[INITIAL BRIEF]

ORAL ARGUMENT NOT YET SCHEDULED

No. 18-1213

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TWIN RIVERS PAPER COMPANY LLC, CONSUMER ACTION, AMERICAN FOREST & PAPER ASSOCIATION, THE COALITION FOR PAPER OPTIONS, AND PRINTING INDUSTRIES ALLIANCE,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for Review of an
Order of the Securities and Exchange Commission

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

All parties appearing before the Commission and this Court are listed in the brief for the petitioners. In addition, the following have filed an amicus brief in support of petitioners: 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, and the National Association of Letter Carriers. The Investment Company Institute has indicated it will file an amicus brief in support of the Commission.

B. Rulings under Review

On June 4, 2018, the Commission adopted the rule that petitioners challenge here, Rule 30e-3, in *Optional Internet Availability of Investment Company Shareholder Reports*, Investment Company Act Release No. 33115, published in the Federal Register at 83 FR 29,158 (June 22, 2018).

C. Related Cases

The case on review has not previously been before this, or any other, Court. Counsel is not aware of any other related cases currently pending in this, or any other, Court.

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* Authorities on which this brief chiefly relies are marked with an asterisk.

Statutes and Rules

Commission Releases

Other Authorities

GLOSSARY

Adopting Release	*Optional Internet Availability of Investment Company Shareholder Reports*, 83 FR 29,158 (June 22, 2018)
Amicus Br.	Brief of Public and Private Companies, Nonprofit Organizations, and Labor Unions as Amici Curiae in Support of Petitioners
APA	Administrative Procedure Act
Br.	Petitioners' Opening Brief
Commission or SEC	Securities and Exchange Commission
EDGAR	Electronic Data Gathering, Analysis, and Retrieval System
Exchange Act	Securities Exchange Act of 1934
FINRA	Financial Industry Regulatory Authority
FR	Federal Register
IAC	Investor Advisory Committee
IAC Recommendation	*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* (Dec. 7, 2017)
ICA	Investment Company Act of 1940
SAI	Statement of Additional Information
Securities Act	Securities Act of 1933
UIT	Unit Investment Trust

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INTRODUCTION

Registered investment companies such as mutual funds ("funds") are required to transmit periodic reports to their shareholders. Currently, the default delivery method is to mail paper copies of these reports to shareholders. Shareholders may also choose electronic delivery of reports if a fund offers that option. Rule 30e-3—the rule at issue in this case—gives funds the option to change their default delivery method. After an extended transition period during which investors would be repeatedly notified in paper of the impending change, funds will be able to transmit a shareholder report by providing a paper notice of its availability on a publicly

accessible website. Funds that choose to do so will be required, among other things, to allow investors who prefer paper delivery to opt to receive paper copies and to consolidate previously disparate fund portfolio information on the same website.

As the Commission explained, the rule is intended to modernize the manner in which funds deliver periodic information to investors while reducing expenses associated with paper distribution that are borne by funds and their investors. Under either potential default delivery method—paper or website availability under Rule 30e-3—some investors who prefer the alternative may not take the affirmative steps necessary to elect it, resulting in excess use of the default. But of the two methods, paper delivery generates higher printing and mailing costs borne by all investors. And recent trends in internet access and investor preferences suggest that the vast majority of investors are now able and willing to receive financial information online. The Commission thus made a policy judgment to enable funds to opt for a default method that will reduce shared costs while accommodating the interests of the diminishing number of investors who continue to prefer paper delivery.

Petitioners' repeated assertion that the Commission improperly elevated the interests of funds over the interests of fund investors ignores the Commission's statutory responsibility to consider factors beyond investor protection, including ensuring efficient, fair, and orderly markets and encouraging capital formation. It also ignores one of the defining features of funds—that expenses are paid indirectly by investors from fund assets. And petitioners' narrow focus on the interests of the

diminishing number of investors who continue to prefer paper reports ignores the benefits of the rule to investors as a whole. Moreover, the Commission took reasonable steps to assure that those investors who prefer paper reports can continue to receive them by making a single, toll-free telephone call.

Petitioners also repeatedly distort the Commission's analysis, overlooking its discussion of issues they claim it ignored and attacking rationales for the rule that it did not invoke. And they fault the Commission for non-existent contradictions in its assessment of costs and benefits and for not quantifying economic effects that no commenter claimed could or should have been quantified. Rather than undermine the Commission's qualitative analysis, petitioners' unfounded and implausible "hypothetical" calculations confirm its reasonableness. In the end, petitioners fail to call into question the rationality of the Commission's analysis, identifying only a single, inadvertent error in estimating one component of compliance costs that is inconsequential to the rationale supporting the rule.

The Court need not reach these merits issues, however, because none of the petitioners has demonstrated that it is a proper party to bring this suit. Consumer Action can be dismissed at the outset because it fails to identify a single injured member. They and the industry petitioners also rely on the kind of conclusory allegations of harm that this Court has repeatedly found insufficient. And even if they could demonstrate standing, the industry petitioners seeking to maintain demand for

paper mailings fall outside the zone of interests protected by the securities laws and thus lack a cause of action.

COUNTERSTATEMENT OF JURISDICTION

Rule 30e-3 and related amendments were adopted by the Commission on June 4, 2018, pursuant to the Investment Company Act of 1940 ("ICA"), the Securities Act of 1933 ("Securities Act"), and the Securities Exchange Act of 1934 ("Exchange Act"). The petition for review was timely filed on August 3, 2018. This Court has jurisdiction pursuant to Section 43 of the ICA, 15 U.S.C. 80a-42; *see N.Y. Republican State Comm. v. SEC*, 799 F.3d 1126, 1129-34 (D.C. Cir. 2015). However, the petition for review should be denied because petitioner Consumer Action has failed to establish that it has standing, and petitioners Twin Rivers Paper Company LLC, The Coalition for Paper Options, American Forest & Paper Association, and Printing Industries Alliance ("Industry Petitioners") fall outside the zone of interests protected by the securities laws. *See infra* Part I.

COUNTERSTATEMENT OF THE ISSUES

1. Whether the petition for review should be denied because Consumer Action has not met its burden to establish standing by identifying any members who have suffered harm and Industry Petitioners' interest in maintaining demand for paper-related products and services falls outside the zone of interests protected by the securities laws.

2. Whether the Commission's policy judgment that funds should be permitted to use a default transmission method that reduces shared printing and mailing costs while accommodating the interests of investors who prefer paper delivery was reasonable.

3. Whether the Commission fulfilled its obligation to consider the potential economic effects of Rule 30e-3 by analyzing empirical data where practicable and otherwise providing a comprehensive qualitative analysis of the impact of the rule.

4. Whether, in specifically acknowledging and discussing the Investor Advisory Committee's recommendations, incorporating some aspects of the recommendations in the final rule, and soliciting comment regarding other aspects of the recommendations, the Commission satisfied its obligation under the APA to consider reasonable alternatives recommended by the Investor Advisory Committee as well as its statutory obligation to issue a public statement regarding the Investor Advisory Committee's recommendations.

5. Whether the Commission provided adequate notice of certain modifications to the proposed rule that were the focus of multiple requests for comment and were discussed by commenters.

STATUTES AND REGULATIONS

An Addendum to petitioners' opening brief sets forth the pertinent statutory and regulatory provisions.

COUNTERSTATEMENT OF THE CASE

A. Statutory and Regulatory Background

Mutual funds and other investment companies "pool investors' assets to purchase securities and other financial instruments." *Business Roundtable v. SEC*, 647 F.3d 1144, 1154 (D.C. Cir. 2011); *see also* 15 U.S.C. 80a-4, 80a-5(a). Fund investors own shares representing a portion of the value of the fund's assets. Funds typically pay their operating expenses out of fund assets, so fund investors pay these expenses "indirectly." *See, e.g.*, SEC Office of Investor Education & Advocacy, *Mutual Fund Fees and Expenses* (May 12, 2014) at 2, *available at* https://www.sec.gov/files/ib_mutualfundfees.pdf. Consequently, the "more [investors] pay in fees and expenses, the less money [they] will have in [their] investment portfolio." *Id.*; *see also Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies*, 74 FR 4,546, 4,553-54 (Jan. 26, 2009).

Funds are generally required to register with the Commission and comply with a number of filing and reporting requirements. For example, they must file, and periodically update, a prospectus and statement of additional information ("SAI") containing information about the fund and its operations. *See* 15 U.S.C. 77e(b), 80a-8, 17 C.F.R. 210.1-01 *et seq.* Funds must also deliver their prospectus to investors purchasing shares in the fund. 15 U.S.C. 77e(b). Alternatively, under Rule 498 of the Securities Act, mutual funds and other open-end management investment companies

may send investors a summary prospectus containing key information from the prospectus, provided that they make the prospectus, summary prospectus, SAI, and most recent annual and semiannual reports available on a publicly accessible website and provide paper copies of those materials upon request. 17 C.F.R. 230.498.

In addition, section 30(e) of the ICA, and Rules 30e-1 and 30e-2 thereunder, require funds to transmit to their shareholders, at least semi-annually, a report containing financial and other information. 15 U.S.C. 80a-29(e); 17 C.F.R 270.30e-1; *id.* 270.30e-2.[1] Funds must include either a complete or summary schedule of portfolio investments for the period covered—*i.e.*, for the second quarter in the semi-annual report or the fourth quarter in the annual report. *Optional Internet Availability of Investment Company Shareholder Reports*, 83 FR 29,158, 29,167 n.120, 29,184 (June 22, 2018) ("Adopting Release"). When a management company chooses to provide only a summary schedule, an investor seeking the fund's complete portfolio holdings typically must retrieve that information from the website of the Commission's electronic filing system, EDGAR. *See id.* at 29,167-68 n.123. Similarly, first- and third-quarter portfolio holdings information is typically available only through EDGAR. *Id.* at 29,184.

[1] Rules 30e-1 and 30e-2 apply to registered management companies and unit investment trusts ("UITs"), respectively. For convenience, both types of investment companies are referred to here as "funds."

B. Nature of the Case

Petitioners challenge Rule 30e-3, which the Commission adopted in order to modernize the manner in which funds deliver periodic information to their investors and reduce the costs incurred for printing and mailing reports. The rule permits funds to transmit annual and semi-annual reports by making them and certain other fund information accessible, free of charge, at a website address specified in a paper notice ("Notice") sent to shareholders, provided certain conditions are met, including the prompt provision of paper copies of the full report to all investors who request them. *See* 83 FR 29,159.

C. The Rulemaking Proceeding

1. The Proposed Rule

The Commission proposed Rule 30e-3 on May 20, 2015, as part of a larger package of rules and rule amendments to modernize the reporting and disclosure of information by registered investment companies. *See Investment Company Reporting Modernization*, 80 FR 33,590, 33,626-27 (June 12, 2015). Pursuant to the proposal, immediately after the effective date, funds would have been allowed to begin transmitting reports via a website for any shareholder who provided affirmative or implied consent to such transmission. To obtain a shareholder's implied consent, a fund would have been required to send a single, separate written statement ("Initial Statement") notifying the shareholder of its intent to make future shareholder reports available on its website until the shareholder revoked consent. *Id.* at 33,629. The

Initial Statement would have had to include a toll-free telephone number and a pre-addressed, postage-paid reply form that could be used to request paper reports. *Id.* If the fund received no response within sixty days of sending the Initial Statement, the fund could begin sending Notices in lieu of paper reports. *Id.*

The Commission requested comment on all aspects of the proposed rule, including its interaction with existing means of electronic delivery of information, its impact on the accessibility of shareholder information, the effect on investors that still prefer paper reports or that may be less likely to use the internet, and the details of the conditions in the proposal. *Id.* at 33,627, 33,631-33. After an extended comment period, the Commission adopted a number of the rules and amendments that had been proposed simultaneously with Rule 30e-3. *See Investment Company Reporting Modernization*, 81 FR 81,870 (Nov. 18, 2016). The Commission decided not to adopt Rule 30e-3 at that time, however, because commenters on both sides had raised issues that "merit[ed] further consideration." *Id.* at 81,961.

2. The Investor Advisory Committee Recommendation

In December 2017, the Investor Advisory Committee ("IAC"), an advisory body established by Congress in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, issued recommendations relating to proposed Rule 30e-3. *See 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* (Dec. 7, 2017), *available at* https://www.sec.gov/spotlight/investor-

advisory-committee-2012/recommendation-promotion-of-electronic-delivery-and-development.pdf ("IAC Recommendation"). After summarizing member concerns with the proposed rule's reliance on implied consent, the IAC recommended that the Commission "explore alternative approaches to encourage the transition to electronic delivery" that respect investor delivery preferences and increase the likelihood that investors will see and read disclosure documents. *Id.* at 4. "In the meantime," the IAC recommended that the Commission "explore development of a summary disclosure document for annual shareholder reports that incorporates key information from the report along with prominent notice regarding how to obtain a copy of the full report," and that it subject this proposed disclosure to investor testing and public comment. *Id.* at 2, 4.

3. The Final Rule

After considering over 1,000 comments, as well as the IAC Recommendation, the Commission adopted Rule 30e-3 with various modifications from the proposal on June 4, 2018. 83 FR 29,158. In doing so, the Commission found that "it is appropriate to permit the internet availability of shareholder reports to satisfy transmission obligations, subject to certain conditions including protections for investors who continue to prefer reports in paper form." *Id.* at 29,165. The Commission also modified the proposed rule in a number of respects "to address preservation of investor preferences, cost, and administrability of the rule." *Id.* As the Commission explained, the final rule both modernizes the manner in which

periodic information is delivered to investors and "improve[s] the information's overall accessibility while reducing expenses associated with printing and mailing that are borne by funds, and ultimately, by their investors." 83 FR 29,159, 29,183.

a. The final rule permits funds to choose website transmission of shareholder reports provided they meet three sets of conditions.

i. Funds must make accessible on a website shareholder reports and portfolio information previously available only in separate disclosures.

To rely on Rule 30e-3, a fund must make its current shareholder report publicly accessible, free of charge, at a specified website address. *Id.* at 29,167. In addition to the current report, the fund must post the report for the prior reporting period. *Id.* If either report includes a summary schedule of the fund's investments, the fund must also post its complete portfolio holdings as of the closing of the period covered by that report. *Id.* Unless the fund is a money market fund or small business investment company, it must also post its complete portfolio holdings as of the close of its first and third fiscal quarters. *Id.* Because first and third quarter information was not otherwise required to be sent to investors, the effect of these requirements is to provide investors "easy access to a full year of complete portfolio holdings information in one location" (*id.*) for the first time.

The rule imposes several additional conditions to promote the accessibility of the reports and other materials posted on the specified website. For example, the website address may not simply be the address of the Commission's electronic filing

system. *Id.* at 29,168. Required material must be reachable with a single click or tap, and must be presented in a format or formats convenient for reading online and printing on paper. *Id.* at 29,168, 29,170 & n.156. And readers must be able to permanently retain an electronic copy of the materials free of charge. *Id.* at 29,168.

ii. Funds must send a paper Notice notifying shareholders of the website availability of the report with instructions on how to request paper copies.

Funds relying on Rule 30e-3 also are required to send a paper Notice notifying shareholders of the availability of the report within seventy days of the close of the period it covers. *Id.* at 29,169. The Notice must be in plain English and contain certain information specified in the rule, including: a prominent legend in bold-face type stating that an important shareholder report is available online and in paper by request; a statement that the report contains important fund information including portfolio holdings and financial statements; the website address where the report can be found; and a toll-free telephone number to contact the fund or financial intermediary and instructions describing how a shareholder may request a free paper copy of the report or may elect to receive all future reports in paper or, if applicable, by electronic delivery. *Id.* at 29,169-70.

The Commission determined not to require that Notices include pre-addressed, postage-paid reply cards, as proposed, in light of comments detailing their high cost and low response rate. *Id.* at 29,171. But the rule gives funds the flexibility to include additional methods by which shareholders may communicate their preference to

funds and financial intermediaries, such as via email or website. *Id.* The Commission also urged funds to make it as convenient as possible for shareholders to communicate their preference. *Id.* Furthermore, the Commission announced that staff would review and report back to it on funds' implementation of the Notice requirement so that it could determine "whether any further action should be taken to facilitate investor election of delivery preferences." *Id.*

As in the proposal, the Commission was also mindful to prevent the information about the availability of paper reports from being obscured. After reviewing comments, however, the Commission decided to permit funds (other than UITs) to include in the Notice information from the shareholder report to which it pertains. *Id.* at 29,172. Funds may also include pictures, logos, or similar design elements so long as the design is not misleading and the information is clear. *Id.* The Commission explained that this approach would give funds flexibility to craft Notices that convey information they believe may be particularly informative to their investors, while also encouraging investors to access the shareholder report for more information. *Id.* But any content from the report must be placed after the required information about how to request paper delivery. *Id.* at 29,173. And any Notices that include report content must be filed with the Commission. *Id.*

Like the proposed rule, the final rule permits a Notice to accompany a fund's current summary prospectus, statutory prospectus, SAI, or Notice of Internet Availability of Proxy Materials. *Id.* Under the final rule, a Notice may also

accompany one or more Notices for other funds, an investor's account statement, and in the case of a fund offered in a variable annuity or variable life insurance contract, the contract or the contract's statutory prospectus and SAI. *Id.* at 29,173-74. The Commission concluded that these additional materials would not unduly obscure the Notice because they are personalized to the receiver and "could be effective in alerting a shareholder to the Notice if [they] are likely to be read by investors." *Id.* The Commission, however, declined to allow the Notice to accompany other materials. *Id.*

iii. Funds must promptly comply with ad hoc requests for paper copies of shareholder reports and must send paper copies of all reports to shareholders who elect to receive reports in that manner.

Under Rule 30e-3, shareholders at any time may request individual reports in paper on an ad hoc basis, or elect to receive all future reports in paper. A fund that receives such a request must send a paper copy, free of charge and by U.S. first class mail or other reasonably prompt means, within three business days. *Id.* at 29,174. Moreover, a fund may not rely on the rule with respect to any shareholder that has notified it that he or she wishes to receive all reports in paper. *Id.* at 29,175. A shareholder's request for paper delivery is deemed to apply to all funds held with the same fund complex or financial intermediary (such as a broker). *Id.* at 29,176.

b. The final rule includes an extended transition period to ensure investors receive advanced notice of the change in transmission method and an opportunity to elect to receive paper reports.

Comments regarding the proposal's use of implied consent to website access based on the failure to respond to a single Initial Statement were "mixed." *Id.* at 29,175. Ultimately, the Commission concluded that the Initial Statement "would add unnecessary complexity to the implementation of the rule without a corresponding benefit." *Id.* at 29,182. But the Commission also affirmed the importance of providing investors "sufficient notice of the change in transmission method and sufficient opportunity to express their delivery preference." *Id.* at 29,166.

The Commission therefore decided to replace the Initial Statement with an extended transition period. *Id.* at 29,177. Except for newly formed funds, any fund seeking to rely on Rule 30e-3 before January 1, 2022, must include in every prospectus and annual and semi-annual report sent to investors over the previous two years a prominent disclosure of its intent to rely on the rule and instructions on how shareholders may elect to receive future reports in paper. *Id.* at 29,177-78. Under the rule, funds can begin sending such disclosures on January 1, 2019. *Id.* at 29,176-77. Therefore the earliest any investors will receive a Notice in lieu of a paper report is January 1, 2021. *Id.* at 29,177. And until 2022, most investors who receive a Notice

rather than a paper report will have received six paper notices over two years detailing how they can avoid any interruption in paper deliveries. *Id.* at 29,175.[2]

As the Commission explained, these disclosure requirements "help to mitigate commenters' concerns regarding the use of the Initial Statements as a condition to reliance on the rule." *Id.* at 29,178. The extended transition period will also "provide time for funds, financial intermediaries, and Commission staff to undertake efforts to raise investor awareness of the change in transmission method." *Id.* at 29,175. And the Commission encouraged funds and intermediaries to use additional appropriate means during the transition period to communicate the upcoming change. *Id.* at 29,182.

The Commission concluded that the required disclosures and other educational efforts "should decrease the possibility that an investor will be unaware of the change in transmission method," and that it is appropriate to permit all funds to rely on the rule when the transition period ends. *Id.* at 29,166, 29,175; *see also id.* at 29,188 (even investors in funds that wait until after January 1, 2022 to rely on the rule "may realize

[2] Funds newly offered between January 1, 2019, and December 31, 2020, may rely on the rule starting on January 1, 2021, as long as they provide notice to shareholders starting with their first public offering. 83 FR 29,177. Funds newly offered on or after January 1, 2021, may rely on the rule immediately. *Id.* Although this may result in a shorter notice period, the Commission explained that it "is appropriate because these funds will have been offered to investors solely with the expectation that the fund will rely on the rule." *Id.* at 29,176.

some of the benefit of increased awareness of the changes in the shareholder report delivery regime"); *id.* at 29,195.

c. The Commission explained that website default lowered printing and mailing costs shared by all investors while still accommodating those investors who prefer paper delivery.

In adopting the rule, the Commission noted evidence that a large majority of investors across demographic groups have internet access and are interested in enhanced availability of fund information online. *Id.* at 29,165 & nn.96-97, 29,161 & n.42. At the same time, the Commission acknowledged commenters' concerns that a "significant minority" of investors still prefer paper delivery and that certain demographic groups may be less likely to use the internet. *Id.* at 29,165 n.96, 29,174-75, 29,193. The Commission thus incorporated into the final rule "appropriate protections for those who lack internet access or who simply prefer paper reports." *Id.* at 29,165-66.

The Commission further explained that some level of "status-quo" bias exists regardless of the default. *Id.* at 29,183 n.332. Thus, a paper delivery default likely results "in more investors receiving paper copies than may be truly reflective of preferences and thus higher shared costs associated with that excess paper distribution." *Id.* at 29,186. Moreover, an "inefficiently low proportion" of investors may opt into electronic delivery because those who do not still benefit from the cost savings generated by others who do. *Id.* at 29,183 n.332. Similarly, the Commission acknowledged the possibility that, despite Rule 30e-3's additional protections, some

investors that prefer paper reports may not communicate that preference. *Id.* at 29,193. The difference, however, is that when paper delivery is the default, status-quo bias increases costs for all investors. *Id.* at 29,183 & n.332. In the Commission's view, a website availability default had the advantage that "investors in the fund will not share any unnecessary printing and mailing costs for those investors" who fail to express their delivery preference. *Id.* at 29,186.

The Commission acknowledged 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. *Id.* at 29,193. But the Commission explained that commenters were divided on the rule's impact on readership and that it lacked data to resolve the dispute. *Id.* at 29,193 & n.453. Thus, after considering the tradeoffs, the Commission made a policy judgment to permit use of a default that "reduce[s] the printing and mailing costs shared by investors while still accommodating the interests of those investors who prefer paper copies." *Id.* at 29,183.

d. The Commission considered the potential benefits and costs of Rule 30e-3 as well as its effects on efficiency, competition, and capital formation.

The Commission engaged in an in-depth economic analysis, quantifying the economic effects of Rule 30e-3 where practicable and otherwise providing a qualitative assessment. It concluded that Rule 30e-3 will improve overall investor

access to periodic fund information, while reducing printing and mailing expenses borne by funds and, ultimately, fund investors. *Id.* at 29,183.

The Commission explained that several aspects of Rule 30e-3 may improve access to fund information. First, the rule enhances the electronic accessibility of portfolio investment information by making a full year of portfolio holdings available in one location, which may increase the likelihood that current and potential future fund investors review that information. *Id.* at 29,187. Second, to the extent that some funds do not currently post shareholder reports on their websites, the rule may make shareholder reports more accessible to the public. *Id.* at 29,188. Third, the rule has the potential "to significantly improve the communication of [fund] information to investors" by, for example, "expanding the possibilities for innovative visual displays and layered disclosure," which would enable investors to click through to more detailed disclosure on a topic of interest. *Id.* at 29,161, 29,182. Permitting inclusion of visual design elements such as pictures and logos, as well as information from the shareholder report, "could facilitate the addition of content by funds that attracts additional investor attention to the Notice" and "may result in investors who may otherwise not review the shareholder report seeing useful information from such reports." *Id.* at 29,188. Increased use of reports and portfolio information could, in turn, "result in more informed investment decisions and an increase in competition among funds for investor capital," as well as "more efficient allocation of capital across funds and other investments." *Id.* at 29,188.

As noted above, the Commission acknowledged that some investors who prefer paper delivery may not communicate that preference. *Id.* at 29,193. That subset of investors may be less likely to review shareholder reports and portfolio information, potentially decreasing "their ability to efficiently allocate capital across funds and other investments" as well as "competition among funds for investor capital." *Id.* The Commission noted that these potential effects may be attenuated to the extent that investors rely on other sources and disclosures to obtain information about funds. *Id.* Moreover, the Commission explained that it sought to mitigate these potentially adverse effects through provisions such as the Notice requirement and the extended transition period. *Id.* at 29,193-94.

With respect to fund expenses, the Commission estimated that Rule 30e-3 would result in aggregate annual net cost savings after the first year of $141.4 million, or approximately 55 percent of current annual printing and mailing costs. *Id.* at 29,187. The Commission expected that these savings "will generally be fully passed along to investors," except perhaps in circumstances such as where the fund is operating under an expense limitation arrangement. *Id.* at 29,183; *see also id.* at 29,186-87. This reduction in expenses could result in "a net positive effect on the level of capital invested in funds," and could have "further capital formation benefits" to the extent that it has a positive effect on fund performance and thereby attracts new investors or additional capital from existing investors. *Id.* at 29,186.

The Commission also recognized that in reducing printing and mailing expenses, Rule 30e-3 may adversely affect the paper and mail delivery industries. *Id.* at 29,184, 29,194; *see also id.* at 29,160, 29,164 n.86. It noted, however, that commenters "did not provide specific data on or estimates of the rule's potential impact on those industries," and that a variety of other factors may contribute to a continued decrease in demand for paper reports in the future. *Id.* at 29,194. The Commission explained that it was adopting Rule 30e-3 "notwithstanding these potential impacts" because it will modernize the delivery of shareholder reports, generating savings for fund investors and increasing overall accessibility of the reports and related information. *Id.*

STANDARD OF REVIEW

The Commission's rule may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). The Court reviews the Commission's analysis supporting the rule, including its economic analysis, under the arbitrary and capricious standard, which is "[h]ighly deferential" and "presumes the validity of agency action." *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1228 (D.C. Cir. 2007) (quotation omitted; alteration in original); *see also Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 369 (D.C. Cir. 2014), *overruled on other grounds by Am. Meat Instit. v. U.S. Dep't of Agriculture*, 760 F.3d 18 (D.C. Cir. 2014).

SUMMARY OF ARGUMENT

1. The petition for review should be denied because Consumer Action has not established that it has standing and Industry Petitioners fall outside the zone of interests protected by the securities laws. Consumer Action fails to identify a specific member injured by Rule 30e-3 and makes only general and unsubstantiated allegations of harm. Industry Petitioners' declarations suffer from many of the same defects. Moreover, propping up demand for paper is entirely unrelated to the purposes of the securities laws.

2. The Commission considered the relevant factors in adopting Rule 30e-3. It reasonably determined that Rule 30e-3 will increase the accessibility of fund information and reduce fund printing and mailing expenses, while ensuring that the declining number of investors who prefer paper delivery or lack internet access can still receive paper reports. The Commission considered the rule's potential adverse effects on this subset of investors and explained its conclusions that the measures it had incorporated adequately mitigated those effects and that the rule's overall benefits warranted adoption.

3. The Commission considered the potential economic consequences of Rule 30e-3, analyzing empirical data where available and providing a comprehensive qualitative analysis of the rule's effects. It provided an extensive qualitative analysis of the costs associated with the toll-free call requirement and provided specific estimates of the cost of home printing, while reasonably explaining that it could not quantify the

aggregate incremental cost impact of such printing. Neither the APA nor this Court's case law required more.

The Commission also reasonably concluded that the data was insufficient to determine the extent to which investors currently review reports, let alone how readership rates might change under Rule 30e-3. The Commission acknowledged the possibility that some investors may be less likely to review their reports under Rule 30e-3. But it observed that by enhancing the accessibility of fund information, the rule could also potentially increase investor review of that information. And although the Commission made an inadvertent error in estimating the cost of providing paper reports upon request, the error was inconsequential to the rationale for the rule.

4. The Commission satisfied its obligation under the APA to consider the alternative approach recommended by the IAC. It described steps it was taking to explore development of a summary shareholder report and drew from that recommendation in allowing the Notice to include information from the report. The Commission also addressed the concerns the IAC raised about the proposed rule.

5. The final rule is a logical outgrowth of the proposed rule. The Commission requested comment on whether any of the proposed rule's conditions—which included the Initial Statement and reply card requirements—were inappropriate. Many commenters addressed the merits of those requirements, with some arguing that one or both should be eliminated. Moreover, the Commission reasonably determined that the final rule is more protective of investor preferences than the

proposal, thereby undermining any claim of prejudice from the changes petitioners challenge.

ARGUMENT

I. Consumer Action failed to satisfy its burden to establish standing and Industry Petitioners fall outside the zone of interests protected by the securities laws.

A. Consumer Action has not established that it has standing to challenge Rule 30e-3.

Consumer Action claims "associational standing" on behalf of its members. Br. 18. It must therefore establish, through "specific facts" supported by "affidavit or other evidence," that "at least one of its members would have standing to sue in his own right." *Sierra Club v. EPA*, 292 F.3d 895, 898-99 (D.C. Cir. 2002). That requires a showing of "an injury in fact" that is "actual or imminent, not conjectural or hypothetical," that is causally connected to the Commission's adoption of Rule 30e-3, and that is "likely" to be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

A petitioner is generally required to meet its burden to establish standing in its opening brief. *See Ass'n of Flight Attendants-CWA v. U.S. Dep't of Transp.*, 564 F.3d 462, 464, 466 (D.C. Cir. 2009); D.C. Cir. R. 28(a)(7). Consumer Action has failed to comply with that "procedural requirement[]." *Sorenson Commc'ns, LLC v. FCC*, 897 F.3d 214, 224 (D.C. Cir. 2018). Its opening brief and declaration simply assert that unnamed members invest in mutual funds and prefer paper delivery. *See* Br. 17;

McEldowney Declaration. But a petitioner claiming associational standing "must specifically identify members who have suffered the requisite harm." *Chamber of Commerce v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011) (quotation omitted). Because Consumer Action did not do so, "it lacks standing to raise this challenge." *Id.*

Consumer Action's failure to establish standing cannot be excused on the ground that standing is "self-evident." *Ass'n of Flight Attendants-CWA*, 564 F.3d at 466. The Commission's acknowledgement of possible "adverse impacts" of the rule (Br. 16) does not relieve Consumer Action of the burden to demonstrate that one of its members specifically suffered a cognizable injury. Consumer Action's executive director asserts that "many" of its members "prefer a choice to have paper communications" and "depend on (or prefer) access to paper materials." McEldowney Declaration. Rule 30e-3, however, expressly preserves investors' ability to elect paper delivery of shareholder reports by making a toll-free telephone call. To the extent not receiving a paper copy results in some (unspecified) injury to a member, the member's failure to request one will have caused it. *See Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 177 (D.C. Cir. 2012) (a "self-inflicted harm" caused by a party's "voluntar[y]" decision does not satisfy standing requirements).

Consumer Action also vaguely alleges that Rule 30e-3 will harm their members' ability to "access" and "understand" important shareholder information. Br. 17; *see also* McEldowney Declaration (alleging that unnamed members "wish to receive" paper reports "without incurring" the unspecified "burdens imposed by" the rule).

But this Court has repeatedly held that "general allegations of injury are insufficient." *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1207 (D.C. Cir. 2013). Standing requires "evidence of the imminent nature of a *specific* harm," and conclusory allegations resting on multiple unsubstantiated assumptions—here, that a specific member invests in a specific fund, and that this member is likely to suffer a specific injury caused by Rule 30e-3 rather than by the fund's independent decisions or the member's own failure to make a toll-free call—do not suffice. *Swanson Group Mfg. LLC v. Jewell*, 790 F.3d 235, 242 (D.C. Cir. 2015) (quotation omitted).[3]

B. Industry Petitioners lack a cause of action because they fall outside the zone of interests protected by the securities laws.

For many of the same reasons, Industry Petitioners have also failed to establish standing.[4] But the Court need not reach that issue because Industry Petitioners plainly lack a "legislatively conferred cause of action" permitting them to bring this challenge. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014); *see NetCoalition v. SEC*, 715 F.3d 342, 347 (D.C. Cir. 2013) ("[A] federal court has

[3] Petitioner The Coalition for Paper Options similarly fails to identify a single injured consumer-group member and relies on conclusory allegations of harm. *See* Runyan Declaration.

[4] The Coalition for Paper Options and American Forest & Paper Association do not identify any injured industry members. *See* Runyan Declaration; Poling Declaration. Nor do they or the other Industry Petitioners present specific facts substantiating their bare allegations of harm. For example, no evidence establishes that any Industry Petitioner or member company supplies paper to a fund that is likely to use the paper in shareholder reports. *See Lujan*, 504 U.S. at 561-62 (standing is "substantially more difficult" to establish when petitioner is not "the object of the government action").

leeway to choose among threshold grounds for denying audience to a case on the merits.") (quotation omitted).

Industry Petitioners have a cause of action only if they can demonstrate that "the interest [they] seek[] to protect is arguably within the zone of interests to be protected or regulated by" the securities laws. *Grocery Mfrs. Ass'n*, 693 F.3d at 179 (quotation omitted). Although this test is "not especially demanding," *Lexmark*, 572 U.S. at 130 (quotation omitted), Industry Petitioners cannot meet it because their interest in propping up demand for paper-related products and services is "so marginally related to or inconsistent with the purposes implicit in the [securities laws] that it cannot reasonably be assumed that Congress intended to permit th[is] suit." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012).

Industry Petitioners contend that Rule 30e-3 "will necessarily reduce the demand" for the paper-related products and services they provide. *See* Poling Declaration; Freeman Declaration; Winterhalter Declaration. But the mere fact that Rule 30e-3 may adversely affect Industry Petitioners' business interests is not sufficient. *See, e.g.*, *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1256-58 (D.C. Cir. 2014), *rev'd on other grounds*, *Michigan v. EPA*, 135 S. Ct. 2699 (2015). And they "make[] no attempt to show that the Congress intended [the securities laws] to protect interests of [this] sort, either directly or as a proxy for the [public interests] for whose protection [those laws were] presumably passed." *Sierra Club*, 292 F.3d 903.

In *Grocery Manufacturers*, for example, the Court held that food producers could not challenge an EPA decision raising the permissible ethanol content in gasoline based on the resulting increase in the price of corn, even though a related statute directed EPA to consider food prices in setting renewable fuel mandates. 693 F.3d at 179. And this Court has held that companies that supply technologies and services for treating hazardous waste fall outside the zone of interests of the Resource Conservation and Recovery Act, which governs the handling of such waste. *See Sierra Club v. EPA*, 755 F.3d 968, 976 (D.C. Cir. 2014); *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 924-26 (D.C. Cir. 1989). Similarly, there is no reason to assume that Industry Petitioners' interest in maintaining demand for paper-related products and services falls within the zone of interests of the securities laws, which reveal no concern for that interest at all. Indeed, many of the policies that petitioners themselves assert the Commission should have considered as beneficial to investors—for example, expanded use of summary disclosures and opt-in electronic delivery—would adversely affect Industry Petitioners' business interests, confirming just how "marginally related" those interests are to the ICA's purposes.

II. The Commission's policy judgment to enable funds to choose as their default a transmission method that reduces costs incurred by all investors while protecting investor preferences was reasonable.

In arguing that the rule is unnecessary to achieve the Commission's purpose, petitioners misconstrue the Commission's policy goals. And, ultimately, petitioners' disagreement with the Commission's policy choice is insufficient to overturn the

Commission's judgment. *See Nat'l Ass'n of Mfrs.*, 748 F.3d at 368. It suffices that the Commission's assessment was "reasonable and reasonably explained." *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009).

A. The Commission's reasonable basis for adopting Rule 30e-3 is not undermined by investors' ability to opt into electronic delivery.

Petitioners contend (Br. 20-21) that Rule 30e-3 is "unnecessary" because investors can choose to receive shareholder reports electronically, and already do so at rates that approximately match the percentage of investors that prefer electronic delivery. But the Commission did not adopt Rule 30e-3 to correct a "misalignment" between electronic delivery preferences and electronic delivery rates, or because funds currently lack the ability to make shareholder reports available in electronic form. Br. 10, 21. Rather, the Commission made a policy judgment that funds and their investors should "only incur printing and mailing costs as necessary to accommodate those investors opting for paper." 83 FR 29,186. Petitioners' observation that many investors already have the option to elect electronic delivery does not render that policy judgment unreasonable.

Nor does that policy judgment arbitrarily "misalign[]" investor preferences. Br. 21. The rule does not force any investors to accept a transmission method they do not prefer. It simply allows funds to use a different default transmission method, which investors may decline by making a single, toll-free telephone call. To the extent some of the shrinking number of investors who prefer paper reports do not take that

step, the Commission considered the adverse effects that could result and concluded that the rule was nonetheless appropriate. "The Commission's explanation was rational, and that is enough." *Nat'l Ass'n of Mfrs.*, 748 F.3d at 368 (quotation omitted).

Moreover, as the Commission explained, although the rates petitioners cite suggest that "electronic delivery is used for a significant portion of shareholder reports," this information was not sufficient to estimate the percentage of *funds* that solely or predominantly rely on electronic delivery—and thus would be less likely to rely on Rule 30e-3—because funds are not required to report the extent to which they rely on electronic delivery. 83 FR 29,184. In any event, the fact that electronic delivery is steadily growing supports the reasonableness of modernizing the shareholder report delivery framework to reflect declining shareholder demand for paper reports. *See id.*

Petitioners similarly err in arguing (Br. 23-24) that a website availability default is "unsuitable" because the Commission and the Internal Revenue Service require affirmative consent to electronic delivery of certain investment and tax documents. As the Commission observed, electronic delivery is distinct from Rule 30e-3's notice and access approach in that electronic delivery involves emailing "documents or website links thereto . . . directly to an investor's individual email address." 83 FR 29,162 n.56. Rule 30e-3 does not alter the affirmative consent requirement for funds that continue to use electronic delivery. *Id.* In any event, the Commission reasonably explained that, in light of data on current internet access and use and "the

Commission's experience" in the two decades since issuing the electronic delivery guidance, it was appropriate to permit funds to make notice and access the default transmission method for shareholder reports. *Id.* at 29,159, 29,165.

B. The Commission reasonably considered the relevant factors in adopting Rule 30e-3.

In arguing that Rule 30e-3 runs afoul of the Commission's statutory obligations, petitioners focus exclusively on the obligation to protect investors. *See, e.g.*, Br. 19. But while investor protection is one of the interests the Commission considers in adopting rules under the ICA, *see, e.g.*, 15 U.S.C. 80a-1(b), 80a-29(e), it is not the only relevant interest. For example, in determining whether an action is consistent with the public interest, the Commission must also consider whether it "will promote efficiency, competition, and capital formation." *Id.* 80a-2(c); *see also id.* at 80a-37(a) (Commission may issue such rules "as are necessary or appropriate to the exercise of the powers conferred upon [it] elsewhere in [the Act]."). And the Commission may strike a balance between providing investor protections and other interests as long as it provides a "reasoned analysis." *Lindeen v. SEC*, 825 F.3d 646, 657 (D.C. Cir. 2016).

Moreover, petitioners distort the obligation to protect investors, arguing that the Commission was required to prioritize the convenience of the subset of investors who prefer paper reports over all other interests. But it is the Commission, not petitioners or courts, that has discretion under the securities laws "to determine how

best to protect the public and investors." *Id.* at 654. The Commission here reasonably considered benefits to investors as a whole.

1. The Commission reasonably determined that the final rule adequately mitigated any adverse effects Rule 30e-3 might have on a subset of investors.

Petitioners' argument (Br. 22-23) that the Commission disregarded commenters' concerns about the potential adverse effects on certain investors is meritless. The Commission thoroughly considered the comments it received, explained the ways in which it had modified the proposed rule to address them, and reasonably determined that the protections it incorporated were adequate.

1. The Commission acknowledged comments indicating that a "significant minority" of investors still prefer paper reports and that "internet access and use among Americans [is] not universal." 83 FR 29,162, 29165 n.96. At the same time, it pointed to recent findings showing a "significant increase in the use of the internet as a tool for disseminating financial information among all age groups," including findings that 95 percent of U.S. households owning mutual funds have internet access and that investors increasingly use the internet for financial purposes and are interested in having fund information be made available online. *Id.* at 29,165 & nn.96-97; *see also id.* at 29,161 & nn.42, 44.[5]

[5] For example, a 2011 survey found that 44.3 percent of respondents preferred electronic transmission of fund information, compared to 33.3 percent who preferred a printed copy in the mail. 83 FR 29,165 n.96; 80 FR 33,627 n.293. Petitioners note

(Footnote continued on next page…)

Contrary to petitioners' assertion (Br. 23; Amicus Br. 14), the Commission did not assume that internet access alone implies a *preference* to receive shareholder reports over the internet. Rather, it found that, in light of increasing internet access and use, permitting internet availability of reports subject to protections for investors who prefer paper was appropriate. *Id.* at 29,165. And it recognized that other data suggests that "many investors would prefer enhanced availability of fund information on the internet." *Id.* at 29,165. These findings both undermine petitioners' claim that investors will be unable or unwilling to view reports online and support the Commission's policy decision to permit use of website availability as a default (that may be declined).

Nor did the Commission have to "explain away" (Br. 23) studies purporting to find higher preference for paper delivery—though it did note limitations of the FINRA study petitioners cite, *see* 83 FR 29,161 n.44—because Rule 30e-3 is reasonable regardless. Far from "ignor[ing]" the existence of investors who prefer paper reports or lack internet access (Br. 23), the Commission considered it "critical" that they "continue to receive disclosure through means that are convenient and

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(Br. 21) that 49.8 percent of investors in this survey "want[ed] some form of printed, mailed report," but that figure sheds no light on investors' relative preference for paper delivery of full reports versus website availability under Rule 30e-3. It includes the investors who preferred a print summary with a link to the full report online—an option many may receive under Rule 30e-3. And the same survey found that approximately 80 percent of investors would like fund information to be made available electronically either in addition to or instead of in paper. *Id.*

accessible for them," and detailed the provisions of the rule intended to preserve their ability to do so. *Id.* at 29,165-66.

2. The Commission also acknowledged and reasonably addressed commenters' concerns that investors might not understand how to request paper reports. *See id.* at 29,165 & n.98. The additional disclosures required during the extended transition period were specifically designed to "mitigate concerns that some investors might not fully understand what they need to do to continue to receive paper reports." *Id.* at 29,166. This period also gives funds and the Commission additional time to educate investors. *Id.* Moreover, the Commission required that Notices and transition period disclosures "be in plain English so that investors can easily understand" the instructions for electing paper delivery. *Id.* at 29,166, 29,169. And the Commission took steps to make it easier for investors to elect paper delivery, allowing the election to be made at the account level, permitting funds to include multiple methods to communicate investor preferences, and encouraging funds to make the election process as convenient as possible. *Id.* at 29,193.

3. Finally, the Commission acknowledged and reasonably addressed the concern that Rule 30e-3 might reduce the likelihood that certain investors will review shareholder reports. *See id.* at 29,193. As already discussed, it took numerous steps to ensure that investors who prefer paper reports continue to receive them. It also explained that one "critical" provision intended to mitigate that risk is the requirement that the Notice "communicate the importance of the information that would be made

available on the Web site." 80 FR 33,627; *see also* 83 FR 29,170. And the Commission modified the proposed rule to give funds the flexibility to include content from the shareholder report in the Notice, reasoning that "such additional disclosures could encourage investors to access their reports." *Id.* at 29,170; *see also id.* at 29,188 (this change "may result in investors who may otherwise not review the shareholder report seeing useful information from such reports").

2. The Commission reasonably determined that the extended transition period and other changes in the final rule would save costs and enhance investor protection.

Petitioners erroneously argue (Br. 24-25) that the elimination of the proposed Initial Statement and reply card requirements and adoption of an extended transition period impermissibly "diminishe[d]" investor protection "in the interests of saving costs for investment funds." But cost savings to funds are a cognizable benefit. *See Lindeen*, 825 F.3d at 657. And the cost savings from these policy choices accrue to investors as well. *See supra* 6. In any event, the Commission reasonably determined that the final rule was even more protective of investors.

Under the proposed rule, investors would have received a single notice giving them sixty days to avoid interruption in paper delivery. After considering comments, the Commission determined that the Initial Statement requirement was unnecessarily costly and complex and that an extended transition period with enhanced disclosures was a "more appropriate and effective" and "less burdensome" method of providing investors with advance notice of the change in transmission format. 83 FR 29,177,

29,182. Under this modified approach, investors in mutual funds that intend to rely on the rule before January 1, 2022, will receive six notices over a two-year period alerting them to the upcoming change and describing how they can elect paper delivery before the fund begins relying on the rule. *Id.* at 29,175.

Petitioners do not dispute that many investors will receive "considerably more notice of the change in transmission method than they would have under the proposed rule." 83 FR 29,166; *see also id.* at 29,176 n.240. They nonetheless speculate (Br. 25) that the final rule "increas[es] the odds that investors will not appreciate the impending change." But there is no evidence that one free-standing mailing would be more effective than prominent disclosures on the covers of multiple fund prospectuses and shareholder reports sent over two years, and the Commission reasonably concluded to the contrary. *See id.* at 29,166; *see also id.* at 29,162 (citing concerns that the Initial Statement "could be inadvertently discarded or missed by investors").

Petitioners also object (Br. 24-25) to the Commission's decision to eliminate the proposed requirement that funds include in Notices a postage-paid, pre-addressed reply card. But they fail to acknowledge that "[c]ommenters generally opposed the reply card requirement" on the ground that "reply cards have a low response rate that does not justify their cost." *Id.* at 29,171 & n.172 (citing estimated return rates "as low as 2%"). And many commenters argued that a toll-free telephone number would be an "equally effective" and "more cost-effective" means of expressing investor

preferences. *Id.* at 29,171. The Commission explained that it was "persuaded" that inclusion of a reply card was not justified. *Id.* It thus retained the toll-free call requirement, while also permitting the Notice to include additional methods of communication such as "email addresses" and "dedicated web pages." *Id.* Petitioners claim (Br. 25) that this policy choice harms investors, but offer no evidence that reply cards are cost-effective or explain why it is in the interests of investors to deplete fund assets on an expensive and ineffective form of communication.

The Court should likewise reject petitioners' misguided argument (Br. 25) that the Commission conceded Rule 30e-3's inadequacy by encouraging funds to make the toll-free telephone menus they set up as easy to navigate as possible and informing funds that staff will be monitoring their implementation of the rule to determine whether further action is necessary. *See* 83 FR 29,171. They suggest that the Commission should have imposed enforceable limitations on the number of customer service representatives or telephone menus an investor must engage with. But the Commission reasonably decided to evaluate how effectively funds facilitate investor preference election before attempting to micromanage their call systems. *Id.*

Petitioners also misconceive the purpose of a Request for Comment that the Commission issued when it adopted Rule 30e-3. *See id.* at 29,159. Contrary to petitioners' suggestion (Br. 26), it was not intended to satisfy the Commission's obligation to provide notice and comment on Rule 30e-3. The proposed rule had already elicited over 1,000 comments, and petitioners' objections to the notice it

provided are meritless. *See infra* Part V.[6] Nor did the Commission consider the Request an additional "protection" (Br. 26) for investors affected by Rule 30e-3. Its purpose was to gather investor input on ways to improve fund disclosure in general. *See Request for Comment on Fund Retail Investor Experience and Disclosure*, 83 FR 26,891 (June 11, 2018). It did not foreclose the Commission from moving ahead with a specific rule on which it had received extensive comments. *See Taylor v. FAA*, 895 F.3d 56, 68 (D.C. Cir. 2018) (an agency "need not solve every problem before it in the same proceeding") (quotation and alteration omitted).

3. The Commission reasonably considered the costs and benefits of Rule 30e-3 to investors.

Contrary to petitioners' assertion (Br. 27-29), the Commission reasonably addressed the "burdens and costs" Rule 30e-3 may impose on investors who would like to continue receiving paper reports, *see infra* 40-43, reasonably concluding that the rule's benefits justify these costs. Petitioners fail to rebut the Commission's conclusion that the rule would improve accessibility of fund information—including by consolidating previously disparate reports and portfolio information on a single website—and that this "may result in greater investor review of that information," which "could result in more informed investment decisions." 83 FR 29,187-88. And while they claim (Br. 28) the Commission was unable to identify any other "tangible

[6] For that reason, *U.S. Steel Corp. v. EPA*, 595 F.2d 207 (5th Cir. 1979), cited at Br. 26, is inapposite.

benefits" to investors, the Commission explained that investors as a whole will benefit from the expected reduction in fund printing and mailing costs. *Id.* at 29,183.

Petitioners respond (Br. 29) that the annual cost savings estimated by the Commission are "negligible" when spread across all funds and fund investors.[7] Rather than ignore that argument, as petitioners claim, the Commission specifically acknowledged it, *id.* at 29,163 & n.71, 29,187 n.372, and its discussion of cost savings demonstrates why it is misleading. As the Commission explained, those savings "will not necessarily be distributed uniformly across all funds that choose to rely on [Rule 30e-3]." *Id.* at 29,185. Funds with lower printing costs—for instance, those that deliver more of their reports electronically—will realize smaller net cost savings, and vice versa. *Id.* For that reason, simply averaging the savings across all funds does not prove that the more than 50 percent reduction in aggregate annual fund printing and mailing costs estimated to result from the rule (*id.* at 29,187) is a negligible benefit.

III. The Commission satisfied its obligation to consider and evaluate the potential economic consequences of Rule 30e-3.

As discussed below, the Commission fulfilled its obligation to meaningfully consider the potential economic consequences of Rule 30e-3. Petitioners' scattershot arguments attempting to show that the Commission's economic analysis suffers from

[7] The actual average savings per fund is more than double petitioners' misleading estimate, which uses obsolete figures from the proposal and inflates the denominator with funds that do not rely on the rule and thus could not reasonably expect to obtain any savings. *See* 83 FR 29,196.

the same defects the Court identified in *Business Roundtable*, 647 F.3d 1144, do not withstand scrutiny.

A. The Commission reasonably considered the costs associated with the toll-free call requirement and possible home printing of shareholder reports.

Petitioners contend that the Commission erred in engaging in a qualitative rather than quantitative analysis of certain costs of compliance with the final rule. But neither the APA nor this Court's case law requires the Commission to quantify every potential cost and benefit of its actions. To the contrary, the Commission "need not—indeed cannot—base its every action upon empirical data" and "may be entitled to conduct a general analysis based on informed conjecture." *Chamber of Commerce v. SEC*, 412 F.3d 133, 142 (D.C. Cir. 2005) (quotation and alteration omitted). Thus, when the Commission "d[oes] not have the data necessary to quantify precisely" a particular cost, a qualitative discussion is sufficient as long as the Commission "articulate[s] a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Lindeen*, 825 F.3d at 658 (quotation and alterations omitted); *see also Nat'l Ass'n of Mfrs.*, 748 F.3d at 369; *Investment Co. Inst. v. CFTC*, 720 F.3d 370, 377, 379-80 (D.C. Cir. 2013). The Commission's consideration of the costs associated with both the toll-free call requirement and home printing of reports meets that standard.

1. Petitioners' assertion (Br. 32) that the Commission made "no reference at all to the costs" associated with the toll-free call requirement ignores the Commission's

specific discussion of those costs. The Commission recognized that "funds and intermediaries may incur costs to implement and maintain systems to record shareholder preferences for paper delivery and requests for paper copies." 83 FR 29,191. Noting the similarities between the rule's approach and certain existing requirements, however, the Commission predicted that funds would likely leverage their "existing systems" for tracking electronic delivery preferences. *Id.* & n.417; *see also id.* at 29,179. As the Commission explained, it lacked data to estimate the incremental costs necessary to update these systems, which will vary across funds and intermediaries. *Id.* at 29,191. As for the cost to investors, the Commission recognized that they must take the affirmative step of calling a toll-free number in order to request paper reports, which is why it urged funds to make that process as convenient as possible. *Id.* at 29,171.

Petitioners erroneously contend (Br. 27, 32-33) that the Commission was required to do more, suggesting that the incremental costs funds would incur fielding toll-free calls and the "cost of time" investors will spend on those calls "are not difficult to estimate." But the Commission requested comment on the rule's costs, *see* 80 FR 33,672, and 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. *See Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 549 (D.C. Cir. 2006) ("[I]ssues not raised in comments before the agency are waived and this Court will not consider them.") (quotation omitted). Given the flexibility provided to individual

funds to design their call systems and the uncertain baseline of existing systems, the Commission reasonably determined to assess these costs on a qualitative basis. Petitioners pluck numbers out of thin air to illustrate what a "hypothetical calculation" might have looked like (Br. 33), but they cite no authority that required the Commission to do the same. And, in any event, their calculation erroneously assumes that funds will require all new resources to handle calls under Rule 30e-3.

2. There is similarly no merit to petitioners' argument (Br. 33-34) that the Commission failed to adequately consider the costs associated with increased home printing of shareholder reports. The Commission explicitly acknowledged that "some investors may incur printing costs due to manually printing specific documents of their choosing," and provided specific estimates of the cost to print individual reports. 83 FR 29,194 & n.461. The Commission concluded, however, that "[i]t is not clear how many shareholders will manually print shareholder reports, and thus, what the aggregate incremental cost impact on shareholders will be." *Id.* at 29,194 n.461.

This discussion satisfied the Commission's obligation "to apprise itself—and hence the public and the Congress"—of this potential effect of Rule 30e-3. *Chamber of Commerce*, 412 F.3d at 144. Indeed, the Commission's analysis mirrors that required in *Chamber*, where the Court accepted that data limitations may have prevented the Commission from estimating a rule's "aggregate cost" to the entire fund industry, but found that the Commission should have estimated the cost to an "individual fund." 412 F.3d at 143-44.

Petitioners suggest (Br. 33-34) that the Commission should have assumed, based on a 2007 Commission release, that ten percent of investors will print reports at home. But in discussing this estimate in the Adopting Release, the Commission reasonably recognized that printing costs for shareholder reports and the proxy materials that were the subject of the 2007 release may differ. 83 FR 29,194 n.461. Petitioners provide no evidence to call this into question; nor do they offer any other reason why the Commission should have assumed the 2007 figure would accurately reflect investor behavior over a decade later with respect to different materials.

Petitioners also mistakenly apply this estimate to all 95.8 million fund investors (Br. 34), overlooking the fact that not all funds will rely on the rule and that many of the investors in funds that will rely on it have already elected electronic delivery and thus will not face any new home printing costs. These unfounded assumptions lead them to conclude that there are millions of investors who will be unwilling or unable to make a toll-free call but will go through the trouble of printing reports at home. That defies common sense. Given the absence of reliable data on key variables, the Commission's determination that it was unable to quantify aggregate home printing costs "was reasonable." *Nat'l Ass'n of Mfrs.*, 748 F.3d at 369.

B. The Commission reasonably analyzed Rule 30e-3's likely economic benefits.

In arguing (Br. 34-39) that the evidence contradicts the Commission's conclusions about Rule 30e-3's likely economic benefits, petitioners mischaracterize both the evidence and the Commission's analysis.

1. Petitioners incorrectly assert (Br. 35) that the Commission failed to account for the impact of potential overlap between funds it expects will rely on Rule 30e-3 and those that already make shareholder reports available online pursuant to Rule 498. The Commission explicitly estimated in the proposal that all of the funds that already post shareholder reports online consistent with Rule 498 will rely on Rule 30e-3, and that these funds will account for ninety percent of the funds that will rely on Rule 30e-3. 80 FR 33,678 n.800. No commenter questioned these estimates. 83 FR 29,196.

Petitioners' assertion that the Commission overstated Rule 30e-3's potential benefits because many funds already post shareholder reports online rests on an erroneous premise. As in the proposal, the Commission estimated that ninety percent of funds that *will rely on* Rule 30e-3—not ninety percent of the total number of funds, as petitioners contend (Br. 34)—currently post shareholder reports consistent with Rule 498. *Id.* Thus, ten percent of the funds that the Commission estimates will rely on Rule 30e-3 do not currently post reports online, and their shareholders will benefit from increased accessibility of reports. 83 FR 29,188, 29,196. The Commission

recognized that the funds already relying on Rule 498 "will likely experience smaller benefits of increased access and review of fund information," *id.* at 29,188, but correctly noted that these funds will still benefit from reduced printing and mailing costs and increased accessibility and review of portfolio information. *Id.* Petitioners identify no basis to second guess these predictive judgments. *See Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 374 F.3d 1251, 1260-61 (D.C. Cir. 2004).[8]

2. Petitioners' assertion (Br. 35-36) that the Commission's economic analysis made unfounded claims of increased report readership from the rule improperly conflates the Commission's findings. As discussed above, the Commission's finding of increased accessibility to, and review of, shareholder reports was limited to those funds not already posting them online. And its further findings of increased accessibility and review of fund information were focused on newly available portfolio information. *Id.* at 29,187-88. Petitioners do not dispute that investors in funds that rely on the rule will have access to new and more comprehensive portfolio information in one online location.

The Commission also recognized the possibility that some investors—particularly those who prefer paper copies—might be less likely to review reports

[8] Petitioners' confusion may stem from the Adopting Release's reference (83 FR 29,196) to the "proposed estimate" of the percentage of funds that post shareholder reports online. As made clear in the proposal, the Commission estimated that ninety percent of all funds currently eligible to do so—*i.e.*, open end funds—post reports online pursuant to Rule 498.

under the rule. *Id.* at 29,193. The Commission explained that the evidence was at best mixed as to how Rule 30e-3 would affect report readership, *id.* at 29,193 n.453, but that it nonetheless was adopting the rule because of its cost savings and accessibility benefits, *id.* at 29,194.

Moreover, petitioners' estimate that 34 percent of investors who prefer paper delivery will not elect it (Br. 36) is flawed. It assumes 49 percent of all investors prefer the current paper default, but the 2011 investor survey found that only 33.3 percent preferred paper delivery of full reports. The remaining 16.5 percent of investors preferred to receive a print summary with a link to an online report, which funds may now provide under Rule 30e-3. *See supra* 32 n.5. Thus, according to the 2011 survey, the number of investors who prefer the current paper default is considerably lower than petitioners estimate and is likely even lower today given investor preference trends.[9]

Petitioners also appear to assume that there is a one-to-one relationship between the number of investors who do not elect their preferred delivery method and decreased readership. But, again, the data before the Commission regarding the effect of delivery method on readership was decidedly mixed. And the data on internet access and use suggests that some investors who say they prefer paper are

[9] Petitioners alternatively point to the FINRA study, but as the Commission noted, that study "does not distinguish fund shareholder reports from other disclosure materials." 83 FR 29,161 n.44.

likely among the large majority of investors willing to access fund information online. *See supra* 32. Moreover, as the Commission noted, the effects of decreased readership could be mitigated to the extent investors rely on other sources of information about funds. 83 FR 29,193.

Similarly, data showing a reduction in investor "viewing" and "voting" levels following the introduction of notice and access in the proxy materials context do not establish that Rule 30e-3 will decrease readership, as petitioners contend. *See* Br. 37-38; Amicus Br. 6-7. The Commission reasonably rejected commenters' suggestion that Rule 30e-3 is "similar" to the framework that applies to proxy materials in light of the different actions required of shareholders. *See* 83 FR 29,179 n.285 ("the proxy framework involves additional complexities relating to the process of voting security holdings" that are "not applicable in the case of [Rule 30e-3], particularly after the modifications we have made to the final rule"); *see also id.* at 29,194 n.461 (noting that "[p]rinting costs for shareholder reports and proxy materials may differ"). Petitioners' assumption that potential future changes in "readership percentages" will mirror past changes in proxy material "viewing levels" and "voting response rates" disregards the many differences between an investor's personal decision to buy, sell, or hold his shares in a fund and a decision to participate in a proxy vote.[10]

[10] The amicus cites two industry-sponsored studies purporting to assess the proposed rule's effect on review of shareholder reports. Amicus Br. 5-6. But commenters

(Footnote continued on next page…)

3. Petitioners also err in arguing (Br. 38-39) that the Commission's cost savings analysis fails to sufficiently account for electronic delivery rates. As the Commission explained, the baseline data used to estimate fund printing and mailing costs already "factors in the current use of electronic delivery" because it is derived from funds' current expenditures. *Id.* at 29,187. The Commission also recognized that if growth in electronic delivery continues, "annual printing and mailing cost savings under [Rule 30e-3] in future years may be lower than estimated." *Id.*; *see also id.* at 29,184.

The Commission did not quantify this potential impact of growth in electronic delivery because it was unable to estimate the percentage of funds that solely or predominantly rely on electronic delivery, as funds are not required to report to the Commission the extent to which they do so. *Id.* at 29,184, 29,187. Petitioners contend (Br. 38) that the Commission should have used commenter estimates that "43 percent of investors currently receiv[e] electronic reports." But the percentage of *investors* receiving electronic delivery does not provide a reliable way to estimate how many *funds* solely or predominantly rely on electronic delivery. *See supra* 30. Absent data enabling more precise forecasts, the Commission's discussion "fulfills its statutory obligation to consider and evaluate potential costs and benefits." *Lindeen*, 825 F.3d at 658 (quotation omitted).

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disagreed about their relevance and reliability. *See* 83 FR 29,193 n.453. In any event, they add nothing to the Commission's discussion of Rule 30e-3's potential effects.

C. The Commission's methodology in calculating compliance costs was reasonable.

The Commission's economic analysis estimates—and neither petitioners nor any commenters have disputed—that five percent of investors in funds relying on the rule will request paper reports annually. *See* 83 FR 29,199 & n.529; 80 FR 33,678 n.816. Petitioners suggest (Br. 39) that the annual cost of delivering paper reports to these investors could be estimated by taking five percent of the estimated $230.6 million in gross annual cost savings, 83 FR 29,187, resulting in annual paper delivery costs of $11.53 million.

The Adopting Release, by contrast, states that funds will spend $5.7 million annually to transmit paper reports. *Id.* at 29,199. Petitioners claim (Br. 40) that the discrepancy is due to a "methodological inconsistency," but in fact it is due to an inadvertent failure to carry through a revised assumption. The proposal estimated annual paper delivery costs of $5.4 million, based on an assumption that one-third of the annual external costs associated with the preparation and transmission of shareholder reports ($10,000 out of approximately $30,000 per fund) were attributable to printing and mailing. *See* 80 FR 33,678 n.816. In the Adopting Release, the Commission revised the proportion of external costs due to printing and mailing up to approximately $20,000 per firm, 83 FR 29,190, 29,199, and also increased its estimate of the number of firms expected to rely on the rule, *id.* at 29,184. The Commission incorporated the increased estimate of the number of firms relying on

the rule into its estimated cost of paper delivery. But although it intended also to "incorporate" the "revised" estimate of printing and mailing costs—and did so elsewhere—the Commission neglected to do so. *Id.* at 29,190, 29199 n.530. Had the Adopting Release reflected the Commission's intent, the estimated annual cost of paper delivery would have been $11.4 million—akin to petitioners' estimate.

This inadvertent error does not render the Commission's analysis unreasonable. This Court "do[es] not reverse [an agency rule] simply because there are uncertainties, analytic imperfections, or even mistakes in the pieces of the picture petitioners have chosen to bring to our attention," but only if there is "such an absence of overall rational support" as to render the rule arbitrary and capricious. *Center for Auto Safety v. Peck*, 751 F.2d 1336, 1370 (D.C. Cir. 1985). The error here accounts for only 2.5 percent of Rule 30e-3's gross savings and less than 6.5 percent of estimated compliance costs. *See* 83 FR 29,187. It increased the Commission's estimate of annual net cost savings by less than five percent, from $135.7 million to $141.4 million. There is no basis to conclude that Rule 30e-3's adoption hinged on the margin of error of estimated annual net cost savings being less than five percent. On the contrary, the Commission specifically recognized that other factors, such as growth in electronic delivery, could result in net savings less than estimated. *Id.*; *supra* 48.

D. The Commission reasonably considered the rule's impact on efficiency, competition, and capital formation.

Petitioners also erroneously contend (Br. 38, 40-42) that Rule 30e-3 will harm capital formation and impermissibly burden competition. But the Commission reasonably determined that the rule will increase accessibility of shareholder information and reduce shared printing and mailing costs, thus potentially resulting in: "an increase in competition among funds for investor capital," a "more efficient allocation of capital across funds and other investments," and a "positive effect on the level of capital invested in funds." *Id.* at 29,186, 29,188.

In arguing to the contrary, petitioners rely on their erroneous assertions that the Commission overestimated the rule's benefits (Br. 38), claiming the Commission was unable to determine any "clear benefit from the rule to investors" (Br. 40). But, as discussed above, that claim is incorrect. *See supra* 38-39, 44-48. And to the extent petitioners argue that only quantifiable benefits may be considered, *see* Br. 12, 40, they are likewise mistaken. *See Lindeen*, 825 F.3d at 658; *Nat'l Ass'n of Mfrs.*, 748 F.3d at 369. Moreover, petitioners misconstrue the Commission's pragmatic recognition that some investors who prefer paper reports may not elect them and that some investors might be less likely to review reports online as a finding that the rule will "inevitabl[y]" result in "some degree of competitive harm" (Br. 41) despite the benefits the Commission cited and the mitigating measures it adopted. But the Commission reasonably determined to adopt the rule despite recognizing these potential effects.

Nor does the rule run afoul of Section 23(a)(2) of the Exchange Act, as petitioners contend (Br. 40-42).[11] That provision merely requires the Commission to "balance" competitive considerations against other policy goals of the Exchange Act. *See Bradford Nat'l Clearing Corp. v. SEC*, 590 F.2d 1085, 1105 (D.C. Cir. 1978); *Belenke v. SEC*, 606 F.2d 193, 200 (7th Cir. 1979). And this balancing is subject to the same arbitrary-and-capricious review as other determinations. S. Rep. No. 94-75 at 13 (1975); *Bradford*, 590 F.2d at 1104. As already discussed, the Commission's predictive judgment here satisfied that standard.

IV. The Commission satisfied its obligation to consider the Investor Advisory Committee's recommendations.

The IAC was created to "advise and consult with the Commission" on regulatory priorities, issues, and initiatives, and to submit "findings and recommendations" for Commission "review." 15 U.S.C. 78pp(a)(2), (g); 83 FR 29,164 n.90. Petitioners argue (Br. 29-30) that the Commission's response to the IAC's December 2017 recommendations was insufficient under 15 U.S.C. 78pp(g), which requires the Commission to "promptly issue a public statement" that "assess[es]" the finding or recommendation and "disclos[es] the action, if any, [it] intends to take" in response. But they cite no authority for the proposition that a

[11] Only a few of the related form and notice amendments were issued under the Exchange Act, *see* 83 FR 29,158, 29,182, and petitioners make no argument that those amendments specifically burden competition. But even if Section 23(a)(2) applies here, petitioners cannot establish that the Commission violated it.

failure to comply with that provision could invalidate a rulemaking addressing the topic of the recommendation. Nor could they, as the statute does not require the Commission to engage in any rulemaking, *id.* 78pp(h), much less impose particular requirements.

In any event, the Commission's discussion of the IAC recommendation in the Adopting Release satisfied both that requirement and the APA's requirement that it "consider" the alternative approach proposed by the IAC, *Nat'l Mining Ass'n v. MSHA*, 116 F.3d 520, 527 (D.C. Cir. 1997). While 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. *See supra* 29-35.

The Commission also acknowledged that the IAC and others had recommended development of a document akin to a "summary shareholder report" incorporating "layered disclosure principles," 83 FR 29,172, and it "dr[ew] from" the Recommendation in permitting the inclusion in the Notice of information from the shareholder report. *See id.* at 29,172 & n.190. And the Commission reasonably explained why it chose not to *require* that specific content from the report be incorporated into the Notice. *Id.* at 29,195.

Finally, the Commission described two other initiatives it was undertaking that are consistent with the IAC's recommendation. *Id.* at 29,172 n.190. First, the Commission issued a release requesting comment on ways to improve fund disclosure

and specifically asked whether it should encourage or require use of summary shareholder reports. 83 FR 26,897. Second, the Commission noted that its Office of the Investor Advocate was engaging in investor testing of new disclosure alternatives. 83 FR 29,172 n.190; *see* 83 FR 26,892 & n.5. By incorporating aspects of the IAC's recommendation into Rule 30e-3, while leaving fuller consideration to potential future rulemaking, the Commission brought "its expertise and its best judgment to bear upon th[e] issue[s]" raised by the IAC. *Chamber*, 412 F.3d at 145; *see also Nat'l Mining Ass'n*, 116 F.3d at 549 ("An agency does not have to make progress on every front before it can make progress on any front.") (quotation omitted).

V. Petitioners had adequate notice of, and were not prejudiced by, the changes in the final rule.

Petitioners contend (Br. 43) that, because the final rule eliminates the Initial Statement and reply cards, it was not a "logical outgrowth" of the proposal. But the test for logical outgrowth is whether "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." *Int'l Union, United Mine Workers of Am. v. MSHA*, 626 F.3d 84, 94-95 (D.C. Cir. 2010) (quotation omitted). And commenters were on notice to address whether the Initial Statement and reply card requirements should be retained.

The proposal requested comment on whether "any of the proposed conditions" for reliance on the rule were "inappropriate." 80 FR 33,631; *see also id.* at

33,632 (asking whether Commission should "permit funds to obtain implied consent, as proposed"). The Initial Statement and reply card requirements were among the most prominent conditions in the proposal, and this request unsurprisingly generated extensive discussion of them, with some urging the Commission to eliminate one or both. 83 FR 29,171, 29,175; *see Nat'l Mining Ass'n v. MSHA*, 512 F.3d 696, 699 (D.C. Cir. 2008) (logical outgrowth test "take[s] into account the comments . . . made during the notice-and-comment period"). The proposal also asked whether the Notice should be permitted to include additional information and to accompany other fund documents, and thus petitioners cannot credibly claim "surprise" (Br. 44) at those changes either. *See* 80 FR 33,633; *see also* 83 FR 29,170, 29,172-73 (discussing comments).[12]

The cases petitioners cite involving the unanticipated reversal of a proposed policy or interpretation are thus inapposite. *See Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1109 (D.C. Cir. 2014); *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005). Moreover, given the Commission's reasonable determination that the final rule is actually more protective of investors who prefer paper delivery, petitioners cannot demonstrate that they were prejudiced by any lack of notice. *See Allina Health Servs.*,

[12] The extended transition period with additional disclosures was also previewed in the proposal. *See* 80 FR 33,631 (asking whether any conditions "should be added"); *id.* at 33,632 (asking whether to require that funds provide "multiple written statements (*i.e.*, in addition to the Initial Statement) prior to inferring consent to electronic transmission"); *see also* 83 FR 29,180 (noting one commenter specifically requested a transition period of at least 24 months).

746 F.3d at 1110; *First Am. Discount Corp. v. CFTC*, 222 F.3d 1008, 1015-16 (D.C. Cir. 2000).

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,478 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface—Garamond, 14 point—using Microsoft Word.

/s/ *Daniel E. Matro*

December 20, 2018 Daniel E. Matro

CERTIFICATE OF SERVICE

I certify that on December 20, 2018, I electronically filed the foregoing Brief of the Securities and Exchange Commission, Respondent, with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's appellate CM/ECF system, which will send notice to all the parties.

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