediately disqualified from FINRA membership and therefore must apply to FINRA for approval to stay in the securities industry, FINRA Regulatory Notice 09-19. After re-application is approved, FINRA rules require heightened, costly supervision for such broker-dealers. FINRA Regulatory Notice 9523(b).

Apex and other regulated entities that had settled under the off-channel communications enforcement sweep before January 2025 moved the Commission to modify certain of their undertakings "pursuant to Rules 200(d)(1), 154, and 100(c) of the Commission's Rules of Practice."[4] In its motion, Apex sought to equalize the Settled Order's undertakings with those in the January 2025 orders, and likened the Commission's authority to amend its orders to the authority federal courts have to amend final judgments under Federal Rule of Civil Procedure 60(b)(5). Apex argued that "[i]n these particular circumstances, it would be inequitable to require Apex to comply with the prior Ordered Undertakings instead of the undertakings enumerated in the January 2025 Orders."

The Commission's Division of Enforcement ("Division") opposed Apex's motion. It characterized the motion as containing a "sole argument" of "purportedly similarly situated [regulated entities] in separate proceedings later received a better outcome for themselves." And this argument, the Division contended, was "insufficient to justify [vacating the Settled Order] in order to get what [Apex] views as a better deal" because it does not rise to the "exceptional" or "compelling circumstances" level required for modification. The Division warned that granting Apex's motion "would open the floodgates" for others to "relitigate all manner of settled Commission administrative proceedings" and disrupt the "finality" and "efficacy" of the Commission's enforcement program and orders. Apex filed a reply in support of its motion.

In April 2025, by a two-to-one vote, the Commission issued a single order ("Order") denying the motions to modify or amend their settled

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[4] They also moved to stay the effectiveness of those undertakings under Commission Rule of Practice 401.

orders brought by Apex and other regulated entities (referred to as "respondents" in the Order). *Certain Off-Channel Commc'ns Settled Ords.*, Exchange Act Release No. 6874, 2025 WL 1101495 (Apr. 14, 2025). The majority put forth two overarching reasons for its decision: (1) respondents had not made the necessary showing to modify the Settled Orders and (2) respondents relied on inapposite or inapplicable Commission authority. *Id.* at *1–3.

As to the first reason for denial, the majority explained that because there is a "strong interest in maintaining the finality of settlements[,] [p]arties generally therefore must demonstrate compelling or extraordinary circumstances to modify a settled order." *Id.* at *1. They found Rule 60(b)(5)[5] instructive and thereby looked to the Supreme Court case *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 383–84 (1992),[6] for guidance. *Certain Off-Channel Commc'ns Settled Ords.*, 2025 WL 1101495, at *2. The majority appears to have read *Rufo*'s changed-circumstances examples as a definitive list and determined that the respondents did not argue that any of them were present. Rather, the majority posited, "the only arguably changed circumstance [the respondents] identify is that later parties negotiated what [r]espondents believe to be better settlement terms," which is "not the type of compelling circumstance that justifies" modification. *Id.* As support for this position, the majority cited *Richard D. Feldman*, Exchange Act Release

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[5] The third clause of Rule 60(b)(5) provides that, "[o]n motion and just terms, the court may relieve a party . . . from a final judgment, order, or proceeding" when "applying it prospectively is no longer equitable." FED. R. CIV. P. 60(b)(5).

[6] In *Rufo*, the Supreme Court stated that "[a] party seeking modification of a consent decree may meet its initial burden by showing either a significant change either in factual conditions or in law." *Rufo*, 502 U.S. at 384. The Supreme Court then provided examples of changed factual conditions, such as when "a decree proves to be unworkable because of unforeseen obstacles." *Id.*

No. 77803, 2016 WL 2643450, at *2 (May 10, 2016), wherein the Commission denied a motion to modify because the settling respondent accepted the risk that litigating respondents might achieve a better result. The majority continued that reaching different settlement terms was not detrimental to the public interest[7] because it "gives government authorities flexibility and discretion to resolve future cases and has not, as a matter of experience, deterred persons from entering into settlements." *Certain Off-Channel Commc'ns Settled Ords.*, 2025 WL 1101495, at *2. "In short," the majority stated, "[s]ettlor's remorse—and a desire to revisit th[e] risk calculus—does not justify upsetting a final, agreed-upon settled order." *Id.* at *3.

As to the second reason, the majority explained that the case respondents primarily relied upon, *Millennium Partners, L.P.*, Securities Act Release No. 4458, 2016 WL 3902753 (July 19, 2016), was factually distinct. The majority also explained that Rule of Practice 200(d)(1)[8] was inapposite, and that Rule of Practice 100(c)[9] "does not give parties the right to

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[7] It is unclear if the majority provided a "public interest" analysis because it was raised by Apex in its motion or because *Rufo* provided that modification under Rule 60(b)(5) may be appropriate "when enforcement of the decree without modification would be detrimental to the public interest." *Rufo*, 502 U.S. at 384. When discussing *Rufo*, the majority stated that respondents did not argue "that continued enforcement of the terms would be detrimental to the public interest," but nonetheless provided a "public interest" analysis. *Certain Off-Channel Commc'ns Settled Ords.*, 2025 WL 1101495, at *2.

[8] "Amendment to order instituting proceedings. By the Commission. Upon motion by a party, the Commission may, at any time, amend an order instituting proceedings to include new matters of fact or law." 17 C.F.R. § 201.200(d)(1)

[9] "The Commission, upon its determination that to do so would serve the interests of justice and not result in prejudice to the parties to the proceeding, may by order direct, in a particular proceeding, that an alternative procedure shall apply or that compliance with an otherwise applicable rule is unnecessary." 17 C.F.R. § 201.100(c).

substantive relief." *Certain Off-Channel Commc'ns Settled Ords.*, 2025 WL 1101495, at *3. "This is especially true," the majority elaborated, "where, as here, granting the requested relief would undermine the compelling interest in the finality of settlements and thus not serve the interests of justice." *Id.*

One Commissioner dissented. *Id.* at *6–9. While the dissenter agreed with the majority that respondents had not satisfied the standards for relief under Federal Rule 60(b)(5), she posited that Rule of Practice 100(c) provided an avenue for relief, noting that *Millenium Partners* granted relief without citing any Rule of Practice or applicable legal standard governing the request for relief. *Id.* at *6. She explained that the "undertakings in the January settlements are demonstrably less draconian and costly[,]" *id.*, and that it did not appear that the Commission had "explain[ed] the differential treatment across firms that were similarly situated inasmuch as they committed the same underlying violation," *id.* at *8. She stated that "something more significant [than settlor's remorse] is going on in these proceedings." *Id.* In her ultimate paragraph, she explained that "[w]hen the Commission engages in enforcement sweeps that ensnare large numbers of firms across different parts of its regulatory ambit, it should endeavor to ensure . . . that it imposes [] remedies in a fair and even-handed manner across firms." *Id.* And "[w]hen it settles on a remedial scheme that results in significantly greater costs to one category of firms, it should do so for well-explained and transparent reasons. This need for clear and transparent explanation is only heightened when the Commission chooses to change course in its application of the remedial scheme." Because the dissenter found "that explanation is lacking here," she "would grant the" motions to modify "to make the undertakings voluntary in all of them." *Id.*

Apex timely filed a petition for review challenging the Order.

## II.

This court has jurisdiction over Apex's petition for review under 15 U.S.C. § 78y(a)(1), which provides that "[a] person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order" in the appropriate circuit "by filing . . . within sixty days after the entry of the order, a written petition." *See* 15 U.S.C. § 78y(a)(3).

The Commission's denial of Apex's motion is reviewed under the Administrative Procedure Act's ("APA") standards. *See* 15 U.S.C. § 78y(b)(4); *see also Chamber of Com. v. SEC*, 85 F.4th 760, 767–68 (5th Cir. 2023) (applying the APA to assess a petition for review of the Commission's final rule and citing § 78y(b)(4)). "We review questions of law de novo, without deference to the agency's conclusions. And the Commission's factual findings are conclusive if supported by substantial evidence." *Nat'l Ass'n of Priv. Fund Managers v. SEC*, 151 F.4th 252, 260 (5th Cir. 2025) (citation modified).

Under the APA, this "court shall . . . hold unlawful and set aside agency action[s]" that are "found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency decision or action is arbitrary and capricious if the agency did not show that it has "reasonably considered the relevant issues and reasonably explained the decision." *Chamber of Com.*, 85 F.4th at 774; *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) [hereinafter *State Farm*] ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962))). We "may not supply a reasoned basis for the agency's action that the agency itself has not given," *State Farm*, 463 U.S. at 43, and "must set aside any action premised on reasoning that fails to account for 'relevant factors' or evinces 'a clear error of judgment,'" *Univ. of Tex. M.D. Anderson Cancer Ctr. v. U.S. Dep't of Health and Hum. Servs.*, 985 F.3d 472, 475 (5th Cir. 2021) [hereinafter *M.D. Anderson*] (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989)).

## III.

Apex contends that the Order is arbitrary and capricious for two independent reasons: (1) the Order flouted the "bedrock principle of administrative law that an agency must treat like cases alike," *see M.D. Anderson*, 985 F.3d at 479 (citation modified), and (2) the Order was not the product of reasoned decision making.

However, failing to treat like cases alike, standing alone, does not provide an independent basis for an arbitrary and capricious ruling. The "treat like cases alike" principle "is an outgrowth of the old adage from *State Farm* that 'an agency changing its course must supply a reasoned analysis.'" *M.D. Anderson*, 985 F.3d at 479 (quoting *State Farm*, 463 U.S. at 57). Therefore, an agency's action can be arbitrary and capricious if it fails to "provide an adequate explanation to justify treating similarly situated parties differently." *Shenzhen IVPS Tech. Co., Ltd. v. FDA*, 148 F.4th 306, 317 (5th Cir. 2025) (quoting *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 776 (D.C. Cir. 2005)). Accordingly, a petitioner arguing that it was treated dissimilarly must navigate two canal locks: (1) whether the agency failed to treat similarly situated parties alike, and if so, (2) whether the agency provided an adequate explanation for its departure.

The Commission contends the Order—not the Settled Order—is under review on appeal; therefore, in the Commission's view, the proper lens is whether the Commission adequately explained why Apex is not similarly situated to parties that have previously obtained *settlement modification*. The

Commission bolsters this position by citing 17 C.F.R. 201.240(c)(4) and asserts that "in agreeing to a settled order, [Apex] voluntarily waive[d] the right to seek judicial review" of the Settled Order. Apex counters that the Commission never previously made this waiver argument, and it cannot identify any provision in Apex's settlement indicating that Apex waived its right to pursue its challenge. We address the waiver argument first.

This court recently explained that "[a]n agency may not advance arguments before [the court] without first presenting them in the administrative record." *Louisiana v. U.S. Dep't of Energy*, 90 F.4th 461, 469 (5th Cir. 2024). Instead, "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses its action was based." *Id.* (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). Indeed, "the Supreme Court has repeatedly reaffirmed this prohibition on convenient litigating positions and post hoc rationalizations." *See id.* (citation modified) (collecting cases).

Here, the administrative record is barren of any on-point argument that Apex waived its right to challenge the Settled Order's undertakings.[10] Neither the Division's opposition to Apex's motion nor the Order mention the possibility of Apex having waived such right, let alone waiver under § 201.240(c)(4). Thus, because the Commission did not "present[]" this

[10] The limited instances in which the Commission or the Division discussed "waiver" are inapposite. Namely, in an August 2024 order recommending the Commission accept Apex's settlement offer (alongside other firms' offers), the Division discussed the Commission's authority to waive disqualifications of certain regulations and noted "any prior waiver granted to any Firm" in that context. This does not speak to whether Apex waived administrative or judicial review.

waiver argument "in the administrative record," it "may not advance" it here.[11] *See id.*

With no waiver barring our way, we return to the initial question of framing. We agree with the Commission: The order under review is the denial of Apex's motion to modify. Therefore, we consider whether the Commission treated Apex's motion similarly to other motions to modify a settlement, and if not, whether it adequately explained its departure. We answer that the Commission treated Apex's motion to modify similarly to other motions to modify a settlement *and* provided reasoned explanations for its denial of the motion.

First, the Commission treated Apex as it has every other party seeking to modify a final order: it required the clearing house to show that the circumstances merited modification. The Commission applied the rule, gathered from the Supreme Court's 60(b)(5) precedent—specifically, *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992)—that modification is warranted only by a significant change either in factual conditions or in law. The Commission rejected Apex's argument that a later settlement on different terms with other parties constituted a significant change of fact or law, and we agree with that rejection. While the factual conditions in *Rufo* were merely examples, not the only factual conditions that may be relevant, the theme of the examples from *Rufo* are unworkability or detrimentality. Apex has not shown that its undertakings are unworkable or detrimental to the public interest as a result of the later settlements. Even the dissenting

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[11] While *Louisiana* concerned an APA challenge to a Department of Energy regulation, *see* 90 F.4th at 465–66, 469, rather than an order denying motions to modify settled orders (as here), the breadth of this court's above-mentioned statements, as well as the Supreme Court's cited language addressing "administrative order[s]," *id.* (quoting *Chenery Corp.*, 318 U.S. at 87), suggest these principles apply here.

Commissioner agreed that Apex had not met the requirements of Federal Rule 60(b)(5). Consequently, Apex was not entitled to relief simply because "it is no longer convenient to live with [those] terms." *See Rufo*, 502 U.S. at 383.

Second, the Commission reasonably explained why Apex's situation was different from its precedent on when modification of settled orders may be necessary. Apex contends that the Order deviated from "a consistent line of precedent in which the [Commission] modified undertakings that were comparatively inequitable," pointing to *In re Millenium Partners, L.P.*, Rel. No. 34-78364 (July 19, 2016) as support.[12] However, we do not read *Millenium Partners* to stand for an overarching principle that settled orders should be modified when they are no longer equitable. As the Commission noted in the Order, *Millenium Partners* was clear that the "particular circumstances" of the case warranted modification of the settlement, "including that the Division of Enforcement d[id] not oppose the relief sought." *In re Millenium Partners, L.P.*, Rel. No. 34-78364, at *2. While Apex correctly argues that "an administrative agency cannot hide behind the fact-intensive nature of . . . adjudications to ignore irrational distinctions between like cases," the distinctions between *Millenium Partners* and Apex's case are not irrational. *See M.D. Anderson*, 985 F.3d at 480. They include the facts that, in *Millenium Partners*, the Division did not oppose modification, the imposed requirements were becoming unworkable, and the modification would sunset an otherwise indefinite obligation. *In re Millenium Partners, L.P.*, Rel. No. 34-78364, at *1. In contrast, here, the Division opposes

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[12] Apex also cited *In re Putnam Inv. Mgmt., LLC*, Rel. No. IAA-3600 (May 3, 2013), *In re Mass. Fin. Servs. Co.*, Rel. No. IAA-3312 (Nov. 9, 2011), *In re Janus Cap. Mgmt., LLC*, Rel. No. IAA-3065 (Aug. 5, 2010), and *In re MDC Holdings, Inc.*, Rel. No. 34-39537 (Jan, 9, 1998). Because none of these cases mention modifying a settlement because of inequity, we do not address them further.

modification, Apex is not requesting modification because the undertakings are unworkable, and the obligations are not indefinite in nature. Therefore, the Order was no deviation from precedent.

Third, the Commission addressed Apex's argument that it did not treat similarly situated firms alike when it imposed less severe sanctions in the January 2025 settled order for similar record keeping violations as the pre-2025 settled orders. The Commission explained that the inequity was not a basis for modifying the Settled Orders for the reasons detailed above—insufficient changed circumstance and no applicable precedent for modification. While the inequity is undisputed, even in an enforcement sweep the Commission is not required to settle on equal terms because it has "discretionary authority to settle on a particular set of terms." *S.E.C. v. Citigroup Glob. Markets, Inc.*, 752 F.3d 285, 295 (2d Cir. 2014); *Powell v. United States Sec. & Exch. Comm'n*, 149 F.4th 1029, 1046 (9th Cir. 2025). Moreover, in a settlement, any burden imposed on the party must be agreed to. An agency cannot by settlement "give free passes to its friends and hammer its enemies," unless its enemies consent to the hammering. *See M.D. Anderson*, 985 F.3d at 480. In this case, Apex consented to the hammering.

We sympathize with Apex's position; on this record, the January firms were *lucky* to be caught in a later wave of the enforcement sweep, enjoying significantly lighter settlement terms. But also on this record, that is not enough to say that the Commission's denial of Apex's motion to modify was arbitrary and capricious. The Commission considered its scant prior precedent on when modification of settled orders may be necessary, borrowed additional substance from caselaw, and applied the resulting framework to Apex. Accordingly, the Commission's denial of Apex's motion to modify was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* 5 U.S.C. § 706(2)(A).

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For the foregoing reasons, we DENY the petition for review.