[Final Brief]

ORAL ARGUMENT SCHEDULED FOR MARCH 12, 2019

No. 18-1213

IN THE 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.

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

BRIEF OF INVESTMENT COMPANY INSTITUTE AND INDEPENDENT DIRECTORS COUNCIL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 26.1 and 28(a)(1), *amici curiae* Investment Company Institute and Independent Directors Council certify as follows:

A. Parties

Except for the following, all parties, intervenors, and *amici* appearing before this Court are listed in the Brief for Petitioners:

Amici in this Court: Domtar Corporation, EMA, Monadnock Paper Mills, Inc., Boise Paper, The Printing Industry of the Carolinas, Inc., National Grange of the Order of Patrons of Husbandry, National Association of Letter Carriers, Investment Company Institute, and Independent Directors Council.

The Investment Company Institute ("ICI") is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds, closed-end funds, and unit investment trusts in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of $21.9 trillion in the United States, serving more than 100 million U.S. shareholders, and $7.0 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

The Independent Directors Council ("IDC"), part of ICI, supports investment company independent directors in fulfilling their responsibilities to represent the interests of fund shareholders. It promotes the highest standards of fund governance for the benefit and protection of fund shareholders. And it keeps fund directors informed about issues that affect their ability to fulfill their responsibilities while adapting to the rapidly changing financial services landscape.

ICI and IDC have no parent company, and no publicly held company owns ten percent or more of their stock.

B. Rulings Under Review

The ruling under review is identified in the Brief for Petitioners.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel for ICI and IDC is not aware of any other related case currently pending in this Court or any other court.

/s/ Eugene Scalia
Eugene Scalia

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GLOSSARY

EDGAR	Electronic Data Gathering, Analysis, and Retrieval System
ICI	Investment Company Institute
IDC	Independent Directors Council
IRS	Internal Revenue Service
Paper Industry Petitioners	Twin Rivers Paper Company LLC, American Forest & Paper Association, and Printing Industries Alliance
The Rule	Rule 30e-3 of the Investment Company Act of 1940
SEC	Securities and Exchange Commission

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in an addendum to the Brief for Petitioners.

IDENTITY AND INTEREST OF *AMICI CURIAE*, AND SOURCE OF THEIR AUTHORITY TO FILE

This case concerns a rule recently adopted by the Securities and Exchange Commission ("SEC" or the "Commission"), allowing registered investment companies to provide periodic shareholder reports online on a publicly accessible website. Shareholders wishing to receive a paper copy can call a toll-free number provided in a notice that is mailed when the report is posted. *See Optional Internet Availability of Investment Company Shareholder Reports* ("*Optional Internet Availability*"), 83 Fed. Reg. 29,158 (June 22, 2018), JA172 (adopting Commission Rule 30e-3).

The Investment Company Institute ("ICI") is the leading association for mutual funds and other entities that are given additional flexibility by the Rule. ICI has three core goals: encouraging adherence to high ethical standards by all industry participants, promoting public understanding of funds, and advancing the interests of funds and their shareholders, directors, and advisers.

The Independent Directors Council ("IDC"), part of ICI, serves the independent directors of mutual funds by advancing the education, communication, and policy positions of mutual fund independent directors, and promoting public understanding of their role. These are directors, required by statute and SEC regulations, who are independent of the company, or "adviser," that establishes and

manages the mutual fund; they play an important role in protecting the interests of fund shareholders. *See Chamber of Commerce of U.S. v. SEC*, 412 F.3d 133, 137 (D.C. Cir. 2005). IDC supports independent directors in fulfilling that responsibility and promotes the highest standards of fund governance for the benefit of fund shareholders.

ICI and IDC (collectively, "*Amici*") participated in the rulemaking process, including by submitting comments. They support the Commission's rule because they believe that it will benefit funds and shareholders. Printing and mailing reports to shareholders is expensive and often unnecessary. By permitting an online delivery option, the rule facilitates substantial cost savings for funds and shareholders. It aligns with how Americans—and shareholders particularly—access important information: online. It allows funds to take advantage of current technology to develop innovative approaches to providing information to shareholders. And it includes extensive measures to ensure that shareholders who want to receive paper copies of reports can continue to do so, at the fund's expense.

All parties have consented to the filing of this brief. *See* D.C. Cir. Rule 29(b). No counsel for a party authored this brief in whole or in part, and no person other than *Amici* and their members contributed any money that was intended to fund preparing and submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

FACTUAL BACKGROUND

At least twice a year, mutual funds and other "registered investment compan[ies]" must send reports to their shareholders. 15 U.S.C. § 80a-29(e); 17 C.F.R. §§ 270.30e-1, 270.30e-2. (These reports are in addition to the prospectus (or "summary" prospectus) and prospectus updates that many funds must provide to investors. *See* 15 U.S.C. § 77e(b); 17 C.F.R. § 230.498.) Shareholder reports are long and technical documents that include financial statements, data on fund performance and portfolio holdings, and various regulatory disclosures.[1] During the rulemaking at issue in this case, ICI reviewed shareholder reports from the five largest funds of each of the twenty largest U.S. mutual fund complexes: It found that consolidated reports (i.e., those containing information from multiple funds) ranged from 65 to 651 pages, with an average length of 189 pages. Unconsolidated reports ranged from 32 to 160 pages, with an average length of 60 pages. *See* Letter from Paul Schott Stevens, President and CEO, ICI, to Brent J. Fields, Secretary, SEC (Mar. 14, 2016), JA547 ("ICI March Comment").

That is a lot of paper, and a lot to read—if it is read at all. One recent ICI survey of individuals who own mutual funds found that, of those who recall

[1] Example shareholder reports can be found by searching the Commission's electronic filing system, EDGAR, https://www.sec.gov/edgar/searchedgar/mutualsearch.html. Entering the name of a fund into the search bar will lead to a list of that fund's publicly filed documents, including its annual and semi-annual shareholder reports.

receiving shareholder reports, only 13% read "most" or "all" of the report; 24% read "some" of the report; and 63% read "very little" of the report or did not read the reports at all. ICI, *Mutual Fund Investors' Views on Shareholder Reports: Reactions to a Summary Shareholder Report Prototype* 7 (Oct. 2018), https://www.ici.org/pdf/ppr_18_summary_shareholder.pdf.[2]

Some investors, including those who hold mutual funds as part of a 401(k) plan, do not directly receive the reports. Instead, the report is sent to the plan sponsor. *Cf.* 29 C.F.R. § 2550.404a-5 (requiring annual disclosures to be provided to participants of 401(k) plans).[3]

The rulemaking at issue here concerns the manner in which shareholder reports are provided to investors. Historically, funds have printed and mailed the reports. *See Investment Company Reporting Modernization*, 80 Fed. Reg. 33,590, 33,626 (June 12, 2015), JA45. Under Commission "guidance" first announced in

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[2] The Commission did not have access to this recent survey during the rulemaking at issue here. However, ICI provided data from its 2006 survey, which found that 49% of investors who recalled receiving reports reported reading very little or none; 24% reported reading some; and 27% reported reading all or most of their reports. *See* ICI March Comment, JA555 (citing ICI, *Understanding Investor Preferences for Information* 7 (2006), https://www.ici.org/pdf/rpt_06_inv_prefs_full.pdf).

[3] ICI, The U.S. Retirement Market, Third Quarter 2018 (Dec. 20, 2018), https://www.ici.org/research/stats/retirement/ret_18_q3 (noting that 401(k) plans held $3.7 trillion in mutual fund assets as of September 2018, nearly one-fifth of total mutual fund assets).

1995, however, funds can provide reports electronically (i.e., via email) "on a shareholder-by-shareholder 'opt-in' basis, provided that certain other conditions are met." *Optional Internet Availability*, 83 Fed. Reg. 29,158, 29,184 (June 22, 2018), JA198; *see also id.* at JA173 n.18 (citing previous Commission guidance regarding the use of electronic delivery).

In June 2018, the Commission adopted the rule at issue here—Rule 30e-3—to establish strict procedures by which funds may elect to post shareholder reports online, provided they send investors a paper notice that the report has been posted and instructions on how to request a paper or email copy. This "notice-and-access" approach flips the default rule, so that investors must "opt-out" of notice and access to receive paper copies of these voluminous reports. *See Optional Internet Availability*, JA172. Delivery of reports in accordance with the Rule may begin in January 2021—two-and-a-half years after the Rule was adopted. Existing funds wishing to use this new delivery approach must provide shareholders a series of notices of their intent to do so over a *two-year period* preceding their implementation of the new approach. *See id.* at JA189-90. Funds must also mail a notice to shareholders each time a report is issued, alerting them that the new report is available online and informing them that they may request a paper copy at the fund's expense. *See id.* at JA183-88.

Shareholders who want their reports the old-fashioned way can simply make a toll-free phone call requesting delivery by mail. *Optional Internet Availability*, JA188-90. And when reports are provided online, they must be in a format "convenient for both reading online and printing on paper." *Id.* at JA182.

The Rule has been challenged in this Court by Consumer Action, The Coalition for Paper Options, the Twin Rivers Paper Company LLC, the American Forest & Paper Association, and the Printing Industries Alliance. (The last three of these petitioners are referred to herein as "the Paper Industry Petitioners.") Petitioners enjoy the *amicus* support of four more paper companies (Domtar Corporation, EMA, Monadnock Paper Mills, Inc., and Boise Paper), two more paper industry trade associations (The Printing Industry of the Carolinas, Inc. and the National Grange of the Order of Patrons of Husbandry), and a labor union—the National Association of Letter Carriers.

These petitioners and their *amici* purport to be concerned about unnamed investors who avidly read shareholder reports, yet would be unable to place a toll-free call to request paper copies. Petitioners' real concern with the Rule, however, is not so easily papered over.

SUMMARY OF ARGUMENT

Drawing on more than twenty years of experience using the internet as a medium to provide documents and other information to investors, the Commission

decided to give funds the option of delivering reports to shareholders by sending a notice of the report's availability online, so long as a hard copy is available and mailed at the fund's expense to any shareholder who makes a single phone call to request it. The merits of its new Rule are obvious—it reduces costs for funds and shareholders, reflects the public's widespread use of the internet and shareholders' increasing preference for accessing information online, permits funds to use technology to communicate more effectively, and accommodates shareholders who cannot or do not want to review reports online.

Flipping the default rule from paper delivery to online access increases efficiency, preserves fund assets, promotes capital formation, and protects investors. Under the current "opt-in" approach to electronic delivery, funds incur unnecessary printing and mailing costs because they must provide paper copies to shareholders who actually prefer to access reports electronically but fail to affirmatively request that, or who are simply indifferent. Under the new notice-and-access approach, those shareholders can access reports online, reducing fund expenses and preserving fund assets for shareholders. At the same time, shareholders who prefer paper can make a single phone call to receive paper copies of any individual report or of all future reports.

The Commission originally proposed, but declined to ultimately require, that an initial statement be mailed shortly before a fund begins notice-and-access

delivery, and a pre-paid reply form that shareholders could use to request paper copies. Although petitioners complain that the Commission "eliminated" those supposed "protections," the Commission reasonably explained why it dropped those inefficient and costly requirements in favor of multiple notices over a two-year period and a toll-free number that shareholders can call to request paper.

Ultimately, petitioners' stated objection to the Rule boils down to the far-fetched complaint that shareholders who read and make investment decisions based on complex reports will be unable to understand the paper notices they receive, or unable to complete a simple call to express their preference for a hard copy. Indeed, petitioners' concerns with the Rule are so remote and evanescent that they fall outside the "zone of interests" of the federal statutes they seek to invoke, and lack standing to proceed in this Court.

This Court should deny the petition for review.

ARGUMENT

I. PETITIONERS LACK STANDING OR FALL OUTSIDE THE ZONE OF INTERESTS PROTECTED BY THE SECURITIES LAWS.

Rule 30e-3 reduces the transfer of wealth from mutual fund shareholders to paper companies, while making hard copy reports just a phone call away for shareholders who want them. The Rule therefore injures no one, except possibly the Paper Industry Petitioners, whose interests fall outside the "zone of interests" the securities laws are meant to protect.

1. Consumer Action and the Coalition for Paper Options lack standing to challenge Rule 30e-3. *See* SEC Br. 22-24. As the Commission explains, neither entity satisfies its obligation to "'specifically identify members who have suffered the requisite harm.'" *Id.* at 23 (quoting *Chamber of Commerce v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011)); *see also id.* at 24 n.3.

Both entities' declarations suffer from an additional flaw. "An association only has standing to bring suit on behalf of its *members* when its *members* would otherwise have standing to sue in their own right." *Gettman v. Drug Enf't Admin.*, 290 F.3d 430, 435 (D.C. Cir. 2002) (defining members as those who play a "role in selecting [an organization's] leadership, guiding its activities, or financing those activities"). But neither entity establishes that its members, as distinct from other loosely affiliated individuals, will be harmed by the Rule. Consumer Action's executive director asserts that its "members, *followers and supporters* include retirees and retirement savers who wish to receive reports from investment funds in paper form without incurring the burdens imposed by SEC's Rule 30e-3." McEldowney Declaration (emphasis added). And the Coalition for Paper Options' executive director similarly declares that its "members include consumer groups and investor advocates" and that the members of *those* groups would prefer paper reports "without incurring the burdens imposed by SEC's Rule 30e-3." Runyan Declaration. Because an association lacks standing to sue on behalf of its

followers, supporters, or members of members, *see Gettman*, 290 F.3d at 435 (magazine could not bring claims on behalf of readers and subscribers); *Conservative Baptist Ass'n of Am., Inc. v. Shinseki*, 42 F. Supp. 3d 125, 134 (D.D.C. 2014) (association of churches could not bring claims on behalf of chaplains), neither Consumer Action nor the Coalition for Paper Options has standing to raise this challenge.

Even if they had identified members who purportedly will be harmed by the Rule, Consumer Action and the Coalition for Paper Options fail to identify injuries that would be enough to confer standing. The only "burden" imposed by Rule 30e-3 on individuals who wish to receive paper reports is to dial a toll-free telephone number and express that preference, hardly a "legally cognizable injur[y]," *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 514 (D.C. Cir. 2016), that is "direct, real, and palpable," *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 914 (D.C. Cir. 2015). Far from frustrating rights, the ability to make a phone call is a familiar means for vindicating rights—as petitioner Consumer Action recognizes. *See* Consumer Action Help Desk, https://www.consumer-action.org/helpdesk ("Consumer Action wants to help you resolve your consumer complaints. For free, non-legal advice, email our Complaint Hotline. Or, call 415-777-9635 and leave us a voice mail message with a brief description of your complaint and the state you live in."); *id.* (advising consumers to submit complaints to the Bureau

of Consumer Financial Protection online or by calling "855-411-CFPB"). And, as the Commission explains, any possibility that an investor might not receive a paper report is entirely speculative and would be a self-inflicted injury that cannot confer standing. *See* SEC Br. 23.

2. The Paper Industry Petitioners, for their part, fall outside the zone of interests of the statutes involved in this case. *See* SEC Br. 24-26. The "burden" of demonstrating that they satisfy this requirement "falls squarely on petitioners." *Am. Trucking Ass'ns, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 246 (D.C. Cir. 2013). But the Paper Industry Petitioners make no meaningful attempt to show that their interests are arguably within the zone of interests regulated or protected by any relevant statute. *See* Petrs.' Br. 17-18. Nor could they: The Paper Industry Petitioners are not registered investment companies regulated by the Investment Company Act of 1940; they are not the "intended beneficiaries" of any of the securities laws; and the interests they assert are "more likely to frustrate than to further . . . statutory objectives." *Scheduled Airlines Traffic Offices, Inc. v. Dep't of Def.*, 87 F.3d 1356, 1359 (D.C. Cir. 1996) (omission in original). Their interest in this litigation is pure rent-seeking that is directly opposed to some of the major objectives of the securities laws—safeguarding shareholders' investment and promoting efficiency, competition, and capital formation. *See*, *e.g.*, 15 U.S.C. §§ 80a-1(b), 80a-2(c).

Because none of the petitioners is a proper challenger to Rule 30e-3, this Court should deny the petition without reaching the merits.

II. THE COMMISSION'S RULE IS EMINENTLY REASONABLE.

The core of petitioners' challenge to Rule 30e-3 is that the Commission acted arbitrarily and capriciously by changing a paper delivery default to a default of online access. *See* Petrs.' Br. 19-28. Petitioners do not contend that any statute forbids the Commission's decision; at root, "this is a *State Farm* case, not a *Chevron* case." *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (citing *Motor Vehicles Mfrs. Ass'n v. State Farm*, 463 U.S. 29 (1983) and *Chevron USA, Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984)). And under *State Farm*'s "deferential standard," this Court "must uphold [the Commission's] rule so long as it is reasonable and reasonably explained." *Id.*

Rule 30e-3 "allow[s] the mutual fund industry the option to embrace basic technological advancements that have been in common use for at least two decades." *Statement of Commissioner Michael S. Piwowar on Investment Company Rule 30e-3, Enabling Optional Internet Availability of Shareholder Reports* ("Piwowar Statement") (June 5, 2018), https://www.sec.gov/news/public-statement/statement-piwowar-060518. This small step toward modernizing fund reporting is obviously reasonable: It will benefit funds and shareholders by reducing costs; it aligns with shareholder preferences and widespread practices; it

allows funds to use technology to present information more effectively; and it accommodates shareholders who prefer paper copies, while reducing avoidable expenses.

A. The Rule Benefits Funds And Shareholders.

1. The Rule will significantly reduce fund expenses in the form of printing and mailing costs. *See Optional Internet Availability*, JA200-01. These cost savings, the Commission explained, will benefit funds and their investors through "efficiency" gains and—by "increas[ing] the portion of investor money that is retained in the fund rather than used to cover expenses"—will "result[], over time, in a net positive effect on the level of capital invested in funds." *Id.* at JA200. Reducing fund expenses, moreover, could have "a positive effect on fund performance," attracting new investors and investments and leading to "further capital formation benefits." *Id.* The Commission thus complied with its statutory obligations by "determin[ing]" that the Rule would protect investors and "promote efficiency, competition, and capital formation." 15 U.S.C. § 80a-2(c); *accord id.* § 77b(a); *see Lindeen v. SEC*, 825 F.3d 646, 652 (D.C. Cir. 2016).

Oddly, petitioners criticize the Commission for its focus on cost savings, asserting that this focus is somehow in tension with the Commission's "obligation to protect investors." Petrs.' Br. 26-28. Petitioners never explain why they assume these goals are in tension. Nor could they. The cost savings of the Rule will be

great, as reflected by the three paper companies and five trade associations that appear before this Court to lament the Rule—and the revenues they will lose from it. Those revenues flow directly out of the funds in which mutual fund investors are shareholders: Funds typically pay regular operating expenses out of fund assets, which means that shareholders—who are entitled to a pro-rata share of the fund's assets—end up bearing the cost of those expenses. *See* SEC, Mutual Fund Fees and Expenses (May 2014), https://www.sec.gov/files/ib_mutualfundfees.pdf. And by definition, "the more [shareholders] pay in fees and expenses, the less money [they] will have in [their] investment portfolio[s]." *Id.* at 2. "Even small differences in fees . . . can add up to substantial differences in [a shareholder's] investment returns over time." *Id.* at 1.

Because cost savings for funds equals more money for fund shareholders, there is simply no tension between reducing unnecessary expenses and protecting investors. By reducing this wealth transfer to the paper industry while allowing more efficient and effective delivery of information to investors, the Rule preserves fund assets for shareholders, thus furthering the central purpose of the Investment Company Act. *See* 15 U.S.C. § 80a-2(c).

Petitioners fault the Commission for supposedly failing to respond to comments by the Consumer Federation of America that any cost savings would be "highly unlikely to be passed on to shareholders." Petrs.' Br. 28. But the

Consumer Federation apparently failed to grasp that reduced expenses for funds accrue to shareholders, and it provided no reasoning to support its assertion that funds would somehow not "pass on" the savings. *See* Letter from Barbara Roper, Director of Investor Protection, Consumer Federation of America, to Brent J. Fields, Secretary, SEC (July 29, 2015), JA315. The Commission reasonably disagreed with the Consumer Federation's *ipse dixit*, explaining that because "printing and mailing expenses are fund expenses," it "expect[ed] that these savings will generally be fully passed along to investors." *Optional Internet Availability*, JA197.[4] The Commission was not required to do more to respond to the Consumer Federation's apparent misunderstanding. *See*, *e.g.*, *Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012) ("[A]n agency's failure to address a particular comment or category of comments is not an APA violation *per se*."); *Thompson v. Clark*, 741 F.2d 401, 409 (D.C. Cir. 1984) ("The failure to respond to comments is significant only insofar as it demonstrates that the agency's decision was not based on a consideration of the relevant factors.").

Ultimately, the Commission concluded that the Rule would save funds almost $1.5 billion over the next decade. *See Optional Internet Availability*,

[4] Some funds, the Commission noted, operate under an expense limit, which caps the amount of fees for operating expenses that are charged to shareholders; savings on expenses that exceed the limit would not directly accrue to shareholders (although they would presumably allow the funds to set an even lower expense limit). *See Optional Internet Availability*, JA197.

JA201; SEC Br. 47-48. Petitioners' description of that amount as "negligible," Petrs.' Br. 28, is belied by the paper industry's decision to sue to claw that money back from mutual funds and their shareholders. In any event, petitioners may not demand that this Court replace the Commission's considered policy judgment with their own. *See State Farm*, 463 U.S. at 43.

2. The Rule also reflects "the significant increase in the use of the internet as a tool for disseminating financial information among all age groups" and shareholders' increasing preference for electronic delivery of reports. *Optional Internet Availability*, JA177, 179. As Commissioner Piwowar noted, paper copies of shareholder reports "have continued to languish on doorsteps and recycling bins in homes all across the country where their investor recipients read news online, bank online, and shop online." Piwowar Statement.

Mandating paper delivery is increasingly anachronistic, as more and more everyday activities are conducted electronically. Americans today invest online. *See*, *e.g.*, Fidelity, https://www.fidelity.com; Charles Schwab, https://www.schwab.com; E*Trade, https://us.etrade.com. They shop online. *See South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018) ("Last year, e-commerce retail sales alone were estimated at $453.5 billion."). They find dates—and spouses—online. *See* Sophie Ross, *This Is Officially the Most Popular Way People Are Meeting Their Spouse*, The Knot, https://bit.ly/2Rwe0oc (reporting that

according to a 2017 survey, more recently married brides met their spouses online than through friends, in college, or at work). And the Supreme Court, recognizing that this "Cyber Age" reflects a "revolution of historic proportions" with "vast potential to alter how we think, express ourselves, and define who we want to be," *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017), has begun to embrace electronic options, *see* Supreme Court of the U.S., Electronic Filing https://www.supremecourt.gov/filingandrules/electricfiling.aspx ("The Supreme Court's new electronic filing system will begin operation on November 13, 2017.").

Almost all households owning mutual funds have access to the internet (94%), including households where the head of the household is older than 65 (86%), has an education level of high school diploma or less (84%), or has an income of less than $50,000 (84%). *Optional Internet Availability*, JA175 & n.42. And an increasing percentage of fund shareholders prefer to access financial information online. As ICI informed the Commission, "fewer than half of mutual fund shareholders still review some printed materials for information about their fund investments, and over two-thirds of these individuals likewise access online materials to gather information on their fund investments." *Id.* at JA176 n.63 (alteration omitted).

Petitioners rely on certain survey data suggesting that "electronic preference rates" were "in the 33 to 44 percent range" when the Rule was proposed. Petrs.' Br. 21. Those surveys, however, concern electronic delivery—email—not online delivery through a notice-and-access approach as under the Rule. *See also Optional Internet Availability*, JA175 n.44 (explaining the methodological shortcomings in one of the surveys on which petitioners rely). And the percentage of individuals who prefer electronic delivery is likely higher in any event. Currently, shareholders who prefer electronic delivery must affirmatively request it. *See id.* at JA173-74 & nn.18 & 25. The Commission considered evidence that even in 2015, 40%-43% of shareholders investing through brokerage accounts had requested electronic delivery (with one commenter estimating that percentage would climb to almost 60% by 2018). *See id.* at JA198 & n.348. There is no reason to suppose that the number of shareholders who prefer electronic copies of reports is *lower* than the number who *actually elected* to receive them. Rather, because shareholders currently must take affirmative steps to receive electronic reports, "status quo" bias is likely to result in many shareholders continuing to receive paper copies even if they prefer electronic delivery. *See*, *e.g.*, Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. Chi. L. Rev. 1159, 1172 & n.43 (2003).

More importantly, the Commission did not adopt Rule 30e-3 to ensure that online access rates precisely match shareholder preferences. SEC Br. 27. Instead, the Commission made a reasonable policy judgment that funds should "only incur printing and mailing costs as necessary to accommodate those investors opting for paper." *Optional Internet Availability*, JA200.

The current "opt-in" approach to electronic delivery results in paper delivery to (i) shareholders who prefer electronic delivery, but not enough to request it; (ii) shareholders who do not care whether they receive reports electronically or in hard copy and so do not request electronic delivery; (iii) shareholders who kind of like getting a hard copy, but value it so little that they would not pick up a phone to request it; *and* (iv) shareholders who prefer a hard copy and would affirmatively request one. The shareholders in the first two groups—those with a slight preference for electronic delivery, or who are indifferent—indisputably impose unnecessary costs on the other shareholders (and on themselves) under the current approach. Switching to an "opt-out" approach eliminates this inefficiency, preserves fund assets, furthers capital formation, and increases shareholder value. With respect to the third group of shareholders—those with a slight preference for hard copy—the Commission's notice-and-access approach ensures that those shareholders' preference is a *considered, meaningful* one. And its approach fully preserves the ability of the fourth group of shareholders—those with a

demonstrable preference for paper—to obtain reports in the form they prefer: They are reminded that they may request paper copies at the fund's expense each time a shareholder report is issued. At the same time, the Commission's approach ensures that shareholders are not imposing real, quantifiable costs on the fund due to a preference so slight that it's not worth it to them to make a phone call.

The paper industry may not like this logic, but it promotes efficiency in a way that goes directly to funds' bottom line. It also comports with economists' explanation of the best default rules for circumstances where one party imposes costs on others (in this case, other shareholders). *See* Russell Korobkin, *Libertarian Welfarism*, 97 Cal. L. Rev. 1651, 1665 (2009) (default rules should take account of "negative externalities created by the behavior of the regulated individuals" in order to "maximize social welfare, which includes the utility of actors subject to regulation and the utility of third parties"). Under these circumstances, the Commission reasonably decided to allow funds to ask shareholders to access reports online or to take a simple step to request paper copies.

In doing so, the Commission joined a "global movement" toward a notice-and-access model for shareholder reports. *Optional Internet Availability*, JA178 n.81. For example, in the European Union, funds may post shareholder reports online, with paper reports available by request. *Id.* Canada and Australia permit

the same and allow funds to rely on implied consent. *Id.*; *see also id.* at JA177-78 (noting that the Rule was similar to the approach taken by the Bureau of Consumer Financial Protection "for certain financial institutions to satisfy privacy notice transmission requirements"). Petitioners argue that the Internal Revenue Service ("IRS") does not permit implied consent to electronic delivery of tax documents containing personal financial information, such as W2 and 1099 forms. Petrs.' Br. 23; *see* IRS Publication 1179, § 4.6 (Sept. 2018). But they do not explain why the Commission should have followed that outlier approach—which the IRS takes toward particularly sensitive documents with personally identifying information—rather than the emerging consensus supporting a notice-and-access approach for documents such as shareholder reports. Indeed, the IRS itself decided in 2010 to save money by no longer mailing income tax forms to taxpayers. *See* Ed O'Keefe, *IRS to Stop Mailing Income Tax Forms*, Wash. Post (Sept. 27, 2010), https://wapo.st/2R7jeHl.

3. Finally, the Rule gives funds added flexibility to use technology to communicate information to shareholders more effectively. *See Optional Internet Availability*, JA186. Shareholder reports can be lengthy and complicated documents, with the result that relatively few shareholders read them. *Supra*, 3-4. Rule 30e-3 gives funds new tools for offering shareholders ready access to the information in the reports that is likely to be of greatest interest. For example,

funds could include key content from the reports with the required notice delivered to shareholders, while pointing those who want additional information to the more detailed report available online (or by mail upon request). *See Optional Internet Availability*, JA186 (suggesting that funds could include information such as "graphical representations of holdings; a lists of the fund's top holdings . . .; performance information; [and] a brief statement of the fund's investment objective and strategies").

This "layered" approach to disclosure enables investors to get the information they find most useful, at the level of detail they desire, and in a format they prefer.[5] It reflects the recommendations of the Commission's Investor Advisory Committee. *See Optional Internet Availability*, JA186 & n.190. And it tracks the Commission's approach to disclosures in other areas. For example, the Commission adopted a layered approach to mutual fund prospectuses in 2009, allowing funds to provide a summary prospectus to investors, while making a more detailed statutory prospectus available online or by mail upon request. *See Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-*

[5] As part of its efforts to modernize fund reporting, the Commission has requested comments on alternative approaches to shareholder reports, including the use of "summary" reports. *See Request for Comment on Fund Retail Investor Experience and Disclosure*, Investment Company Act Release No. 33113 (June 5, 2018). Rule 30e-3 gives funds flexibility to experiment with summary reports in the meantime, although it does not require them to do so.

End Management Investment Companies, 74 Fed. Reg. 4546, 4560-61 (Jan. 26, 2009), JA270-71. As the Commission explained, this layered approach would "provide investors with better ability to choose the amount and type of information to review, as well as the format in which to review it." *Id.* at JA270. As a result, funds would be able to present investors "with more useable information . . . in a format that investors [would be] more likely to use and understand." *Id.* at JA270-71.

In sum, Rule 30e-3 promotes the interests of funds and shareholders by reducing expenses, taking advantage of widespread technological changes, and enabling funds to provide shareholders with reports that they are more likely to actually read and understand—rather than to recycle.

B. The Rule Accommodates Shareholders Who Prefer Paper Reports.

Petitioners would have this Court ignore this forest of benefits for a few trees—those shareholders who prefer paper reports and potentially might not receive them, either because they overlook numerous notices about the availability of the report online or because they fail to request a paper copy. *See* Petrs.' Br. 21-26. But the Commission provided more than adequate accommodation for any shareholder who prefers paper. To request a paper copy of any individual report or of all future reports, those shareholders must simply make one free phone call, following instructions that will be prominently displayed every time they receive

notice about the availability of a new shareholder report. *See Optional Internet Availability*, JA219-20. Shareholders will have received ample warning that a fund intends to switch to a notice-and-access approach—in addition to notices delivered when each report becomes available online, most will receive multiple notices over a two-year period of the pending change. *See id.* at JA220. And the online reports themselves must be in a format "convenient for . . . printing on paper" for shareholders who wish to do so. *Id.* at JA182.

Petitioners nonetheless fault the Commission for "eliminat[ing]" two requirements in the proposed rule: an initial statement about the pending switch and a postage-paid, pre-addressed reply form that would allow shareholders to opt-out of online delivery. Petrs.' Br. 24. But the Commission reasonably explained its decision to modify those aspects of the proposal.

With respect to the initial statement, the Commission actually *increased* the amount of forewarning shareholders would receive by replacing a single initial statement mailed shortly before a fund elected to use notice and access with a series of notifications delivered over an extended transition period. *See Optional Internet Availability*, JA188-91. Petitioners' only objection to the extended transition period appears to be that notifications "mixed in with other shareholder materials" might not be as effective as "a free-standing document." Petrs.' Br. at 24; *see also id.* at 44. As an initial matter, petitioners confuse the notifications of

the forthcoming change with the "Notice[s]" required when each report is made available online; the changes to which petitioners object apply to the contemporaneously mailed Notices, not the notifications that replaced the initial statement. *Compare Optional Internet Availability*, JA183-88 (describing "Notice" to "contemporaneously alert [shareholders] to the availability of a shareholder report online"), *with id.* at JA189-90 (describing "notices" delivered during transition period). More importantly, the Commission explained that permitting funds to include additional information along with the Notices—for example, by combining them with a shareholder's account statement—"could encourage investors to access their reports" and "result in additional cost savings." *Id.* at JA184, JA188; *see also id.* at JA188 ("Moreover, we believe that an investor who is likely to read account statements would also be likely to become aware of the accompanying Notice and the content therein."). Simply, the Commission reasonably concluded that shareholders interested in wading through a shareholder report potentially hundreds of pages long would also succeed in noticing, reading, and understanding a notice that was sent to them repeatedly over more than two years, and each time a report becomes available online thereafter.

As for its decision not to require a pre-paid reply form, the Commission was persuaded that "reply cards have a low response rate that does not justify their cost." *Optional Internet Availability*, JA185 (footnote omitted). Indeed, as ICI

explained, reply cards are so ineffective that many of its members have given up their postage-paid licenses and thus currently lack the capability to provide postage-paid envelopes. *See* Letter from David W. Blass, General Counsel, ICI, to Brent J. Fields, Secretary, SEC (Aug. 11, 2015), JA509 ("ICI August Comment"). Petitioners fail to acknowledge the Commission's stated reasons for either of these decisions.

Setting aside these gaps in petitioners' arguments, their essential complaint about Rule 30e-3 makes no sense. At bottom, petitioners' supposed concern is a class of shareholders so inquiring, sophisticated, and energetic that they not only read and understand lengthy shareholder reports, they actually make and change investment decisions based on the reports' content. And yet, petitioners fear, those same people may fail to see or understand repeated notices that the reports will be available online, or will be hopelessly befuddled by making a toll-free phone call to request paper copies. That is utterly implausible.[6]

[6] In this regard, it is telling that one individual commenter in the rulemaking submitted a letter explaining that he was "closing in on retirement" and preferred paper reports—but neglected to mention he was an executive officer at an envelope company. *See* Letter from Bob Broadbear to SEC (July 15, 2015), JA314; Bob Broadbear, COO at Tension Envelope Corp., LinkedIn.com, https://www.linkedin.com/in/bob-broadbear-7a18646/. This Court may be confident that the COO will be able to make a phone call to his mutual fund company. He might even have his assistant place the call.

III. THE FINAL RULE WAS A LOGICAL OUTGROWTH OF THE PROPOSED RULE.

As the Commission explains, petitioners had more than adequate notice that the Commission could modify or eliminate the proposed rule's initial-statement and reply-card requirements. SEC Br. 52-53; *see Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) ("[A] final rule is a 'logical outgrowth' of a proposed rule only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.").

Not only was ICI able to anticipate that the Commission might scrap the reply-card requirement, it submitted comments urging the Commission to do so, explaining that "[r]equiring a pre-addressed, postage paid reply form would be burdensome and expensive without a corresponding benefit for investors." ICI August Comment, JA509; *Nat'l Mining Ass'n v. Mine Safety & Health Admin.*, 512 F.3d 696, 699 (D.C. Cir. 2008) (This Court has "taken into account the comments, statements and proposals made during the notice-and-comment period."). Another commenter also advocated eliminating the initial-statement requirement. *See Optional Internet Availability*, JA189.

In light of these comments urging the Commission to drop those requirements, petitioners cannot plausibly assert that they were "surprise[d]."

Petrs.' Br. 44. Moreover, Consumer Action submitted *three* supplemental comments on the proposed rule, one of which it wrote specifically to respond to comments submitted by ICI.[7] Yet none of those supplemental letters addressed the recommendations to drop the reply-card and initial-statement requirements. The Court should reject petitioners' belated attempt to paper-over their oversight.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

Dated: February 11, 2019

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[7] *See* Letter from Linda Sherry, Director of National Priorities, Consumer Action, to Brent J. Fields, Secretary, SEC (Apr. 12, 2016), JA573-74 (responding to ICI March Comment); *see also* Letter from Linda Sherry, Director of National Priorities, Consumer Action, to Brent J. Fields, Secretary, SEC (Dec. 1, 2017), JA575-76; Letter from Linda Sherry, Director of National Priorities, Consumer Action, to Brent J. Fields, Secretary, SEC (Jan. 8, 2015), JA311-13.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this brief complies with the applicable typeface, type style, and type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1), this brief contains 6,337 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

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CERTIFICATE OF SERVICE

I certify that on this 11th day of February 2019, I caused a true and correct copy of the foregoing brief to be served via electronic mail upon all counsel of record by operation of the Court's ECF system.

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