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

INVESTMENT COMPANY INSTITUTE and CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, Appellants v. UNITED STATES COMMODITY FUTURES TRADING COMMISSION, Appellee.	No. 12-cv-5413

JOINT MOTION OF THE NATIONAL FUTURES ASSOCIATION AND BETTER MARKETS, INC. FOR LEAVE TO FILE JOINT *AMICUS CURIAE* BRIEF WITH INCREASED WORD LIMIT

Pursuant to Federal Rule of Appellate Procedure 29(d), the National Futures Association ("NFA") and Better Markets, Inc. ("Better Markets") respectfully submit this motion for leave to file a single, joint *amicus* brief with an increased word limit, in support of Appellee Commodity Futures Trading Commission ("CFTC"). Specifically, Better Markets and NFA request that they be allowed to file a joint brief of not more than 10,000 words, exceeding the current limit of 7,000. Clerk's Order (Jan. 15, 2013); FED R. APP. P. 29(d). Appellants have

represented through counsel that they do not oppose the submission of a joint *amicus* brief by NFA and Better Markets, but they do oppose any modification of the current 7,000 word limit.

INTRODUCTION AND SUMMARY

Appellants are challenging a rule that requires investment companies acting as "commodity pool operators" ("CPOs") to register as such with the CFTC, the federal agency that bears primary responsibility for regulating the commodities and derivatives markets. Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed. Reg. 11,252 (Feb. 24, 2012) ("Rule").

The Rule was adopted as a component of the regulatory reforms necessitated by the financial crisis of 2008 and for the purpose of addressing specific and concrete concerns cited by *amicus* NFA in its rulemaking petition filed with the CFTC. The rule will provide important customer protection safeguards to protect customers from fraudulent practices and ensure that they fully understand the risks of commodity investments. In addition, through the reporting requirements, the Rule will help ensure that the previously opaque swaps market, which served as the incubator for the financial crisis of 2008, is subject to comprehensive regulatory oversight and systemic risk controls. The Rule accomplishes these objectives while imposing minimal burdens on industry.

Appellants seek to vacate the Rule on multiple substantive and procedural

grounds. They claim that the CFTC reversed a prior rulemaking without justification; that the CFTC's assessment of costs and benefits of the Rule violated both the Administrative Procedure Act and the Commodity Exchange Act ("CEA"); that various elements of the Rule, including certain exemptions and thresholds, were arbitrary and capricious; and that the CFTC failed to provide an adequate opportunity for notice and comment. *See* Brief of Investment Company Institute and U.S. Chamber of Commerce at 4-5 (Jan. 30, 2013).

The District Court upheld the Rule against all of these arguments in a thorough and well-reasoned opinion. Memorandum and Opinion, *Inv. Co. Inst. v. CFTC*, No. 1:12-cv-00612-BAH (Dec. 12, 2012).

In accordance with Local Rule 29(d) and this Court's scheduling order of January 15, 2013, the NFA and Better Markets plan to file a joint *amicus* brief in support of the CFTC and the Rule. However, they seek a 3,000 word increase because of the number of issues raised in Appellants' opening brief, the importance of the issues this appeal involves, and the different perspectives and interests that NFA and Better Markets bring to the appeal.

The appeal presents numerous issues of exceptional complexity and importance, including: (1) the need for comprehensive regulation of market participants engaged in commodities and derivatives trading; (2) the need for increased transparency in those markets; (3) the importance of the Rule as a

component of the regulatory reform process under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank Act") intended to prevent another financial crisis; (4) the degree to which the regulatory regimes under the CEA and the securities laws overlap or complement each other; (5) the actual scope of the CFTC's duty to consider the costs and benefits of its rules; and (6) the manner in which the CFTC fulfilled that obligation in this case.

Moreover, NFA and Better Markets each offer distinctly different arguments on the issues presented. NFA will focus on the need for the Rule, the specific market behavior that gave rise to it, and the benefits of registration and reporting as regulatory safeguards. Better Markets will focus on a distinct set of issues surrounding the CFTC's duty to consider costs and benefits when it promulgates rules (including statutory and case law analysis), as well as the CFTC's actual conduct in connection with that duty in this case.

Amici respectfully submit that full development and presentation of these issues requires more than 7,000 words between them, which effectively allocates only 3,500 words to each. Without the increase, the Court will not have the benefit of complete argumentation in a case involving *de novo* review of an important rule governing our financial markets that may have broad precedential scope.

IDENTITY AND INTEREST OF *AMICI*

The NFA.

NFA is the non-profit organization that serves as the independent, self-regulatory organization for the United States futures industry. Its fundamental mission is to protect the integrity of the U.S. futures market. To this end, it provides innovative regulatory programs and services that ensure futures industry integrity, protect market participants, and help its members meet their regulatory responsibilities.

NFA has a unique interest in the Rule for two reasons. First, NFA was the catalyst for the Rule. Around the time of the 2007-2008 financial crisis, NFA observed that certain Registered Investment Companies ("RICs") were using wholly-owned and controlled subsidiaries to invest in commodity futures transactions, instead of the RICs themselves directly investing, and were thereby circumventing the CFTC's and the NFA's regulatory requirements. NFA understood the threat that this emerging trend posed to investors as well as to market stability more generally, and it accordingly filed a petition with the CFTC that ultimately led to promulgation of the Rule. *See* Proposed Rule, 76 Fed. Reg. 7,976, 7,978 (Feb. 11, 2011).

Second, as the self-regulatory organization for the United States futures industry, NFA has unique insight into the need for, and the benefits conferred by,

registration and reporting under the CEA. In fact, membership in NFA is mandatory for "commodity pool operators" as that term is defined by the Commodity Exchange Act (the "CEA"), 7 U.S.C. § 1 et seq., and enforced by the CFTC.

Better Markets.

Better Markets is a non-profit organization founded to promote the public interest in the financial markets. It advocates for greater transparency, accountability, and oversight in the securities and commodities markets through a variety of activities, including comment on proposed rules, public advocacy, litigation, and independent research.

Better Markets has in interest in this case because one of the Appellants' principal arguments is that the CFTC failed to conduct an adequate cost-benefit analysis when it promulgated the Rule. A decision invalidating the Rule on cost-benefit grounds would undermine several important interests that Better Markets seeks to advance. First, it would eliminate the investor protection and data collection tools that the Rule provides through its registration and reporting requirements, thus reducing accountability and transparency in the commodity markets.

Second, and with more far-reaching impact, it could entrench the mistaken view that under Section 15(a) of the CEA, 7 U.S.C. § 19(a), Congress intended to

burden the CFTC with a costly, time-consuming, and virtually impossible duty to conduct an exhaustive cost-benefit analysis for each of its rules. Such a holding could in turn pose a threat to the entire process of financial reform—a process that is essential for preventing another financial crisis and the enormous costs it would inflict. Forcing the CFTC to overcome such a high and unwarranted hurdle could undermine the agency's ability to finalize its regulatory reforms and to defend its already-implemented rules against challenges in court.

ARGUMENT

I. Circuit Rule 29 provides that where the issues presented in a case require greater briefing length by *amici*, a motion to exceed length limits is appropriate.

Circuit Rule 29 governing *amicus* briefs provides that where the "issues presented require greater length than these rules allow," the appropriate remedy is not separate briefs from interested *amici*, but instead "a motion to exceed length limits." Circuit Rule 29(d). The issues presented in this case, and the distinct contribution that each *amicus* can make with respect to those issues, require a reasonable extension of the briefing limit beyond the current level of 7,000 to 10,000.

While Circuit Rule 28(e) provides that motions to exceed limits on brief length "will be granted only for extraordinarily compelling reasons," it does not appear that this more stringent standard applies to *amicus* briefs. The length of

amicus briefs and motions to exceed briefing limits for *amici* are addressed in other, separate provisions of Federal Rule of Appellate Procedure 29, Circuit Rule 29, and the Handbook of Practice and Internal Procedures. The various cross-references in the rules confirm the point. *See* Circuit Rule 29(d) (indicating that motions to exceed length limits for *amicus* briefs are appropriate when the issues require greater length, and cross-referencing some portions of Circuit Rule 28 but not Circuit Rule 28(e), which requires "extraordinarily compelling reasons" to exceed length limits); FED R. APP. P. 29(d) (stipulating the maximum length of *amicus* briefs with the proviso "except by the court's permission" but without cross-referencing Circuit Rule 28(e)); Handbook at 38 (addressing the length of *amicus* briefs, and cross-referencing some portions of Circuit Rule 28 but not Circuit Rule 28(e)); and Handbook at 40 (addressing the length of other briefs, but without cross-referencing any Federal Rules of Appellate Procedure or Circuit Rule relating to *amicus* briefs). Further confirming this interpretation of the rules, the Handbook expressly states that "*Parties*" wishing to exceed length limits must comply with the "extraordinarily compelling circumstances test" of Circuit Rule 28(e). Handbook at 40 (emphasis added).

This distinctive treatment of motions to extend the length of *amicus* briefs is appropriate, given the unique challenges facing *amici*. Under Circuit Rule 29 and the type of scheduling order in this case, *amici* are presumptively required to

prepare a single, joint brief not to exceed 7,000 words. This limit applies regardless of how many organizations seek to provide arguments, knowledge, and expertise on the issues presented, and regardless of the degree to which the interests and perspectives of the *amici* are the same or different. *Amici* are thus potentially subject to word limits that are dictated by the happenstance of the number of other *amici* who seek to file briefs and the extent of alignment in their interests and perspectives. Under these circumstances, the standard for seeking additional word length by *amici* should be more flexible than the one normally applicable to the parties in an action. This approach helps ensure that in complex cases having a potentially broad impact, the Court has the benefit of a full presentation of all the issues presented.

However, even if Circuit Rule 28(e) is deemed applicable, that standard is met in this case. As shown below, this appeal presents extraordinary and compelling circumstances that warrant an increased word length for the movants.

II. The requested increase in word length is justified in this case.

Given the importance of this case, the complexity of the issues presented, and the unique contribution that each *amicus* can make if provided sufficient briefing length, the modest increase in briefing length that *amici* seek is justified.

This rule challenge is one of only two cases involving an attempt to invalidate CFTC rules principally on the basis of the agency's alleged failure to

conduct cost-benefit analysis under the CEA. *Int'l Swaps and Derivatives Ass'n v. CFTC*, No. 12-5362 No. 11-cv-2146 (RLW) (D.D.C. 2012) (challenging the CFTC's rule establishing position limits in the commodities markets on, *inter alia,* cost-benefit grounds). The resolution of these claims could have far-reaching implications because the scope of the CFTC's obligation to conduct economic analysis when it promulgates rules could largely determine the course of regulatory reform at the CFTC and the fate of a host of crucial rules that the CFTC has finalized or will be finalizing in accordance with the Dodd-Frank Act.

Properly interpreted, in accordance with Congress's language and intent and relevant Supreme Court precedent, the CFTC's obligation is simply to consider the costs and benefits of its discretionary rules in light of five public interest factors, not to conduct an exhaustive cost-benefit analysis—a task that is time consuming, inherently imprecise, and in many cases, virtually impossible to perform. To the extent a more onerous standard is established in this case, the result could have a number of adverse consequences. It could delay and weaken implementation of the specific Rule at issue on CPO registration and reporting; drain the CFTC's resources by requiring compliance with a more burdensome standard of cost-benefit analysis than the law requires; induce a slower and weaker approach to rulemaking under the Dodd-Frank Act; subject the CFTC to additional and costly rule challenges in court, which threaten to invalidate other important regulatory

provisions; and ultimately increase the threat of another financial crisis.

This case also presents multiple legal and factual issues, including not only the core question centering on the CFTC's economic analysis duty, but also the specific need for the Rule, the appropriate role of the CFTC and the SEC in exercising jurisdiction over the commodity activity at issue, the real value of the registration and reporting mechanisms the Rule establishes, and the reasonableness of the rulemaking choices that the CFTC made.

Finally, the *amici* movants can offer unique and helpful insights that will assist the Court in reaching an appropriate resolution of these issues. The NFA is a quasi-governmental agency, and its fundamental mission is to protect the integrity of the U.S. futures market. It will address two important aspects of this case: the specific facts and circumstances that gave rise to the Rule, and the function of the Rule's registration and reporting requirements in protecting investors and enhancing transparency in the formerly opaque derivatives markets.

Better Markets had developed a wealth of expertise in the area of regulatory reform under the Dodd-Frank Act. Over the past two years, it has submitted more than 125 comment letters to the financial market regulators engaged in implementing the Dodd-Frank Act, including the CFTC, the SEC, and the agencies that oversee banks.[1] Better Markets has also developed an expertise on the scope

[1] *Available at* http://comments.cftc.gov/PublicComments/CommentList.aspx;

of the economic analysis that the financial regulatory agencies must conduct under their respective statutes, including the CEA. Better Markets can therefore provide the Court with a unique perspective on the CFTC's economic analysis in this case, and the importance of the Rule in the larger context of regulatory reform under the Dodd-Frank Act.

Under these circumstances, a reasonable increase in the applicable briefing length is appropriate.

CONCLUSION

For the foregoing reasons, the NFA and Better Markets respectfully request that their motion for leave to file a joint brief with a length of up to 10,000 words be granted.

March 8, 2013

Respectfully submitted,

/s/John M. Devaney

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http://www.federalreserve.gov/apps/foia/dfproposals.aspx;
http://www.fdic.gov/regulations/reform/initiatives.html;
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http://sec.gov/rules/proposed.shtml.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 26.1 and 29(b), *amici* hereby states that:

1. The National Futures Association is a non-profit organization and the independent, self-regulatory organization for the United States futures industry. Its fundamental mission is to protect the integrity of the U.S. futures market. To this end, it provides innovative regulatory programs and services that ensure futures industry integrity, protect market participants and help its members meet their regulatory responsibilities. It has no parent corporation and there is no publicly held corporation that owns 10% or more of stock in the National Futures Association.

2. Better Markets, Inc. is a non-profit organization founded to promote the public interest in the financial markets. It advocates for greater transparency, accountability, and oversight in the financial system through a variety of activities, including comment on proposed rules, public advocacy, litigation, and independent research. Better Markets has no parent corporation and there is no publicly held corporation that owns 10% or more of the stock of Better Markets.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rules 28(a)(1), Better Markets and NFA state as follows:

(A) Parties, Intervenors, and *Amici*

Except for the following, all parties, intervenors, and *amici* appearing in this Court are listed in the Brief for Appellants: the Mutual Fund Directors Forum and former senior officials of the Securities and Exchange Commission: Chairman Richard C. Breeden; Commissioners Paul S. Atkins, Edward H. Fleischman, and Joseph A. Grundfest; and Directors of the Division of Investment Management Allan S. Mostoff, Paul F. Roye, and Marianne K. Smythe.

(B) Rulings Under Review

References to the rule at issue appear in the Brief for Petitioners.

(C) Related Cases

Counsel is aware of no related cases currently pending in any other court.

CERTIFICATE OF SERVICE

I certify that on March 8, 2013, I caused the foregoing Joint Motion of the National Futures Association and Better Markets, Inc. for Leave to File Joint A*micus Curiae* Brief with Increased Word Limit in Support of Appellee to be filed with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit via the CM/ECF system, which will serve counsel listed below.

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