Dissent of Commissioner Paul S. Atkins
To the Commission Response to Remand by Court of Appeals
Investment Company Governance

On June 29, 2005, three of the five commissioners (the "majority") of the U.S. Securities and Exchange Commission ("SEC" or "Commission") voted to reaffirm a rulemaking[1] eight days after the United States Court of Appeals for the District of Columbia Circuit (the "Court") remanded the rulemaking to the Commission.[2] I dissented from the majority's action. Although I have substantive objections to the rule amendments that the majority reaffirmed,[3] my concerns about today's actions of the majority run much deeper. The majority's action is the product of a gravely flawed process, which is far from the informed deliberation that should have preceded any final action in response to the Court's remand. My concerns are set forth below.

Background

Last year, the Commission, in a split vote, adopted amendments to ten widely relied-upon exemptive rules in order to mandate a uniform corporate governance structure for all investment companies.[4] The three commissioners who voted in favor of the amendments last year are now reaffirming the adoption of these amendments. In the interim, the Chamber of Commerce of the United States of America (the "Chamber") petitioned the Court for a review of two of the

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1 Investment Company Governance, Investment Company Act Release No. 26985 (June 30, 2005) ("Remand Release"). Because at the time of this writing (2:30 p.m. on June 30, 2005) I do not yet have a final version of the release, this dissent refers to the draft release circulated on June 27, 2005.

2 Chamber of Commerce of the United States of America v. Securities and Exchange Commission, No. 04-1300, slip op. (D.C. Cir. June 21, 2005) ("Slip Opinion").

3 These concerns are set forth in the dissent that Commissioner Glassman and I filed when the rules were adopted. See Dissent of Commissioners Cynthia A. Glassman and Paul S. Atkins to Investment Company Governance (July 27, 2004) [69 FR 46390 (Aug. 2, 2004)] (available at: http://www.sec.gov/rules/final/ic-26520.htm#dissent) ("Adoption Dissent").

4 Investment Company Governance, Investment Company Act Release No. 26520 (July 27, 2004) [69 FR 46378 (Aug. 2, 2004)] ("Adopting Release").

amendments.[5] On the morning of Tuesday, June 21, 2005 the Court granted, in part, the Chamber's petition and remanded the matter to the Commission to address two violations of the Administrative Procedure Act ("APA")[6] that the Court identified in the process by which the Commission had approved the rules. Specifically, the court held that the Commission had (i) "violated its obligation under 15 U.S.C. § 80a-2(c), and therefore the APA, in failing adequately to consider the costs imposed upon funds by the two challenged conditions," and (ii) violated the APA by failing to consider a disclosure based alternative to the independent chairman condition.[7]

A summary of the events that followed the issuance of the Court's opinion provides a window into the nature of the deliberation that preceded the majority's reaffirmation of the rule amendments.[8] On Tuesday evening, less than twelve hours after the Court had issued its opinion, the Chairman of the Commission scheduled the matter for a vote on June 29, 2005. The Chairman's chief of staff explained in an email that the staff had "concluded that the court's concerns can be addressed on the basis of the record already before the Commission." That same evening, the Chairman displaced the designated duty officer for the week to authorize

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5 The amendments require that, if a fund relies on one of the exemptive rules, the fund must have a board of directors with (i) no less than 75 percent independent directors, and (ii) a chairman who is an independent director.

6 5 U.S.C. 551 et seq.

7 Slip Opinion, supra note 2, at 17.

8 A timeline laying out the events of the past week is attached to this dissent. See Exhibit A. Even under normal circumstances, the Commission could not conduct a meaningful analysis within eight days, as the majority claims it has done. During the eight day period at issue, the commissioners and their staffs moved to a new headquarters building, which meant that they had no access to office space or computers for more than two of the eight days. In addition, the Chairman and two commissioners were out of the country for much of this period.

unilaterally the issuance of a public notice of the meeting.[9] This "sunshine act notice" was issued the next morning.[10]

On Friday evening, less than eighty hours after the Court's decision, the staff, recommending against additional fact-gathering, provided the Commissioners with a 27-page draft release that purported to analyze the issues remanded by the court. The staff typically provides their recommendations to the Commission at least two weeks (and often thirty days) before the meeting at which they are scheduled for consideration. On Monday evening, shortly after asking the Chairman to remove the item from the Commission's calendar in order to seek additional comment, a substantially revised draft of the release was distributed. We were instructed by the Chairman's staff to submit any dissenting statements by noon the following day.[11] On Tuesday, after the close of business, we received the draft of the release that would be considered at the Commission meeting the next morning.

Thus, before the ink on the Court's opinion was even dry, the die was cast for the predetermined result of the Commission's deliberations. There was never a serious attempt made to solicit my views or incorporate them into the Commission's release. The procedural flaws that characterized this process did not mitigate, but rather compounded, the flaws in the adoption process that were identified by the Court. This peculiar sequence of events is a very

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[9] The Commission's Rules of Practice provide for the delegation of certain matters to a "duty officer." See 17 CFR 200.43. "To the extent feasible, the designation of a duty officer shall rotate, under the administration of the [Commission's] Secretary, on a regular weekly basis among the members of the Commission other than the Chairman." 17 CFR 200.43 (a)(2) (emphasis added). I can recall only one other instance from my years as a Commissioner and, before that, on the Commission staff, when a Commission chairman has taken the place of the designated duty officer to authorize Commission action. I am not contending that the Chairman's acting as duty officer was illegal, simply that it was irregular and evidenced the hurried and prejudged nature of the process.

[10] Available at: http://www.sec.gov/news/openmeetings/ssacmtg062905.htm.

[11] Because I had not yet seen the final pre-meeting version of the release, I was unable to comply.

fitting capstone on this rulemaking process in which the majority's self-described "logic and experience and anecdotal evidence"[12] has counted more than anything else.

Analysis of Costs

After protesting repeatedly over the past year and a half about the Commission's inability to conduct an analysis of costs, the majority claims to have done just that in about a week. When the majority adopted the rule, it described the costs as minimal, explained that our staff had no "reliable basis" for estimating costs, and complained that doing so would be "difficult."[13] After the rule's adoption, Congress directed the Commission to submit a report justifying the rule.[14] The staff report,[15] which the majority submitted in April 2005 over Commissioner Glassman's and my objections,[16] continued to insist that costs were "minimal," "speculative," or could not be estimated.[17]

The order of an unanimous court should have chastened the Commission, but the majority's Remand Release only perpetuates the cavalier attitude with which we have

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[12] Open Meeting to Consider Investment Company Governance Amendments (Jan. 14, 2004) (webcast available at: http://www.sec.gov/news/openmeetings.shtml) (statement of Commissioner Harvey Goldschmid) ("there are moments where logic and experience and anecdotal evidence compels your conclusions and this for me is one of those areas … .").

[13] See Adopting Release, supra note 4, at VI.B ("Costs"). In addition, the "Consideration of Promotion of Efficiency, Competition and Capital Formation" section of the adopting release, which the Court found to be deficient (Slip Opinion, supra note 2, at 17), contained only two sentences of analysis. See Adopting Release, supra note 4, at Section VIII. This is peculiar given the majority's belief that these amendments will have a profound effect on the market. See, e.g., Remand Release, supra note 1, at text accompanying note 13 ("It is important that we avoid postponement of the compliance date [of the investment company governance amendments] and the attendant potential harm to investors and the market that would result.").

[14] See Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 2910 (2004).

[15] Staff Report, EXEMPTIVE RULE AMENDMENTS OF 2004: THE INDEPENDENT CHAIR CONDITION: A REPORT IN ACCORDANCE WITH THE CONSOLIDATED APPROPRIATIONS ACT, 2005 (April 2005) (available at: http://www.sec.gov/news/studies/indchair.pdf) ("Staff Report").

[16] See Letter from Commissioners Cynthia A. Glassman and Paul S. Atkins to the Honorable Thad Cochran, Chairman, Senate Committee on Appropriations (Apr. 29, 2005) (available at: http://www.sec.gov/news/speech/spch050205cagpsa.htm.

[17] Staff Report, supra note 15, at 60-61.

approached our obligations in this rulemaking.[18] While the Court, appreciating the difficulty of estimating costs in this area, did not demand perfection, it did direct us to do the best we can.[19] I respectfully submit that our eight-day reconsideration of the rule does not meet this standard.[20]

The Remand Release purports to undertake a consideration of the deficiencies identified by the Court on the basis of information in the existing record and information that was publicly available at the time of adoption.[21] This approach is problematic on several fronts. First, and most importantly, some funds have already begun to comply with the fund governance rules.

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[18] Arguably, the Commission should already have been chastened by embarrassing miscalculations of cost in connection with earlier rulemakings. In connection with the adoption of regulations to implement Section 404 of the Sarbanes-Oxley Act, for example, "we estimated the aggregate annual costs of implementing Section 404(a) of the Sarbanes-Oxley Act to be around $1.24 billion (or $91,000 per company)." Managemen's Reports on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, Securities Act Release No. 8238 (June 5, 2003) [68 FR 36636 (June 18, 2003)] at Section V.A. A subsequent industry report found the implementation costs to be "more than 20 times greater than our 2003 estimates." Alex Davern, et al., SARBANES-OXLEY SECTION 404: THE 'SECTION' OF UNINTENDED CONSEQUENCES AND ITS IMPACT ON SMALL BUSINESS (Feb. 2005), at 2 (available at: http://www.aeanet.org/governmentaffairs/AeASOXPaperFinal021005.asp). See also Financial Executives International, Press Release: Sarbanes-Oxley Costs Exceed Estimates (Mar. 21, 2005), at 1 (available at: http://www.fei.org/files/spacer.cfm?file_id=1498) (based on a survey of 217 public companies with average revenues of $5 billion, FEI found that "[t]heir total cost of compliance averaged $1.34 million for internal costs, $1.72 million for external costs and $1.30 million for auditor fees"). Additionally, Congress has reprimanded the Commission in the past for its failure to conduct the type of analysis that the Court found flawed. See Gramm-Leach-Bliley Conference Report (Nov. 1, 1999) (available at: http://banking.senate.gov/conf/somfinal.htm), at Title II.A) ("In addition, during the rulemaking process, the SEC must also make a number of findings. When considering whether such an action is in the public interest, the SEC must also consider whether the action will promote efficiency, competition and capital formation … . The Conferees note that the SEC's record in implementing section 3(f) has failed to meet Congressional intent. The Conferees expect that the SEC will improve in this area.").

[19] The Court stated specifically that the difficulty of the task "does not excuse the Commission from its statutory obligation to determine as best it can the economic implications of the rule." Slip Opinion, supra note 2, at 15.

[20] I cannot, without more information and more time, take a position on the quality of particular estimates in the majority's cost-benefit analysis, but the majority's estimates may not be conservative. For example, how would the majority's estimates change if it used average instead of median salary information to calculate the cost of new independent directors? See Remand Release, supra note 1, at text following note 28. Do the salary figures cited include additional costs of expenses related to traveling to board meetings?

[21] See Remand Release, supra note 1, at text preceding note 11. The majority purports to look at "supplementary public information available subsequent to our original adoption of the amendments" only to "confirm[] the information available at the time of our original adoption." See Remand Release, supra note 1, at note 11. In several instances, however, the majority appears to rely only on post-adoption sources for cost estimates. See Remand Release, supra note 1, at note 32 (for cost of recruiting an independent director, citing J. Bel Bruno, "Recruiter Picked for HP Search," THE PHILADELPHIA INQUIRER, Feb. 18, 2005, at C03); Remand Release, supra note 1, at note 43 (for percentage increase in director compensation during 2004, citing MPI Bulletin, "More Meetings, More Pay: Fund Directors' Compensation Increases 13% as Workload Grows" (Apr. 2005) (available at www.mfgovern.com)).

Instead of relying on estimates, the Commission could easily conduct a survey asking questions about actual costs to comply with the rules. Why would we not seize on this fortuitous opportunity to utilize current, relevant data?[22] In this regard, just two days ago, the ICI volunteered to assist the Commission with obtaining this information from its widespread and representative membership.[23]

Second, the Remand Release implicitly acknowledges that the rulemaking record contained critical gaps regarding costs. Recognizing this flaw, the majority haphazardly searches for additional information that happened to be publicly available at the time of the rule's adoption to attempt to justify its actions.[24] The majority takes a sort of "judicial notice" of the newly-discovered information by treating it as irrefutable fact and uses it to ratify its prior decision.[25]

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[22] The majority cited post-adoption materials when doing so served its purposes. See, e.g., Remand Release, supra note 1, at note 69 (citing, for proposition that "[r]ecently industry experts have similarly noted that the quantitative effect of the independent chairman condition will be modest," Kathleen Pender, "SEC's Fund Rule, Revisited," San Francisco Chron., June 23, 2005, at C1 (quoting fund governance analyst Meyrick Payne as estimating "that the industry-wide cost of having independent chairs, 'at an absolute maximum, is $18 million' a year, which is 'a drop in the bucket' for an industry with $8 trillion in assets.").

[23] See Letter from Elizabeth R. Krentzman, General Counsel, Investment Company Institute, to Jonathan G. Katz, Secretary, SEC (June 27, 2005) ("ICI Letter"), at 2.

[24] Given that the majority supplements the record, it is not clear why they cite cases that stand for the proposition that "if the existing record is a sufficient base on which to address on remand the court-identified deficiencies, additional notice and comment procedures are not required." See Remand Release, supra note 1, at note 9 (citing Sierra Club v. EPA, 325 F.3d 374, 382 (D.C. Cir. 2003); National Grain and Feed Ass'n v. OSHA, 903 F.2d 308, 310-11 (5th Cir. 1990); AT&T Wireless Servs., Inc. v. FCC, 365 F.3d 1095, 1103 (D.C. Cir. 2004). Each of these cases is also distinguishable on the grounds that there was no dissent within the decisionmaker. Both the Environmental Protection Agency and the Occupational Safety and Health Administration are led by a single administrator and the action at issue in the third case was reached by the decision of an unanimous Federal Communications Commission. The instant matter is distinguishable; the Commission's action is the product of a divided Commission, two members of which have continually expressed concerns about the process by which the determination on how to proceed was reached.

[25] The majority also relies heavily on its own experience for specific estimates that are central to its cost-benefit analysis. See, e.g., Remand Release, supra note 1, at text preceding note 36 ("Based upon our experience, we estimate that, on average, the new independent directors will use additional independent legal counsel services a total of 30 hours a year."); Remand Release, supra note 1, at text following note 56 ("In our judgment, independent chairmen will hire no more than, on average, two staff employees, consisting of one full time senior business analyst and one full time executive assistant."); Remand Release, supra note 1, at text following note 61 ("Based upon our experience, we estimate that, on average, the independent chairman will use independent legal counsel a total of 50 hours a year more under the amendments."). The use of the Commission's judgment and experience is appropriate,

The majority's primary discovery to supplement the flawed rulemaking record was a two-page newsletter, which summarizes the results of a nonpublic survey about director compensation conducted by a private consulting firm.[26] Incidentally, the Commission staff did not obtain a copy of the underlying nonpublic survey, apparently because doing so would contradict the majority's intention to rely only on the purportedly adequate public record. In any case, before relying so heavily on this summary, the majority should have included this summary in the comment file to alert the public of its intention to rely upon it. The public then could have reacted to it. The Commission's economists should have evaluated the underlying data. The information presented in the summary may inform any decision that we make,[27] but it should not do so in isolation. Others who are not consultants to independent directors, as the author of this summary is, might have supplemented or contradicted the data.[28] Of course, this process could not possibly have occurred within the eight-day period the majority allowed itself. Therefore,

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but where, as here, the Commission's judgment and experience are the source of the basic elements of its cost analysis, members of the public should have the opportunity to counter with estimates from their own judgment and experience and with empirical data.

[26] Management Practice Inc., "More Meetings Means More Pay for Fund Directors" (Apr. 2004) ("April 2004 MPI Bulletin"). The Remand Release cites to this or one of three other MPI Bulletins approximately seven times. The Remand Release also cites two newspaper articles that quote from Meyrick Payne, a senior partner of MPI. See Remand Release, supra note 1, at note 64 (citing Beagan Wilcox, "Wanted: Independent Chairmen," Board IQ, July 6, 2004 (citing estimate of Meyrick Payne, senior partner, Management Practice, Inc.)); Remand Release, supra note 1, at note 69 (citing Kathleen Pender, "SEC's Fund Rule, Revisited," San Francisco Chron., June 23, 2005, at C1 (quoting fund governance analyst Meyrick Payne as estimating "that the industry-wide cost of having independent chairs, 'at an absolute maximum, is $18 million' a year, which is 'a drop in the bucket' for an industry with $8 trillion in assets.")). Before relying so heavily on the data from Management Practice Inc., the majority should have analyzed whether the data are robust and representative.

[27] As the Draft Release notes, Commissioner Glassman and I cited an earlier version of the data in our dissent. Remand Release, supra note 1, at note 28 and Adoption Dissent, supra note 3, at note 24.

[28] A recent email from C. Meyrick Payne, a senior partner at Management Practice Inc. ("MPI"), the author of the summary, suggests that MPI might have an interest in perpetuating this rulemaking. See Email from C. Meyrick Payne to Various Recipients (June 26, 2005) (attachment to Letter from Cory J. Skolnick of Gibson, Dunn & Crutcher LLP to Jonathan G. Katz, Secretary of the SEC (June 28, 2005) (in the email, Mr. Payne stated that, in advance of the Commission's open meeting, people might want to express their support for the independent chairman provision: "If you, or your board, feel that an independent chair is an appropriate response to the recent mutual fund scandals you might like to write to SEC or your favorite newspaper on Monday or Tuesday so that your opinion can be influential.").

after having forced the Commission to act within an impossibly short timeframe, the majority cannot claim to have not done the "best it can," as the Court directed the Commission to do.[29]

Disclosure Alternative

In addition to finding fault with the Commission's analysis of costs, the Court took issue with our consideration of alternatives. Specifically, the Court stated that the Commission should have considered the disclosure alternative that Commissioner Glassman and I suggested as an alternative to the independent chairman requirement.[30] The Commission's failure to do so violated the APA[31] because, as the Court said, "the disclosure alternative was neither frivolous nor out of bounds."[32] Accordingly, the Court directed the Commission to "bring[] its expertise and its best judgment to bear" to consider the disclosure alternative.[33] Oddly, neither the majority nor the staff solicited our views on the disclosure alternative before (or after) circulating a draft that concluded that the disclosure alternative was without merit. Thus, the majority's action cannot be said to embody the expertise and best judgment of the Commission.

The Remand Release largely reiterates an argument, already dismissed by the Court as unconvincing,[34] namely that the Investment Company Act always favors a prescriptive approach over a disclosure approach.[35] As the court explained, "that the Congress required more than disclosure with respect to some matters governed by the ICA does not mean it deemed disclosure

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29 Slip Opinion, supra note 2, at 15.

30 Slip Opinion, supra note 2, at 17.

31 Slip Opinion, supra note 2, at 17.

32 Slip Opinion, supra note 2, at 18 (citation omitted).

33 Slip Opinion, supra note 2, at 19.

34 Slip Opinion, supra note 2, at 18.

35 Remand Release, supra note 1, at text accompanying notes 76-82.

insufficient with respect to all such matters."[36] The release ignores that we have found disclosure rather than prescriptive, one-size-fits-all solutions to be sufficient in other contexts.[37]

The majority claims that the proposing release elicited comment on the disclosure alternative. Although the proposing release did ask whether the Commission should consider any alternatives to the proposal, disclosure was not specifically mentioned.[38] As the majority notes, a few commenters[39] sua sponte raised the possibility of allowing investors to choose among funds based on clear disclosure about the independence of their chairman.[40] These comments were ignored and the staff's summary of comments, which was provided to the Commission prior to adoption, did not discuss them. Commissioner Glassman's and my attempts to find a disclosure-based compromise were also ignored. In light of the failure of the majority to consider the disclosure alternative prior to adoption, it is hard to understand how the pre-adoption rulemaking record can now be relied upon to form the basis for a full and fair discussion of this alternative.

Plea for a Deliberative Approach

Commissioner Glassman and I have both called for a more deliberate response to the Court. We could, for example, conduct a formal, unbiased survey, host a roundtable, or solicit

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36 Slip Opinion, supra note 2, at 18.

37 See, e.g., Disclosure Regarding Approval of Investment Advisory Contracts by Directors of Investment Companies, Investment Company Act Release No. 26486 (June 23, 2004) [69 FR 39798 (June 30, 2004)] (requiring investment companies to provide disclosure to shareholders regarding determinations that formed the basis for the board's approval of advisory contracts).

38 See also Staff Report, supra note 15, at 59-60 (a section entitled "Alternatives Were Considered" makes no mention of disclosure as an alternative).

39 See Comment Letter of the Financial Services Roundtable, File No. S7-03-04 (Mar. 10, 2004) ("[I]nvestors will be able to express their views on this [independent chairman] issue, given clear and appropriate disclosure. … Investors for whom this issue is a priority can direct their investments to those funds."); Comment Letter of Charles K. Carlson, President, Greenspring Fund Incorporated, File No. S7-03-04 (June 17, 2004) ("Greater disclosure of relevant information would allow shareholders to make better informed decisions. If an independent Chairman is desirable in the eyes of some investors, then make that information readily accessible.").

40 Remand Release, supra note 1, at note 10 and accompanying text.

additional public comment on the issues raised by the Court. Many others have made similar pleas for a more deliberative approach than that pursued by the majority.[41] Because the failures identified by the Court relate to issues that were not fully aired during the notice-and-comment process, one logical approach would seem to be to do so now. As the Court explained, "uncertainty may limit what the Commission can do, but it does not excuse the Commission from its statutory obligation to do what it can to apprise itself – and hence the public and the Congress – of the economic consequences of a proposed regulation before it decides whether to adopt the measure."[42]

In the Remand Release, the majority boldly states that taking more than eight days to reflect on this issue "risks significant harm to investors."[43] The majority does not elaborate on how delaying action on the remand for the short time that it would take to do a thorough study would endanger investors.[44] When circumstances have required it, the Commission has delayed

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41 See, e.g., ICI Letter, supra note 23, at 1 ("In light of the court's decision, we recommend that the Commission invite additional public comment and collect additional data to assure a thoughtful and deliberative process."); Letter from Eight Senators to Commission (June 22, 2005), at 1 ("[W]e are asking that the Commission defer final action on this controversial and complex matter until the Commission's new chairman is in office and the full Commission can make a deliberate decision."); Letter from Joseph A. Grundfest, W.A. Franke Professor of Law and Business, Stanford Law School, to Commission (June 23, 2005), at 3 ("The inescapable concern is that this sequence of events supports the inference that the matter has been prejudged and that any additional consideration of the record is being conducted more as a procedural fig leaf than as a professional and good faith inquiry."); Letter from Bevis Longstreth to the Commission (June 24, 2005) ("Input on these issues from both the industry and its client base must be obtained, and this evidence-gathering cannot be done in a week's time."); Letter from Harvey L. Pitt, Kalorama Partners LLC, to Commission (June 23, 2005) (writing, as one of the seven "living former SEC Chairmen" who supported the rulemaking prior to adoption, to recommend a more deliberative approach); Letter from Eugene Scalia, Gibson, Dunn & Crutcher LLP, to Giovanni P. Prezioso, General Counsel, SEC (June 23, 2005) (writing on behalf of the Chamber of Commerce to urge the Commission to "engage in a thorough, rigorous, and deliberate process"); Letter from Walter B. Stahr to Commission (June 24, 2005), at 1 (urging the Commission to reconsider its plan "to re-issue the same rules, presumably on the basis of a quick analysis of the costs and alternatives"); Letter from Richard M. Whiting, Executive Director and General Counsel, The Financial Services Roundtable, to Jonathan Katz, Secretary, SEC (June 27, 2005), at 1 (requesting that "no final action on the Rule be taken prior to the conclusion of [a] new public comment and fact-finding process").

42 Slip Opinion, supra note 2, at 17 (emphasis added).

43 Remand Release, supra note 1, at text following note 11.

44 The majority's claimed interest in certainty for funds rings hollow because, by taking this hasty action, they have virtually ensured further litigation over this matter. See Remand Release, supra note 1, at note 15 ("Even prior to our having issued this Release, there have been reports that additional legal proceedings may result from our

other actions that it has deemed to be of great importance to investors.[45] The urgency of forcing funds to change their governance structures seems to be more closely tied to the imminent departures of Chairman William Donaldson[46] and Commissioner Harvey Goldschmid[47] than to legitimate concerns about the well-being of the shareholders in the many fund groups that do not have independent chairmen.

The Remand Release admits that the timing of this action is personnel-driven. It explains that the Commission needs to act expeditiously to marshal "the collective judgment and learning" of the five commissioners that originally considered the rule.[48] It does not note the significant procedural and substantive objections that Commissioner Glassman and I raised before the rule was originally adopted. It does not note our futile pleas that the Commission obtain more empirical evidence. More importantly, though, if the Commission adopts a meritorious rule under lawful procedures, then the composition of the Commission that adopted it is irrelevant. The rule should be able to weather the inevitable personnel changes at the Commission and stand on its own without the support of the three commissioners that originally voted for it.

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action today. Accordingly, we are instructing our Office of the General Counsel to take such action as it considers appropriate to respond to any proceedings relating to this rulemaking").

[45] See, e.g., Amendment to Rule 4-01(a) of Regulation S-X Regarding the Compliance Date for Statement of Financial Accounting Standards No. 123 (Revised 2004), Share-Based Payment, Securities Act Release No. 8568 (Apr. 15, 2005) [70 FR 20717 (Apr. 21, 2005)] (allowing companies to delay implementation of accounting standard governing employee stock options); Management's Report on Internal Control over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports of Non-Accelerated Filers and Foreign Private Issuers; Extension of Compliance Dates, Securities Act Release 8545 (Mar. 11, 2005) [70 FR 13328 (Mar. 18, 2005)] (extending a rule implementing Section 404 of the Sarbanes-Oxley Act, which was a direct statutory mandate).

[46] SEC Chairman William H. Donaldson to Step Down on June 30, SEC Press Release 2005-82 (June 1, 2005) (http://www.sec.gov/news/press/2005-82.htm).

[47] Robert Schmidt and Otis Bilodeau, SEC's Nazareth is Democrats' Choice for Commissioner, BLOOMBERG (May 18, 2005) (reporting "Goldschmid's plan to retire from the SEC by August and return to teach at Columbia's law school").

[48] Remand Release, supra note 1, at text preceding note 14.

Lastly, I question the majority's conclusion that "[t]he Court did not vacate the rule amendments … and they remain in effect."[49] The Court specifically identified two statutory violations in the process by which the majority adopted these rules. Until these statutory violations are remedied, the rule is not in effect, because the Commission has not satisfied the statutory predicate for legitimacy and enforceability of our rules. The only way for us to cure these fatal flaws is to comply with the Administrative Procedure Act and the Investment Company Act as the Court has directed us to do and which today's action does not do.

The Court gave the Commission a chance to redeem itself. It told us what we needed to do to fulfill our legal obligation. Unfortunately, the majority has squandered this opportunity. For the reasons stated above, I dissent.

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[49] Remand Release, supra note 1, at text preceding Section II ("Introduction").

THE SEC'S RACE TO BEAT THE CLOCK

Court of Appeals releases opinion remanding rule

Chief of staff calendars issue for vote on June 29

SEC issues Sunshine Act notice of public meeting

First of numerous letters arrives urging SEC not to proceed in this way

All Commissioners and their personal staff must be out of office at old headquarters

Staff circulates 27-page draft release that "fully addresses the issues remanded"

Commissioners and their personal staff do not have access to office space or computers

Commissioners and personal staff move to new headquarters

Hard copy of Friday's release delivered via regular mail to my home

SEC General Counsel stops by for first time to see if I have any questions about the recommendation

Commissioners' staff meet to discuss release. It is clear that there is no hope to change the recommendation.

Chairman's deadline for receipt of dissenting statements

Final pre-meeting draft circulated

Open Meeting to vote on response to remand recommendation

Tuesday, June 21	Wednesday, June 22	Thursday, June 23	Friday, June 24	Weekend	Monday, June 27	Tuesday, June 28	Wednesday, June 29	Thursday, June 30
10:00 am	8:35 pm	12:00 pm	3:00 pm	6:15 pm	9:00 am	11:00 am	12:00 pm	4:00 pm	5:30 pm	6:57 pm	10:00 am	12:00 pm	7:09 pm	10:00 am

10.5 hrs

26 hrs

80 hrs

192 hrs

My staff receives a copy of significantly revised release

I ask Chairman Donaldson to remove recommendation from calendar and seek additional public comment

Commissioner Glassman asks Chairman Donaldson to remove recommendation from calendar and seek additional comment

Chairman Donaldson's last day at the SEC.

EXHIBIT A to Commissioner Atkins' Dissent