ORAL ARGUMENT REQUESTED

CASE NO. 18-1213

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TWIN RIVERS PAPER COMPANY, LLC, *et al.*,

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Petition for Review of Final Rule of the
United States Securities and Exchange Commission

REPLY BRIEF OF PETITIONERS

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GLOSSARY

Adopting Release, or Final Rule	*Optional Internet Availability of Investment Company Shareholder Reports*, 83 Fed. Reg. 29,158 (June 22, 2018)
Amicus Brief, or ICI Br.	Brief of Investment Company Institute and Independent Directors Council as *Amici Curiae* in Support of Respondent
Br.	Petitioners' Opening Brief
Commission, or SEC	United States Securities and Exchange Commission
Dodd-Frank Wall Street Reform and Consumer Protection Act	Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 911, 124 Stat. 1376, 1822 (codified at 15 U.S.C. §78pp)
FINRA	Financial Industry Regulatory Authority
IAC	Investor Advisory Committee
IAC Report	*Recommendations of the Investor Advisory Committee Regarding Promotion of Electronic Delivery and Development of a Summary Disclosure Document for Delivery of Investment Company Shareholder Reports* (Dec. 7, 2017)
ICA	Investment Company Act of 1940

ICI	Investment Company Institute
Proposing Release, Proposed Rule, or Proposal	*Investment Company Reporting Modernization*, 80 Fed. Reg. 33,590 (June 12, 2015)
Rule 30e-3	*Optional Internet Availability of Investment Company Shareholder Reports*, 83 Fed. Reg. 29,158 (June 22, 2018)
SEC Br.	Respondent's Opening Brief

STATUTES AND REGULATIONS

The text of relevant statutes and regulations is set forth in the Addendum to the Opening Brief of Petitioners.

SUMMARY OF ARGUMENT

The SEC has adopted a rule that switches the default method of delivery of lengthy, detailed shareholder reports provided to individual investors from traditional paper copies to electronic access. The Commission concedes that any investor who wants electronic reports can freely obtain them under existing policies, and does not dispute that investment funds have offered numerous inducements to encourage investors to convert to electronic access. Nonetheless, the Commission insists that a wholesale reversal of the settled default is essential to make sure the funds save millions of dollars, even though, seeking to have it both ways, the Commission styles the rule as "optional" for funds to implement or not.

The Commission argues that this rule is not arbitrary and capricious, despite the Adopting Release's acknowledgment that individual investors, particularly those in certain demographic groups, will fail to understand and take steps to counteract the Commission's use of implied consent, with adverse consequences on investor readership, efficient allocation of funds across investments, and competition among funds for investor capital. And, as the Adopting Release admits, these concerns were exacerbated by the Commission's abandonment of proposed protections that would have required a standalone Initial Notice and pre-paid reply card.

The Commission's brief recognizes the divergence between the interests it is required by statute to protect: in "striking a balance between investor protections and other interests," the Commission chose "other interests." The final rule's diluted requirements do not come close to protecting investors who rely on paper from the impacts of this rule.

Over and over again, the Commission and amicus Investment Company Institute ("ICI") point to measures that funds *could* – but most assuredly are not *required* to – take that might ameliorate the rule's harmful impacts on investors who rely on paper, seeming to argue that these helpful suggestions and voluntary undertakings somehow overcome the shortcomings of the rule. Funds *could*, for example, provide investors with a print summary and a link to a full report online, or send a pre-paid reply card to solicit actual consent for conversion to electronic access, or conduct educational outreach, or offer additional forms of communication, or follow advice to reduce negative experiences with toll-free call arrangements. Many of these approaches were supported by numerous commenters as alternatives to the rule the Commission adopted. But not a single one of these mitigating measures is *required* by the rule, and the fact that the Commission felt it necessary to suggest so many ways to reduce adverse impacts starkly illustrates the harm to investors the final rule will cause. This line of argument cannot save a seriously flawed rule, particularly when the Adopting

Release repeatedly expresses the Commission's belief that funds "will only rely on the rule if the benefits exceed the costs," clear recognition that any voluntary measures that would incur costs are contrary to a fund's rational interests in maximizing profits.

The Commission tacitly concedes its failure to abide by its statutory obligations to respond publicly to its Investor Advisory Committee's ("IAC") recommendations against finalizing the rule in the form the Commission adopted. Instead of discharging its clear legal obligations to respond promptly and publicly to the IAC's recommendations and identify what actions the Commission planned to take in response, it ignored the report for six months and then summarily dismissed it in one of the rule's 594 footnotes. The Commission argues that no case law requires that the rule be invalidated because of this dereliction of duty, but this is hardly surprising, given the recent passage of this statutory amendment and the apparent absence of any previous need for judicial review of the Commission's failure to adhere to it. But this Court need not decide whether the Commission's blatant disregard of its congressionally mandated responsibilities would by itself invalidate this rule, given the presence of multiple other grounds to vacate it as arbitrary and capricious.

The Commission openly admits to one significant flaw in its cost benefit analysis, which, like numerous other analytical shortcomings it seeks to minimize,

applies only to the cost side of the ledger. The Commission's one-sided, claimed inability to quantify costs includes a complete failure to provide any cost estimate for the time investors (and funds) will have to spend dealing with newly installed toll-free call systems that investors who want to preserve their right to receive paper reports will have to navigate, even though the Adopting Release acknowledged the potential obstacles investors are at risk of encountering. Nor did the Commission even attempt to calculate the total costs investors would incur printing copies of reports at home despite the fact that in a previous rule the Commission had no trouble producing such an estimate. Instead, the Commission criticized Petitioners for providing an estimate based on the Commission's own figures, after contenting itself with filling the Adopting Release with a litany of speculative "coulds" and "mays," all extolling the rule's potential benefits to investors.

Both the Commission and ICI argue that "status quo bias" means that whichever delivery format is the default will enjoy the benefits of inaction of investors who are unaware, unable, or disinclined to take action. The Commission insists that the reasonable choice to which this Court should defer is in favor of tech-savvy investors who already have the ability to choose electronic reports, rather than investors, like those represented by co-petitioner Consumer Action, who lack computers or broadband internet, have physical or other limitations that

make using computers and even toll-free calls infeasible or at best a challenge, or for various reasons rely on paper reports for complicated financial matters, whether or not they use smart phones or enjoy connecting to the internet for other purposes.

For multiple reasons, the Commission's adoption of this rule is arbitrary and capricious, and vacatur is appropriate.

ARGUMENT

I. Contrary to the Commission's Arguments, Petitioners Satisfy the Requirements for Standing.

A. Consumer Action Has Standing.

The Commission and ICI argue that Consumer Action lacks standing because it has not specifically identified a member who will be harmed by Rule 30e-3. SEC Br. 24-25; ICI Br. 9-11. These arguments fail for two reasons. First, Consumer Action's standing here is "self-evident." *Am. Library Ass'n v. FCC*, 401 F.3d 489, 490-91 (D.C. Cir. 2005). Consumer Action was significantly involved in the rulemaking process, including submission of multiple comment letters[1] and a meeting with the Commission,[2] in which it pressed its members' objections to the rule's adverse impacts on investors who rely on paper reports. The Commission understands full well Consumer Action's interests here and the

[1] *See, e.g.*, Letter from Linda Sherry, Director of National Priorities, Consumer Action, to Brent J. Fields, Secretary, SEC (Dec. 1, 2017).

[2] *See* Memorandum from the Office of Commissioner Hester Pierce regarding a May 21, 2018, meeting with representatives of Consumer Action, et al. (May 21, 2018), https://www.sec.gov/comments/s7-08-15/s70815-3681194-162456.pdf.

harm that the rule will inflict on its members. Indeed, the Commission acknowledged this harm in the Adopting Release. *See* 83 Fed. Reg. at 29,162 n.51 (specifically referencing Consumer Action's concerns about impacts on seniors and minorities).

Second, to the extent that this Court finds standing is not self-evident and requires further information, several declarations from Consumer Action members are appended to this Reply. These declarations come from a diverse group of investors, with investments in a broad spectrum of funds. These investors include (among others) three individuals who do not own a computer at all and rely on hard copy reports, two who do not use email, and one who suffers from traumatic brain injuries, finds toll-free call processes difficult to manage, and depends on paper for all of his transactions; all object to the burden of navigating a toll-free call process to preserve their right to receive paper reports.

These declarations not only demonstrate that Consumer Action's members will clearly be harmed by the Rule (burdened with outcomes of either losing access to paper reports or taking action to continue receiving those reports), but also that Consumer Action's basis for standing comes from real, dues-paying members. Thus, the Commission's and ICI's citations of *Sorenson Comm'ns, LLC v. FCC*, 897 F.3d 214, 225 (D.C. Cir. 2018), and *Gettman v. Drug Enf't Admin.*, 290 F.3d 430, 435 (D.C. Cir. 2002) are inapposite.

The Commission argues that Consumer Action should have included these declarations with its opening brief; however, this Court has routinely allowed and considered such post-opening brief submissions, including those submitted even following oral argument, particularly in cases where those submissions make standing "obvious." *Communities Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 685 (D.C. Cir. 2004). *See also Am. Library Ass'n v. FCC*, 401 F.3d 489, 492-93 (D.C. Cir. 2005); *Delaware Dept. of Natural Res. and Envt'l Control v. EPA*, 785 F.3d 1, 8-9 (D.C. Cir. 2015); *Center for Sustainable Economy v. Jewell*, 779 F.3d 588, 598-99 (D.C. Cir. 2015); *Town of Barnstable, Mass. v. FAA*, 740 F.3d 681, 691 (D.C. Cir. 2014); *KERM, Inc. v. FCC*, 353 F.3d 57, 60-61 (D.C. Cir. 2004); *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1219 (D.C. Cir. 2009); *Pub. Citizen, Inc. v. NHTSA*, 489 F.3d 1279, 1290 (D.C. Cir. 2007); *Americans for Safe Access v. DEA*, 706 F.3d 438, 444-45 (D.C. Cir. 2013); *Am. Chemistry Council v. DOT*, 468 F.3d 810, 819 (D.C. Cir. 2006). Here, these declarations make the basis for Consumer Action's standing obvious, and the Commission will not be prejudiced by the Court's consideration of this information. Indeed, the Commission's brief recognizes and argues against the very injuries discussed in these declarations. The fact that the Commission did not have a specific person's name to reference has no bearing on the Commission's arguments and would surely not change them.

The Commission claims that there is no injury to Consumer Action's members, asserting that any harm would be self-inflicted. SEC Br. 23-24. This is not so. Consumer Action's members are certainly not responsible for changing the regulations, and they will now be burdened with a choice between losing their access to paper reports and spending their valuable time dealing with a toll-free call process to obtain paper reports.[3] While the Commission may argue this is a minor injury, even minor injuries qualify as harm for standing. *See, e.g., New Jersey Chapter Inc. of Am. Physical Therapy Ass'n, Inc. v. Prudential Life Ins. Co. of America*, 502 F.2d 500, 504 (D.C. Cir. 1974) ("Standing need not be founded on a rock; a pebble or even a cobweb may do."); *Joseph v. U.S. Civil Service Comm'n*, 554 F.2d 1140, 1145 (D.C. Cir. 1977) ("The injury need not be substantial. A trifle is enough for standing.") (citing *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973)). Indeed, other courts have recognized that sending or receiving a phone call or a fax is a concrete injury for standing purposes. *See Palm Beach Golf Center-Boca, Inc. v. Sarris*, 781 F.3d 1245, 1252 (11th Cir. 2015) ("occupation of Plaintiff's fax

[3] To the extent the Commission argues that there is no guarantee any of the funds in which Consumer Action's members are investors will utilize Rule 30e-3, as the declarations make clear, declarants are investors in a wide array of funds. In any event, this Court has rejected such arguments because the "saving grace" of a rule cannot be based on arguments that it will not be used. *Business Roundtable v. SEC*, 647 F.3d 1144, 1156 (D.C. Cir. 2011) (finding this to be "an unutterably mindless reason" to uphold a rule).

machine" was a sufficient injury to confer standing); *Rogers v. Capital One Bank*, 190 F.Supp.3d 1144, 1147 (N.D. Ga. 2016) (finding "particularized injuries because [the plaintiffs'] cell phone lines were unavailable for legitimate use").

The injury that Consumer Action's members will suffer is not of their own making and is sufficient for standing.[4] Of course, it is not surprising that the Commission is once again ignoring the burden the new rule places on investors. The Adopting Release makes it clear that the agency has not given any consideration to investors' time or prioritized their access to paper reports. Nonetheless, there is no denying that investors, including Consumer Action's members, will be injured by this rule.

B. The Remaining Petitioners Have Standing.

Importantly, this Court need only determine that Consumer Action has standing to proceed. *See Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 175 (D.C. Cir. 2012) (the Court "need not conclude that all petitioners have standing" so long as "even one" does). As set forth above, Consumer Action has standing, and the

[4] Co-petitioner Coalition for Paper Options has members that include the National Consumers League, Senior Citizens League, and Coalition of Mutual Fund Investors, which are similarly situated to co-petitioner Consumer Action and its members.

remaining Petitioners' standing is thus largely irrelevant. However, the remaining Petitioners nonetheless have standing based on their competitive interests here.[5]

In *Honeywell Intern. Inc. v. EPA*, 374 F.3d 1363, 1370 (D.C. Cir. 2004), *withdrawn in part on other grounds*, 393 F.3d 1315 (D.C. Cir. 2005), this Court discussed competitive interests as a basis for satisfying the "zone of interest" test where Honeywell was challenging a rule authorizing the use of substitute chemicals, explaining:

> Our cases have pointed out that a party need not share Congress' motives in enacting a statute to be a suitable challenger to enforce it; "parties motivated by commercial interests routinely satisfy the zone of interests test," as "[c]ongruence of interests, rather than identity of interests, is the benchmark." *Amgen, Inc. v. Smith*, 357 F.3d 103, 108–09 (D.C. Cir. 2004).

Further, the *Honeywell* Court explained that "[i]rrespective of whether the statutory scheme contemplates that competitive interests will advance statutory goals," competitors seeking to enforce statutory (or in this case, regulatory) restrictions in cases where a substitute "is either permitted . . . or it is not" satisfy zone of interest requirements. *Id*. at 1370-71. *See also Scheduled Airlines Traffic Offices v. DOD*, 87 F.3d 1356, 1360–61 (D.C. Cir.1996) (holding that the *Hazardous Waste Treatment Council* line of cases is inapposite where the plaintiff's competitive interests are "not 'more likely to frustrate than to further …

[5] As the Commission notes, the "zone of interests" test is "not especially demanding." SEC Br. 25 (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014)).

statutory objectives'" and the relevant analysis concerns whether something is permitted or it is not) (quoting *First Nat'l Bank and Trust Co. v. Nat'l Credit Union Admin.*, 988 F.2d 1272, 1275-78 (D.C. Cir. 1993), *aff'd* 522 U.S. 479 (1998)). Here, a similar rationale applies because, as the Commission explicitly acknowledges (SEC Br. 19, *citing* 83 Fed. Reg. at 29,194), Rule 30e-3 effectively authorizes a substitute/competitive product (default electronic delivery) for the currently approved product (default paper delivery). Thus, the remaining Petitioners have standing.

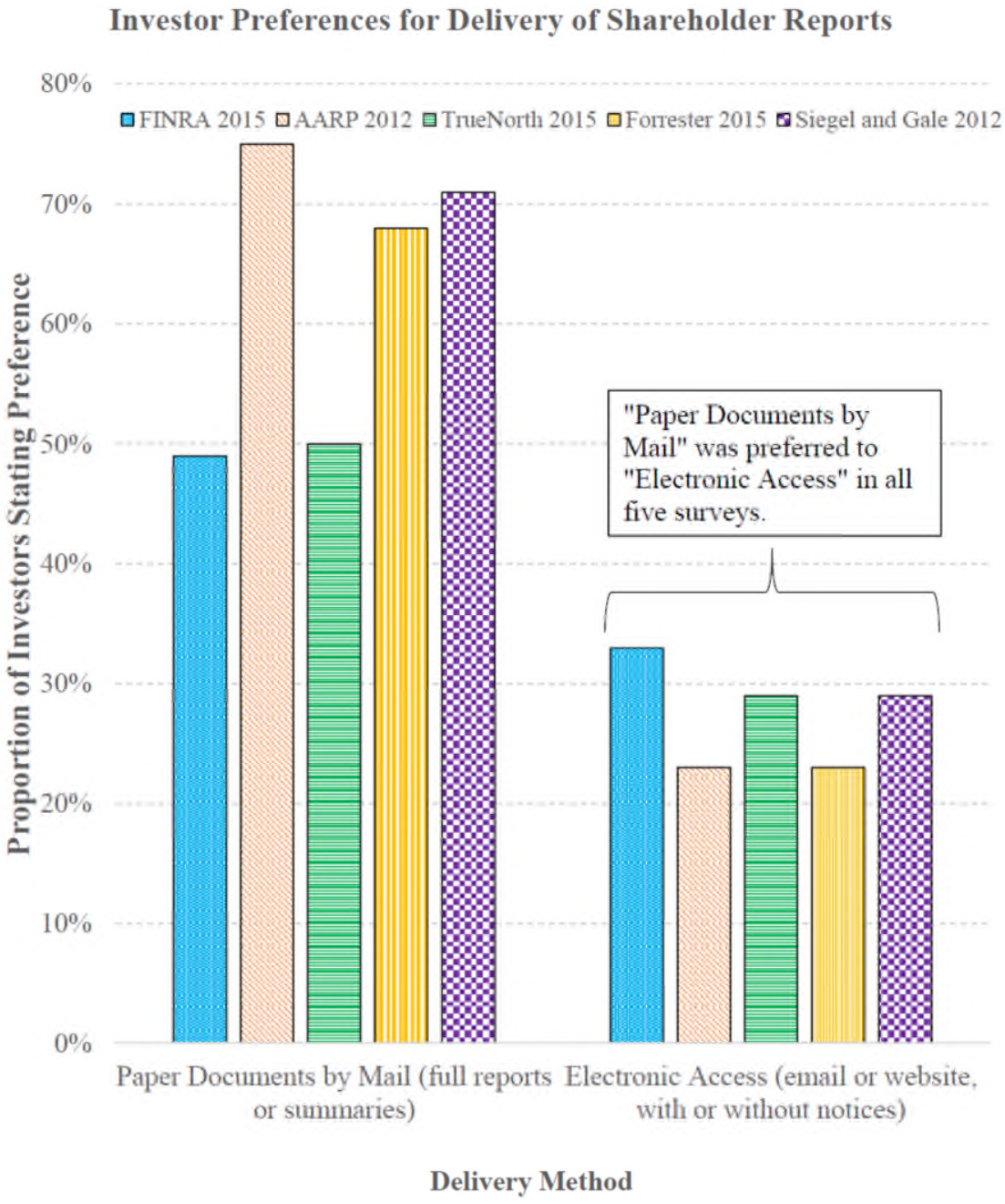
II. The Rule is Unnecessary and Unjustified.

A. The Rule is Not Needed to Allow Investors Who Want Access to Electronic Reports to Obtain Them.

Despite much discussion in the Commission (SEC Br. 2) and ICI (ICI Br. 16-19) briefs about investors' increasing desire for "modern" electronic access, the Commission does not dispute that investors already have the ability to request electronic delivery of shareholder reports, which the Adopting Release clearly recognizes. 83 Fed. Reg. at 29,184. Nor does the Commission try to deny that for years, investment funds have conducted "campaigns" offering all manner of inducements to persuade investors to switch to electronic delivery. *Id.* at 29,182. According to the Adopting Release, these have included dedicated electronic delivery website pages, mailed paper solicitations, email invitations, online account alerts or pop-ups, scripted phone calls, and even financial incentives. *Id.*

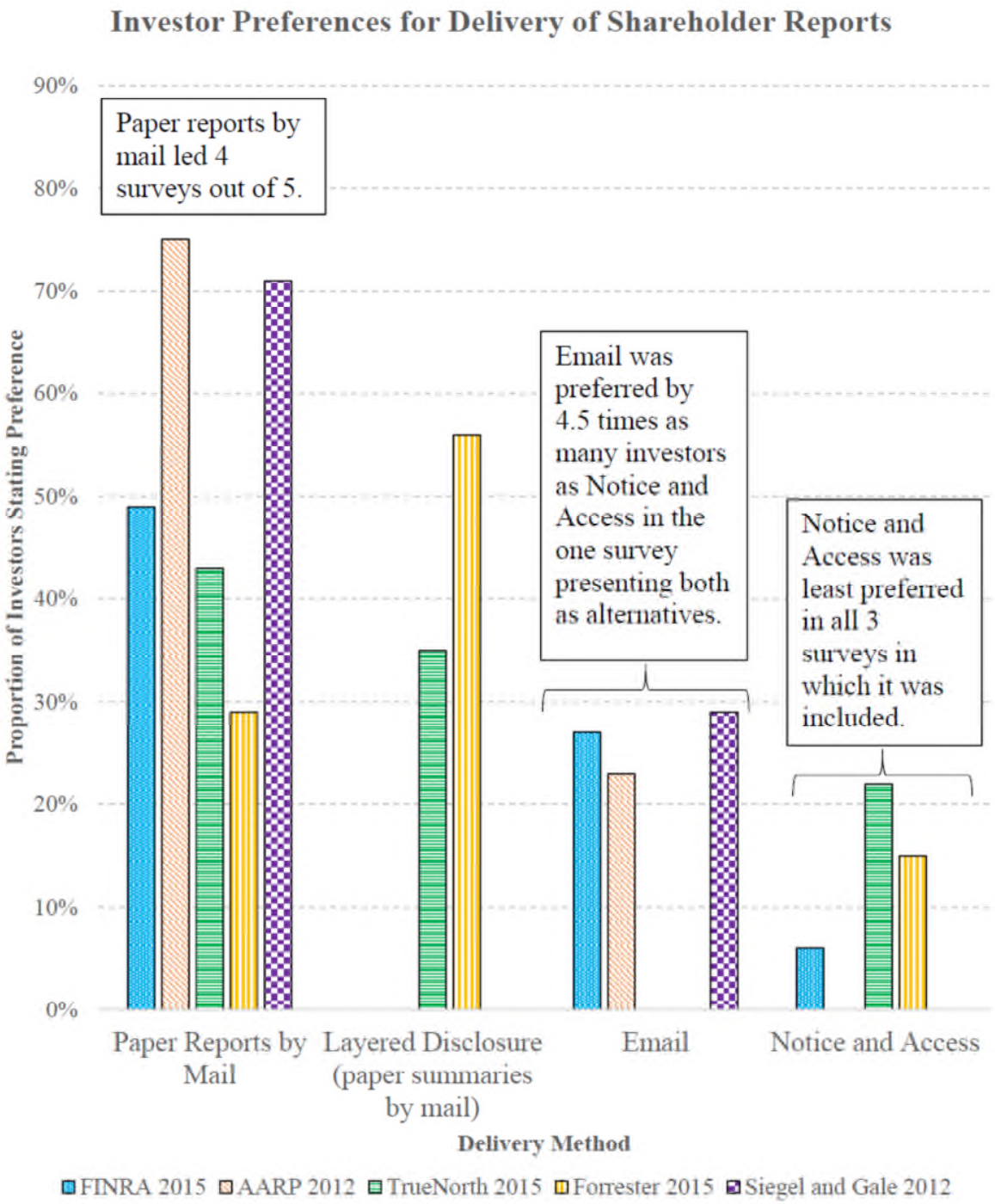
These aggressive efforts have produced results, and a substantial number of investors have switched from paper to electronic reports, a trend the Commission fully expects will continue and grow in the future. *Id*.

While the Commission and ICI quibble over which studies in the record or added to the debate by amici are better or worse (SEC Br. 45 n.9, 46 n.10, ICI Br. 18), a simple graphic illustrates clearly that *all* the surveys show investor preference for paper documents (either full reports or summaries) over electronic (either email or website access).



Notes and Sources: Data from surveys and focus groups referenced in Adopting Release, comment letters, and amicus briefs. Siegel and Gale 2012 data from Homework Participants section of that survey.

A breakdown of preferences into the critical subcategories within the paper and electronic categories further reveals that investors' desire for paper financial reports is not, in fact, some "shrinking" (SEC Br. 28) eccentricity of "anachronistic" investors (ICI Br. 17) whom the Commission needs to cure of their "old fashioned" ways (ICI Br. 6). The graph below separates investor preferences for delivery of shareholder reports into the subcategories "Paper Reports by Mail," "Layered Disclosure," "Email," and "Notice and Access." "Paper Reports by Mail" led in four out of five surveys in which it was included, coming in second place to layered paper disclosure in one survey. "Notice and Access," the method the Commission selected for Rule 30e-3, was the least preferred choice in all three surveys in which it was included. Notably, in the one survey in which email was included as an alternative to notice and access, email was preferred by about 4.5 times as many recipients as notice and access. This suggests that Rule 30e-3 may increase, rather than reduce, misalignment with investor preferences, as investors will have to go through the same time-consuming process to request email delivery as they will to request paper delivery, assuming the fund voluntarily elects to allow email delivery as a choice. Due to status quo bias, most will end up with notice and access rather than print delivery or email delivery despite both print and email being preferred to notice and access.



Notes and Sources: Data from surveys and focus groups referenced in Adopting Release, comment letters, and amicus briefs. Siegel and Gale 2012 data from Homework Participants section of that survey.

Whether a study was commissioned by a financial group, a consumer group such as AARP, or the Commission itself, the results across surveys collectively show that Rule 30e-3's reversal of the default from paper delivery to electronic access is neither needed for those investors who already have access to electronic reports nor justified by the high percentages of investors who want to review these complicated materials in paper form.[6]

B. The Commission's Blatant Disregard of its Statutory Obligations in Response to Recommendations of the Investor Advisory Committee is Unsupportable.

The Commission makes no attempt to dispute its failure to discharge its statutory duty to review and respond promptly to the findings or recommendations it receives from the Investor Advisory Committee ("IAC"), nor could it. Instead of adhering to the clear requirement that it "shall… promptly issue a public statement assessing the finding or recommendation of the Committee … and disclosing the action, if any, the Commission intends to take with respect to the finding or recommendation," 15 U.S.C. § 78pp(g) (internal subsection marks omitted), the Commission ignored the report for six months and then dismissed its

[6] In its argument that Americans today are increasingly relying on the internet, ICI cites the Supreme Court as an institution that is embracing electronic alternatives. However, although the Supreme Court has incorporated e-filing into its procedures, "the paper version of a document remains the official filing." *See* https://www.supremecourt.gov/filingandrules/faq_electronicfiling.aspx. This Court also relies on paper filings. In fact, the parties will be required to deliver paper copies of the final briefs in this case to the Court. *See* D.C. Cir. Rule 31.

recommendations in a single footnote, one of 594 in the Adopting Release. 83 Fed. Reg. at 29,172 n.190.

Unable to rebut this clear violation of its legal obligations, the Commission irrelevantly observes that another section of the statutory provisions relating to the IAC "does not require the Commission to engage in any rulemaking." SEC Br. 51. Continuing, the Commission's brief attempts to rationalize its actions with a combination of claims that all fall far short of the mark. First, the Commission asserts it "satisfied its obligation to consider" the IAC recommendations because, "[w]hile the IAC recommended that the Commission engage in more testing and seek further comment before adopting Rule 30e-3, that recommendation was based on concerns that other commenters raised and the Commission addressed." SEC Br. 50-51.

Second, the Commission argues the Adopting Release's willingness to allow funds voluntarily to send investors a "summary shareholder report" over and above complying with the final rule's requirements was equivalent to acting appropriately on the IAC's recommendation that the Commission consider this approach as a mandatory requirement of the final rule and an alternative to it. And finally, the Commission contends its solicitation of comments to be submitted – after the rule was finalized and has gone into effect – on ways to improve fund disclosure generally, along with unrelated investor testing of disclosure alternatives being

conducted by the Commission's Office of the Investor Advocate, somehow fulfills its responsibilities. SEC Br. 51-52.

For its part, ICI enthusiastically supports the IAC's recommended "layered approach," saying the Commission required this kind of report in a different rule (and context) and suggesting that the mere possibility that a fund might choose to rely on such an approach (which again is not required by Rule 30e-3) should somehow weigh in favor of upholding the final rule. ICI Br. 23, citing *Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies*, 74 Fed. Reg. 4,546, 4,560-61 (Jan. 26, 2009). Like the numerous other helpful suggestions the Commission hopes investment funds will volunteer to adopt, even though they run counter to the rational profit maximization motivation the Commission assumes will inform the funds' decision whether to opt in to Rule 30e-3 at all, 83 Fed. Reg. at 29,183, reliance on voluntary measures outside the rule's actual requirements cannot prevail as a basis for upholding its validity.

Even apart from the Commission's abject failure to abide by its statutory obligations, the Commission's summary dismissal of the IAC's recommendations is contrary to this Court's clear holding admonishing the Commission that its unwillingness to give adequate consideration to a worthy alternative violates the APA. *Chamber of Commerce v. SEC*, 412 F.3d 133, 143-45 (D.C. Cir. 2005).

While in *Chamber of Commerce* the Commission ignored alternatives endorsed by two dissenting Commissioners, here the Commission disregarded the carefully reasoned and supported recommendations of the IAC, a body Congress created in the Dodd-Frank Wall Street Reform and Consumer Protection Act and specifically charged with advising the Commission to "protect investor interest" and "promote investor confidence and the integrity of the securities marketplace." 15 U.S.C. §78pp(a)(2)(iii), (iv). The IAC's recommendations were developed over the course of multiple meetings for more than a year that included written and oral public comments and work by an IAC subcommittee to develop a concrete alternative approach. *Recommendation of the Investor Advisory Committee Regarding Promotion of Electronic Delivery and Development of a Summary Disclosure Document for Delivery of Investment Company Shareholder Reports* at 4 (Dec. 7, 2017) ("IAC Report").[7] No one argues that the Commission is required to consider "'every alternative … conceivable by the mind of man'" or "unworthy of consideration," *Chamber of Commerce*, 412 F.3d at 144, *quoting Motor Vehicle Mfrs. Assn v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 51 (1983), but the Commission's peremptory dismissal of the IAC's carefully considered,

[7] Available at https://www.sec.gov/spotlight/investor-advisory-committee-2012/recommendation-promotion-of-electronic-delivery-and-development.pdf. The IAC's report included a specific finding that "a plurality [of investors] appears to continue to prefer receiving paper documents through the mail." IAC Report at 4.

congressionally authorized recommendations in a footnote cannot be squared with this Court's holding in *Chamber of Commerce* or the statutory duties imposed upon the Commission when the IAC was created.

C. The Commission's Defense of its Rule as Protective of the Rights of Those Who Want to Continue Receiving Paper Fails on Multiple Grounds.

The Adopting Release openly acknowledges that investors who rely on paper, particularly those in vulnerable demographic groups, may "experience a reduction in their ability to access shareholder reports and portfolio investment information" if they do not take steps to preserve their right to receive paper reports. 83 Fed. Reg. at 29,193. Further, this reduction in review of shareholder reports "could potentially decrease their ability to efficiently allocate capital across funds and other investments" and consequently "decrease the competition among funds for investor capital." *Id*. The Commission's brief does not deny these concerns, noting "the possibility that investors who do not express their preference for paper delivery may be less likely to review their reports, and that some investors may be less likely to review reports made available online than reports sent in paper." SEC Br. at 16.

The consequences of switching from default paper reports to notice and access are illustrated by the significant declines in investor review of proxy materials following the Commission's rule allowing those materials to be

disseminated via notice and access. Surveys found that at least 85% of investors receiving proxy materials by mail looked at the materials, but only 0.43% of investors subject to notice and access clicked the link for proxy materials. *See* Broadridge Comments, at 11-12 (Aug. 11, 2015); Consumer Action Comments, at 2 (Dec. 1, 2017). After accounting for investors who actively requested paper, this was an estimated 98% decline in the proportion of investors who viewed these materials. These results cannot simply be brushed aside, as the Commission urges (SEC Br. 46). Indeed, both the Proposing and Adopting Releases repeatedly cite to notice and access precedent with respect to proxy materials. *See, e.g.*, 80 Fed. Reg. at 33,627-28; 83 Fed. Reg. at 29,166-72.

In addition, the Proposing and Adopting Releases recognized that, because of the rule's reliance on implied consent, "[s]ome … investors might not fully understand the actions they would need to take under the proposed rule to continue to receive their reports in paper." 80 Fed. Reg. 33,590, 33,627 (June 12, 2015); 83 Fed. Reg. at 29,165 n.98. Despite the Commission's attempt now to argue to the contrary, the Adopting Release explicitly admitted that the final rule's abandonment of requirements for a pre-paid reply card and a standalone Initial Statement reduced protections for investors who rely on paper, saying this change "may reduce the likelihood, *compared to the proposal*, that investors who prefer to access reports in paper form will elect to receive reports in that form, which in turn

would potentially reduce the likelihood that investors will review the information in reports, and similarly may result in less well-informed investment decisions and potential adverse effects on the efficiency of capital allocation across funds." 83 Fed. Reg. at 29,193 (emphasis added).

Nonetheless, the Commission now insists that the substitute protections it embedded in the final rule are adequate to address these concerns and protect the rights of those who rely on paper reports, but they are not. In eliminating the safeguards of a postage prepaid reply and an independent document alerting investors to the change in reporting methods, the Commission relied instead on a two-year transition period, during which funds are required to send several notifications of the switchover from paper to electronic, although most of these communications will be mixed in with other notices from the funds. 83 Fed. Reg. at 29,160. Investors who want to preserve their ability to receive paper reports will have the burden of contacting the fund and working through whatever toll-free call arrangement the fund devises. The risks of these approaches are evident in the Commission's efforts to avoid the notices' being "*unduly* obscured," 83 Fed. Reg. at 29,174 (emphasis added), and its inclusion of suggestions to the funds on ways to reduce obstacles in the toll-free calling system, such as "limiting the need for investors to speak with multiple representatives or navigate through multiple

telephone menus." *Id.* at 29,171.[8] Other measures the Commission suggested to mitigate these concerns included a variety of "additional methods" funds could voluntarily adopt, for example, conducting educational and outreach efforts (SEC Br. 15, 83 Fed. Reg. at 29,166), sending a print summary with a link to the full online report (SEC Br. 31 n.5), offering additional forms of communication to determine the most effective (83 Fed. Reg. at 29,171), or even using the reply cards the final rule jettisoned (83 Fed. Reg. at 29,170 n.162). However, none of these suggestions are in any way required by the rule.

In the end, the Commission acknowledged the divergence in this rule between the interests it is required by statute to protect, saying that "while investor protection is one of the interests the Commission considers in adopting rules under the ICA … it is not the only relevant interest." SEC Br. 29 (internal citations omitted). Instead, the Commission argues it "may strike a balance between providing investor protections and other interests as long as it provides a 'reasoned

[8] The Commission misapprehends the point of Petitioners' reference to the Adopting Release's suggestions to the funds on ways to reduce difficulties for investors who will be forced to use their toll-free call systems. Petitioners were not proposing that the Commission "micromanage" these systems, but rather observing that the need for these admonitions revealed the practical reality that these arrangements will prove burdensome for the investors who must deal with them. SEC Br. 35-36. Similarly, Petitioners were not suggesting that the Commission's post-final-rule comment opportunity was meant to fulfill the Commission's rulemaking obligations for Rule 30e-3, but rather that an after-the-fact chance to provide "investor input on ways to improve fund disclosure in general" (*id.* at 36) was an empty protection for those harmed by the final rule.

analysis.'" *Id*. at 30 (quoting *Lindeen v. SEC*, 825 F.3d 646, 657 (D.C. Cir. 2016)). But when, by the Commission's own admission, the final rule eliminated measures that would have offered stronger protection to investors against the risk of reduced readership among those who prefer paper reports, likely resulting in less well-informed investment decisions and potential adverse effects on the efficiency of capital allocation across funds, the Commission's reliance on a collection of helpful suggestions, hoped-for voluntary efforts from funds, and its claim that it performed a "reasoned analysis" cannot withstand scrutiny under an arbitrary and capricious review.

D. The Commission's Cost Benefit Analysis is Fundamentally Flawed.

The Commission concedes one error in its cost benefit analysis, in which it underestimated a compliance cost by nearly $6 million, close to five per cent of total savings claimed by the Commission from the rule. SEC Br. 48. The Commission seeks to downplay the impacts of this mistake, minimizing the effect on the rule's overall cost, but in numerous other situations also involving costs, it found itself unable to quantify cost impacts, each time arguing that these costs would not change the outcome, since estimated cost savings (benefits) to investment funds are so large they would surely dwarf cost tradeoffs.

Thus, for example, the Commission made no attempt to estimate the total costs that investors who require paper shareholder reports will have to incur to

print them at home, and as ICI notes, these reports can run to hundreds of pages. ICI Br. 3. The absence of a cost estimate for investors who print reports at home is striking, given the contrast with the Commission's own precedent. In the Commission's 2007 final rule for proxy materials notice and access, which the Commission cites throughout the Adopting Release, the Commission acknowledged that "an issuer's decision to use the notice and access model will introduce several new costs into the process … including … the cost to shareholders of printing proxy materials at home that would otherwise be printed by issuers," and presented calculations and cost estimates ranging from $16 million to $80 million per year. 72 Fed. Reg. 4,147, 4,163-64 (Jan. 29, 2007). This would amount to between 12 and 59 per cent of the claimed net cost savings in the final Rule 30e-3 (after accounting for the Commission's acknowledged methodological error). Although the Commission objects to use of its 2007 figures (SEC Br. 41), it plainly had no difficulty estimating this type of costs in its previous rule and does not credibly explain why it could not do so here.

Nor did the Commission's cost benefit analysis make any effort to include the costs to investors of the time they will have to spend dealing with funds' toll-free call systems, even though the Commission found it necessary to urge funds to reduce the burdens of this process as much as possible. 83 Fed. Reg. at 29,171. The Commission's only response to this failure to even attempt an estimate of

these costs is that "not one commenter argued that the Commission could or should have done more to quantify these particular costs, or provided data that would have enabled it to do so." SEC Br. 40.

But the Commission's responsibility to provide a robust, well-based cost benefit analysis does not depend on whether a commenter demands it and provides the necessary data. This Court has repeatedly held the Commission accountable for failing "adequately to assess the economic effects of a new rule" and to fulfill its "unique obligation to consider the effect of a new rule upon 'efficiency, competition, and capital formation' and 'apprise itself – and hence the public and the Congress – of the economic consequences of a proposed regulation.'" *Business Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (*quoting* 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a-2(c)). In particular, this Court has struck down Commission rules for "inconsistently and opportunistically fram[ing] the costs and benefits of the rule," failing "adequately to quantify the certain costs or to explain why those costs could not be quantified," "neglect[ing] to support its predictive judgments," "contradict[ing] itself," and "fail[ing] to respond to substantial problems raised by commenters." *Id*. at 1148-49.

The Commission also attempts to explain that criticisms of the cost savings in the rule are "misleading" because, it argues, savings "will not necessarily be distributed uniformly across all funds" and averaging the cost savings equitably

across all funds does not demonstrate that the estimated cost savings is a "negligible benefit." SEC Br. 38. However, the Commission acknowledges that "cost savings represent a small fraction of assets under management of registered investment companies." 83 Fed. Reg. 29,187. n.372. And the Commission further states that "printing and mailing expenses associated with shareholder reports are typically passed on to fund investors through fund expense ratios." *Id.* at 29,183. Expense ratios are generally reported out to 0.01 per cent precision, as highlighted in an ICI report cited in the Adopting Release. *Id.* at 29,165 n.97, 29,184 nn.340-41 (citing Investment Company Institute, *2017 Investment Company Fact Book*, available at https://www.ici.org/pdf/2017_factbook.pdf). And using the Commission's own figures results in a savings estimate of approximately 0.0007 per cent, nearly two orders of magnitude too small even to show up in fund expense ratios.[9]

Thus, the vast majority of funds utilizing this rule, and the corresponding consumers investing in those funds, will see negligible cost savings. This is not efficient; it will not promote capital formation; and it harms a large number of consumers who will not realize the benefits from the cost savings in the rule but will be adversely affected by the lack of paper reports being provided to them.

[9] This figure is arrived at by utilizing the Commission's estimates of $19 *trillion* in fund assets (83 Fed. Reg. at 29,184) and comparing that figure against the Commission's (flawed and inflated) estimate of $141.4 *million* in annual savings. 83 Fed. Reg. at 29,183 (*i.e.*, $141M/$19T = 0.000007 = 0.0007%).

III. The Final Rule is Not a Logical Outgrowth of the Proposal.

The Commission and ICI argue that the final rule was a "logical outgrowth" of the proposed rule, relying largely on comments submitted by ICI itself. SEC Br. 52-54; ICI Br. 27-28. Indeed, the Adopting Release suggests that "[c]ommenters generally opposed the reply card requirement," but the footnotes for this proposition cite only comments submitted by ICI (83 Fed. Reg. at 29,171 n.172) or the investment fund industry (*id*. at n.173). Regardless, the submission of these comments is hardly dispositive on the issue of whether the Commission provided proper notice.

For example, in *Int'l Union, United Mine Workers of America v. Mine Safety and Health Admin*., 407 F.3d 1250, 1259 (D.C. Cir. 2005) (emphasis in original), the agency's proposed rule provided that "[a] *minimum* air velocity of 300 feet per minute must be maintained" to ventilate underground coal mines. The final rule then provided that "[t]he *maximum* air velocity in the belt entry must be no greater than 500 feet per minute." *Id* (emphasis in original). Even though some comments "urg[ed] the Secretary to set a maximum velocity cap," the court nonetheless vacated the final rule because the agency failed to provide adequate notice that it might switch from a minimum air velocity to a maximum air velocity. *Id*. at 1261. *See also Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir.1991) (agencies "cannot bootstrap notice from a comment").

Thus, the mere fact that ICI and other representatives of the investment fund industry attempted to (and ultimately succeeded in) changing the Commission's mind does not mean that the Petitioners and others were fairly put on notice of this potential switch. Notably, in both the Adopting Release and Commission brief, the Commission fails to identify any commenters outside the investment fund industry that argued for or against the reply card requirement. This, of course, makes complete sense because none of the other commenters realized this was a possibility, particularly in light of the language from the Proposing Release emphasizing the importance of the Notice and reply card to protecting investors. *See* Br. 43-45. The final rule is not a logical outgrowth of the proposed rule and should be vacated.

CONCLUSION

For the foregoing reasons, the Court should hold the Commission's promulgation of Rule 30e-3 arbitrary and capricious, and contrary to law, and vacate the rule.

Date: January 28, 2019

Respectfully submitted,

/s/ Jane C. Luxton
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,492 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Date: January 28, 2019

/s/ Jane C. Luxton
Jane C. Luxton

ADDENDUM

TABLE OF CONTENTS

Declaration of Karen Andresen

I, Karen Andresen, do hereby state and declare as follows:

1. I live at 529 Stone Drive in Novato, CA. I am a retired school librarian.
2. I am a dues-paying member of Consumer Action in good standing. I was a member in good standing prior to June 4, 2018, and have been since that date.
3. I am an investor in nine different Fidelity Investments accounts. My top holdings are in Fidelity Total Bond, Fidelity Puritan, Fidelity Limited Term Bond Fund, American Century One Choice 2025 Inv., and Fidelity Real Estate Investment. I was an investor in these funds prior to June 4, 2018, and have been since that date.
4. I have always received my shareholder reports from these funds via paper reports and prefer receiving paper copies instead of changing to electronic versions. Paper copies of these reports make it easier for my husband to review our statements.
5. I understand that the Securities and Exchange Commission's new "Rule 30e-3" allows funds to rely on "implied consent" to make electronic delivery of shareholder reports the default option, and that this means I will be forced to take action to continue receiving paper copies of shareholder reports from every fund in which I am an investor that decides to follow this newly allowed practice. I expect my funds will use this implied consent process to convert to electronic instead of paper delivery, because electronic records will save them money.
6. I understand that each fund will be able to develop its own process, using a toll-free number, which I will have to follow to preserve my right to receive paper shareholder reports. I do not believe I should have to take these extra steps to continue receiving paper copies of my information. When I chose to switch some of my bills to be received

electronically, I initiated the change after being encouraged to do so. There is no reason that the funds where my money is invested should be allowed to make a change to electronic reports without my permission.

I declare under penalty of perjury that the foregoing is true and correct.

Date: January 7, 2019

Karen Andresen

Karen Andresen

Declaration of H. W. Pasa

I, H. W. Pasa, do hereby state and declare as follows:

1. I am a resident of San Francisco, CA. I am a survivor of traumatic brain injury and am no longer employed.
2. I am a dues-paying member of Consumer Action in good standing. I was a member in good standing prior to June 4, 2018, and have been since that date.
3. I am an investor in numerous different mutual funds, including FIDELITY GOVERNMENT CASH RESERVES T ROWE PRICE NEW ERA I was an investor in these funds prior to June 4, 2018, and have been since that date.
4. Because of my brain injury, I cannot depend on my short term memory. I am unable to use the internet or e-mail. I depend on paper for all of my transactions. I need paper copies of all important reports, including shareholder reports.
5. As I understand it, fund managers will be able to rely on "implied consent" to stop sending me paper copies of shareholder reports without having to ask my permission. I would not agree to this, since only paper reports will meet my needs. I think it is wrong to force me to take action to continue receiving paper copies of shareholder reports from every fund in which I am an investor that decides to implement this new choice. Having to make a toll-free call might seem like a small burden to some, but it would be a real hardship for me to have to follow the requirements that each fund will set and deal with

the toll-free call process. I have found that kind of process extremely difficult to manage, given my condition.

I declare under penalty of perjury that the foregoing is true and correct.

Date: 16 JAN ~~2018~~ 2019

H. W. Pasa

H. W. Pasa

Declaration of Karen Platt

I, Karen Platt, do hereby state and declare as follows:

1. I am a resident of Albany, CA. I am a retired community college instructor.
2. I am a dues-paying member of Consumer Action in good standing. I was a member in good standing prior to June 4, 2018, and have been since that date.
3. I am an investor in numerous different mutual funds, including three (3) funds with American Funds, two (2) with Calvert, and other funds with Domini Investment Impacts, Fidelity, First Eagle Investment Management, and Franklin Templeton Investments. I was an investor in these funds prior to June 4, 2018, and have been since that date.
4. I have always received my shareholder reports from these funds via paper reports and appreciate receiving them this way. I am comfortable with using e-mail and the Internet, but want to rely on paper copies of important financial information like shareholder reports. I often file these paper reports for convenient future reference. I prefer receiving paper copies instead of receiving these reports electronically, and will continue to prefer receiving paper copies of these reports for the foreseeable future.
5. I do not like the idea of fund managers relying on "implied consent" to stop sending paper copies of shareholder reports. I understand that the Securities and Exchange Commission's "Rule 30e-3" allows these funds to do exactly that, and that I will be forced to take action to continue receiving paper copies of shareholder reports from every fund in which I am an investor that decides to implement this new choice. I understand that I will no longer receive paper copies if I fail to take action. In light of the cost savings for funds that the SEC's rule predicts, I have every reason to believe funds in

which I am an investor will use this implied consent process to convert to electronic communication instead of paper.

6. I understand that each fund will be able to implement its own process, using a toll-free number, which I will have to use to preserve my right to receive paper shareholder reports. I have experienced lengthy waits and cumbersome procedures in other toll-free number processes. I do not want spend my valuable time to take action to receive paper copies of these reports, and I should not have to do so, particularly when I could have but never affirmatively consented to electronic delivery.

I declare under penalty of perjury that the foregoing is true and correct.

Date: 1/7/19

Karen J Platt

Karen Platt

Declaration of Kenneth T. Solnit

I, Kenneth T. Solnit, do hereby state and declare as follows:

1. I am a resident of 21103 Fenway Ct., Cupertino, CA 95014. I am retired.
2. I am a dues-paying member of Consumer Action in good standing and have been since 1999.
3. I am an investor in 9 Vanguard mutual funds, PrimeCap Odyssey Aggressive Growth, and Mutual Series Shares funds. I was an investor in these funds prior to June 4, 2018, and have been since that date.
4. I have always received my shareholder reports from these funds in the form of paper reports and prefer receiving paper copies instead of receiving these reports electronically. I intend to continue to prefer receiving paper copies of these reports for the foreseeable future.
5. I am aware that the Securities and Exchange Commission has adopted a new "Rule 30e-3," which allows funds to rely on "implied consent" to make electronic communication of shareholder reports the default form of delivery, and that I will be forced to take action to continue receiving paper copies of shareholder reports from every fund in which I am an investor that decides to implement this new choice (and will no longer receive paper copies if I fail to do so). In view of the cost savings for funds that the SEC's rule projects, I have every reason to believe the funds in which I am an investor will use this implied consent process to convert to electronic delivery instead of paper.
6. I understand that each fund will be able to implement its own process, using a toll-free number, which I will have to use to preserve my right to receive paper shareholder reports. I do not want spend my valuable time to take action to receive paper copies of

these reports, and I should not have to do so, particularly when I could have but never affirmatively consented to electronic delivery.

I declare under penalty of perjury that the foregoing is true and correct.

Date: January , 2019

Kenneth T. Solnit

Kenneth T. Solnit

Declaration of Nancy Z. Spillman

I, Nancy Z. Spillman, do hereby state and declare as follows:

1. I am a resident of Winnetka, CA. I am a retired educator.
2. I am a dues-paying member of Consumer Action in good standing. I was a member in good standing prior to June 4, 2018, and have been since that date.
3. I am an investor in a Fidelity mutual fund. I was an investor in this fund prior to June 4, 2018, and have been since that date.
4. I have always received my shareholder reports from this fund via paper reports and appreciate receiving them this way. I do not own a computer and I read the hard copies of my shareholder reports.
5. I do not like the idea of fund managers relying on "implied consent" to stop sending paper copies of shareholder reports. If we are smart enough to put money in their funds, we should be trusted to make our own decisions. They are not my conservator nor are they the conservator for millions of consumers who prefer to have paper statements.
6. I understand that each fund will be able to implement its own process, using a toll-free number, which I will have to use to preserve my right to receive paper shareholder reports. I already have indicated my preference for paper reports by not accepting my fund's invitation to go paperless, and I feel it would be an imposition to be forced to spend my valuable time to take action to receive paper copies of these reports.

I declare under penalty of perjury that the foregoing is true and correct.

Date: January 11, 2019

Nancy Z. Spillman

Nancy Z. Spillman

Declaration of Jean M. Wang

I, Jean M. Wang, do hereby state and declare as follows:

1. I am a resident of Seaside, CA. I am a retired social worker.
2. I am a dues-paying member of Consumer Action in good standing. I was a member in good standing prior to June 4, 2018, and have been since that date.
3. I am an investor in numerous different mutual funds in 410K, including Franklin Templeton Investment funds and others. I was an investor in these funds prior to June 4, 2018, and have been since that date.
4. I have always received my shareholder reports from these funds via paper reports and appreciate receiving them this way. I am not comfortable with using e-mail and the Internet, but want to rely on paper copies of important financial information like shareholder reports. I often file these paper reports for convenient future reference. I prefer receiving paper copies instead of receiving these reports electronically, and will continue to prefer receiving paper copies of these reports for the foreseeable future.
5. I do not like the idea of fund managers relying on "implied consent" to stop sending paper copies of shareholder reports. I understand that the Securities and Exchange Commission's "Rule 30e-3" allows these funds to do exactly that, and that I will be forced to take action to continue receiving paper copies of shareholder reports from every fund in which I am an investor that decides to implement this new choice. I understand that I will no longer receive paper copies if I fail to take action.

I declare under penalty of perjury that the foregoing is true and correct.

Date: Jan 8, 2019

Jean M. Wang

Jean M. Wang

(by Linda Sherry)
per attached Declaration

DECLARATION OF LINDA SHERRY

I, Linda Sherry, do hereby state and declare as follows:

1. I am the Director, National Priorities, for Consumer Action. My office is in Washington, DC.

2. Consumer Action, also known as San Francisco Consumer Action, is a non-profit, tax-exempt association that has been a champion of underrepresented consumers nationwide since 1971, focusing on financial literacy for low- and moderate-income and limited English-speaking consumers. Consumer Action represents members across the country, including seniors, minority Americans, disabled Americans, and those living in rural areas, who struggle with digital literacy or otherwise depend on access to paper materials for the information they need.

3. Consumer Action is a co-petitioner in litigation challenging the Securities and Exchange Commission's Rule 30e-3, after having filed comments in the SEC's rulemaking that resulted in Rule 30e-3, published in the Federal Register on June 4, 2018.

4. I make this Declaration to explain and support the Declaration of Jean M. Wang, a dues-paying Consumer Action member in good standing since before June 4, 2018 and to the present. In an effort to supplement Consumer Action's previous declaration in this litigation of the harm its members will suffer from Rule 30e-3, I contacted members to ask for individual declarations. Several responded and have submitted declarations. In the case of Ms. Wang, and a number of other members for whom I did not have email addresses, I mailed letters using the U.S. mail service. I do not know if Ms. Wang uses email at all. Ms. Wang is 82 years old. She responded to my letter with a phone call, said she was willing to submit a declaration but was leaving on a long trip and would not return in time to submit the declaration with our reply brief. After I read the declaration to her, she requested and authorized me to sign her name, which I have done, sending a copy to her by mail for her files. The Declaration of Jean M. Wang, to which this Declaration is attached, is her Declaration, which I have signed at her direction.

I declare under penalty of perjury that the foregoing is true and correct.

Date: Jan 8, 2019

Linda Sherry

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January 2019, a copy of the Petitioner's Reply Brief was served electronically through the Court's CM/ECF system on all registered counsel.

Date: January 28, 2019

Respectfully submitted,

/s/ Jane C. Luxton
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