

NO. 05-1240

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Respondent

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

**BRIEF OF AMICI CURIAE FUND DEMOCRACY, INC. AND CONSUMER
FEDERATION OF AMERICA IN SUPPORT OF RESPONDENT**

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to District of Columbia Cir. R. 28(a)(1), the undersigned counsel for *Amici Curiae* Consumer Federation of America and Fund Democracy, hereby certifies the following:

- A. Parties and *Amici*.** All parties and *amici* are listed in the brief for the petitioner.
- B. Rulings Under Review.** References to the rulings at issue appear in the Brief for Respondent.
- C. Related Cases.** All related cases are listed in the brief for respondent.

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Circuit Rule 26.1(a):

No corporation or any other entity owns more than 10% of the stock of the Consumer Federation of America, which is a nonprofit membership association.

No corporation or any other entity owns more than 10% of the stock of Fund Democracy, Inc., which is a nonprofit membership organization.

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GLOSSARY

Response	“Commission Response to Remand by Court of Appeals,” 70 Fed.Reg. 39,390 (July 7, 2005)
COC	Chamber of Commerce of the United States of America
COC Br.	COC Brief
Commission	United States Securities and Exchange Commission
ICA	Investment Company Act of 1940
SEC	United States Securities and Exchange Commission

INTEREST OF *AMICI CURIAE*

Amici are actively involved in promoting the interests of U.S. consumers and investors. The Consumer Federation of America (CFA) is a non-profit association organized in 1967 to advance the interests of consumers through advocacy and education. CFA's current membership is comprised of almost 300 national, state, and local consumer groups throughout the United States. The CFA has long included investor protection issues among its top policy priorities.

Fund Democracy is a non-profit membership organization advocating the interests of mutual fund shareholders. Fund Democracy is a 501(C)(3) nonprofit membership organization funded solely by public contributions. It was founded to serve as an information resource for mutual fund shareholders and an advocate for shareholders' rights and interests.

Because the effect of the governance conditions will promote integrity within the community of investment professionals and support efficient and fair capital markets, the *Amici* join the Commission in urging dismissal of the COC complaint. Both Fund Democracy and the CFA submitted a comment letter on the governance conditions.¹

ISSUES PRESENTED

1. Has the COC effectively asked the Court to reconsider its prior determinations, rather than address the Commission's reconsideration of the costs of and disclosure alternative to the governance conditions?

¹ See Letter from CFA, Fund Democracy, Consumer Action and Consumers Union, File No. S7-03-04 (Mar. 10, 2004).

2. Subsequent to this Court's remand, did the Commission adequately consider costs for the 75 percent independent director and independent chairman governance conditions?

3. Subsequent to this Court's remand, did the Commission adequately consider the disclosure alternative?

SUMMARY OF ARGUMENT

Understandably disappointed by this Court's near-complete rejection of the COC's principal arguments and its petition for rehearing, the COC now ignores the only remaining issues before the Court and again attempts to persuade the Court to supplant the Commission's rulemaking authority. The Commission's reconsideration of the governance conditions far exceeds APA requirements as articulated by this Court, a fact left virtually unaddressed by the COC. The Court should reject the COC's plea for the Court to substitute its regulatory judgment for the Commission's, as the COC's arguments are based entirely on belated evidentiary submissions that reflect nothing more than an attempted regulatory sandbagging.

ARGUMENT

The Commission's thorough and extensive reconsideration of the governance conditions far exceeds the requirement that it "consider... whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. § 80a-2(c). This brief addresses three points: (1) the COC's claims of an APA violation are contrary to the well established law of this Court, (2) the Commission's exhaustive cost-benefit analysis far surpasses the remand's requirement "adequately to consider the costs mutual

funds would incur in order to comply with the conditions,” and (3) the Commission’s well documented evaluation of the disclosure alternative far surpasses the remand’s requirement to “adequately consider a proposed alternative to the independent chairman condition.” *Chamber of Commerce of the United States of America v. SEC*, 412 F.3d 133, 136 (D.C. Cir. 2005). Accordingly, the Commission has fulfilled the obligations of the remand and the law requires dismissal of the COC’s plea for judicial activism.

I. THE COC REARGUES SETTLED ISSUES AND ITS BRIEF IS VIRTUALLY IRRELEVANT TO THE ISSUES BEFORE THE COURT

Having twice failed to persuade the Court to reject the Commission’s authority and rationale in connection with its amendment of the exemptive rules, the COC now uses the Court’s narrow remand to try a third time, effectively ignoring the issues now before the Court. Most of the COC’s brief is devoted to arguments that ignore or flatly contradict the Court’s holding. The COC claims that the Commission violated the Small Business Regulatory Enforcement Act, *see* COC Br. at 55, yet the Court found only that the Commission had violated the APA. *See Chamber of Commerce*, 412 F.3d at 144. The COC claims that the Commission violated the APA because it reconsidered the rule without complying with notice and comment procedures, *see* COC Br. at 37, yet the Court required only that the Commission on remand “address the [noted] deficiencies,” *Chamber of Commerce*, 412 F.3d at 144, and has previously held that remand does not necessitate notice and comment. *See Sierra Club v. EPA*, 325 F.3d 374, 382 (D.C. Cir. 2003) (remand to federal agency “for further explanation, though not necessarily for further notice-and-comment rulemaking.”). The Court nowhere stated or implied that notice and comment was necessary, and the case that the COC argues requires notice and

comment on remand nowhere mentions notice and comment and does not even involve a rulemaking. *See* COC Br. at 35 (*citing Checkosky v. SEC*, 139 F.3d 221 (D.C.Cir. 1998)).

The COC argues that the need to reinforce the protective conditions in the exemptive rules is not an adequate rationale, COC Br. at 38 & 50 – 51, yet the Court specifically held that the Commission’s “rationales for the two conditions satisfy the APA.” *Chamber of Commerce*, 412 F.3d 136, 141 (“the Commission’s effort to prevent future abuses of exemptive transactions was not arbitrary, capricious, or in any way an abuse of its discretion, in violation of the APA”). The COC argues, without citing any legal authority, that the Commission is not permitted to consider information outside of the pre-remand record (while simultaneously accusing the Commission of relying on “inadequate” data, COC Br. at 45), *see* COC Br. at 36, yet the consideration of additional information is precisely what the Court intended that the Commission do in order to fully consider the costs of the conditions. *See Chamber of Commerce*, 412 F.3d at 145. The COC states that the Court held that the Commission failed to consider at “least one” alternative to the conditions, COC Br. at 13, yet the Court has already held that the disclosure alternative was the “only significant” example cited. *Chamber of Commerce*, 412 F.3d at 144. In short, the bulk of the COC’s brief ignores the basis for the Court’s remand and instead raises arguments the Court has already specifically rejected.

The most glaring illustration of the COC’s disregard of the Court’s express holdings is the COC’s obsession with regulatory minutiae. The COC would have the Court vacate the Commission’s rulemaking because of: the SEC Chairman’s “ousting” of the duty officer, COC Br. at 17, a dissenting Commissioner’s personal offense arising

from a lack of staff attention, *see* COC Br. at 19 – 20, the staff’s lack of access to its computers for two days and the general disruption caused by moving offices, *see* COC Br. at 18, the dissenting Commissioners’ frustration with the schedule for filing their dissents, *see* COC Br. at 18 – 19, public comments concerning the Commission’s public reputation, *see* COC Br. at 21, and the continued service of one Commissioner on the Commission after the formal expiration of his term. *See* COC Br. at 16. This Court found deficiencies in the Commission’s consideration of costs of the conditions and the disclosure alternative, not in the administration of the Commission or the proper handling of minor grievances of dissenting Commissioners. The COC would have this Court assume the role of agency overseer, reviewing every perceived slight and minor grievance. This persnickety level of review is uncalled for and patently absurd.

Even more absurd is the COC’s application of the standard for reviewing the actual content of the Commission’s Response. The COC challenges the Commission’s determination because it relies on: newsletters and newspaper articles, *see* COC Br. at 45; data that is two- and five-years old, respectively, *see* COC Br. at 46, 48; and assumptions regarding the precise number of additional hours that board counsel may serve. *See* COC Br. at 40, 50. It is the consideration of precisely this kind of picayune detail that this Court has firmly and repeatedly eschewed in its review of administrative rulemakings. *See Chamber of Commerce*, 412 F.3d at 143 (“court owes *extreme deference* to the agency when it is evaluating scientific data within its technical expertise” (quoting *Huls v. Browner*, 83 F.3d 445, 452 (D.C.Cir. 1996))).

The COC even claims that the rulemaking must be vacated because the Commission failed to demonstrate that the benefits of the governance conditions in

connection with the approval of a joint bond or insurance policy would exceed the cost of the conditions. *See* COC Br. at 25-26. In addition to the fact that the Court already has accepted the Commission’s rationale for the rules, and the fact that the COC chose the example of the joint bond and insurance policy in a misleading attempt to belittle the seriousness of the abuses against which the exemptive rules are designed to protect (*cf.*, settlements pursuant to the mutual fund scandal involving violations of exemptive rules have resulted in billions of dollars in disgorgement and penalties²), the COC’s claim again utterly fails to address this Court’s concerns. There is no requirement to demonstrate that the benefits realized from the amendment of each exemptive rule are independently sufficient to justify the costs of the governance conditions.

The COC’s critique of the Commission’s analysis of the costs of the conditions for small funds is truly over the top. The COC claims that the conditions’ cost to fund complexes with less than \$50 million in assets would be the full \$415,000 that the Commission estimates might be spent on three new board hires and \$350,000 in incidental services. *See* COC Br. at n.13. Given the availability of less-costly alternatives for compliance, it is ludicrous to think that a \$50 million fund complex would choose to comply with the conditions by hiring three new directors at a combined salary of \$65,000 per year and spending an additional \$350,000 on incidental expenses,

² *See, e.g., In the Matter of PA Fund Management LLC*, Admin. Proc. File No. 3-11645 (Sep. 23, 2004) (finding violation of ICA Section 17(d), 15 U.S.C. § 80a-17(d), and Rule 17d-1, 17 C.F.R. 270.17d-1, by fund manager whose CEO also served as the funds’ non-independent chairman, and requiring payments of \$50 million). Moreover, the mutual fund scandal that alerted the Commission to significant deficiencies in mutual fund governance cost shareholders billions of dollars and caused a crisis of confidence in the fund industry. In this respect, we must correct the Court’s and COC’s erroneous statements “that none of the documented abuses involved a transaction covered by the Exemptive Rules.” *Chamber of Commerce*, 412 F.3d at 140-41. In fact, in many of the settlements resulting from the scandal, the Commission alleged violations of Rule 17d-1, for example, which is one of the most important exemptive rules. *See, e.g., In the Matter of PA Fund Management LLC*, supra.

or 0.83% of fund assets (the 75 percent condition does not even apply to fund boards with 3 or fewer members). *See* COC Br. at n.13. More ridiculous is the COC’s concern that \$10 million fund complexes would choose to comply in a way that increased their expense *four-fold*, or 4 percentage points above a typical expense ratio of 1.1%. *See* COC Br. at 54. A recent study confirms the vast chasm that exists between the actual costs of compliance and the COC’s purely theoretical concerns.³

This Court has mandated only that the Commission consider every reasonably foreseeable reality, not every conceivable possibility, when considering the effects of the governance conditions. *See Chamber of Commerce*, 412 F.3d at 142 (“When ... an agency is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer, our role is more limited; we require only that the agency so state and go on to identify the considerations it found persuasive.” (citing *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1221 (D.C.Cir. 1999))). The Commission’s thorough and extensive consideration of the governance conditions far exceeds that standard.

³ *See Cost Implications of an Independent Chair and 75 Percent Independent Board*, Mutual Fund Directors Forum at 2 (Aug. 30, 2005) (finding that (1) governance condition compliance costs to date are at the “low end of the range of estimates provided by the Commission,” (2) “compliance with 75 percent independent director and independent chair rule requirements is likely to have a negligible impact on a fund’s operating costs, and, (3) “in every instance, any additional costs... will almost certainly be *substantially less than one percent of the aggregate advisory fees incurred by the fund* (in the case of a single stand-alone fund), or the family of funds in the complex.” (emphasis added)) *available at* <http://www.mfdf.com/UserFiles/File/ReportofSurvey.pdf> (last visited Oct. 23, 2005).

II. THE COMMISSION'S THOROUGH AND EXTENSIVE CONSIDERATION OF THE COSTS AND BENEFITS OF THE GOVERNANCE CONDITIONS FAR EXCEEDS APA REQUIREMENTS

The issue for this Court, which the COC has failed to address, is whether the Commission “adequately . . . consider[ed] the costs imposed upon funds by the two challenged conditions.” *Chamber of Commerce*, 412 F.3d at 144. The Commission’s Response evidences a thorough and exhaustive analysis that far exceeds APA standards as applied by this Court. The Commission based its determination on a substantial pre-remand record. That record includes extensive information regarding the costs of the conditions, including information provided by the fund industry. Industry representatives submitted information regarding, for example, the estimated dollar cost of compliance with the conditions,⁴ the anticipated means of compliance with the conditions,⁵ and the expected incidental costs of the conditions.⁶

⁴ See, e.g., Comment Letter of New Alternatives Fund, Inc., File No. S7-03-04 (Feb. 9, 2004) (\$108,000 cost estimate to comply with all new rules); Comment Letter of Independent Directors of Flaherty & Crumrine Preferred Income Opportunity Fund Inc., File No. S7-03-04 (Feb. 23, 2004) (\$20,000 and \$10,000 annual cost estimate to comply with 75 percent and independent chairman requirements, respectively); Comment Letter of the Disinterested Directors of ICAP Funds, Inc., File No. S7-03-04 (Mar. 4, 2004) (providing salary data for independent chairman).

⁵ See, e.g., Comment Letter of the Directors’ Committee of the Investment Company Institute, File No. S7-03-04 (Mar. 10, 2004) (“While it is our expectation that most funds would reach this percentage by asking an interested director to step down from the board, there are some boards that will do so by adding an independent director.”); Comment Letter of New Alternatives Fund, Inc., File No. S7-03-04 (Feb. 9, 2004) (“[I]t is difficult to find competent directors. An alternative is for the undersigned founder to resign as a director while remaining a manager. We could then reach the 75% requirement.”).

⁶ See, e.g., Comment Letter of Disinterested Trustees of EQ Advisors Trust, File No. S7-03-04 (Mar. 4, 2004); Comment Letter of New Alternatives Fund, Inc., File No. S7-03-04 (Feb. 9, 2004) (\$25,000 cost estimate for “aids to directors”); Comment Letter of Sullivan & Cromwell, LLP, File No. S7-03-04 (Mar. 9, 2004) (“[W]e believe that mandating an independent chairman will effectively mandate the retention of an independent staff and/or enhanced participation by independent counsel in fund complexes both large and small.”).

The Commission also based its determination on a substantial post-remand record, as conceded by the COC. *See* COC Br. at 36 – 40 (describing post-remand information used to analyze six categories of costs). With respect to the 75 percent requirement, the Commission specifically considered the fact that nearly 60 percent of funds were already in compliance and accordingly would incur a compliance cost of \$0. *See* 70 Fed.Reg. 39,390, 39,391. The Commission also considered the compliance costs for funds that chose to appoint additional directors. *See id.* at 39,392. Additionally, the Commission generously supplemented the massive collection of data previously acquired with a mass of publicly available information, including publications of industry experts and related surveys. *See, e.g., id.* at nn.24, 28; 39,393 & nn.32, 33; 39,393 & n.43; 39,394 n.60. Based on rigorous analysis, the Commission’s investigation found that compliance costs by increasing the number of independent directors would entail an entirely insignificant ongoing cost (falling within the range of \$7,037 to \$64,800 per fund). *See id.* at 39,395. As mentioned, compliance by reducing the number of management/interested directors has no monetary cost, and the Commission also determined that such an approach would result in no intellectual capital loss because boards could invite such ex-directors to future board meetings as interested parties. *See id.* at 39,393, 39,394.

With respect to the independent chairman requirement, the Commission’s analysis was similarly thorough and rigorous. Based on several comment letters and its own expertise, the Commission found that an independent chairman could generally be expected to hire no more than one analyst and one executive assistant per family of funds. *See id.* at 39,394. The Commission estimated the staff cost to be \$42,519 per fund, based

on consideration of publicly available salary estimates, adjusted for overhead, and then divided by the average number of funds per such family. *See id.* at 39,394 & n.60. The Commission further considered comments suggesting that an independent chairman would require additional legal counsel. *See id.* at 39,395 & nn.62, 63. The Commission calculated the cost of additional legal fees to be \$15,000 annually per board, or merely \$2,027 per fund. *See id.* at 39,395. Finally, the Commission considered the cost of increased compensation for independent directors, estimating such increases to fall within a range of \$1,147 to \$9,000 annually per fund. *See id.*

With these thorough and meticulous cost estimations completed, the Commission specifically considered and weighed the effect of the improved governance conditions on the promotion of efficiency, competition, and capital formation. The Commission determined that the governance conditions will increase investor confidence, a major factor affecting investment in US capital markets. *See id.* at 39,395. The Commission compared the slight potential costs of compliance with the vast assets managed by the \$7.4 trillion mutual fund industry. *See id.* at n.71. Still further deliberating, the Commission recognized that that most funds would likely choose the lowest cost options for compliance with both requirements, but that utilization of any of the means of compliance would require only minimal expense. *See id.* at 39,395 & n.76. Weighing these factors, the Commission accordingly determined that the possible fund expenses incurred are trivial in comparison to the valuable benefits provided by the governance conditions. *See id.* at 39,396. Furthermore, the Commission recognized that the integrity of the markets is vital to competition and capital formation. *See id.* Based on such

exhaustive overall review and analysis, the Commission found that the new governance conditions promote efficiency, competition, or capital formation. *See id.*

What does the COC make of the Commission's extensive fact-finding and analysis? Again, it argues not that the Commission's analysis was inadequate, but that it was wrong. The COC's substantive disagreement with the Commission's analysis, as noted above, *supra* pp. 3 - 7, is at a level of detail that is flatly inconsistent with this Court's position that "cost-benefit analyses epitomize the types of decisions that are most appropriately entrusted to the expertise of an agency." *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1440 (D.C.Cir.1983); *see Chamber of Commerce*, 412 F.3d at 145 ("the Commission--not its counsel and not this court--is charged by the Congress with bringing its expertise and its best judgment to bear"). The COC also criticizes the Commission for considering post-remand data, notwithstanding that the Court strongly implies that such consideration is appropriate. *See Chamber of Commerce*, 412 F.3d. at 145; *see also Federal Power Com'n v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 28 (U.S. 1961) (the "objection—that the Commission erred in going outside the record—was rejected by the Court of Appeals and we concur in that conclusion.").

At the same time that the COC criticizes the Commission's use of post-remand information, the COC peppers its arguments with its own post-remand information, thereby exposing its position as nothing more than an attempt to persuade the Court to supplant the Commission's judgment with its own. *See* COC Br. at 47, 58, 52, 55. The COC criticizes the Commission's use of news reports, while citing itself nine news pieces for the purpose of persuading this Court to overturn the Commission's decision. *See*

COC Br. at 16, 17, 20, 47, 49, 55. The COC cites three unpublished studies on mutual fund issues for exactly the same purpose, knowing full well that it is well-settled law that the Commission need not consider every source of information under the sun. *See National Grain and Feed Ass'n, Inc. v. OSHA*, 903 F.2d 308, 310-11 (5th Cir. 1990) (agencies are “free on remand to determine whether supplemental fact-gathering is necessary for correction of the perceived error or deficiency”). In contrast, the COC’s comment letter on the Commission’s proposals was *devoid of any reference to the costs of the conditions*, yet the COC now seeks the Court’s complicity in sandbagging the Commission with a trove of data -- apparently only recently discovered -- that demonstrates nothing more than the fact that the COC’s only true disagreement with the Commission is the outcome of its deliberations, not its analysis.

The Commission’s analysis of the costs of the conditions substantially exceeds the standard of review established by this Court and applicable Court precedent. The Court noted that the Commission “‘need not—indeed cannot—base its every action upon empirical data,’” *Chamber of Commerce*, 412 F.3d at 142 (quoting *Melcher v. FCC*, 134 F.3d 1143, 1158 (D.C.Cir.1998)), or even provide “‘complete factual support’” for its findings. *Id.* (quoting *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 813-14 (1978)); *see Radio Ass'n on Defending Airwave Rights, Inc. v. U.S. Dept. of Transportation*, 47 F.3d 794, 806 (6th Cir. 1995) (sustaining federal agency action where the “agency clearly performed ‘some type’ of cost-benefit analysis”); *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1059. (C.A.D.C., 1979) (“absence of firm data did not preclude the SEC from adopting or declining to adopt rules”). Pursuant to this well-established standard of review, this Court required only that the Commission

“consider the costs imposed upon funds by the two challenged conditions” and “to do what it can to apprise itself--and hence the public and the Congress--of the economic consequences of a proposed regulation.” *Chamber of Commerce*, 412 F.3d at 144, a standard substantially exceeded by the Commission’s thorough and extensive Response.

Indeed, to reject the Commission’s cost analysis in the Response would obliterate the deference this Court has stated must be afforded to the Commission’s rulemaking. This Court owes not just “deference,” but “extreme” deference to the agency’s determinations. *Id.* at 143 (quoting *Huls*, 83 F.3d at 452). When the Commission must “make policy judgments where no factual certainties exist” -- as is the case when attempting to estimate the financial and other benefits generated by having a 75 percent independent board with a non-conflicted chairman in place to prevent and deter fraud⁷ -- the Court’s “role is more limited; [it] require[s] only that the agency so state and go on to identify the considerations it found persuasive.” *Chamber of Commerce*, 412 F.3d at 142 (quoting *BellSouth Corp.*, 162 F.2d at 1221). The Commission’s thorough and extensive factual analysis does far more than merely “identify the considerations it found persuasive.” Its findings must be respected for judicial deference to agency determinations to have any vitality.

⁷ *But see PA Fund Management LLC*, *supra* note 2 (\$50 million in penalties and disgorgement).

III. THE COMMISSION'S THOROUGH AND EXTENSIVE CONSIDERATION OF THE DISCLOSURE ALTERNATIVE FAR EXCEEDS APA REQUIREMENTS

This Court held that the Commission had an “obligation to consider” disclosure as an alternative to the governance conditions. *Chamber of Commerce*, 412 F.3d at 145. The Commission has demonstrably exceeded this standard.

The Commission devotes an entire section of the Response to the disclosure alternative. *See* 70 Fed. Reg. 39,396-97 (entitled “Consideration of the Disclosure Alternative”). The Commission considered the fact that disclosure would fail to: mitigate the domination of fund boards by management, prevent the self-dealing that the amendments are designed to prevent and deter, strengthen compliance procedures, or foster meaningful dialogue between the board and management. *See id* at 39,397. Disclosure might permit investors to better evaluate the board’s potential in achieving these goals, but -- as expressly considered by the Commission -- the questionable efficacy of disclosure and the transaction costs of investors’ voting with their feet both undermine the already minimal effect that improved disclosure might have on the effectiveness of fund governance. *See id*. The Commission’s consideration of the disclosure alternative substantially exceeds APA requirements. *See Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (consideration of alternatives is normally adequate unless the agency “entirely failed to consider an important aspect of the problem.”); *see also Neighborhood TV Co., Inc. v. FCC*, 742 F.2d 629, 640 (D.C.Cir. 1984) (relying on an administrative report as proof of agency’s adequate consideration).

It is again difficult to determine how the COC believes that the Commission failed to consider the disclosure alternative. The COC does not even mention the factors that the Commission considered, except for a passing reference to the board/management dialogue issue. *See* COC Br. at 59 - 61. Instead, it restates its complaints about perceived slights against the dissenting Commissioners and the Commission's decision not to conduct a ground-up review of the *raison d'être* of each and every exemptive rule. *See* COC Br. at 59 – 60. The COC again questions the Court's twice-iterated holding that the Commission's authority and rationale satisfied applicable standards. *See* COC Br. at 61 (“Commission gave no consideration at all [sic] the public's interest in having management-chaired funds”). Finally, the COC again ignores the potential abuses against which the exemptive rules are designed to protect, such as the very real possibility that management might negotiate joint insurance or bonds to the disadvantage of fund shareholders.⁸ The COC essentially has nothing to say about the issue that is actually before this Court: the sufficiency of the Commission's consideration of the disclosure alternative.

CONCLUSION

In conclusion, the Commission's thorough and extensive Response to the remand far exceeds the requirements that it “adequately [] consider the costs mutual funds would incur in order to comply with the conditions” and “a proposed [disclosure] alternative to the independent chairman condition.” *Chamber of Commerce*, 412 F.3d at 136. The

⁸ For example, in the late 1990s the Commission became aware that such joint insurance policies included a co-insured exclusion, which meant that independent directors would be not covered by the policy if they disagreed with, and as a result were sued by, fund management. *See* *Role of Independent Directors of Investment Companies*, 64 Fed. Reg. 59,826, n.110 (1999) (“We believe that the ability of fund directors to perform their duties may be further impaired if an adviser's lawsuit poses a threat to fund assets as well as to directors' personal assets.”).

COC has effectively ignored the issue of the sufficiency of the Commission's reconsideration, preferring instead to challenge again the Court's holding finding that the Commission' authority and rationale in connection with the governance conditions complied with applicable legal requirements. Accordingly, the Amici respectfully request the Court to dismiss the COC's petition.

Dated: October 28, 2005

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 12 points and contains 4,483 words.

Thomas Henry Freeland, IV, Esq.
Dated October 28, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 28th of October, 2005, copies of Brief of Amici Curiae in Support of Respondent were mailed first-class, postage prepaid, to:

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