IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INVESTMENT COMPANY INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, Plaintiffs, v. UNITED STATES COMMODITY FUTURES TRADING COMMISSION, Defendant.	Case No. 1:12-cv-00612 (BAH)

DEFENDANT COMMODITY FUTURES TRADING COMMISSION'S REPLY TO PLAINTIFFS' RESPONSE TO CFTC'S CROSS-MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS IN PART

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INTRODUCTION

In the wake of the financial crisis and Dodd-Frank, the CFTC made the prudent decision to eliminate a blind spot in markets for commodity derivatives including swaps by requiring investment companies who meet the statutory definition of "commodity pool operator" to register and file certain financial information. The CFTC has enforced similar requirements throughout most of its history, and its authority to do so is undisputed. Indeed, Plaintiffs here are unable to contradict any of the main premises underlying the Final Rule. For example, Plaintiffs do not seriously dispute that: (1) opacity in derivatives markets was a substantial factor in the crisis; (2) it is reasonable for the CFTC to conclude that increased monitoring in those markets can mitigate risks to the financial system; (3) the SEC does not regulate those markets, notwithstanding its regulation of certain market *participants*; (4) RICs are increasingly active in commodity derivatives markets, but no regulator has had regular access to most data to be collected under the Final Rule; and (5) the types of data the CFTC has determined to collect from CPOs are reasonable. Plaintiffs' case now is reduced to: (1) a demonstrably inaccurate assertion that the crisis and Dodd-Frank are "new rationales" that were "not addressed in the [Final Rule] Release" (Pl. Opp. 7, 10-11); (2) a misguided procedural objection that before the CFTC could exercise its undisputed authority, it was required to perform a top-to-bottom evaluation of the SEC's performance of *its* duties in policing the *securities* markets; (3) quibbles with the CFTC's reasonable policy judgments on specific aspects of the Final Rule; and (4) objections to hypothetical burdens of requirements the CFTC specifically determined *not* to impose in the Final Rule.

As explained below, Plaintiffs' descriptions of the rule releases are false; the CFTC has articulated compelling reasons for the policy change; the Final Rule is justified overall and in its particulars; and there is no deficiency in the Commission's consideration of costs and benefits or

in the notice Plaintiffs received. The CFTC, therefore, is entitled to judgment as a matter of law.

I. The Final Rule Is a Prudent Exercise of the CFTC's Undisputed Authority.

Plaintiffs all but ignored the financial crisis and Dodd-Frank in their opening brief. They now attempt to excuse that omission by claiming that these are "new rationales" "not addressed in the [Final Rule] Release." (Pl. Opp. 7, 10-11) So indefensible is this characterization that, just a few pages later, Plaintiffs retreat to the position that these were not "the principal" reasons or were "cherry-picked from the Rule Release." (*Id*. 22) Plaintiffs actually urge the Court to *ignore* those portions of the releases that contradict their account, "particularly in the introduction," or at least to assume, for no apparent reason, that these passages apply only to *other* aspects of the Final Rule. (*Id*. 6) There is, however, no "introduction," *see* Final Rule, 77 Fed. Reg. 11,252, 11,252-54 (Feb. 24, 2012), and to ignore any portion of the releases discussing the crisis and Dodd-Frank would violate the APA, which requires a court to review "the whole record or those parts of it cited by a party." 5 U.S.C. § 706.

A. Plaintiffs' Descriptions of the Rule Releases Are False.

1. From the outset, the CFTC stated that, "in light of the recent economic turmoil," its *first purpose* was to "bring the Commission's CPO . . . regulatory structure into alignment with the stated purposes of the Dodd-Frank Act," including promotion of "the financial stability of the United States by improving accountability and transparency." NPRM, 76 Fed. Reg. 7976, 7976-78 (Feb. 11, 2011). The Commission repeatedly provided these rationales as principal reasons for the amendments to Rules 4.5 and 4.27 and other aspects of the Final Rule. *See, e.g.*, *id*. at 7977 (citing these reasons "to rescind or modify several" exemptions and exclusions); Final Rule, 77 Fed. Reg. at 11,252 (discussing Dodd-Frank grant of swaps jurisdiction); *id*. at 11,253 (Final Rule is "to provide the C[FTC] with . . . information to address" the "sources of risk delineated in the Dodd-Frank Act" in light of "recent economic turmoil"); *id*. at 11,275 ("[T]he

Dodd-Frank Act has given the C[FTC] a more robust mandate to manage systemic risk and to ensure safe trading practices by entities involved in the derivatives markets[.]").

Commenters understood that these were the principal reasons. *See, e.g.*, AIMA Ltr. (Apr. 12, 2011) at 2 (disputing that CPOs were "a significant contributing factor to the recent financial crisis"); A. Wagner Ltr. (Dechert LLP) (Apr. 12, 2011) at 9 n.21 ("the CFTC has stated that the proposed Regulation 4.5 changes are related to other regulations it is required to adopt under the Dodd-Frank Act"); Vanguard Ltr. (Apr. 12, 2011) at 1 ("The CFTC has proposed to modify Rule 4.5 'to more effectively . . . manage the risks that such participants pose to the markets.'"). So did Plaintiff ICI, responding with the same unpersuasive point they reassert here: that these amendments are "not mandated by the Dodd-Frank" Act. ICI Ltr. (April 12, 2011) at 6. As Plaintiffs now concede, however, Dodd-Frank did not disturb the CFTC's authority to refine the definition of CPO to effectuate the purposes of the CEA. (Pl. Opp. 3); *see* 7 U.S.C. § 1a(11)(B).

2. As Plaintiffs note, the CFTC *also* stated in the releases that it aimed to treat CPOs consistently. But they mischaracterize those statements, arguing that the Final Rule fails "consistent treatment" because it "subjects investment companies to dual registration." (Pl. Opp. 10) They omit, however, the very next clause of the sentence in the release, which states that the amendments "ensure consistent treatment of CPOs *regardless of their status with respect to other regulators*." Final Rule, 77 Fed. Reg. at 11,254 (emphasis added).

The Final Rule addresses: (1) operators of RICs subject to regulation under the Investment Company Act; (2) private fund operators subject to other SEC regulations; and (3) CPOs that are not operating either RICs or private funds. The Final Rule, *inter alia*, (1) rescinds the blanket exclusion for RICs under Rule 4.5; (2) rescinds registration exemptions for CPOs of private funds under Rule 4.13; and (3) amends Rule 4.27 to require all registered CPOs to file Form CPO-PQR or the comparable Form PF, developed jointly with the SEC for

investment advisers to private funds. It is the securities laws, not the CFTC's regulations, that treat these entities disparately. RICs, which market to the general public, are subject to a more robust SEC regime than private funds, which do not. *See* Dodd-Frank § 406(1), 124 Stat. at 1574 (limiting SEC authority over "a private fund managed by an investment advisor"). The non-public nature of private funds does not, however, eliminate the potential for systemic risk, and therefore Dodd-Frank § 406(2) directed the SEC and CFTC jointly to develop reporting requirements for advisers to private funds that, much like RICs active in the CFTC's jurisdictional markets, will be registered with both the SEC and the CFTC. (CFTC Br. 40)[1]

At the same time, the CFTC determined that "sources of risk delineated in the Dodd-Frank Act with respect to private funds are also presented by [other] commodity pools," and so "the Commission has determined to require registration of certain previously exempt CPOs and to further require reporting of information comparable to that required in Form PF." 77 Fed. Reg. at 11,253. Plaintiffs admit that, under the Final Rule, RICs will report information on Form CPO-PQR that "is generally identical to that sought" from private funds on Form PF. *See* ICI Ltr. viii (Col. 3). Thus, the Final Rule correctly states that the amendments "ensure consistent treatment of CPOs *regardless of their status with respect to other regulators*." Final Rule, 77 Fed. Reg. at 11,254 (emphasis added); (CFTC Br. 13, 15, 40); Roundtable Tr. 17 (discussing dual registration by private fund advisors).[2]

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[1] CPOs filing Form PF must also file Schedule A of Form CPO-PQR.

[2] With respect to pension plans, banks, and insurance companies, Plaintiffs fail to respond to the CFTC's explanation that it was "unaware of other classes of entities . . . engaging in significant derivatives trading" and that, if new information showed otherwise, the CFTC would "consider appropriate action" to ensure consistent treatment. 77 Fed. Reg. at 11,255; (CFTC Br. 30-31); *see Nat'l Mining Ass'n v. MSHA,* 116 F.3d 520, 549 (D.C. Cir. 1997) (regulations are not arbitrary just because they fail to regulate everything that could pose a problem).

B. The Commission Reasonably Reached Different Judgments from 2003.

Plaintiffs' lead argument in their opening brief – that the CFTC "identified no problems or abuses that had arisen since 2003" (Mem. 1) – was groundless, and Plaintiffs now have abandoned it. They do not dispute that regulators' lack of visibility into derivatives markets was a significant factor in the 2007-2008 financial crisis. (CFTC Br. 24-25) Indeed, ICI's own president told Congress that the turmoil "revealed significant weaknesses in our current system for oversight of financial institutions" including "gaps in regulation – in particular, with regard to . . . derivatives." *Enhancing Investor Protection & the Regulation of Sec. Markets*, S. Hrg. 111-58, at 85, 93 (Mar. 10, 2009) ("ICI Testimony").

That point conceded, Plaintiffs now seize on the CFTC's acknowledgement in a footnote that regulators have not blamed RICs for the crisis. But the footnote pointed out the *irrelevance* of that fact, because the Final Rule is not a punishment for past conduct. It is "to ensure that the Commission can adequately oversee the commodities and derivatives markets and assess market risk associated with pooled investment vehicles under its jurisdiction." NPRM, 76 Fed. Reg. at 7977. Plaintiffs cite this "conce[ssion]" (Pl. Opp. 2) four separate times, but nowhere do they refute that RIC-CPOs, like all other CPOs, engage in derivatives trading activity that creates risks and that can give rise to systemic risk.[3]

Plaintiffs incorrectly assert that the Commission relies on "a single, unelaborated reference to 'changed circumstances'" as "a sufficient basis to infer" that the crisis and Dodd-Frank caused the CFTC's judgment to change from 2003 to 2012. (Pl. Opp. 30) In fact, the

[3] The 2011 SEC Concept Release notes a substantial increase in use of swaps, including credit default swaps, by RICs in the 2004-2008 time period. 76 Fed. Reg. 55,237, 55,238 n.7 (Sept. 7, 2011) ("SEC Release"). ICI provided very limited data during the comment process, but this data was corroborative of the CFTC's conclusion that RICs are active in CFTC-regulated markets. (Pl. Opp. 36 (citing ICI Ltr. 19-20))

releases discuss at length: the occurrence of the crisis; the problem of opaque markets; Congress' response in Dodd-Frank granting the CFTC jurisdiction over swaps, revising the definition of CPO to include swaps, and establishing FSOC with the CFTC's Chairman as a voting member; the dramatic growth in RICs' trading of swaps and other derivatives; reports of RICs marketing offshore de facto commodity pools to U.S. investors; and the inadequacy of data currently supplied by RICs to enable monitoring of these markets. *See, e.g.*, NPRM, 76 Fed. Reg. at 7976-78; 7984, 7988; Final Rule, 77 Fed. Reg. at 11,252-55, 11,258, 11,275, 11,281. It is clear from the releases that all of these factors played a role in the CFTC's decision.[4]

The D.C. Circuit cases Plaintiffs cite are not on point, because they each involved a regulator's failure to give reasons for, or even to acknowledge, a policy change. *See Dillmon v. NTSB*, 588 F.3d 1085, 1090-92 (D.C. Cir. 2009) (the court was "unable to determine whether" the agency "acted consistent[ly]" with its "unwavering" precedent); *Am. Farm Bureau v. EPA*, 559 F.3d 512, 521-22 (D.C. Cir. 2009) ("not clear" from the record why the EPA no longer found short-term studies relevant, contrary to its previous position); *Owner-Operator Indep. Drivers Ass'n v. FMCSA*, 494 F.3d 188, 206 (D.C. Cir. 2007) (the agency with "no explanation" omitted a key factor from a model); *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 328-29 (D.C. Cir. 2006) (agency failed to acknowledge that it was reconsidering a precedent, doing so only "tacit[ly]," without "announc[ing] its definitive adoption" of a new policy); *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 825-26 (D.C. Cir.

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[4] Plaintiffs question the relevance of the legislative change to the definition of CPO. (Pl. Opp. 25) The CEA states that exclusions from the definition are appropriate only when they will effectuate the purposes of the statute. 7 U.S.C. § 1a(11)(B). Dodd-Frank redefined CPO to include entities that trade swaps and augmented the purposes of the CEA to include combating systemic risks related to swaps. *Id*. § 5(b); (CFTC Br. 25). The exclusion for RICs therefore rested on entirely changed premises. (CFTC Br. 2)

1983) (rejecting the Secretary's "conclusory assurances" that problems identified in the past "disappeared with the passage of time"). In *State Farm*, the agency also "failed to offer [a] rational connection between facts and judgment." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins.*, 463 U.S. 29, 56 (1983). Here, the connection between the facts the CFTC addressed and the judgment it made was clear and rational, and Plaintiffs' contention that the CFTC was "intolerably mute" is not true. (CFTC Br. 24-25)[5]

C. The Justifications for the Final Rule Are Not Merely Reasonable, But Compelling.

1. SEC Regulations Do Not Address the Issues Addressed by the Final Rule.

None of Plaintiffs' arguments refute the Commission's reasonable judgment that the benefits of its rulemaking "are supplementary to, and not duplicative or redundant of, benefits provided by the federal securities laws." 77 Fed. Reg. at 11,276. As Plaintiff ICI stated to Congress in 2009 regarding the SEC and CFTC, "each agency is called upon to maintain the integrity of the markets within its jurisdiction." ICI Testimony, S. Hrg. 111-58, at 98.[6] Plaintiffs do not dispute that it is the CFTC, and not the SEC, that regulates, monitors, and protects the

[5] Plaintiffs also rely on *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), but in that case the Court found the agency's actions "neither arbitrary nor capricious," *id.* at 530. While Plaintiffs contend that the CFTC did not specifically discuss what rescinding the RIC exclusion would mean for liquidity, a benefit the CFTC expected from the 2003 deregulation, the Commission's thorough explanation for its policy change makes clear that other regulatory objectives became paramount in the aftermath of the financial crisis and Dodd-Frank. That explanation satisfies *Fox Television*. In particular, the releases made clear that increasingly higher levels of investment activity was not an unmitigated virtue, explaining that RICs' "significant exposure to the derivatives market" and "dramatic growth in volume" of such activity are "sources of risk," especially since "there currently is no source of reliable information regarding the general use of derivatives by registered investment companies." 77 Fed. Reg. at 11,253, 11,255-56, 11,275.

[6] Plaintiffs call it "absurd" for the CFTC to illustrate the agencies' differing jurisdictions by comparing their mission statements (Pl. Opp. 13), but ICI's president evidently did not find it absurd when he made the same comparison to Congress, stating that "[t]he differing focus expressed in these two mission statements is reflective of historical distinctions in the securities and futures industries . . . ." ICI Testimony, S. Hrg. 111-58, at 97-98.

commodity derivatives markets. (CFTC Br. 44, 58) This is indisputable, since the CEA gives the CFTC "exclusive jurisdiction" in those areas. 7 U.S.C. § 2(a)(1)(A). The Supreme Court has explained that the "purpose of th[is] exclusive jurisdiction provision" is "to separate the functions of the C[FTC] from those of the Securities and Exchange Commission." *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 386 (1982). Many of Plaintiffs' arguments fail as a result.

1. For example, Plaintiffs complain that the CFTC "failed to undertake the analysis of existing regulation required to support" the conclusion that the Final Rule is not "redundant of" the securities laws, and they devote several pages to describing SEC functions. (Pl. Opp. 11-17) But nowhere do they explain the relevance of these SEC activities to oversight of the *commodity derivatives markets*, which they concede the SEC does not oversee. In the same vein, it is illogical to suggest that the CFTC was required to perform an exhaustive regulatory appraisal of the SEC's performance before it could require RICs active in the CFTC's jurisdictional markets to register and provide financial data currently unavailable anywhere else. As the Commission explained, regardless of what the SEC is doing to police its markets, the CFTC "is in the best position to adequately oversee the derivatives trading activities of entities in which the Commission has a regulatory interest." 77 Fed. Reg. at 11,255.

2. Plaintiffs also do not explain how their proposed obstacles to regulation are consistent with the two-regulator statutory scheme, which contemplates dual registration. (CFTC Br. 6) The CEA *presumes* that SEC-registered funds that trade commodity derivatives must also register with the CFTC. 7 U.S.C. §§ 1a(11)(A), 6m, 6n. And the CEA requires the CFTC to justify any exclusion of entities that Congress has defined to be CPOs – including RICs that trade swaps, futures, or other derivatives – by explaining how such exclusion would be consistent with the CEA's purposes. *Id*. § 1a(11)(B). Accordingly, since Congress created the CFTC in 1975,

both agencies generally have required registration, except for the short period following the CFTC's 2003 deregulation. During the Dodd-Frank legislative process, Plaintiff ICI and others fought to *abolish* this two-regulator system. *See, e.g.,* ICI Testimony, S. Hrg. 111-58, at 96. But Congress was not persuaded. And while Plaintiffs observe that Dodd-Frank "preserved the Commission's authority to exclude entities" from the definition of CPO (Pl. Opp. 3), they do not dispute that this is appropriate only if "there is no substantial public interest to be served by the registration" (CFTC Br. 6); Final Rule, 77 Fed. Reg. at 11,253. The CFTC reasonably determined here that this standard for exclusion was no longer met. *Id*.

3. Plaintiffs' description of the SEC's oversight of RICs is misleading.[7] Plaintiffs state that the SEC regulates RICs' use of derivatives "comprehensively" (Pl. Br. 14), but just last year Plaintiff ICI told the SEC that the SEC's system is "a patchwork of interpretations that is neither practical nor sustainable." ICI SEC Ltr. (Nov. 7, 2011) at 9-10, http://tinyurl.com/ICISECLetter. Both perspectives cannot be accurate. And, while Plaintiffs rely on an ABA task force report concerning funds' use of derivatives (Pl. Opp. 13), the report itself describes a "lack of applicable [SEC] regulatory guidance." Cmte. on Fed. Reg. of Sec., ABA, *Report of the Task Force on Inv. Co. Use of Derivatives & Leverage*, at 4 (July 6, 2010) ("ABA Rpt."). To the extent there is such guidance, the ABA report warned that, in practice, it may leave funds "expose[d]" to "volatile" assets. *Id*. at 15-16.

4. Plaintiffs' discussion of "leverage" misconstrues the concept, and, again, does not convey what Plaintiff ICI told the SEC. Certain derivatives create leverage because they place

[7] The Commission addresses Plaintiffs' claims concerning SEC regulation because they are central to Plaintiffs' argument, but it remains the case that the SEC's policing of securities markets does not address the CFTC's regulatory interest in maintaining the integrity of commodity derivatives markets.

the buyer in debt – what the SEC calls "indebtedness" leverage. Ltr. from Chairman Levitt (Sept. 26, 1994), encl. at 23, http://tinyurl.com/LevittMemo. Other instruments create "economic leverage" because they "magnify" the "gain or loss from an investment in much the same way that incurring indebtedness does." *Id*. SEC guidance addresses *only* "indebtedness" leverage. ABA Rpt. 9; NFA Br. 15-16 (using "external" leverage for "indebtedness" leverage and "internal" leverage for "economic" leverage). Plaintiff ICI explained to the SEC that there is "no question" internally leveraged instruments "can be volatile." ICI SEC Ltr. 8. Yet ICI argued that the SEC should *not* regulate RICs' use of those instruments because the Investment Company Act is "not concerned in a general sense with the effects of economic leverage." *Id*.

With respect to indebtedness leverage, Plaintiffs tout the SEC's guidance establishing "limitations on the creation of risk" by requiring funds "to enter into offsetting transactions or to segregate fund assets[.]" (Pl. Opp. 14) But they fail to mention that, in their letter to the SEC, ICI lamented that no such "written SEC or staff guidance exists" for swaps. ICI SEC Ltr. 9. The SEC confirms that leverage practices with respect to most swaps "have not been addressed by the [SEC]," and, as a result, "many" RICs *do not* segregate sufficient funds to cover those liabilities. 76 Fed. Reg. at 55,244 (explaining that "many funds" segregate only "daily mark-to-market liability"). ICI also contended that "for derivative instruments that are not securities," it is not clear whether SEC rules "apply at all." ICI SEC Ltr. 7, 17. As the SEC Chair recently stated in remarks quoted in the Final Rule, controls in place for RICs "can lose their effectiveness" because "a relatively small investment in a derivative instrument can expose a fund to potentially substantial gain or loss – or outsized exposure to an individual counterparty." 77 Fed. Reg. at 11,255. Plaintiffs have no response but to say this "should have been at the very heart of the discussion in the Rule Release." (Pl. Opp. 14) However, it *was* at the heart of the discussion, *see* 77 Fed. Reg. at 11,255, and the CFTC was prudent to act.

4. Plaintiffs next characterize a RIC's board of directors as a "layer of protection for investors" from derivatives (Pl. Opp. 15), but this contradicts their own statements in the rulemaking and elsewhere. For example, in their letter to the SEC, ICI stated that although "[s]ome directors may have a . . . background that affords a deep understanding of the technical aspects of the [investment] adviser's techniques; others may not" including "with respect to derivatives." ICI SEC Ltr. 16. In their comment letter here, ICI argued that RICs' directors "do not perform functions" sufficiently related to "the CFTC's regulatory interest" to require them personally to register, because a RIC typically "relies on its adviser for the day-to-day management of, and decisions regarding, the company." ICI Ltr. 13-14. Amicus MFDF agreed that directors' role in derivatives is "limited" and they "do not and should not engage in . . . micromanagement," including decisions "to buy specific derivatives and how, exactly, to use those derivatives. . . ." MFDF Ltr. 3. Thus, MFDF argued, it would be "superfluous and irrelevant" for RIC directors to take the Series 3 exam because directors do not need to know the subjects tested. *Id*. 5-6. The CFTC agreed in the Final Rule that board members would not be required to register. 77 Fed. Reg. at 11,259 & nn.80-81 (citing ICI's and MFDF's letters). It is, therefore, baseless to argue that the CFTC failed to consider the role of the board. (*See* Pl. Opp. 14-15)

2. The Reasons for Registration Are Sound.

Plaintiffs fail to respond meaningfully to the comprehensive discussion in the Final Rule of the inherent benefits of registration. Final Rule, 77 Fed. Reg. at 11,254-56. The release explained that registration provides "two significant benefits" – allowing the CFTC to ensure "minimum standards of fitness and competency," and providing it with "a clear means of

addressing wrongful conduct," such as by revoking registration. *Id*. at 11,254.[8]

1. Plaintiffs do not explain how the SEC, rather than CFTC, can or should monitor for and enforce violations of the CEA and CFTC regulations. The CFTC reasonably determined that when Plaintiffs' companies participate in CFTC-regulated markets, they should be subject to discipline for violations of the commodities laws, just like other CPOs, by the agency assigned by Congress to enforce these laws. 7 U.S.C. § 12a(2)-(3) (grounds for disqualification from registration, including CEA violations). As the Commission explained, "Congress empowered the [CFTC] to oversee the derivatives market" and "the Commission's programs are structured and its resources deployed in service of that mission." 77 Fed. Reg. at 11,255. Plaintiffs are silent on how the CFTC could perform this disciplinary function absent registration.

2. With respect to competency, the Final Rule release explained that registration permits the CFTC to ensure that CPOs maintain minimum standards. (CFTC Br. 29) Plaintiffs respond that "nowhere" is there a study of the "efficacy" of "existing regulations" to ensure this (Pl. Opp. 17), but, as elsewhere, they incorrectly presume that the SEC and CFTC pursue the same purposes. In fact, the agencies and associated SROs screen for different competencies and enforce different laws. As MFDF explained, the Series 3 "covers such topics as the definitions of future contracts, hedging and speculating, the operation of various investment strategies, technical analysis and spread trading, calculation of gain and loss, and other matters such as floor procedures and reporting rules." MFDF Ltr. 5-6. MFDF acknowledged that this goes "far beyond" competencies typically required of a RIC's board. *Id*. While Plaintiffs continue to rely

[8] Plaintiffs are thus wrong to state that the CFTC failed to address their suggestion to obtain data from RICs without requiring registration. (Pl. Opp. 36; CFTC Br. 29) They also miss the point of the CFTC's observation that ICI provided little in the way of data during the rulemaking – there *is* no reliable source of data concerning RICs' use of derivatives. SEC Release, 76 Fed. Reg. at 55,238.

on a limited testing exemption under CFTC regulations (Pl. Opp. 18), the cited rule addresses competency only in the sales context, as Plaintiffs concede. (Mem. 5) It does not excuse the individuals *operating* the commodity pool from NFA testing. These regulations reflect that securities competencies are *not* sufficient to operate a commodity pool. (CFTC Br. 63)

3. Plaintiffs next argue that registration is unwarranted because the Final Rule "is directed at th[e] narrow universe of 'de facto' commodity pools," the off-shore pools registered with the SEC as RICs "in name only." (Pl. Opp. 26) But this was just one of several reasons for the Commission's action. (CFTC Br. 26-31) Plaintiffs' reliance on *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533 (D.C. Cir. 1999), is therefore misplaced. There, the agency chose, without explanation, an approach broader than the only problem it had articulated. *Id*. at 543. Here, the CFTC identified a number of reasons to resume exercising its registration authority as to a broader group of RICs, as it has for most of its history.

4. That does not, however, diminish the significance of the problem of de facto CPOs. Plaintiffs contend that this issue was limited to a "grand total of three investment companies." (Pl. Opp. 9) But according to a bi-partisan congressional letter the Commission considered, as many as 70 or more companies may have been pursuing the off-shore strategy. Levin-Coburn Ltr. (Dec. 20, 2011) at 3. In the Final Rule, the CFTC referenced NFA's petition for rulemaking, which stated that, as of August 2010, it was aware of "at least" three entities, but the record developed over the course of the following year, including Congress' letter from late 2011, showed a practice far more pervasive.[9]

[9] Plaintiffs are incorrect that if the Court disagrees with even one aspect of the CFTC's reasoning, it "must vacate the Rule unless the Release identified the flawed rationale as an alternative ground." (Pl. Opp. 1) Numerous cases make clear that vacatur requires consideration of the seriousness of any flaws in an agency's reasoning and is not automatic. *E.g.*, *Milk Train,*
---footnote continued on next page---

D. The CFTC Made Reasonable Judgments on All Aspects of the Final Rule.

1. ***Restoration of the 5 Percent Threshold as Part of a 2-Prong Test***. Plaintiffs mistakenly contend that the CFTC "provides no justification for selecting" the 5 percent threshold "other than that it had selected that number before" in earlier iterations of Rule 4.5. (Pl. Opp. 41) After soliciting comments concerning the appropriate threshold, NRPM, 76 Fed. Reg. at 7984, the CFTC determined that "[f]ive percent remains the average required for futures margins." 77 Fed. Reg. at 11,256. While commenters argued this was "too low," the Commission explained that "no data was provided to support this assertion." *Id.* As in 1985, derivatives in such amounts can create substantial exposure. 1985 Rule, 50 Fed. Reg. at 15,878 & n.64. Plaintiffs also overlook the Commission's explanation that in absolute dollar terms, a 5 percent allowance for derivative margins may mean extreme exposure, warranting regulatory oversight for systemic risk. *See* Final Rule, 77 Fed. Reg. at 11,256 (this "evidences a significant exposure to the derivatives markets"); NPRM, 76 Fed. Reg. at 7985. With respect to swaps, which commenters asserted may have higher margins, Plaintiffs do not address the alternative test under which a RIC may obtain exclusion if their derivatives do not expose more than 100 percent of the pool's value. 77 Fed. Reg. at 11,256 (alternative test "provides flexibility" given possible variation in required margins). Plaintiffs' silence is dispositive, because it was their burden to show that the threshold – taking into account both alternatives allowed by the rule – is unreasonable. *See Nat'l Ass'n of Home Builders v. EPA*, __ F.3d __, 2012 WL 2362585, at *4

(cont'd)

Inc. v. Veneman, 310 F.3d 747, 755-56 (D.C. Cir. 2002); *see Consol. Edison Co. of N.Y. v. FERC*, 823 F.2d 630, 641-42 (D.C. Cir. 1987) (remanding where flaw reflected "pervasive" problems with agency's approach). These cases are consistent with *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006), cited by Plaintiffs, since it is unlikely that an agency would abandon a rule absent a serious flaw in the rule's justification. *See Consol. Edison*, 823 F.2d at 641-42 (reasoning that flaw in question "appears to be infusing much of the [agency's] work" and was not "minor").

(D.C. Cir. June 22, 2012).

2. ***Inclusion of Swaps in the 5 and 100 Percent Thresholds.*** The Final Rule states that the Commission "decided to include swaps as a component of the trading threshold" because only "de minimis activity by [RIC]s does not implicate the Commission's regulatory concerns." 77 Fed. Reg. at 11,258. Those concerns are elaborated throughout the releases. Plaintiffs nevertheless ask the Court to infer that the CFTC made this decision because it believed it could not "fashion language that would exclude swaps from the determination of whether an investment company met the definition of a CPO." (Pl. Opp. 39) The more reasonable conclusion, supported by the record, is that the CFTC declined to exclude swaps because that would undermine the Final Rule and Congress' amendment of the definition of CPO specifically to *include* swap participants. (CFTC Br. 34-35) Plaintiffs do not deny that disregarding swaps activity would have been anomalous – they simply deny that this was the Commission's reason. Yet again, they ask the Court to ignore those portions of the releases and record that do not support their account, which is impermissible under the APA. *See* 5 U.S.C. § 706.

The "regulatory concerns" arising from swaps activity are discussed extensively as to multiple aspects of the Final Rule. That Congress granted the CFTC jurisdiction over swaps is cited in the NPRM, twice at the outset of the Final Rule release, and is the first reason given in the Chairman's signing statement. 76 Fed. Reg. at 7986; 77 Fed. Reg. at 11,252; *id*. at 11,343. Swaps are included in the marketing restriction, *id*. at 11,283, and in trading thresholds in the amended exemption for private funds, *id*. at 11,284. The Commission also explained that "it is critical" to inform "clients about the potential risks" of swaps. NPRM, 76 Fed. Reg. at 7986. A CPO is now required (other than RICs for whom compliance with much of Part 4 is not currently required) to disclose to clients that swaps "involve a variety of significant risks" and that "highly leveraged transactions may experience substantial gains or losses in value as a result of relatively

small changes in the value or level of an underlying or related market factor." Final Rule, 77 Fed. Reg. at 11,285 (original in caps). These are precisely the sorts of regulatory concerns to which the CFTC was referring when refusing to exclude swaps from the threshold.

Plaintiffs urge the Court to ignore this context and infer that the CFTC simply did not understand how to draft language to undermine its own purposes by disregarding swaps trading. That is not a reasonable interpretation. If the agency's purpose "may reasonably be discerned," the Court must accept it, even if of "less than ideal clarity." *Am. Trucking Ass'ns v. U.S. Dep't of Transp.*, 166 F.3d 374, 384 (D.C. Cir. 1999). Here, the Final Rule emphasizes that it is intended, *inter alia*, to implement "the expansion of the Commission's jurisdiction to include swaps under Title VII of the Dodd-Frank Act." 77 Fed. Reg. at 11,252. Plaintiffs have not met their burden to show that the inclusion of swaps in the threshold reflects a different intent.

3. ***Non-Adoption of a "Risk Management" Exclusion***. Nor did the CFTC make "illogical" policy judgments concerning the bona fide hedging exception, which Plaintiffs incorrectly describe as applicable only to transactions in "physical commodity markets" and not "offsetting transactions in other markets." (Pl. Opp. 41-42) The Commission explained in its opening brief that this exception applies to hedges of "any commodity for future delivery," including financial instruments, so long as the entity holds the same cash commodity. 17 C.F.R. § 1.3(z)(1)-(2); (CFTC Br. 35). Not included are so-called "risk management" hedges, which the CFTC reasonably viewed as subjective and presenting a different level of market risk. 77 Fed. Reg. at 11,256 & n.49; *see also* ICI SEC Ltr. 14 (stating that "determination of which transactions actually offset others" is "very complicated" and subject to "no clear guidance"). The Commission believed it important that the bona fide hedging exception, which it had no obligation to provide, not defeat the objective of the Final Rule to require registration of RICs with significant activity in commodity markets. As the CFTC Chairman explained in his signing

statement, "many, if not most, positions in a portfolio could potentially be characterized as serving a risk management purpose," which "would result in an overly broad exclusion from the definition of CPO." Final Rule, 77 Fed. Reg. at 11,343. Congress made a similar determination in Dodd-Frank not to permit a "risk management" allowance in defining "bona fide hedging" for purposes of position limits on speculation in physical commodities, which the Commission found instructive here. *Id*. at 11,256 (citing 7 U.S.C. § 6a(c)).

Plaintiffs state that the CFTC "takes a broader approach to defining bona fide hedging in other contexts." (Pl. Opp. 42) But the referenced proposal, 75 Fed. Reg. 80,747, implements a statutory exception to the swap clearing requirement for certain parties "using swaps to hedge or mitigate commercial risk." 7 U.S.C. § 2(h)(7)(A). Under that statute, financial entities including commodity pools may not take advantage of the end-user hedging exception at all. *Id*. §§ 2(h)(7)(A), (C)(i)(V). These differences reflect that swap clearing for end users raises entirely different policy considerations.[10]

Finally, Plaintiffs attempt to rely on the Commission's Erratum, which clarified that it was 1993 when the CFTC first amended Rule 4.5 to permit RICs to exclude bona fide hedging transactions from the 5 percent calculation. (Pl. Opp. 31-32) Plaintiffs made no mention of this in their opening brief, because it is not a point in their favor. For nearly *30 years* prior to 2003, RICs generally were required to register with the CFTC if they traded commodity futures. For the last ten years of that period, the Rule 4.5 exclusion was *most* similar to the one adopted in the Final Rule. To restore this registration requirement in much the same form, after only a brief

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[10] Plaintiffs reference a comment citing instructions in a CFTC form where filers are asked whether they are "commercially engaged in business activities hedged by use of the futures or option markets." CFTC Form 40, at 2, http://tinyurl.com/Form40. Plaintiffs do not explain why this instruction would dictate CFTC policy on CPO registration.

period of abstention, was not arbitrary or capricious.

E. Plaintiffs' Challenge to "Requirements that flow from" Registration Is Unripe.

Plaintiffs seek an injunction not only with respect to the Final Rule, but also to requirements they say "flow from registration." (*E.g.*, Pl. Opp. 23) But they incorrectly assert that the Final Rule requires RICs to register "and subject themselves to [the CFTC's] 'compliance framework' without knowing what the framework will entail." (*Id*. 33, 38 n.7) They ignore that the Final Rule *exempts* RICs affected by the Rule 4.5 amendments from compliance with other CFTC Part 4 regulations pending a final harmonization rule. (CFTC Mem. 16, 48-49 (citing, *e.g.*, 77 Fed. Reg. at 11,252)) The costs and benefits of other rules will be considered if and when the Commission considers imposing them. Thus, it is premature for Plaintiffs to challenge the additional compliance requirements in Part 4. (Pl. Opp. 33-34, 37-39)

II. Plaintiffs Fail to Identify Any Flaw in the Commission's Consideration of Costs and Benefits.

Unable to take serious issue with the Commission's consideration of costs and benefits of the Final Rule, Plaintiffs focus instead on supposed burdens that the CFTC *specifically determined not to impose* in the Final Rule. Except for registration and Form CPO-PQR, the Final Rule *exempts* affected RICs from Part 4 compliance, pending further action of the CFTC, if any. Plaintiffs focus so much attention on the semantics of "consider" versus "evaluate," that they miss the language in CEA Section 15(a) that disposes of their claims – that the CFTC, "in promulgating a regulation . . . shall consider the costs and benefits *of the action*." 7 U.S.C. § 19(a)(1) (emphasis added). Here, Plaintiffs complain about being subjected to an "entire regulatory apparatus," including "recordkeeping obligations, restrictions on segregation of assets, [and] investor disclosures." (Pl. Opp. 23) However those are not costs "of the [CFTC] action" in "promulgating" the Final Rule. They do not, as Plaintiffs claim, "flow from registration"

because the Final Rule specifically provided that they do not. 77 Fed. Reg. at 11,252. Under *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011), the obligation to quantify costs exists, if at all, only with respect to "the *certain* costs." *Id*. at 1149 (emphasis added). No court has *ever* done what Plaintiffs ask – to strike down a federal regulation based on hypothetical costs that the agency *has not determined to impose*.

While Plaintiffs cite the CFTC's recognition that the Final Rule may involve "significant burdens" (Pl. Opp. 32), their objections fail to account for the CFTC's statutory mandate to consider both costs *and* benefits. Here, the Commission recognized the costs, but found the substantial benefits of the Rule to be persuasive – in particular, enhancing the CFTC's ability to monitor significant exposure to risky derivatives and deter illegal practices in commodity markets. *See* 77 Fed. Reg. at 11,275-77, 11,280-81; (CFTC Br. 54-55). Plaintiffs do not dispute that these benefits are unquantifiable, and the Commission would contravene its mandate if it were to focus on the dollar costs to industry to the exclusion of these unquantifiable and substantial benefits to the public. Moreover, *Business Roundtable* is distinguishable because Plaintiffs point to no data the Commission failed to consider. *See Ass'n of Private Sector Colleges & Univs. v. Duncan*, 681 F.3d 427, 448 (D.C. Cir. 2012) (distinguishing *Business Roundtable* on that ground).

Plaintiffs assert that investors may be confused by two regulators, but they cite no evidence in this regard despite nearly thirty years (1975-2003) of a dual registration regime. (Pl. Opp. 32) Congress evidently did not agree when it established the presumption that RIC-CPOs would register with both regulators and declined, in Dodd-Frank, to merge the CFTC and SEC. Plaintiffs repeat their assertion that the CFTC failed to consider the increased liquidity predicted in the 2003 release (Pl. Opp. 29), but the CFTC specifically cited "increased derivatives trading activity" by excluded entities and concluded that the greater threat to the healthy operation of

these markets is the existence of an "opaque area of investment activity." Final Rule, 77 Fed. Reg. at 11,275, 11,281. The Commission reasoned that the Final Rule, among other benefits, will help it "assess potential threats to the soundness of derivatives markets," "protect the public and markets from unfit persons and conduct that may threaten the [markets'] integrity," and "increase[] consumer confidence in pools and offered funds." *Id*. at 11,276-77, 11,280-81. Nor did the Commission fail to consider competitiveness or risk management. *Id*. at 11,280-81. Plaintiffs point to no evidence that registration and reporting will have a negative impact in these areas.

Plaintiffs' continued reliance on recent D.C. Circuit cases arising under the securities laws (Pl. Opp. 19-22) is misplaced, because, among other reasons, the Final Rule is consistent with their holdings (CFTC Br. 52-53, 58-59, 61). In particular, the facts here are not "virtually indistinguishable" from *American Equity Investment Life Insurance Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010). In that case, the SEC argued that its regulation would enhance competition by requiring certain disclosures, but it did not consider whether equivalent disclosures already were required by state law.[11] *Id.* at 178. Here, the CFTC acknowledged some overlap in the agencies' objectives, but reasoned that the Final Rule related to a crucial CFTC regulatory function that the SEC does not share: "to foster open, competitive, and financially sound commodity and derivatives markets." 77 Fed. Reg. at 11,278. However strong or weak the SEC's regulation of RICs, its efforts do not extend to markets over which the CFTC has exclusive jurisdiction, where the CFTC "is in the best position to oversee entities engaged in more than a limited amount of non-hedging derivatives trading." *Id*. at 11,255. While Plaintiffs contend that the Commission

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[11] Plaintiffs contend that state insurance regulators do not regulate securities (Pl. Opp. 20-21), but that was irrelevant in *American Equity* because the states regulated the product at issue in that case, fixed index annuities.

did not determine whether SEC regulations provide "sufficient protection" (Pl. Opp. 21), the entire thrust of the rulemaking is that, with respect to the CFTC's enhanced responsibility under Dodd-Frank to guard against systemic risks in its jurisdictional markets, they *necessarily* do not. *See* Part III, *infra* (explaining that CPO-PQR will collect data not collected by any other regulator). Unlike the SEC in *American Equity* or *Business Roundtable*, the CFTC simply reverted to regulating entities that Congress defined as CPOs. The decision briefly to exclude RICs was discretionary and, Plaintiffs concede, appropriate only so long as no substantial public interest would be served by registration. It was not incumbent on the CFTC to justify the existence of the two-regulator system *vel non* for entities that meet the CEA definition of CPO. Rather, the Commission simply had to explain why the deregulatory rules were no longer consistent with the purposes of the CEA. The Commission clearly met that burden here.[12]

Finally, it was within the CFTC's discretion to approve the Final Rule without waiting for the conclusion of other rulemakings setting margin requirements for uncleared swaps and further defining "swap" (Pl. Opp. 34-35), because "the costs and benefits [of registration and reporting] are sufficiently clear" to enable the Commission to decide the appropriate policy. 77 Fed. Reg. at 11,276; (CFTC Br. 60-61).[13] First, in light of potential variability regarding margins for uncleared swaps, the Commission adopted an alternative net notional test, which does not consider margins. (*Id*. 61 n.36) Second, Plaintiffs place undue significance on the fact that the compliance date is tied to the further definition of "swap," which merely recognizes that regulatory certainty would be served by a short delay; it does not cast doubt on the CFTC's

[12] Plaintiffs actually resort to needling the Commission over a June 13, 2011 Inspector General's report, but that report was critical of certain rule proposals other than the one at issue and issued eight months before the Final Rule. (Pl. Opp. 19)
[13] On July 10, 2012, the CFTC voted to approve a rule further defining the term "swap."

judgment that there was sufficient understanding of what is a "swap" to consider the costs and benefits of registration and reporting. It is *always* the case that future rulemaking may alter the precise benefits and burdens of a given rule, but an agency is within its discretion to conduct rulemaking in stages. (*Id*. 48)

III. Plaintiffs Fail to Show that Form CPO-PQR Requires Information that Is Similar to Information Required by the SEC.

1. While the Complaint asserts a facial challenge to Rule 4.27 (Compl. ¶¶ 76-79), Plaintiffs now acknowledge that the CFTC had "reason[s] for requesting this data from *all* CPOs," and dispute only the "justification for requesting this data from [RICs]." (Pl. Opp. 43) Because a RIC-CPO's obligation to file Form CPO-PQR results from the amendments to Rule 4.5, not 4.27, and because Plaintiffs do not challenge any particular aspect of Form CPO-PQR or question the CFTC's judgments as to what information it generally needs from CPOs, Plaintiffs have abandoned their facial challenge to Rule 4.27.

2. With respect to the CFTC's judgment to require this information from RIC-CPOs, the main systemic-risk information, including the most detailed reporting by the largest CPOs, will be on Schedule C. (CFTC Br. 15) Plaintiffs concede that *none* of the information on Schedule C is regularly reported by RICs to any regulator. (Pl. Opp. 43) This concession disposes of Plaintiffs' claim that RICs provide to the SEC data that is "generally comparable" (Compl. ¶ 51) and their assertion that the CFTC has not "established the existence of 'blind spots'" in the derivatives markets (Pl. Opp. 22). Plaintiffs state no reason why private funds and other CPOs should provide this information, but RIC-CPOs should not provide it to any regulator.

This blind spot extends to the information to be collected on Schedule B, because Plaintiffs are incorrect that such data is "comparable to that required" on SEC Form N-SAR. (Pl. Opp. 43) Plaintiffs, who bear the burden here, have never identified an overlapping question

between Schedule B and N-SAR, because there is no meaningful overlap. (CFTC Br. 43) N-SAR requires a yes/no answer on whether the fund's investment policy *permits*, and whether the fund *actually engaged in*, investing in certain specified types of futures and options, and margin purchases. N-SAR Question 70(E)-(Q). N-SAR also requires information on total assets in cash, repurchase agreements, debt, common stock, options on equities, options on all futures, and "other investments." *Id.* Question 74(A)-(I). However, the question on "other investments" does not distinguish among derivative types (commodity futures, interest rate swaps, credit default swaps, etc.) or between derivatives and any other asset (such as real estate, money market funds, private funds, and venture capital). There would be no way to know from N-SAR how much a fund is invested in each derivative type, or how derivatives are traded or cleared.

In contrast, Schedule B requires specific information on the value, trading mechanisms, clearing mechanisms, and gains and losses for derivatives by derivative type. 77 Fed. Reg. at 11,308-09, 11,314-15. Accordingly, the CFTC correctly rejected ICI's argument that the data was comparable. 77 Fed. Reg. at 11,266 & n.154 (citing ICI's letter); *see Public Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993) (an agency is not required to discuss every item of fact or opinion raised by comments and need only address major issues of policy). As to Schedule A, no commenter, including Plaintiffs, suggested that it was unreasonable for the CFTC to collect this minimally burdensome background information – necessary, among other things, to know who is involved and how to contact them. In fact, ICI argued that RICs' reporting should be *limited* to such information. Roundtable Tr. 82.[14]

Plaintiffs for the first time suggest that the CFTC could obtain the data it needs either

[14] Commodity funds including RICs may qualify for exemption from registration if their pools have no more than 15 investors and initial contributions do not exceed $400,000. Rule 4.13(a)(2).

from SEC Form N-1A or in SEC reports under 17 C.F.R. § 210 (Pl. Op. 16), but this is unfounded. Form N-1A requires disclosure of the types of instruments in which a fund may invest, and is required of open-end funds (such as mutual funds), not closed-end funds or exchange traded funds (ETFs – a substantial subset of all RICs). Form N-1A at 1. And 17 C.F.R. § 210.12-13 does not, as Plaintiffs claim, require "a list of all open derivatives positions on a contract-by-contract basis." (Pl. Opp. 16) Rather, apart from securities holdings, the RIC need only state "each major category of investments by descriptive title," and this is required only of "management investment companies," not ETFs. 17 C.F.R. § 210.12-13 n.1. In any event, the alleged similarity to N-1A and § 210 was never asserted in the comment period and is accordingly waived. *Advocates for Highway & Auto Safety v. FMCSA*, 429 F.3d 1136, 1150 (D.C. Cir. 2005).

3. Plaintiffs make clear that it is they, not the CFTC, who "misunderstand[] the 'mandate' of Dodd-Frank." (Pl. Opp. 24) The Commission seeks this information both to effectuate its own responsibility "to ensure … the avoidance of systemic risks," 7 U.S.C. § 5(b), as well as to assist FSOC, whose objectives include "identify[ing] risks to the financial stability of the United States" and "respond[ing] to emerging threats to the stability of the United States financial system." Dodd-Frank § 112(a)(1), 124 Stat. at 1394-95. Plaintiffs attempt to downplay the CFTC's role in that mission, notwithstanding that (1) FSOC was created in response to a crisis that emerged, in part, from markets over which the CFTC now has jurisdiction and (2) the CFTC Chair is one of eight voting FSOC members. *Id.* § 111(b)(1)(G), 124 Stat. at 1393. While Plaintiffs claim that the SEC should be the regulator providing FSOC with systemic risk information related to RICs (Pl. Opp. 25), they concede that the SEC neither monitors the commodity derivatives markets, nor collects most systemic risk information to be obtained through Form CPO-PQR. (Pl. Opp. 43; CFTC Br. 44, 58) Accordingly, the Final Rule is

reasonably necessary for the CFTC's role in FSOC. 77 Fed. Reg. at 11,252-53.

IV. Plaintiffs Received Adequate Notice.

Contrary to Plaintiffs' contention, the CFTC provided adequate notice of the factors that entered into its cost-benefit consideration in the Final Rule. *See, e.g.,* 76 Fed. Reg. at 7980-81 (benefits of information in Form CPO-PQR); 7983-84 (of registration); 7987-88 (estimated hours burden for Form CPO-PQR). Even assuming an agency must provide notice of its consideration of costs and benefits, *but see* 5 U.S.C. § 553(b)(3) (notice shall include terms and substance of the *proposed rule*), it need not fully elaborate its ultimate thought process in the proposal. *See, e.g., Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 225 (D.C. Cir. 2007). With respect to the seven marketing factors, Plaintiffs' opposition is nonresponsive to the CFTC's observation that this is not a "test" as Plaintiffs have characterized it, but a statement of agency policy. 77 Fed. Reg. at 11,259; *see* CFTC Br. 37. Thus, notice was not required. 5 U.S.C. § 553(b)(3)(A). Plaintiffs cite *Syncor International Corp. v. Shalala*, 127 F.3d 90 (D.C. Cir. 1997), but that case makes clear that the list of factors here was not a rule because the agency did not "intend[] to bind itself to a particular legal position," *id*. at 94. (CFTC Br. 37) Nor do Plaintiffs address that the NPRM provided notice sufficient to enable commenters to discuss the precise subject matter or their failure to show prejudice. (CFTC Br. 37-38)

CONCLUSION

For these additional reasons, the CFTC's motions should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2012, I caused the foregoing document to be served on the following counsel through the Court's CM/ECF system:

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