[INITIAL BRIEF]

ORAL ARGUMENT SCHEDULED FOR JANUARY 6, 2006

No. 05-1240

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA,
Petitioner,

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

GIOVANNI P. PREZIOSO
General Counsel

JACOB H. STILLMAN
Solicitor

JOHN W. AVERY
Special Counsel

MICHAEL L. POST
Senior Counsel

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
(202) [illegible] (phone)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES

All parties, intervenors, and amici appearing before the Commission and in this Court are listed in the brief for the petitioner.

B. RULING UNDER REVIEW

The petitioner seeks review of an order of the Securities and Exchange Commission, Investment Company Act Release No. 26985 (June 30, 2005) [70 FR 39390 (July 7, 2005)]. Petitioner's Addendum, A-1.

C. RELATED CASES

The matter on review was previously reviewed by this Court in No. 04-1300. The Chamber of Commerce also sued the Commission on September 2, 2004, in United States District Court for the District of Columbia, No. 1:04-cv-01522-RMC, seeking to overturn certain provisions of the rule amendments adopted in the Commission's order for which the petitioner sought this Court's review in No. 04-1300. The district court action has been stayed. Counsel is not aware of any other related cases currently pending in this Court or in any other court.

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BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

INTRODUCTION

The rule amendments challenged by the Chamber of Commerce, which are a central feature of a broad series of reforms, were adopted in the wake of scandals in the mutual fund industry – scandals that inflicted massive losses on mutual fund investors and left investor confidence severely shaken. 1/ The Chamber's first

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1/ Investment Company Act Release No. 26520 (July 27, 2004) [69 FR 46378
(continued...)

petition for review was granted in part. In its opinion on June 21, 2005, 2/ this Court upheld the Commission's action in major respects. However, the Court found that the Commission failed adequately to consider the costs mutual funds would incur in complying with the two conditions adopted by the Commission, and failed adequately to consider a proposed disclosure alternative to the independent chairman condition. The Court remanded the matter to the Commission to address these issues, but did not vacate the rule amendments.

The Commission and its staff immediately mobilized to respond to the remand. The Commission believed it was important to avoid any postponement of the January 16, 2006, date for compliance with the conditions and "the attendant potential harm to investors and the market that would result." 3/ Building on more than a year's work by the Commission and the staff, and on the extensive existing rulemaking record, the Commission was able to respond promptly, issuing a release setting forth a detailed analysis of the likely costs and a careful

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1/ (...continued)
(Aug. 2, 2004)] ("Adopting Release").

2/ *Chamber of Commerce of the United States v. SEC*, 412 F.3d 133 (D.C. Cir. 2005) ("Remand Opinion").

3/ Investment Company Act Release No. 26985 (June 30, 2005) [70 FR 39390, 39391 (July 7, 2005)] ("Remand Release").

consideration of the disclosure alternative. After considering the issues as the Court had directed, the Commission determined "not to modify the amendments." 70 FR at 39398. As this Court's precedent establishes, the Commission was fully authorized to consider the remanded issues and to determine *not* to modify the rule amendments, even though the mandate had not yet issued.

The Commission candidly explained the reasons for acting promptly. Any further delay or ambiguity about the implementation of the two conditions would "disadvantage not only investors but also fund boards and management companies, most of which have already begun the process of coming into compliance with the rules." 70 FR at 39398. Further, by taking the matter up at its previously scheduled June 29 open meeting, the Commission was able to consider the remanded issues prior to the departure from the Commission of Chairman Donaldson and another Commissioner, both of whom had been fully engaged in this lengthy rulemaking process. As the Commission explained, the June 29 meeting was "the last opportunity to bring the collective judgment and learning of all of us, who have spent the last year and a half thinking about the issues raised in this rulemaking, to bear on the important questions presented to us by the Court." 70 FR at 39391. Once the Commission determined that it had the factual basis necessary to respond to the Court's remand without the necessity of

further notice and comment, it followed the most responsible possible course as an agency – it responded to the remand as promptly as possible in the public interest.

Nevertheless, the Chamber (which announced its intention to sue the Commission even before the Commission had acted in response to the remand) decries the Commission's prompt response to the remand, falsely claiming (Br. 41) that the Commissioners who supported the rule amendments "raced" to respond to the Court's remand in order to "ram through a pre-ordained, ill-considered conclusion," and that in doing so they "excluded" the other Commissioners from the decisionmaking. Br. 17. The only motive suggested by the Chamber (Br. 17) for this action was that the majority wanted to respond to the remand before Chairman Donaldson left the Commission on June 30, because "[h]is successor had already been nominated, and it was believed that he might not support re-adoption of the challenged provisions." This claim that the Commission had an ulterior purpose is absurd. Chairman Donaldson is one of the most distinguished members of the securities community, with a long and exemplary career in business, academia and government. There was nothing in it for him to use the occasion of his last open meeting as Chairman of the Commission to tackle this highly contentious matter. He could simply have left it to his successor. In fact, the promptness of the Commission's response was laudable, an example of good

government in the finest traditions of the Commission.

Contrary to the Chamber's assertion, none of the Commissioners was "excluded" from the Commission's decisionmaking. All of the Commission's decisions were made at the open meeting, which was attended by all five Commissioners. Indeed, the Commission's deliberations on those decisions could *only* have taken place at a meeting "open to public observation" in light of the requirements of the Government in the Sunshine Act, 5 U.S.C. 552b. Not only were all of the Commissioners fully engaged in the process, they each made lengthy statements at the open meeting and provided statements appended to the Remand Release.

The Chamber repeatedly misrepresents the nature of the Court's remand and of the Commission's response in order to exaggerate the difficulty of responding to the remand quickly, and to bolster its unsupported demand for another round of notice and comment rulemaking. The Chamber recites as though it is fact (Br. 7) that this case concerns the Commission's "re-adoption" of two new requirements that this Court had "invalidated." In fact, the two conditions *had not* been invalidated by this Court, which rejected the Chamber's request to vacate the amendments. Nor did the Commission "re-adopt" the rule amendments. Because the amendments had not been vacated, it was not necessary for the Commission to

"re-adopt" them.

Although the Chamber quibbles about the Commission's findings, the Chamber cannot seriously challenge the substance of the Commission's response to the remand. The fact is the costs associated with the two conditions are minimal, as a subsequent study has confirmed, and the Commission rationally articulated why the disclosure alternative is *not* a superior alternative to the independent chair condition. The Commission's prompt response to the Court's remand demonstrated responsible government and was entirely appropriate under the circumstances.

COUNTERSTATEMENT OF JURISDICTION

THE CHAMBER HAS NOT DEMONSTRATED ITS STANDING TO BRING THIS PETITION.

The Chamber has not shown that it has standing to seek review of the rule amendments.

1. The Chamber relies on the prior panel's conclusion that it had standing at that time for injury suffered as a fund investor. The Chamber fails, however, to grapple with two issues that, in light of the jurisdictional nature of this question, must be resolved by this Court. First, it provides insufficient evidence – based on the current record before the Court – to demonstrate the "injury-in-fact" that is

constitutionally required to support its standing to bring its current petition for review in this new judicial proceeding. Second, it does not cite, or discuss the implications of, the recent decision by the Seventh Circuit in *DH2, Inc. v. SEC*, 422 F.3d 591 (7th Cir. 2005) – a decision that would be in direct conflict with the law of this Circuit if the Chamber is permitted to proceed without further evidence of a "concrete, particularized injury" beyond the mere allegation of an inability to purchase a desired product.

The present case is a new judicial proceeding. Standing must be determined not as of the time of the prior proceeding, but as of the commencement of this proceeding and on the basis of the current record. Regardless of what the prior record may have shown, the Chamber must provide evidence of its standing, including injury, now. Moreover, the new record contains detailed findings firmly establishing that the potential costs of the two conditions are so minimal that the Chamber cannot now seriously contend that it satisfies the required element of injury-in-fact.

The Chamber nonetheless asserts injury on the theory that it has lost the opportunity to invest in shares of funds that do not satisfy the two conditions, even if no concrete harm results from that lost choice. If this Court were to uphold standing on that basis, such a decision would directly conflict with the Seventh

Circuit's decision in *DH2, Inc. v. SEC*, decided September 7, 2005. In that case, the Seventh Circuit correctly rejected a claim of lost opportunities to profit through mutual fund investments as a basis for standing, stating that "(to the extent it is an injury at all), [it] is a diffuse and speculative harm that cannot support standing." 422 F.3d at 597.

It is the Seventh Circuit's decision, not the Chamber's position, that is in accord with long-established precedent of the Supreme Court and this Court holding that a petitioner must demonstrate a concrete, particularized injury. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Chamber's position, if adopted by this Court, would eviscerate the injury-in-fact requirement by holding that a mere lost opportunity to purchase a product suffices, without any proof that the petitioner will suffer concrete harm from the lost choice, and, thus, have a real interest in the case. If the mere lost opportunity to purchase a product suffices to establish standing, it would allow virtually anyone to use this Court as a forum to debate virtually any agency action that touches upon the product. As the Supreme Court has said, the "actual injury" requirement "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge*

Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). Here, the Chamber has shown no injury-in-fact and it strains credulity to believe that it would have engaged in this lengthy litigation merely to vindicate a desire to invest specifically in funds with less effective independent director oversight of conflicts of interest. In fact, the Chamber long ago conceded that its challenge to these rule amendments was intended to be a "shot across the bow" designed to chill Commission efforts at other regulatory reforms. 4/

Nor is the position urged by the Chamber compelled by the prior panel's analysis of standing. The panel relied upon two decisions of this Court, neither of which holds that injury is established simply by the inability to buy a desired product. The cases cited by the panel require more; a "lost opportunity" alone is not sufficient injury-in-fact for standing. *See Competitive Enterprise Institute v. NHTSA*, 901 F.2d 107, 113 (D.C. Cir. 1990) (higher prices and reduced safety); *Consumer Federation of America v. FCC*, 348 F.3d 1009, 1012 (D.C. Cir.2003) (loss of unrestricted "access to content" that other cable internet providers would

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4/ *See* Deborah Solomon and Michael Schroeder, *Back Off! Businesses Go Toe to Toe With SEC*, THE WALL ST. J., October 27, 2004, at C1.

offer). 5/ Although the Chamber asserts (Br. 2) that, as an investor, it will suffer an injury on the ground that "the [rule amendments] will increase the costs and diminish the value of the funds in which it is invested," the evidence shows that the costs will be minimal. The Chamber has presented no evidence to the contrary.

2. The Chamber also claims to have associational standing, a claim not addressed in the prior panel decision. The Chamber relies solely on the declaration of its Strategic Marketing Manager (Petitioner's Addendum at A-54), who states that at least 30 of its members and their subsidiaries are fund advisers, that these include funds that have non-independent chairs and fewer than 75 percent independent directors, and that they engage in transactions covered by the Exemptive Rules. But the Chamber has not provided evidence that *any* of those members has been injured by the rule amendments, much less evidence of "concrete and particularized" harm that is "actual or imminent, not conjectural or

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5/ The prior panel's decision on standing, even if it were construed as supporting the Chamber's view, would not be binding upon this Court as law-of-the-case. This is not a continuation of the first judicial proceeding, as would be the situation in successive appeals in a single district court case, but rather a new judicial proceeding challenging a new agency action. And, even if it were a continuation of the first proceeding, law-of-the-case would not prevent reconsideration since a loss of standing during the pendency of a case renders the case moot.

hypothetical." *Lujan v. Defenders of Wildlife*, *supra.* Indeed, the Chamber provides no evidence that any of its members would even contend that they have been injured by the rule amendments. This Court requires a petitioner whose standing is not self-evident to establish its standing, at the latest, in its opening brief. Its burden of production in this Court is the same as that of a plaintiff moving for summary judgment in the district court: it must support each element of its claim to standing by affidavit or other evidence. *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002). 6/ Without the declaration of a single fund adviser member explaining how it has been injured at all, much less the probability of "substantial" injury, the Chamber has not established its associational standing. *DEK Energy Co. v. FERC*, 248 F.3d 1192, 1195 (D.C. Cir. 2001).

COUNTERSTATEMENT OF THE ISSUES

1. Did the Commission have authority to comply with this Court's remand opinion prior to the issuance of the mandate, where the Commission acted in accordance with 50 years of precedent holding that a lower tribunal retains jurisdiction during the pendency of an appeal to consider modifying, and to deny

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6/ Petitioner was reminded of this obligation in the Court's order issued August 10, 2005.

modification of, an order that is the subject of the appeal?

2. Did the promptness with which the Commission complied with this Court's remand opinion violate procedural requirements where, contrary to the Chamber's assertions, (a) the prompt action was taken to avoid delay that would harm investors and the market and (b) the Commission provided a detailed analysis and careful consideration of the remanded issues after thorough deliberation and vigorous debate in which all five members of the Commission were fully informed and fully engaged?

3. Did the Commission commit reversible errors in its consideration of the remanded issues without engaging in a second round of notice and comment, where (a) the Chamber's immaterial objections on insignificant matters did not establish that there was any prejudice from the alleged errors, and (b) no errors were committed because (i) the information in the existing record, together with publicly available information, was sufficient to address the remanded issues without further notice and comment, and (ii) the Chamber did not establish either the inadequacy of the information relied upon by the Commission or the inaccuracy of the Commission's findings?

4. Did the Commission, notwithstanding its detailed and thorough analysis, fail to give adequate consideration to (a) the effects of the costs of the

rule amendments on efficiency, competition and capital formation and (b) the disclosure alternative?

COUNTERSTATEMENT OF THE CASE

A. ADOPTION OF THE RULE AMENDMENTS

In 2004, the Commission adopted amendments to ten exemptive rules ("Exemptive Rules") that permit mutual funds to engage in transactions that would otherwise be prohibited under the Investment Company Act. Because these transactions may in some cases be beneficial to funds, Congress gave the Commission authority to grant exemptions, conditionally or unconditionally, as necessary or appropriate. 7/ For many years, such exemptions have been conditioned upon the judgment and scrutiny of the funds' independent directors to oversee the conflicts of interest inherent in the transactions. The rule amendments strengthen this oversight by increasing the percentage of independent directors of a fund that seeks to rely on the Exemptive Rules from a simple majority to 75 percent, and by imposing the condition that the board have an independent chair.

The amendments were adopted in response to scandals in the mutual fund industry involving serious abuses by mutual fund managers. In the three months after the first of the scandals broke, investors withdrew $80 billion from mutual

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7/ *See, e.g.*, Section 6(c) of the Act, 15 U.S.C. 80a-6(c).

funds. To date, the abuses have cost this nation's 92 million mutual fund investors billions of dollars in losses. These abuses did not involve a few bad apples at the fringes of the fund industry, but resulted from systemic wrongdoing by major fund groups, including at least 9 of the 25 largest fund complexes, and officials at the highest levels of those complexes. Enhanced independent oversight of fund managers was critical to stem these abuses. The rule amendments were part of a larger package of regulatory reforms "designed both to prevent the compliance failures of yesterday and to strengthen a fund board's ability to deal with compliance challenges of the future." 69 FR at 46384.

B. THE CHAMBER'S FIRST CHALLENGE AND THE COURT'S REMAND

In response to the Chamber's earlier petition for review, this Court first determined that the Commission did not exceed its statutory authority in adopting the rule amendments and that it had articulated a reasonable rationale for the two conditions. 412 F.3d at 139-41. The Court also rejected the Chamber's contention that the Commission was required to conduct an empirical analysis of whether funds with independent chairs performed better than funds with management chairs: "Here the Commission, based upon 'its own and its staff's experience, the many comments received, and other evidence, in addition to the limited and conflicting empirical evidence,' concluded an independent chairman 'can provide

benefits and serve other purposes apart from achieving high performance of the fund.' The Commission's decision not to do an empirical study does not make that an unreasoned decision." 412 F.3d at 142 (citation omitted).

With respect to the Commission's consideration of the costs of the conditions, however, the Court reached a different conclusion. The Commission had described three methods by which a fund might comply with the 75% independent director condition, one of which had little or no cost. The Commission said that it did not have a "reliable basis for determining how funds would choose to satisfy this [condition] and therefore it [was] difficult to determine the costs associated with electing independent directors." 69 FR at 46387. The Court noted, however, that: "That particular difficulty may mean the Commission can determine only the range within which a fund's cost of compliance will fall, depending upon how it responds to the condition but, as the Chamber contends, it does not excuse the Commission from its statutory obligation to determine as best it can the economic implications of the rule it has proposed." 412 F.3d at 143 (citing *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1221 (D.C. Cir. 2004) (in face of uncertainty, agency must "exercise its expertise to make tough choices about which of the competing estimates is most plausible, and to hazard a guess as to which is correct, even if ...

the estimate will be imprecise")).

With respect to the independent chairman condition, the Court noted that the Commission acknowledged in a footnote that an independent chairman may choose to hire more staff, but that it stopped there because, it said, it had no reliable basis for estimating those costs. The Court said: "Although the Commission may not have been able to estimate the aggregate cost to the mutual fund industry of additional staff because it did not know what percentage of funds with independent chairman would incur that cost, it readily could have estimated the cost to an individual fund, which estimate would be pertinent to its assessment of the effect the condition would have upon efficiency and competition, if not upon capital formation." 412 F.3d at 144.

Finally, the Court agreed with the Chamber that the Commission had failed adequately to consider an alternative to the independent chair condition that each fund be required prominently to disclose whether it has an inside or an independent chairman and thereby allow investors to make an informed choice. "The Commission may ultimately decide the disclosure alternative will not sufficiently serve the interests of shareholders, but the Commission – not its counsel and not this court – is charged by the Congress with bringing its expertise and its best judgment to bear upon that issue," the Court held. 412 F.3d at 145.

The Court remanded the matter to the Commission to address these issues, but did not vacate the rule amendments. Indeed, at the conclusion of the Remand Opinion, 412 F.3d at 145, the Court cited two cases (with jump cites to the relevant discussion) in which this Court explained the conditions under which, as here, the Court would remand an agency rulemaking without vacating the rule. In *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (citations omitted), this Court noted: "An inadequately supported rule, however, need not necessarily be vacated. The decision whether to vacate depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" The Court in *Allied-Signal* went on to find that "there is at least a serious possibility that the Commission will be able to substantiate its decision on remand," 8/ and that "the consequences of vacating may be quite disruptive." 988 F.2d at 151. *Accord Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048-49 (D.C. Cir. 2002)

8/ Although the Chamber derides (Br. 16, 42) an informal comment by one of the Commissioners, Professor Harvey Goldschmid, that "[t]he procedural deficiencies cited [in the Court's decision] should be easy to remedy," his comment was entirely consistent with the Court's refusal to vacate.

C. THE COMMISSION'S RESPONSE TO THE REMAND

The Commission acted promptly in its release issued on June 30, 2005, to respond to the Court's remand. The Commission first determined that the information in the existing record, together with publicly available information upon which it could rely, gave it a sufficient base on which to address the issues identified by the Court. Engaging in further notice and comment procedures would not only be unnecessary, the Commission found, the resulting delay risked "significant harm to investors without significant corresponding benefits, given the adequacy of the information currently available upon which we may rely." By acting promptly, the Commission "hope[d] to bolster investor confidence, resolve any uncertainties associated with the remand, and ensure that investors receive the protections afforded by the amendments without delay." 70 FR at 39391. "Our failure to act at this time, moreover, risks the creation of significant uncertainties and potential harm to investors that would not, in our judgment, be in the public interest." *Id.*

Moreover, because Chairman Donaldson was scheduled to leave the Commission on June 30, 2005, the Commission considered it important to vote no

later than the time of its previously scheduled open meeting on June 29, 2005. 9/ The Commission believed it was "both important and appropriate for the same five of us to consider the issues raised by the Court on remand." 70 FR at 39391. The Commission explained that, because it had previously sought and received comment, it had "a significant foundation from which to consider the issues remanded by the Court." *Id.* The Commission found that it could "fully discharge [its] responsibilities" while still allowing participation by "the same group of Commissioners that adopted the amendments." *Id.*

The Commission proceeded to reexamine the costs of the two conditions as directed by the Court, and whether the conditions would promote efficiency, competition and capital formation. With respect to the 75 percent condition, the Commission concluded that it *did* in fact have a reliable basis upon which to make the more focused determination directed by the Court. Based on data from a widely used industry survey of mutual fund directors' compensation, 10/ as well as other data, the Commission estimated the range of costs for each of the ways in

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9/ Like Chairman Donaldson, Commissioner Goldschmid was also due to leave the Commission shortly to resume his post as Dwight Professor of Law at Columbia University.

10/ An earlier version of this same survey was cited by the dissenting Commissioners in their statement attached to the Adopting Release. *See* Remand Release, 70 FR at 39392 n.28.

which a fund might elect to meet the condition. 70 FR at 39391-94. Similarly, with respect to the cost of the independent chairman condition, the Commission concluded that it *did* in fact have a reliable basis for estimating, as the Court directed, the costs to an *individual* fund associated with that condition. The Commission estimated the possible cost to an individual fund of additional staff, as well as the cost of increased compensation for an independent chair. *Id.* at 39394-95. For each condition, the Commission made a detailed analysis of the various costs and set forth with specificity the sources of the data upon which it relied and the methodology it employed.

Based upon these cost estimates, the Commission considered the impact of the costs of compliance with the two conditions on funds' efficiency, competition and capital formation. *Id.* at 39395-96. The Commission found that the costs were extremely small relative to the fund assets for which fund boards are responsible, and were also small relative to the expected benefits of the two conditions. Consistent with the conclusion it had reached in the Adopting Release, the Commission found that the minimal added expense of compliance with these conditions would have little, if any, adverse effect on efficiency, competition and capital formation. "Whether the two conditions are viewed separately or together, even at the high end of the ranges, the costs of compliance

are minimal," the Commission concluded. *Id.* at 39395. The Commission specifically considered the effects of these costs on small funds. The Commission found that "[t]he costs for any fund are sufficiently small that we think any adverse effect on competition will continue to be minimal and will be justified by the benefits of the rule, especially given our judgment that small funds will choose options for compliance with the conditions at cost levels that do not approach the upper end of the range." 70 FR 39396 n.77.

The Chamber's characterization (Br. 24-25) of the Commission's findings on costs is highly misleading. Taking the highest estimated cost in each category of costs, the Chamber repeatedly claims (Br. 50 (emphasis added)) that the compliance cost "could approximate $1 million *per board.*" This ignores that these figures represented the high-end for boards that oversee 70 or more funds. 70 FR at 39392 n.29. Even at the high-end, the cost *per fund* is not even close to $1 million per year. As the Commission warned: "While the high-end costs may be applicable to a given fund, the high-end costs clearly will not be applicable to all funds or even most funds. It would be incorrect, and indeed misleading, to take the highest possible cost for a single fund and extrapolate for the entire industry." 70 FR at 39395 n.75.

The Commission discussed the *per fund* costs in detail. 70 FR 39395. The

Commission pointed out that for funds that choose to comply with the 75 percent condition simply by decreasing the size of the board, the costs are insignificant. Even for funds that choose to add three new independent directors, the ongoing annual costs range from $64,800 per fund, for boards that oversee only one fund, down to $7037 per fund, for boards that oversee 70 or more funds. Start-up costs in the first year, the Commission said, are somewhat more per fund. But using any of the options, the Commission found that the costs per fund would be no more than a very small fraction of the fund assets for which the fund boards are responsible. Similarly, with respect to the independent chair, the Commission calculated that "[e]ven using the *highest* additional compensation figure, the average *fund* will incur a total cost for staff, legal counsel and additional compensation of only $47,220." *Id.* (emphasis added).

The Commission also pointed out that at the time it adopted the rule amendments, 60 percent of funds already complied with the 75 percent condition and would incur no additional cost as a result of the implementation of that condition. Moreover, the Commission said it expected few boards to appoint or elect as many as three new independent directors. "Most are likely to decrease the size of their board or add one or two new directors. Our highest cost estimates are for boards that oversee only a single fund, which is an atypical situation. We think

it unlikely that such a board would choose the more costly options of adding as many as three new directors and hiring two full-time staff to assist the independent chairman." 70 FR at 39395-96. Indeed, a subsequent study has confirmed that the costs associated with the two conditions are negligible. 11/

The Commission also considered the disclosure alternative, but found that that approach – to provide information to enable an informed investment decision – would not adequately protect fund investors from the potential abuses inherent in the conflict-of-interest transactions permitted under the Exemptive Rules. The Commission noted that the Act *prohibits* these transactions (absent a Commission exemption). Although disclosure may enable fund investors to decide whether to invest in a fund that does not have an independent chair, the Commission found the utility of such disclosure limited. Disclosure would not prevent fund managers from engaging in self-dealing. The Commission determined that the objectives of the Act would best be served by strengthening – through enhanced independent oversight – investor confidence that those charged with managing their fund will act in the investors' interests. 70 FR at 39396-97.

11/ *See* Cost Implications of an Independent Chair and a 75 Percent Independent Board, August 30, 2005 (available at http://www.mfdf.com/UserFiles/File/ReportofSurvey.pdf) ("Mutual Fund Directors Forum Survey").

Because the Commission found that the costs of the two conditions were minimal, that the benefits far outweighed those costs, and that the proposed disclosure alternative would not afford adequate protection to investors, the Commission determined not to modify the two conditions. 70 FR at 39398. The Commission did *not*, as the Chamber incorrectly states, "re-adopt" the rule amendments.

STANDARD OF REVIEW

Under Section 706 of the Administrative Procedure Act, 5 U.S.C. 706, this Court considers whether an order of the Commission is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law. *See AT&T Corp. v. FCC*, 236 F.3d 729, 734-735 (D.C. Cir. 2001). The Commission's conclusions of law with respect to the statutes it administers are "binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001), citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

SUMMARY OF ARGUMENT

The Commission responded promptly to the remand precisely as directed by the Court and as required under the Commission's Rules of Practice and the APA. Adopting the focused approach suggested by the Court, the Commission was able to provide a detailed analysis of the likely costs of the two conditions, and a careful consideration of the proposed alternative. Although the Chamber derides the speed with which the Commission acted, the Chamber never demonstrates that the Commission's findings and conclusions were incorrect. In fact, the Commission's swift response to the Court's remand was the most responsible course of action for the Commission to take under the circumstances. The Commission explained the importance of avoiding a postponement of the compliance date and the attendant potential harm to investors and the market that would result. The Commission also explained the benefits of allowing the same group of Commissioners that had adopted the rule amendments to consider the issues raised by the Court and to respond to the remand. Contrary to the Chamber's claim, none of the Commissioners were "excluded" from the Commission's decisionmaking. All of the Commission's decisions were made at the open meeting, which was attended by all five Commissioners. Indeed, the Commission's deliberations on those decisions could *only* have taken place at an

open meeting under the Government in the Sunshine Act.

With respect to its consideration of costs, the Commission had said at the time it proposed the rule amendments that it believed the costs were minimal and sought comment on that point. After careful reconsideration of those costs on remand, the Commission confirmed that the costs were indeed minimal. The Commission also carefully considered, and explicitly rejected, the disclosure alternative. After considering the issues as the Court had directed, the Commission determined not to modify the rule amendments. The Commission was fully authorized to consider the matters remanded to it by the Court and to determine *not* to modify the rule amendments, even though the mandate had not yet issued. An agency *retains* jurisdiction to consider modifying and to deny modification of an order that is the subject of a pending appeal – precisely what the Commission did here. In *Alabama Power Company v. FPC*, 511 F.2d 383, 388 (D.C. Cir. 1974), this Court rejected the argument that, because an FPC rule was the subject of a pending appellate review proceeding, the FPC lacked the authority to consider a petition to amend the rule.

While the Chamber quibbles about insignificant aspects of the Commission's cost estimates, the Chamber does not show that any of the Commission's cost estimates are inaccurate so as to render the estimate of any cost

component unreasonable, much less render unreasonable the Commission's overall finding that the total costs of the two conditions are minimal. Nor was another round of notice and comment necessary. Since the proposing release had stated that the Commission expected the costs to be "minimal," all interested parties were on notice, and had a fair and meaningful opportunity, to provide comments if they disagreed. Moreover, in the Remand Response, the Commission determined to leave the two conditions unchanged, concluding that the costs were indeed minimal. The Commission's reliance in its release on information that "only confirmed the findings delineated in the proposal" did not trigger a requirement to engage in a second round of comment.

Although the Chamber argues that the Commission inadequately considered the effect of the two conditions on efficiency, competition, and capital formation, the Commission carefully considered these factors in the light of the more specific findings with respect to the costs associated with the conditions. The Commission concluded that the cost of compliance, being minimal for any fund, would have little, if any, adverse effect on efficiency, competition and capital formation. Contrary to the Chamber's contention that the Commission failed to consider the effects of the costs on smaller funds, the Commission expressly found that the costs for any fund were sufficiently small that any adverse effect on competition

would be minimal and would be justified by the benefits of the rule, especially given its judgment that small funds would choose options for compliance with the conditions at cost levels that did not approach the upper end of the range.

Finally, although the Chamber argues that the Commission failed to adequately consider the disclosure alternative, the Commission carefully considered the disclosure alternative and explained the reasons why it would not sufficiently serve the interests of investors.

ARGUMENT

I. The Commission Had Authority Under Longstanding Precedent To Take the Actions It Did Prior to Issuance of the Court's Mandate.

The Chamber's argument that the Commission lacked jurisdiction to comply with this Court's remand opinion before the issuance of the mandate ignores more than 50 years of precedent holding that a lower tribunal, either a court or an agency, *retains* jurisdiction to consider modifying and to deny modification of an order that is the subject of a pending appeal – precisely what the Commission did here. Because the Commission never *lost* jurisdiction to take the actions it took in response to the remand opinion, it cannot have violated the "mandate rule," under which a lower tribunal "does not *regain* jurisdiction"—*i.e.*, "'control over those aspects of the case involved in the appeal'"—"until the court of appeals issues its

mandate." *United States v. DeFries*, 129 F.3d 1293, 1302 (D.C. Cir. 1997) (emphasis supplied) (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)). Moreover, the Chamber has cited no case – and we are aware of none – that has applied the mandate rule in the context of an agency rulemaking. In fact, in *Alabama Power Company v. FPC*, 511 F.2d 383, 388 (D.C. Cir. 1974), the only case to address the issue, this Court suggested that comparable limits on an agency's jurisdiction might *not* apply in the rulemaking context. Even if the mandate rule were potentially applicable, however, the circumstances that the rule was created to avoid did not exist in this case because the Commission was taking the very action that the Chamber had argued for and this Court had ordered. There was therefore no risk that this Court would be asked to reconsider its decision to remand.

1. In *Alabama Power*, this Court rejected the argument that, because an FPC rule was the subject of a pending appellate review proceeding, the FPC lacked the authority to consider a petition to amend the rule. 511 F.2d at 388. On review of the FPC's order denying the petition to amend the rule, the *Alabama Power* court stated that although "[l]imitations on the [FPC's] power to *modify* an order during the pendency of an appeal may be inferred from Section 313 of the

Federal Power Act 12/ * * * [t]he precise scope of these limitations has not been fully defined." *Id.* at 388 (emphasis supplied). Indeed, the Court indicated that an agency might even have authority to amend or modify a rule that is on appeal. *Id.* 13/ The Court went on to hold, in any event, that even "[a]ssuming the [FPC's] remedial powers [are] limited during the pendency of appeal, it nevertheless retains power to *consider* a petition for amendment and to defer until disposition of the appeal any *modification* found appropriate or, in a case of urgency, to apply to the reviewing court for a remand order so as to permit amendment." *Id.* (emphasis supplied).

In support of that conclusion, *Alabama Power* cited *Smith v. Pollin*, 194 F.2d 349 (D.C. Cir. 1952), which rejected the argument that a district court lacks authority to consider a motion under Federal Rule of Civil Procedure 60(b) related

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12/ Section 313 of the Federal Power Act, 16 U.S.C. 825l, contained substantially the same language as the relevant jurisdictional provision in this case, Section 43(a) of the Investment Company Act, 15 U.S.C. 80a-42(a).

13/ The Court observed that although "[t]he statute disables the Commission, while appeal is pending, from altering its findings or orders addressed to particular persons, entered after adjudication * * * [t]here is room for doubt that Congress intended by the foregoing provisions to disable the Commission, during the pendency of appeal, from reconsidering broad policy decisions, and from making prospective changes through the instrument of the rulemaking power." *Id.* The Court ultimately found it unnecessary to resolve that issue in deciding the case.

to a judgment that is on appeal. Instead, the *Smith* court held that a district court has the power to entertain such a motion and that, if the district court indicates that it will grant the motion, the movant should then request that the court of appeals remand the case in order for the district court to grant the requested relief. *Id.* at 350; *see also Hoai v. Vo*, 935 F.2d 308, 312 (D.C. Cir. 1991) (and cases cited) (same). Courts have recognized that a district court has the authority to *deny* a Rule 60(b) motion made during the pendency of an appeal without any further involvement of the court of appeals. *See, e.g., Smith*, 194 F.2d at 350 (discussing this practice in the context of criminal cases and stating that the same rule should apply in the civil context); *Fobian v. Storage Technology Corp.*, 164 F.3d 887, 889-91 (4th Cir. 1999); *Piper v. United States Dep't of Justice*, 374 F. Supp.2d 73, 77 (D.D.C. 2005) (recognizing that reading the *Smith* line of precedent together with *DeFries* simply means that "[i]n this situation, the district court may outright *deny*, but cannot outright *grant*, a Rule 60(b) motion" without a remand of the matter from the court of appeals).

Under the foregoing authorities, the Commission retained the jurisdiction, prior to the issuance of the mandate, to consider whether the issues raised in the Court's remand opinion – which did not vacate the rule amendments – required a modification of those amendments and, if the Commission concluded that no

modification was required, to deny modification. The Commission took precisely those actions here, which did not usurp or infringe upon this Court's control over the matters on appeal.

The Chamber's argument fails to recognize the dispositive difference between the challenged actions that the Commission took here and the actions that this Court found the district court lacked jurisdiction to take in *DeFries*. The Commission, in assessing whether an existing rule should be altered and declining to make any change, acted consistently with the long line of precedent discussed above authorizing precisely such limited actions during the pendency of an appeal. By contrast, the district court's task in *DeFries* was not simply to consider whether to modify a preexisting judgment. Instead, the court had to resume *control* over the mail fraud count that had been the subject of the government's interlocutory appeal in order to conduct a trial and ultimately render a judgment on the count, something which, absent an applicable exception to the mandate rule, may be done only after the mandate has issued. *DeFries*, 129 F.3d at 1303.

2. The Chamber also fails to recognize that, even if the mandate rule did apply, this case presents the sort of "unusual circumstances" – which this Court found lacking in *DeFries* – in which a lower tribunal's action in advance of the mandate does *not* present the risk of confusion and conflict that the mandate rule

was created to avoid. Here, the Commission undertook further inquiries on remand only because this Court had rejected *the Commission's* argument that such inquiries were not necessary and had accepted the Chamber's contrary position. Thus, when the Commission acted before the mandate issued, it was doing something that the Chamber had sought, this Court had ordered, and the Commission (by complying with the decision rejecting its position) had agreed to do. Because the Commission was the *only* party that could have sought rehearing of this Court's rulings on those issues and chose instead to proceed in accordance with them, there was no risk that the Court would reverse those rulings prior to the issuance of the mandate. Thus, contrary to the Chamber's argument (Chamber Br. 34 n.7), the issues that the Commission was addressing had "hardened into a certitude" at the time the Commission acted, and the mandate rule did not apply. *See DeFries*, 129 F.3d at 1303.

3. Finally, contrary to the Chamber's assertions (Chamber Br. 30-31, 34), the Commission did not violate – and cannot have violated – Federal Rule of Appellate Procedure 41 by responding to the remand opinion before the mandate issued. Rule 41 addresses certain technical aspects of a mandate. *See* Fed. R. App. P. 41 (a)-(d). The issue presented here, however, is whether the Commission was entitled to act as it did prior to the mandate issuing – a question that is not

answered by Rule 41. *See, e.g., United States v. Salerno*, 868 F.2d 524, 540 (2d Cir. 1989) (noting that whether a lower tribunal is divested of jurisdiction to act in advance of the issuance of the mandate is not based on the rules of procedure).

II. The Commission's Process to Respond Promptly to the Court's Remand Was Entirely Appropriate.

The Commission's response to the Court's remand was entirely appropriate in the public interest and in the best traditions of the Commission. The Commission responded to the remand precisely as directed by the Court and as required under the Commission's Rules of Practice, 17 CFR 201.100 *et seq.*, and the APA. Adopting the focused approach suggested by the Court, the Commission was able to provide a detailed analysis of the likely costs of the two conditions, and a careful consideration of the proposed alternative. Although the Chamber derides the speed with which the Commission acted, the Chamber never demonstrates that the Commission's findings and conclusions were incorrect. Nor does it demonstrate that a second round of notice and comment was required or might have produced a different result. In fact, the Commission's swift response to the Court's remand, which served to reassure investors that their interests would be protected, was the most responsible course of action for the Commission to take under the circumstances.

The Chamber's feigned outrage and inflammatory rhetoric are based on a fundamentally false depiction of the process employed by the Commission to respond promptly to the Court's remand. The Chamber argues (Br. 41): "The Commission's race to conduct the June 29 Open Meeting before Chairman Donaldson departed reflected an impermissible resolve to ram through a pre-ordained, ill-considered conclusion, rather than to soberly and objectively conduct the analyses directed by the Court and to follow them wherever they might lead, as required by the APA." This contention is wholly without merit. The Commission acted promptly for good reason. The Commission explained the importance of avoiding a postponement of the compliance date and the attendant potential harm to investors and the market that would result. 70 FR at 39398. The Commission also explained the benefits of allowing the same group of Commissioners that had adopted the rule amendments to consider the issues raised by the Court and to respond to the remand. The value of continuity in deliberative decision-making is widely recognized. For example, many courts of appeals, including this Court, provide that when a case is remanded by the Supreme Court it is assigned to the same panel that previously considered it. *See, e.g.*, Handbook of Practice and Internal Procedures, United States Court of Appeals for the District of Columbia Circuit, Part X.E.3.

This explanation by the Commission, which is entirely reasonable and consistent with the Commission's actions, refutes the Chamber's false assertion (Br. 17) that the Commission acted quickly because the supporters of the amendments feared that Chairman Donaldson's successor "might not support re-adoption of the challenged provisions." The Chamber's sole support (Br. 17) for this contention is manufactured from a newspaper article quoting opponents of the rule amendments (including an official of the Chamber itself). Chairman Donaldson himself explained his motivation to act promptly (70 FR at 39400): "Our failure to act would, I fear, throw the future of this rulemaking into an uncertain limbo until a new Chairman is confirmed and the new Chairman is able to familiarize himself with the rulemaking record and the policy considerations weighing for and against the decision that we made last year. Today, however, we have intact the full complement of Commissioners who have spent the last year-and-a-half thinking about the issues raised in this rulemaking, and with my imminent departure from the Commission, today is the last opportunity to bring the collective judgment and learning of we five Commissioners to bear on the important questions presented to us by the Court." Before becoming Chairman of the Commission, Chairman Donaldson was one of the most distinguished members of the securities community: he had founded one of the leading

investment firms on Wall Street, led the Yale School of Management as its first dean, served as president of the New York Stock Exchange, and served previously in government, both in the Marine Corps and in the State Department. He had no secret motive in acting quickly, only his sense of duty and the desire to do the right thing for investors. He derived no personal benefit from taking on a contentious issue in his final days at the Commission. Rather, he and the other two Commissioners who supported the rule amendments believed they had an obligation to finish what they had started, rather than let the matter dangle potentially for months until a new Chairman was confirmed by the Senate and brought up to speed in this matter.

But acting promptly did not interfere with the Commission's obligation to make a "deliberate and careful consideration of the issues raised by the Court." 70 FR 39391. The Commission explained: "We have undertaken to address those issues upon remand promptly because we are convinced that we can do so with the thoroughness and careful consideration required by the Court's direction to us, and without the sacrifice to investor protection that delay would risk." *Id.* Although the Chamber urges throughout its brief that the Commission should have engaged in a comprehensive reevaluation of the amendments through full-blown notice and comment rulemaking, the Commission's direction from this Court was much more

limited. As the Commission noted: "[T]he issues remanded to us by the Court are discrete and clearly defined; indeed, the Court observed that part of our task on remand could be accomplished 'readily.'" 70 FR at 39398. Moreover, the Commission was not starting from scratch. "Because we have previously sought and received comment, the Commission has a significant foundation from which to consider the issues remanded by the Court." 70 FR at 39391.

Responding quickly was not at all unusual for the Commission. "[I]t is in the best tradition of this institution, and not at all unusual, for the Commission to act swiftly on important initiatives in response to market developments and other factors. The Commission has done so on many occasions previously." 70 FR at 39398. In his Concurring Views, Commissioner Campos elaborated (70 FR at 39402):

> [T]his Agency prides itself in meeting impossible deadlines and turning around prodigious amounts of work in short time frames. * * * In a ten day period, the Commission (with the same four Commissioners that enacted the rule in question, except for Chairman Donaldson), enacted no less than ten rulemakings, several on a twice a day schedule, and several being final rules or comments.

Although the Chamber ridicules these remarks (Br. 28), they reflect the pride these Commissioners take in acting as responsible public servants, putting the public trust above their personal concerns.

With respect to its consideration of costs, the Commission had said at the time it proposed the rule amendments that it believed the costs were minimal and sought comment on that point. After careful reconsideration of those costs on remand, the Commission confirmed that the costs were indeed minimal. Nevertheless, the Chamber castigates the Commission for responding so promptly when it had said in the Adopting Release that it had "no reliable basis" to make the cost estimates. But this misstates what the Commission *actually* said, and ignores the more focused cost determination that this Court directed it to make, a determination for which the Commission indeed *did* have a reliable basis. By focusing on the *range* of costs associated with each of the ways funds might comply with the 75 percent condition, as the Court suggested, the Commission was able reasonably to conclude that it did in fact have a reliable basis upon which to consider the costs associated with the condition. Similarly, by focusing on the range of possible costs to an *individual* fund associated with the independent chairman condition, as the Court suggested, the Commission was able reasonably to conclude that it did in fact have a reliable basis for estimating the costs associated with that condition. The Commission also was able expeditiously to consider the disclosure alternative that had been suggested during the comment period and implicitly rejected by the Commission. On remand, the Commission

made that rejection and its rationale explicit.

There was nothing "premature" or "rubber stamp" about the Commission's thorough and well-considered action. Although the Chamber depicts the Commission's action as a "race" to "ram through a pre-ordained, ill-considered conclusion," the Chamber does not explain what *legal* requirements, if any, it thinks were violated, nor does it cite to any provision of the APA or the Commission's Rules of Practice. In fact, its contention appears wholly based upon newspaper articles (Br. 20) and statements by opponents of the amendments (Br. 21). The process followed by the Commission faithfully followed all legal requirements and was entirely appropriate.

Consideration of the remand was added to the agenda for the previously scheduled June 29 meeting on the recommendation of the Commission staff in order to put the Commission in a position, if it wished, to respond to the remand promptly and before Chairman Donaldson departed. The timing was not, as the Chamber asserts, a plot by the Chairman to reach a predetermined result, but an effort by the staff to give the five Commission members optimum flexibility to respond quickly to the Court.

Contrary to the Chamber's assertions that Commissioners were excluded from the decisionmaking (Br. 15, 17, 43), and that the Commission's procedures

"precluded consultative, deliberative process" (Br. 43), the Commission took action only after thorough deliberation and vigorous debate involving all of its members. Each Commissioner was immediately informed of the staff recommendation and received from the staff several drafts of the proposed Remand Release (the first being delivered on the Friday before the Wednesday meeting). 14/ Commissioners were free to comment or respond as they wished. Indeed, all were urged to provide their views in advance of the open meeting, and each made a detailed statement at the meeting. 15/ The deliberative nature of the process here, in which all of the Commissioners were fully engaged, is well illustrated by lengthy concurring and dissenting views of each them appended to the release. Although the Chamber cites one of the Commission's Canons of Ethics, 17 C.F.R. 200.57, which provides that "every effort should be made to promote solidarity of conclusion," the Chamber reverses the import of the Canon, which was intended not as a check on the majority, but as a "safeguard against the

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14/ It was not unusual for Commissioners to receive draft releases less than 14 days before a meeting. Nor was it unusual for the draft release to be modified up until the night before the meeting. Drafts are often polished and revised even after the open meeting.

15/ As noted above, the Government in the Sunshine Act, 5 U.S.C. 552b, prohibited the Commission from engaging in decisionmaking other than at the open meeting.

domination of this Commission by less than a majority." *Id.* The Canons also provide that each Commissioner "should *promptly* perform the duties with which he is charged by the statutes," and that the Commission "should evaluate continuously its practices and procedures to assure that it *promptly* disposes of all matters affecting the rights of those regulated." 17 C.F.R. 200.68 (emphasis added). The failure of an agency to act with unanimity is sometimes unavoidable, but it is certainly not a violation of the APA.

III. The Commission Properly Gave Further Consideration to the Cost Issue Remanded by the Court Without Engaging in a Second Round of Notice and Comment.

A. The Chamber's immaterial objections do not show that it suffered any prejudice from the Commission's actions.

The Chamber makes a host of arguments that the Commission was required to hold a second round of public comment on remand and improperly relied on evidence that was extra-record, unreliable, or inadequate. Although these arguments lack merit for the numerous reasons set forth in detail below, we emphasize at the outset that none of these arguments, even if they had merit, would have any effect on the outcome of this case.

First, instead of articulating some *consequence* of its various complaints, the Chamber is reduced to quibbling and nitpicking over insignificant aspects of the

Commission's cost estimates. The Remand Opinion, however, expressly permitted the Commission to make estimates, and did not demand absolute precision. *See* 412 F.3d at 143. The Chamber does not show that any of the Commission's cost estimates is inaccurate so as to render the estimate of any cost component unreasonable, much less render unreasonable the Commission's overall finding that the total costs of the two conditions are minimal.

Second, this Court will only find a notice and comment defect in this context where new underlying data not previously published for comment was the "most critical" information underlying the agency's decision. *Air Transport Ass'n v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999). None of the data that the Chamber criticizes here rises to that threshold.

Finally, in order to obtain relief for an absence of notice and comment, the Chamber has the burden of showing prejudice by indicating with reasonable specificity what information it objects to and demonstrating that had more precise notice been given, it "would have submitted additional, different comments that could have invalidated the rationale for the [rule]." *City of Waukesha v. EPA*, 320 F.3d 228, 246-47 (D.C. Cir. 2003); *see* 5 U.S.C. § 706 (requiring "due account shall be taken of the rule of prejudicial error"). Not having shown any material inaccuracy in the Commission's cost estimates, the Chamber certainly has not

carried this burden.

B. The Commission properly determined that the information on which it could rely, without triggering a second round of comment, was a sufficient basis for its further consideration of the cost issue.

The Chamber contends (Br. 34) that the Commission improperly failed to hold a second round of public comment on remand. The Chamber, however, does not dispute that an agency on remand may find that the existing record, without further notice and comment, is a sufficient basis for the agency's ultimate rulemaking decision (Br. 37). 16/ Indeed, by not specifying the use of any particular procedures on remand, the Court followed what it has called the "'usual rule that a reviewing court should leave the agency free on remand to determine whether supplemental fact-gathering is necessary'" to correct the deficiencies identified by the Court. *Sierra Club v. EPA*, 325 F.3d 374, 382 (D.C. Cir. 2003). Even where some fact gathering might be necessary, "on remand, the court leaves 'to the agency the methods, procedures, and time dimension of the needed inquiry * * *.'" *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1055 (D.C. Cir. 1979).

The APA requires a notice of proposed rulemaking to set forth "either the

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16/ *See P.A.M. News Corp. v. Butz*, 514 F.2d 272, 276 n.7 (D.C. Cir 1975).

terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). The Chamber does not dispute that the Commission's notice in the proposing release fully complied by setting forth *both*. The Chamber also did not argue in the prior petition that the notice was inadequate in any respect, or seek an additional opportunity to comment. The Commission's notice in fact solicited comment on the two issues later remanded by the Court – the costs of the two conditions and possible alternatives – and the notice actually elicited comment on both of those issues. The proposing release had stated that the Commission expected the costs to be "minimal." Thus, all interested parties were on notice, and had a fair and meaningful opportunity, to provide comments if they disagreed. Certainly, the Proposing Release was "sufficiently descriptive of the 'subjects and issues involved' so that interested parties [could] offer informed criticism and comments." *National Small Shipments Traffic Conf. v. CAB*, 618 F.2d 819, 834 (D.C. Cir.1980).

As the Commission gave sufficient notice initially, "the focus in [this Court's] rulemaking cases is primarily on whether the final rule changes critically from the proposed rule rather than on whether the agency relies on supporting material not published for comment." *Air Transport Ass'n*, 169 F.3d at 7. Here, far from changing critically, the two conditions were adopted substantially

identically as proposed. Moreover, in its subsequent Remand Response, the Commission determined to leave the two conditions unchanged, concluding that the costs were indeed minimal and that the disclosure alternative was not sufficient. The Commission's reliance in its release on information that "only confirmed the findings delineated in the proposal" did not trigger a requirement to engage in a second round of comment. *Building Indus. Ass'n of Superior California v. Norton*, 247 F.3d 1241, 1246 (D.C. Cir. 2001); *see Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991) (per curiam) (allowing use of information unavailable during comment period to check or confirm prior assessments; information supported a more precise quantitative measure of prior estimate).

Nevertheless, the Chamber implies (Br. 35-36) that the Court's remand opinion itself required further notice and comment because that was the procedure used by the agencies in the two cases cited by the Court in remanding the challenged provisions. Neither of the opinions in those cases, however, directed the agencies to engage in further notice and comment procedures. This Court's opinion does not indicate through those citations that further notice and comment was required, but uses them to explain the circumstances in which a court should remand but not vacate a rule. *See Fox Television Stations v. FCC*, *supra*; and

Allied-Signal v. NRC, supra.

The Chamber next contends that further notice and comment was required because the Commission relied on supposedly "extra-record" evidence in its Remand Response. The Chamber, however, ignores settled distinctions between the record requirements for informal rulemakings as compared with formal agency actions required to be made after an opportunity for a hearing "on the record." While informal action must be reviewed "on the basis of what [the administrator] had before him when he acted, and not on the basis of 'some new record made initially in the reviewing court,'" that is a "quite a different and less onerous requirement" than that of a hearing on the record. *Ass'n of Data Processing Serv. Orgs. v. Board of Governors*, 745 F.2d 677, 684 (D.C. Cir. 1984) (citation omitted). The administrative record in an informal rulemaking "might well include crucial material that was neither shown to nor known by the private parties in the proceeding." *Id.* 17/ Indeed, the ability to bring expert agency judgment and experience to bear (even after the close of the comment period) is a primary

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17/ "As has been often observed, an agency engaged in informal rulemaking is not obliged to consider only record evidence." *Air Transport Ass'n*, 169 F.3d at 7 (citing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 547-48 (1978) and *Ass'n of Data Processing Serv. Orgs. v. Board of Governors*, 745 F.2d at 684-85); *see Siegel v. Atomic Energy Comm'n*, 400 F.2d 778, 786 (D.C. Cir. 1968).

intended benefit of informal rulemaking's more relaxed procedures. 18/

The Chamber cites *AT&T Wireless Servs. v. FCC*, 365 F.3d 1095, 1103 (D.C. Cir. 2004), for the proposition that an agency can decline to engage in further comment "only where the 'existing record was a "sufficiently adequate base on which to rest the Commission's decision."'" Br. 37 (quoting *AT&T*, 365 F.3d at 1103). But the Chamber changes the meaning of what the *AT&T* Court said by adding the word "only" before the quotation from the decision. The *AT&T* Court simply held that it was not an abuse of discretion to reject further filings in such circumstances. The Court did not address what other circumstances might warrant declining to accept further filings. In any event, that case involved adjudication and did not address the issue here – the scope of the record in an informal rulemaking.

Finally, the Chamber asserts (Br. 37) that "the Commission" made a "false" statement to support its decision to forgo notice and comment by claiming that the existing record was sufficient. Yet, it is the Chamber's statement – which is based on nothing more than an internal e-mail sent by the Chairman's chief of staff (Br.

18/ *See* Paul R. Verkuil, Judicial Review of Informal Rulemaking, 60 Va. L. Rev. 185, 189 & n.14 (1974); *Sierra Club v. Costle*, 657 F.2d 298, 352-53 (D.C. 1981) (noting "[i]t is entirely proper and often necessary for the agency to continue its deliberations and *internal* decisionmaking process after the close of public comment" (emphasis added)).

15) – that is false. The truth is that the Commission clearly stated in the Remand Release that it found "the information in the existing record, *together with publicly available information upon which we may rely*, is a sufficient base on which to rest the Commission's consideration of the deficiencies identified by the Court." 70 FR at 39391 (emphasis added). Indeed, that is precisely the information upon which the Commission *did* rely.

C. The Chamber's specific contentions that certain evidence was beyond the record, unreliable, or inadequate are without merit, and, in any event, fail to show prejudice as required by the APA.

The Chamber challenges the Commission's estimates of the additional expenses incurred by mutual fund boards for the services of independent legal counsel, an almost negligible component of the total costs. The Chamber questions (i) the Commission's estimate of $360 for the average hourly rate for legal counsel and (ii) the Commission's estimates that independent directors and independent chairmen will use independent legal counsel an additional thirty and fifty hours per year, respectively. The Chamber, however, does not demonstrate that these figures are materially inaccurate. The Chamber does not offer any contrary information or even any reason to believe that the estimates should be some other figures.

The Chamber objects to the Commission's reliance on its experience in

regard to the estimates of attorney time, but it is well recognized that reliance on matters known to an agency through its experience are not outside the rulemaking record. *See* Remand Opinion, 412 F.3d at 142 (upholding portion of Commission's prior decision that was expressly made based on "'its own and its staff's experience'"); *Siegel v. Atomic Energy Comm'n*, 400 F.2d at 786. 19/ The Chamber criticizes the Commission's experience as "unidentified," but it is well known that the Commission is an agency predominantly made up of lawyers, including former counsel to investment companies. Moreover, the Commission frequently solicits comment on similar legal expenses and makes determinations regarding such expenses in many of its rulemakings. 20/

With respect to the hourly rate, the Chamber further contends that increasing the $300 rate used in a Commission rulemaking in November 2003 by

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19/ The Chamber's general argument (Br. 38) that the Commission could not exercise its expert judgment after the close of the comment period without seeking further comment is frivolous. Under the Chamber's approach, comment procedures would never end until a round was reached in which virtually everything an agency wanted to include in its statement of basis and purpose had been mentioned in a comment.

20/ *See, e.g.*, Securities Act Rel. No. 33-8591 (July 19, 2005) (adopting, after full notice and comment, on the very day the Commission adopted the Remand Release, an estimate of $300 per hour fee for outside professional services for drafting disclosure); Securities Act Rel. No. 33-8400 (March 16, 2004) (relying on cost estimate of $300 per hour for outside securities counsel, an estimate as to which the Commission had solicited comment).

20 percent did not reliably account for increases in the interim. Again, the Chamber offers no contrary studies or other information. The only information the Chamber cites is an article in a legal newspaper noting a 6.2 percent increase in billing rates in the first half of 2004 (Br. 49). But a 6.2 percent increase during approximately one third of the period from November 2003 until the Remand Release in July 2005 is fully consistent with an estimated increase during the full period of 20 percent.

Next, the Chamber criticizes the Commission's reliance on information from 2001 regarding the frequency with which independent directors will be replaced, contending that the Commission did not "consider" that the frequency will be greater now than in the past (Br. 39, 46-48). The Chamber, however, fails to appreciate that the Commission conservatively estimated the replacement of directors on average every *five* years, based on the information from 2001 indicating a typical tenure of *ten* years. 70 FR at 39393 & n.33. The Chamber does not suggest that the average tenure is actually *less* than five years, nor does it offer any basis to believe that five years is an unreasonable estimate. The Chamber insists that the Commission failed to account in its estimates for changes in directors' role and duties (Br. 46-47), but the Chamber ignores the fact that the Remand Release added a cushion of twenty percent to the estimated costs "to

reflect the increased responsibilities" of independent directors. 70 FR at 39393.

The Commission's consideration of the widely used public bulletins from the Management Practice Institute, including the survey of director compensation, was entirely appropriate. As noted, in an informal rulemaking an agency is not limited to the formal "record" evidence. *See Ass'n of Data Processing Serv. Orgs. v. Board of Governors*, 745 F.2d at 684. Because the bulletins were publicly available, the Chamber and other commenters had access to the same information if they wished to address it prior to the Adopting Release. 21/ This is quite different from information "that, [in] critical degree, is known only to the agency." *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973). Furthermore, although the Chamber seeks to impugn the survey of director compensation, the Chamber raises no serious challenge to its reliability. Versions of the survey have not only been previously relied upon by opponents of the rule amendments, including the Investment Company Institute, they have also been cited by a broad array of publications as the principal source on fund director

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21/ The Commission never suggested, as the Chamber contends (Br. 40), that the public availability of the survey of director compensation was a barometer of its reliability, or a basis not to consider other publicly available information.

compensation over at least the last decade. 22/ The Chamber does not specify any studies or other information at odds with any of the MPI bulletins. Instead, the Chamber complains that the Commission did not examine the underlying data and methodology. But the information in the survey is not at all of a subjective nature; it is simply a tabulation of compensation data collected periodically from mutual funds and widely relied upon by the industry. Contrary to the Chamber's contention (Br. 46-47), the Commission did not "blindly" rely on these public bulletins, but cross-checked its estimates based on them against the estimates submitted by commenters. 23/ *See* 70 FR at 39393 n.31.

The Chamber's arguments that the data relied upon by the Commission were

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22/ *See, e.g.*, ICI, Understanding the Role of Mutual Fund Directors, at 23 (last accessed Aug. 1, 2005) (www.ici.org/funds/inv/bro_mf_directors.pdf); Mara Der Hovanesian *et al.*, *How to Fix the Mutual Fund Mess*, 3850 Business Week 106 (Sept. 22, 2003); Julie Earle, *Mutual Fund Directors' Pay Beats Market*, Financial Times, April 21, 2003, at 15; Carole Gould, *Fidelity Tinkers With Charity Fund*, N. Y. Times, Sept. 10, 1995, § 3, at 8.

An earlier version of the survey was cited in the dissent appended to the Adopting Release. 70 FR at 39392 n.28.

23/ The Chamber's complaints regarding the Commission's estimate that director recruiting costs would equal the director's first year salary (Br. 48) are similarly misplaced. The Chamber offers no evidence that costs are higher, and the first year salary figure appears quite conservative against a backdrop of recruiting fees that generally are considerably lower. *See* Korn/Ferry International, 2005 Form 10-K Report 3-4; Heidrick & Struggles International, Inc., 2004 10-K Report 1.

"extra-record," unreliable, or inadequate are all without merit. After sifting through the Chamber's host of contentions and ample rhetoric, what remains are, at best, claims of immaterial shortcomings in the Commission's cost estimates. The Court's Remand Opinion, however, recognized that the Commission is entitled to make estimates based on "informed conjecture," and even "hazard a guess," though the estimate may be "imprecise." 412 F.3d at 142-43. Like the petitioner in a similar situation, who found immaterial fault with an agency cost estimate founded on staff judgment, the Chamber's challenge is "quibbling over trifles at its worst." *Central & Southern Motor Freight Tariff Ass'n, Inc. v. United States*, 777 F.2d 722, 738 (D.C. Cir. 1985). This Court's declaration there – that it "do[es] not sit as a board of auditors, steeped in accountancy and equipped to second-guess an estimate which seems on its face to be reasonable" – is equally applicable here. *Id. See also Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1048-49 (D.C. Cir. 1978); *National Wildlife Federation v. E.P.A.*, 286 F.3d 554, 562-63 (D.C. Cir. 2002).

IV. The Commission Carefully Considered the Effects of the Costs of the Two Conditions On Efficiency, Competition, and Capital Formation.

The Chamber argues that the Commission inadequately considered the effect of the two conditions on efficiency, competition, and capital formation, as

required under Section 2(c) of the Act, 15 U.S.C. 80a-2(c). In fact, the Commission carefully considered these factors in the light of its more specific findings with respect to the costs associated with the conditions. 70 FR at 39395-96. The Commission concluded that the cost of compliance, being minimal for any fund, would have little, if any, adverse effect on efficiency, competition and capital formation. Indeed, the Commission said it anticipated that the two conditions should help to increase investor confidence, which might lead to increased efficiency and competitiveness of the U.S. capital markets, and that this increased market efficiency and investor confidence might encourage more efficient capital formation. 70 FR at 39396. The Commission also pointed out that there were options for compliance (which could be chosen by *any* fund) that had little or no cost. Contrary to the Chamber's contention (Br. 52) that the Commission failed to consider the effects of the costs on smaller funds, the Commission expressly found that "[t]he costs for any fund are sufficiently small that we think any adverse effect on competition will continue to be minimal and will be justified by the benefits of the rule, especially given our judgment that small funds will choose options for compliance with the conditions at cost levels that do not approach the upper end of the range." 70 FR 39396 n.77.

Nevertheless, the Chamber argues (Br. 52) that the Commission "ignored" a

warning made in one of the comment letters that there would be "severe consequences" for smaller funds. The Commission did not "ignore" this warning – it found to the contrary. Indeed, subsequent events have demonstrated that this warning was not warranted. The Mutual Fund Directors Forum, an organization of independent directors of mutual funds, found in its August 2005 survey of its members: "[T]he costs incurred by Member Groups already operating with these governance enhancements were at the low end of the range of estimates provided by the Commission. Based upon the reported experience of Member Groups, compliance with the [twoconditions] is likely to have a *negligible* impact on a fund's operating costs." Mutual Fund Directors Forum Survey, *supra* note 11, at 1 (emphasis added). The Chamber's contention (Br. 53) that the "competitive consequences of the provisions' disproportionate burden on smaller funds are likely to be substantial," is entirely unsupported.

Next, relying upon a non-public "profile of mutual fund families" prepared by the Investment Company Institute (Br. 53) that supposedly shows that there are 47 funds with assets of less than $50 million, and applying the highest-end costs to them, the Chamber (but not the Investment Company Institute) predicts dire

consequences for small funds and for the mutual fund industry as a whole. 24/ But these dire consequences are premised on the false assumption that the cost will be great. In fact, as the Commission found, the costs are minimal and there are options for compliance that have virtually no cost at all. To bolster its faulty assumption the Chamber cites (Br. 54-55) a "study" (actually, a newspaper article on September 14, 2005) that purports to show that 250 smaller funds had liquidated in 2005 because of the high cost of compliance with the two conditions. This, according to the article, was in contrast to only 69 liquidations in the prior year. In fact, the article is based solely upon the opinion of a lawyer who speculated that the two main reasons for the liquidations were the cost of hiring a compliance officer (a requirement not challenged by the Chamber), as well as the cost of the conditions. Moreover, the article was corrected on September 16 to report that the supposed increase was from 169 liquidations in 2004, not 69 as originally reported. *See* Herbert Lash, *(CORRECTED)-(OFFICIAL)-Over 250 Mutual Funds Liquidate*, REUTERS, Sept. 16, 2005 (http://www.msnbc.msn.com /id/9341883/).

Remarkably, the Chamber asserts (Br. 55) without explanation that the

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24/ The Commission has been unable to locate this non-public profile, which apparently is available only to ICI members, and thus cannot comment on what it shows.

Commission violated the Regulatory Flexibility Act, 5 U.S.C. 604, by not including a final regulatory flexibility analysis in the Remand Release. This ignores that the Commission did include a final regulatory flexibility analysis in the Adopting Release (which was not challenged by the Chamber). Because the Remand Release did not modify the rule amendments in any way, there was no requirement under the Regulatory Flexibility Act that the Commission publish a second final regulatory flexibility analysis. Moreover, the Commission's findings in the Remand Release are entirely consistent with its findings in the Adopting Release. Finally, the Chamber has not established its standing to seek judicial review of this issue. Under Section 611(a)(1), standing is limited to a small entity that is adversely affected or aggrieved. The Chamber is not a small entity, nor has it demonstrated that any of its supposedly aggrieved members are small entities.

The Chamber next claims (Br. 55-56) that the cost of compliance will also affect new entrants to the fund industry because they are likely to be small funds. Again, the Chamber ignores that the cost for small funds is minimal and that there are options for compliance that have little or no cost. There is no reason to believe that new entrants (or smaller funds) would fail to choose the low-cost options if they believed that the higher cost options might affect their entry into the industry

or jeopardize their ability to survive. 25/

Finally, the Chamber cites three unpublished studies that purport to show, unsurprisingly, that small funds saddled with high costs generally will be driven out of business, leading to inefficiencies for the industry as a whole. None of the studies examined, or even mentioned, the costs of the two conditions at issue here.

V. The Commission Carefully Considered the Disclosure Alternative.

Finally, the Chamber argues that the Commission failed to adequately consider the disclosure alternative. In fact, the Commission carefully considered the disclosure alternative and explained the reasons why it would not sufficiently serve the interests of investors. "Disclosure concerning conflicts of interest on the part of fund managers and the potential for self-dealing by them does not prevent the managers from putting their interests ahead of investors' interests," and meaningful disclosure would be difficult in any event. 70 FR at 39397. The Commission also pointed out that, absent Commission approval, the Act *prohibits* the transactions permitted under the Exemptive Rules. Further, the Commission noted that it had not adopted the independent chairman provision in isolation, but "as part of a larger package of regulatory reforms that should lead to enhanced

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25/ The Chamber also chides the Commission (Br. 56 n.14) for failing to consider the effects of the conditions on investor returns, an argument made in its first petition for review and rejected by the Court.

compliance by funds that have independent chairs." For all of these reasons, the Commission "continue[d] to find that it is necessary and appropriate in the public interest and consistent with the protection of investors to condition a fund's reliance upon any of the Exemptive Rules upon its having an independent chairman." *Id.*

Echoing the twice rejected argument it made in its first petition for review, and renewed in its petition for panel rehearing, the Chamber contends that the Commission was required to analyze the disclosure alternative in connection with each of the ten Exemptive Rules individually. But as the Commission explained in its response to the first petition for review, the ten rules were selected because each of them (i) exempted funds from provisions of the Act that prohibit certain conflict-of-interest transactions, and (ii) had as a condition the approval or oversight of independent directors. Because the scandals in the fund industry involved serious conflicts of interest in which fund managers benefitted at the expense of the fund investors, the need for greater scrutiny of potential conflicts of interest, including those covered by the Exemptive Rules, was obvious. There was no need for the Commission to discuss, yet again, the reasons why independent director oversight was an essential condition for each individual rule. Rather, the Commission appropriately discussed why independent director oversight needed

to be *enhanced* and how the independent chair condition would further that objective.

Contrary to the Chamber's contention (Br. 60) that the Commission did not consider the disclosure alternative in combination with the other rule changes, the Commission specifically considered the fact that the independent chair condition had been adopted as part of a larger package of regulatory reforms and was intended to work in concert with those reforms in ways that the disclosure alternative could not. For example, the Commission noted that the independent chair would be in a position to receive reports on behalf of the board from the fund's compliance personnel. 70 FR at 39397. 26/

This Court has "recognize[d] that [an agency] is not required in informal rulemaking *** to explain in detail the reasons why certain alternatives were rejected." *National Citizens Committee for Broadcasting v. FCC*, 567 F.2d 1095, 1112-13 (D.C. Cir. 1977). The Commission's explanation plainly meets the governing requirement that it be "in sufficient detail to permit judicial review." *NAACP v. FCC*, 682 F.2d 993, 998 (D.C. Cir. 1982).

26/ Under another of the rules adopted in response to the scandals, each fund is required to have a chief compliance officer who is responsible for keeping the fund's board of directors apprised of significant compliance events at the fund. *See* Investment Company Act Release No. 26299 (Dec. 17, 2003).

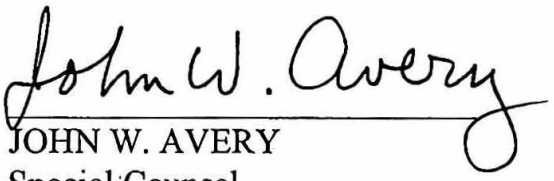
CONCLUSION

For the foregoing reasons, the petition should be dismissed for lack of standing or, alternatively, the order of the Commission should be affirmed.

Respectfully submitted,

GIOVANNI P. PREZIOSO
General Counsel

JACOB H. STILLMAN
Solicitor



JOHN W. AVERY
Special Counsel

MICHAEL L. POST
Senior Counsel

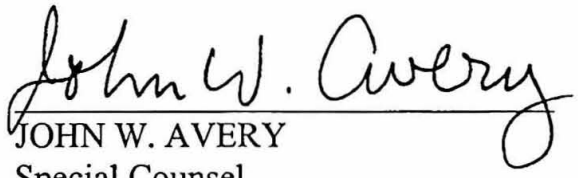
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
(202) 551-5107 (Avery)

October 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2005, I caused two copies of the initial Brief of the Securities and Exchange Commission, Respondent, to be served on counsel for the petitioner, by hand, as follows; and delivered the requisite copies of such brief to the clerk by hand:

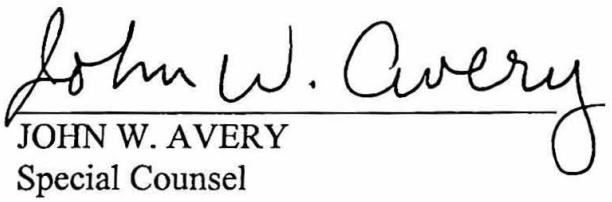
Eugene Scalia, Esq.
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
Telephone: (202)955-8500



JOHN W. AVERY
Special Counsel

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

The foregoing brief used 14-point proportionally spaced type and contains 13,953 words according to the word processing program with which it was prepared, WordPerfect 9.



JOHN W. AVERY
Special Counsel

October 21, 2005

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5 U.S.C. 552b. Open meetings

(a) For purposes of this section--

(1) the term "agency" means any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

(2) the term "meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e); and

(3) the term "member" means an individual who belongs to a collegial body heading an agency.

(b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

(c) Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to--

(1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relate solely to the internal personnel rules and practices of an agency;

(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) involve accusing any person of a crime, or formally censuring any person;

(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) disclose information the premature disclosure of which would--

(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action,

except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

(d)(1) Action under subsection (c) shall be taken only when a majority of the entire membership of the agency (as defined in subsection (a)(1)) votes to take such action. A separate vote of the

agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c), or with respect to any information which is proposed to be withheld under subsection (c). A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed.

(2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

(3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) or (2) of this subsection, make publicly available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation.

(4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: Provided, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the time, place, and subject matter of the meeting and of each portion thereof at the earliest practicable time.

* * * *

Section 611 of the Regulatory Flexibility Act, 5 U.S.C. 611. Judicial review.

(a)(1) For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(2) Each court having jurisdiction to review such rule for compliance with section 553, or under any other provision of law, shall have jurisdiction to review any claims of noncompliance with sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(3)(A) A small entity may seek such review during the period beginning on the date of final agency action and ending one year later, except that where a provision of law requires that an action challenging a final agency action be commenced before the expiration of one year, such lesser period shall apply to an action for judicial review under this section.

(B) In the case where an agency delays the issuance of a final regulatory flexibility analysis pursuant to section 608(b) of this chapter, an action for judicial review under this section shall be filed not later than--

(i) one year after the date the analysis is made available to the public, or

(ii) where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 1-year period, the number of days specified in such provision of law that is after the date the analysis is made available to the public.

(4) In granting any relief in an action under this section, the court shall order the agency to take corrective action consistent with this chapter and chapter 7, including, but not limited to--

(A) remanding the rule to the agency, and

(B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest.

(5) Nothing in this subsection shall be construed to limit the authority of any court to stay the effective date of any rule or provision thereof under any other provision of law or to grant any other relief in addition to the requirements of this section.

(b) In an action for the judicial review of a rule, the regulatory flexibility analysis for such rule, including an analysis prepared or corrected pursuant to paragraph (a)(4), shall constitute part of the entire record of agency action in connection with such review.

(c) Compliance or noncompliance by an agency with the provisions of this chapter shall be subject to judicial review only in accordance with this section.

(d) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise permitted by law.

Section 313 of the Federal Power Act, 16 U.S.C. 8251. Review of orders

* * * (b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

Canon 68 of the Commission's Canons of Ethics, 17 CFR 200.68. Promptness.

Each member should promptly perform the duties with which he is charged by the statutes. The Commission should evaluate continuously its practices and procedures to assure that it promptly disposes of all matters affecting the rights of those regulated. This is particularly desirable in quasi-judicial proceedings. While avoiding arbitrary action in unreasonably or unjustly forcing matters to trial, members should endeavor to hold counsel to a proper appreciation of their duties to the public, their clients and others who are interested. Requests for continuances of matters should be determined in a manner consistent with this policy.