

**ORAL ARGUMENT NOT YET SCHEDULED****CASE NO. 18-1213**

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

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

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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

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**BRIEF OF PUBLIC AND PRIVATE COMPANIES, NONPROFIT  
ORGANIZATIONS, AND LABOR UNION AS AMICI CURIAE IN  
SUPPORT OF PETITIONERS**

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rules 26.1, 28(a)(1), and 29(b), Amici Curiae state that they have consent from all parties to participate as amici curiae and further state as follows:

**(A) Parties and Amici.**

Except for the following, all parties, intervenors, and amici appearing in this court are listed in the Opening Brief of Petitioners:

*Amici Curiae:*

- Domtar Corporation is a publicly-held company that manufactures a wide variety of pulp, paper, and personal care products. Domtar Corporation has no parent company. BlackRock, Inc. is the only publicly-held company with a ten percent (10%) or greater ownership in Domtar Corporation.
- EMA is a trade association dedicated to the business activities of manufacturers and envelope printers, forms companies, packaging companies, market intermediaries, and the supplies that support these companies. EMA promotes the value of paper-based communications and, in particular, envelopes and printed products. EMA has no parent company, and no publicly-held company has a ten percent (10%) or greater ownership in EMA.

- Monadnock Paper Mills, Inc. is a privately-held company that provides a diverse range of paper products, including technical/specialty papers, premium printing, and packaging papers for leading brands worldwide. Monadnock Paper Mills, Inc.'s parent company is Pierce Hill Holdings, LLC. No publicly-held company has a ten percent (10%) or greater ownership in Monadnock Paper Mills, Inc.
- Boise Paper, a division of Packaging Corporation of America, is a manufacturer of paper products. Packaging Corporation of America is a publicly-traded company with no parent company, and BlackRock, Inc. is the only publicly-held company with a ten percent (10%) or greater ownership in Packaging Corporation of America.
- The Printing Industry of the Carolinas, Inc. ("PICA") is a regional trade association for print manufacturing in North Carolina and South Carolina. PICA has no parent company, and no publicly-held company has a ten percent (10%) or greater ownership in PICA.
- National Grange of the Order of Patrons of Husbandry (the "Grange") is a family, community organization with its roots in agriculture. The Grange has no parent company, and no publicly-held company has a ten percent (10%) or greater ownership in the Grange.

- National Association of Letter Carriers (“NALC”) is a labor union that is the sole representative of city delivery letter carriers employed by the U.S. Postal Service. The NALC has no parent company, and no publicly-held company has a ten percent (10%) or greater ownership interest in the NALC.

**(B) Rulings Under Review.**

References to the rulings at issue appear in the Opening Brief of Petitioners.

**(C) Related Cases.**

Amici Curiae are aware of no related cases.

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## **STATUTES AND REGULATIONS**

All applicable statutes and regulations are contained in the Opening Brief of Petitioners.

### **STATEMENT OF IDENTITY, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE**

Amici (as identified above) are public and private companies, nonprofit organizations, and a labor union with an interest in the continued production of shareholder reports in paper form and the delivery of such reports to investors via mail. The amici include companies that manufacture products that are involved in the production and delivery of paper shareholder reports to investors, as well as a labor union that represents workers who are directly involved in the delivery of reports through the mail. While the amici have diverse economic interests, they share a common goal in protecting the interests of consumers and investors who prefer to receive information concerning their investments in the format that is most accessible and convenient for them, i.e., on paper. Amici strongly disagree with the Securities and Exchange Commission's decision to permit investment companies to satisfy their disclosure requirements by posting reports online and requiring investors to take affirmative steps to "opt out" of electronic delivery and request delivery of reports by mail. *See Optional Internet Availability of Investment Company Shareholder Reports*, 83 Fed. Reg. 29,158 (June 22, 2018) ("Rule 30e-3").

All parties have consented to the filing of this brief. This brief was not authored in whole or in part by counsel for any party to this action; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person other than the amici curiae, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief.

### **ARGUMENT**

Rule 30e-3 reverses the longstanding requirement that investment funds deliver annual and semiannual reports to investors in paper form unless investors opt to receive reports electronically, instead permitting funds to post reports online and notify investors of their availability unless investors specifically “opt out” and take affirmative steps to receive paper reports. In adopting Rule 30e-3, the Commission discounted evidence that switching to an “opt out” rule for electronic reports would substantially decrease the likelihood that investors will actually read reports and also specifically harm the significant number of investors who prefer to receive reports in paper form. Paper reports are both more widely read and superior to electronic reports in terms of investor comprehension, and the change in default rules imposed by Rule 30e-3 will lead to a decrease in investors with meaningful access to the information provided in fund reports. The rule will also have a detrimental impact on the many investors who have limited or no access to

the internet or whose primary access to the internet is through smartphones rather than by broadband internet using a home computer. Because the Commission improperly disregarded investors' interests in continuing to receive paper reports in favor of cost savings to industry that are not likely to be passed on to investors, Amici urge the Court to grant the Petition and vacate the rule.

**I. PAPER REPORTS ARE MORE WIDELY READ THAN ELECTRONIC REPORTS AND ARE PREFERRED BY A SUBSTANTIAL NUMBER OF INVESTORS**

Rule 30e-3 creates a presumption that making reports available to investors on the internet adequately protects investors' interests in receiving information regarding their investments. But that presumption goes against significant evidence showing that paper reports are more easily and widely read and understood by investors than electronic reports and that a substantial number of investors prefer receiving and reading annual reports in paper form.

The SEC's own study of mutual fund investors revealed that a majority of investors prefer to read annual reports in paper format. *See* Siegel & Gale LLC, *Investor Testing of Selected Mutual Fund Annual Reports (Revised)* (Feb. 9, 2012), available at <https://www.sec.gov/comments/s7-08-15/s70815-3.pdf>. Specifically, 71% of study participants said they would prefer to read some or all of their reports in print, while only 29% said they would prefer to read reports primarily online. *See id.* at 183. Additionally, approximately 50% of online survey respondents

indicated they preferred to receive either some or all information about their mutual fund investments in print through the mail. *Id.* at 185.

A study commissioned by Broadridge also found that a majority of investors (55%) preferred to receive annual and semiannual fund reports by mail, with even higher percentages reported by investors over age 55 (60%) and over age 65 (65%). See Forrester, *How Might the Proposed Rule on Accessing and Semiannual Mutual Fund Reports Affect Investor Behavior?* (Aug. 7, 2015) (hereinafter, “Forrester Report”) at 20-21, attachment to Comment Letter of Broadridge Financial Solutions, Inc. (Aug. 11, 2015) (“Broadridge Comment Letter I”), available at <https://www.sec.gov/comments/s7-08-15/s70815-321.pdf>. Moreover, when given a choice between receiving a complete report by mail, receiving a summary report by mail with information on how to access the full report, and receiving only a notice by mail with instructions on how to access the full report, 85% said they preferred to receive either the summary or full report by mail, with only 15% preferring the “notice and access” option. *Id.* at 32. Another survey of investors found similar results, with 50% reporting that they preferred to receive reports by mail compared to 29% who preferred to receive a mailed notice explaining where to access reports online. See True North Market Insights, *Annual Report and Semi-Annual Report Notification Study: Understanding the Impact of Providing Investors with Mutual Fund and ETF Report Notifications* (June 2015)

(hereinafter, “TNMI Report”) at 24, attachment to Broadridge Comment Letter I.

A survey commissioned by AARP similarly found that a substantial majority of investors in retirement plans preferred to receive information about their investments in paper form. *See generally* Rebecca Perron, *Paper by Choice: People of All Ages Prefer to Receive Retirement Plan Information on Paper* (2012), available at <http://paperoptions.convergencecms.co/templates/files/aarp-survey.pdf>.

In addition to the fact that receiving paper reports is the stated preference of many investors, studies show that mutual fund investors are far more likely to actually review fund reports received by mail than under the electronic delivery method allowed by Rule 30e-3. In one survey specifically focused on the Commission’s proposed rule change, only 22% of investors who currently received reports by mail said they would be likely to look at reports in the future if Rule 30e-3 were adopted, compared to 65% who said they would be likely to look at reports if they continued to be sent by mail. *See* Forrester Report at 28. When asked to explain why they would be less likely to review reports under the proposed rule, a majority of respondents said they did not like to read reports online, that requesting a mailed copy of reports would be inconvenient, and that they resented having to take extra steps to continue receiving reports by mail. *See* Forrester Report at 29. Indeed, this survey showed that receiving a copy of the

report in the mail is the primary means by which investors become aware of the existence of the report. *See* Forrester Report at 27, 30.

Another study showed that investors who received reports by mail were more likely to report that they “always” reviewed reports compared to investors who received reports only by email (36% vs. 21%) and also were more likely to report that they reviewed reports “most of the time” (31% vs. 27%). *See* TNMI Report at 15. Sixty-nine percent (69%) of investors who had chosen not to receive reports electronically explained that they preferred to look at the information on paper, with 27% reporting that they found it difficult to review this kind of information on a screen, and 24% reporting that they did not want to print information at their own expense. *See* TNMI Report at 14. Forty-two percent (42%) of investors stated that they would be less likely to review reports if they only received a notice of their availability rather than the full report in the mail. *See* TNMI Report at 28.

These studies are consistent with evidence from the proxy context, where proxy participation (in terms of both viewing and voting) declined significantly after the Commission adopted similar “notice and access” rules for proxy materials. *See* Broadridge Comment Letter I at 10-12. The clear effect of Rule 30e-3 will be that fewer investors will look at annual reports, and substantially fewer investors will look at reports in paper form. The latter consequence is

particularly significant in light of research that indicates reading on paper is superior to reading on electronic screens in terms of reading comprehension and long-term memory. *See, e.g.,* Ferris Jabr, *The Reading Brain in the Digital Age: The Science of Paper Versus Screens*, Scientific American, April 11, 2013, <https://www.scientificamerican.com/article/reading-paper-screens/>. In adopting Rule 30e-3, the Commission did not adequately consider the consequences of a rule that would result in fewer investors reading annual reports and fewer investors reading them in the format that produces the highest levels of comprehension.

## **II. THE COMMISSION’S ADOPTION OF AN IMPLIED CONSENT RULE FOR DELIVERY OF REPORTS WILL HARM INVESTORS**

Rather than continuing the Commission’s existing policy of permitting investors to “opt in” to receiving and viewing annual reports and related information electronically, Rule 30e-3 establishes an “opt-out” regime where investment funds can stop delivery of paper reports unless an investor takes specific, affirmative steps to request delivery of paper reports. In adopting Rule 30e-3, the Commission assumes that investors have given their “implied consent” to electronic delivery. But many investors are accustomed to receiving paper disclosures and will not expect the drastic change in default rules incorporated into the Commission’s final rule. Moreover, research shows that many investors will not take affirmative steps to continue receiving paper reports even if they have a

strong preference for receiving reports in paper form. The Commission failed to adequately consider these factors when adopting Rule 30e-3.

In an attempt to address concerns about implied consent, the Commission originally proposed certain notice requirements to investors, including a requirement that funds send investors a separate “Initial Statement” informing them of the change in delivery method at least 60 days prior the change and providing a postage-paid reply card that would have allowed investors to preserve their preference for receiving paper reports. *See* 83 Fed. Reg. at 29,170-72. In its final rule, the Commission abandoned these requirements in favor of an “extended transition period,” with notice of the change included in other fund disclosures over a two-year period. *See id.* at 29,160, 29,175. This change makes it far less likely that investors will be aware of the forthcoming change in delivery methods. Moreover, “funds that are newly offered on January 1, 2021 and thereafter would not be subject to the condition [requiring advance notice] and could therefore rely on the rule immediately without providing any advance notice through required statements.” 83 Fed. Reg. at 29166. Additionally, all funds can rely on the rule without providing any advance notice to investors beginning January 1, 2022. *See* 83 Fed. Reg. at 29177. As a result, a substantial number of investors will receive no advance notice of the change to default electronic delivery of reports.

More importantly, there is substantial research that implied consent rules do not adequately protect the interests of investors because most investors presented with the option to “opt out” will take no action, even when it is in their best interest to do so. *See, e.g.*, Eric J. Johnson, *Defaults and Deciding to Use Information: A White Paper Reviewing the Role of Defaults in Decision Making: Implications for Investor Participation in the Proposed Notice and Access Scenario* (Feb. 2006), attachment to Broadridge Comment Letter I; Daylian M. Cain & Sendhil Mullainathan, *Channel Factors that Block (Psychologically) Effective Access: Unforeseen Risks of the Proposal on “Internet Availability of Proxy Materials”*, attachment to Broadridge Comment Letter I. Research from the field of behavioral economics shows that there are multiple reasons why consumers faced with a choice often take no action. For example, making a choice requires both physical and cognitive actions that take time and effort—such as, in the case of Rule 30e-3, placing a telephone call to the investment fund to register a preference for receiving paper reports. *See* Johnson, *supra*, at 5. Research shows that even when consumers need only make a single mouse click on their computer to change a default option, many consumers will not take action consistent with their preferences. *See id.* at 3. Research also suggests that consumers are influenced by the “implied endorsement” of a default option, meaning that investors will assume that by permitting electronic delivery of annual reports as the default option, the

Commission is signaling to investors that it does not believe paper delivery of reports is important. *See id.* at 5. These are all “psychological barriers to access” that prevent people from taking actions to receive paper reports even though that is their actual preference. *See Cain & Mullainathan, supra.* These concerns have been borne out in the proxy context, where the adoption of “notice and access” provisions led to substantially lower levels of voting and viewing of proxy materials. *See Broadridge Comment Letter I* at 11-12.

As the Commission noted, many federal agencies, including the Internal Revenue Service, do not permit implied consent for electronic delivery of certain materials. 83 Fed. Reg. at 29,162. Although the Commission acknowledged in its final release that there were substantial objections to using implied consent for the electronic delivery of annual reports, the Commission effectively did nothing to address those concerns in its final rule. The Commission acknowledged that “investors with a preference paper delivery that fail to express it may be less likely to review the information in the reports because it is not presented in their preferred format.” 83 Fed. Reg. at 29,188. But the Commission simply assumed that the negative impact on these investors would be minimized by the “extended transition period” adopted in the final rule, ignoring evidence that changes in default rules have lasting and significant impacts on investors’ access to information. By failing to adequately consider and explain this evidence in its

rulemaking, the Commission acted arbitrarily and capriciously. *See Chamber of Commerce v. SEC*, 412 F.3d 133, 140 (D.C. Cir. 2005) (“Although ‘the scope of review under the “arbitrary and capricious” standard is narrow and a court is not to substitute its judgment for that of the agency,’ we must nonetheless be sure the Commission has ‘examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made.’” (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))).

Under the Commission’s preexisting rules permitting electronic delivery of reports to those investors who affirmatively consented to such delivery, approximately 43% of reports were delivered electronically in 2015, with that rate forecasted to increase to as much as 59% in 2018. *See* Broadridge Comment Letter I at 6. Those statistics demonstrate that the existing “opt in” default rules for electronic delivery were working well, and the percentage of investors who had not affirmatively consented to receive reports electronically were doing so because they preferred receiving reports in paper. Rule 30e-3’s adoption of an “opt out” policy cannot be justified based on principles of implied consent for the substantial number of investors who have expressed their preferences for receiving reports in paper form.

### III. RULE 30E-3 WILL HAVE AN ADVERSE IMPACT ON POPULATIONS WITH LIMITED ACCESS TO THE INTERNET

Rule 30e-3's presumption of electronic delivery of annual reports also fails to adequately protect the interests of investors who have either no access or limited access to the internet, including senior citizens, rural Americans, and individuals with low incomes, all of whom rely heavily on mail delivery for access to information concerning their fund investments.

The Commission acknowledged in its proposing release that 41% of seniors 65 and older did not use the internet in 2013 and that a substantial number of seniors (34%) own mutual funds. *See* 83 Fed. Reg. at 29,162 (citing *Investment Company Reporting Modernization*, 80 Fed. Reg. 33,590 (June 12, 2015)). The latest data from the Pew Research Center show that in 2018, 34% of seniors 65 and older are still not using the internet, and only 50% of seniors 65 and older have broadband internet access at home. *See* Pew Research Center, *Internet/Broadband Fact Sheet* (February 5, 2018), <http://www.pewinternet.org/fact-sheet/internet-broadband/> (“Who uses the internet”/“Age”; “Who has home broadband”/“Age”). That is a substantial number of senior citizens whose only meaningful access to annual reports is through written reports delivered by mail. Unsurprisingly, 74% of investors between the ages of 65 and 88 years old stated that they would prefer to continue receiving reports by mail compared to the method permitted by Rule 30e-3. *See* Forrester Report at 26. The Commission's adoption of Rule 30e-3 will

force these senior citizens to take additional steps to continue receiving the information that they have customarily received by mail. It is likely that many of these seniors will not see or fully understand the notice that funds issue to inform them of the availability of reports online, especially since they will not be accustomed to receiving such notices in lieu of receiving the actual reports.

There also remains a significant digital divide between rural and urban or suburban households, with 42% of rural adults reporting that they do not have broadband internet access at home in 2018, compared to 33% of adults in urban areas and 30% of adults in suburban areas. *See* Pew Research Center, *supra* (“Who has home broadband”/“Community”). And there are more substantial variations in internet access across income groups—only 45% of adults with incomes of \$30,000 or less have broadband internet access at home, compared to 87% of adults with incomes over \$75,000. *See id.* (“Who has home broadband”/“Income”). Mutual funds, of course, are broadly owned by investors from all backgrounds. According to one study in 2016, 21% of mutual fund investors had no college education and 17% of mutual fund investors had household incomes below \$50,000, with another 34% having household incomes between \$50,000 and \$100,000. *See* Sarah Holden et al., *Characteristics of Mutual Fund Investors*, ICI Research Perspective (Investment Company Institute), Oct. 2016), at 3, 5, available at <https://www.ici.org/pdf/per22-07.pdf>. Rule 30e-3 will

also adversely affect these investors because they will be forced to take affirmative steps to continue receiving paper reports, with no viable alternative options for reviewing reports online. The rule thus disproportionately affects investors with limited internet access.

#### **IV. INTERNET ACCESS ALONE DOES NOT INDICATE THAT INVESTORS WILL HAVE MEANINGFUL ACCESS TO ANNUAL REPORTS POSTED ONLINE**

The Commission's adoption of Rule 30e-3 was based in large part on evidence that an increasing number of households have access to the internet and thus could review annual reports posted online. But access to the internet does not itself imply that investors will prefer to use their internet access to read annual reports. For example, one survey of investors who received annual reports by mail found that over 70% had used the internet to manage bank accounts, pay bills, and access social media accounts, yet only 26% reported reading annual reports online within the previous six months. *See* Forrester Report at 16. Among other things, concerns about internet security and data breaches have led more and more Americans to be wary of conducting business online, and many Americans limit their online activity to basic activities such as checking emails, reading the news, and posting on social media sites such as Facebook.

Moreover, much of the recent growth in internet usage has been driven by greater penetration of mobile devices. According to the Pew Research Center,

20% of U.S. adults in 2018 do not use broadband at home but have internet access through a smartphone. *See* Pew Research Center, *supra* (“Smartphone dependency over time”). Reliance on smartphones for internet access is particularly high among younger adults, non-whites, and lower-income Americans. *See id.* (“Who is smartphone dependent”/“Age”/“Race”/“Income”) For example, 35% of Hispanics and 24% of Black adults access the internet via smartphone rather than through computer access via broadband at home. *See id.* The Commission has effectively acknowledged that the current form of annual reports are not ideally suited for viewing on smartphones, having issued a Request for Comment on ways to improve shareholder disclosures for investors who prefer to receive disclosures on mobile devices. *See* 83 Fed. Reg. at 29,159 & n.20, 29,165 n.96. The fact that an increasing number of Americans have internet access through smartphones does not justify the Commission’s adoption of Rule 30e-3. Simply put, internet access is not the same as computer access, and the Commission’s rulemaking process for Rule 30e-3 did not adequately take into consideration that the mode of accessing the internet is a relevant factor in determining whether an investor has meaningful access to reports that are posted online.

### **CONCLUSION**

For the foregoing reasons, the Court should grant the Petition and vacate Rule 30e-3.

Respectfully submitted, this 13th day of November, 2018.

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**CERTIFICATE OF COMPLIANCE**

This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 3,504 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point font.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of November, 2018, I electronically filed the foregoing Brief of Public and Private Companies, Nonprofit Organizations, and Labor Union as Amici Curiae in Support of Petitioners using the Court's CM/ECF system, which will automatically serve all parties' counsel of record.

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