ORAL ARGUMENT NOT YET SCHEDULED
No. 14-1240 & 14-1304

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

LOAN SYNDICATION AND TRADING ASSOCIATION,

Petitioner,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION;
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondents.

On Petition for Review of a Final Order of the U.S. Securities and Exchange Commission and the Board of Governors of the Federal Reserve System

BRIEF OF BETTER MARKETS, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS SECURITIES AND EXCHANGE COMMISSION AND BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

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June 15, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rules 26.1 and 28(a)(1), Better Markets states as follows:

(A) Parties, Intervenors, and *Amici*

All parties, intervenors, and *amici* appearing in this Court are listed in the Brief for Petitioner and Brief for Respondent.

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 financial system through a variety of activities, including comment on rules proposed by the financial regulators, public advocacy, litigation, congressional testimony, 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.

(B) Consent

All parties have consented to the filing of this brief. Because Better Markets was unable to reach Petitioner Loan Syndications and Trading Association on Friday, June 12, 2015 (through no fault of Petitioner or Petitioner's counsel), it filed this brief without Petitioner's consent, along with a Motion for Leave to File as *Amicus Curiae*, on that date. On June 15, 2015, Better Markets received the Petitioner's consent to file its brief. Accordingly, Better Markets is re-filing its brief with full consent on June 15, 2015.

(C) Rulings Under Review

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

(D) Related Cases

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

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GLOSSARY

Agencies	The Respondents
APA	Administrative Procedure Act
Fed	Board of Governors of the Federal Reserve System
GDP	Gross Domestic Product
CDO	Collateralized Debt Obligation
CLO	Collateralized Loan Obligation
Release	The final rule and the explanation of the final rule found at 79 Fed. Reg. 77602-77766 (Dec. 24, 2014)
Rule	The final rule found at 79 Fed. Reg. 77602-77766 (Dec. 24, 2014) at 77740-77766.
SEC	United States Securities and Exchange Commission

STATUTES AND REGULATIONS

Except for the following, all applicable statutes and regulations are contained in the Brief for Petitioner, or the Brief for Respondent: 15 U.S.C. § 78c(f), 15 U.S.C. § 78w(a)(2), 15 U.S.C. § 77b(b), 15 U.S.C. 80a-2(c), 7 U.S.C. § 19, 12 U.S.C. § 4802(a), 5 U.S.C. § 553. These statutes and regulations are reproduced in the Addendum.

INTRODUCTION

The 2008 financial crisis was the worst financial disaster since the Great Crash of 1929, and it produced the worst economy our nation has seen since the Great Depression of the 1930s.[1] It nearly collapsed our financial system, destroying millions of jobs, triggering a tidal wave of home foreclosures, wiping out the savings of countless American households, and disabling the credit markets. The costs have been staggering: tens of trillions of dollars in lost GDP and inestimable human suffering, much of which continues to this day.[2]

A primary cause of this historic financial collapse was the securitization market, which created and distributed staggering amounts of toxic securities upon innumerable financial institutions and investors, crippling the balance sheets of banks and Government-Sponsored Enterprises alike. The accumulation of risk in those securities was at the epicenter of the financial crisis.

America's elected officials in the Legislative and Executive Branches responded to these unprecedented events by enacting a comprehensive set of reforms

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[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief. No person—other than Better Markets, its members, or its counsel—contributed money that was intended to fund the preparation or submission of this brief.

[2] *The Cost Of The Wall Street-Caused Financial Collapse and Ongoing Economic Crisis is More Than $12.8 Trillion*, Better Markets (Sept. 15, 2012), *available at* http://www.bettermarkets.com/cost-crisis.

in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203, 124 Stat. 1376 (July 21, 2010) ("Dodd-Frank Act"). Many of those provisions were aimed at repairing the securitization market, and chief among them was the risk retention requirement in Section 941. It is a uniquely valuable regulatory tool because it is designed not simply to impose duties of transparency and fair dealing upon market participants, but also to incentivize firms from within by aligning their economic interests with those of the investors who buy their asset-backed securities.

This case represents a serious threat to the Respondents' risk retention rule (the "Rule") and more generally to the ability of regulators to protect the American people from a future crisis. Petitioner seeks a wholly unjustified carve-out from the risk retention rule for CLOs, instruments that by design embody far too much risk to warrant exemptive treatment. While the underlying loans in these offerings may represent debt from some familiar corporate names, they are highly leveraged firms that have difficulty obtaining financing through mainstream credit channels. Moreover, recent trends indicate that CLO issuance has been steadily increasing, fueled by the search for yield and lower underwriting standards. This accumulation of systemic risk bears a worrisome parallel to the originate-to-distribute mortgage loan securitizations that fueled the financial crisis. 79 Fed. Reg. 77602-7776 (Dec. 24, 2014) ("Release") at 77650-51; 77657-58. Congress clearly did not intend to

exempt such instruments from the risk retention requirements, especially where the rule will do little to disrupt the credit markets and is likely to help restore investor confidence in the securitizations that facilitate credit availability.

In addition, Petitioner, along with its *amicus,* the Chamber of Commerce, contends that the Respondents (or "Agencies") failed to conduct an adequate cost benefit analysis of the Rule as applied to CLOs. This argument seeks to expand the SEC's limited duty under the securities laws far beyond what Congress intended, and impose on the Federal Reserve ("Fed") a requirement found nowhere in statute. If the Chamber's argument is adopted, then all of the Agencies' future rulemakings will be encumbered with unwarranted and impossible analytical obligations, further slowing an already complex and time-consuming process and setting the stage for future attacks on their rules. In that event, the Agencies' ability to implement and defend a wide range of regulatory reforms as Congress intended will be undermined. The Court should avoid these outcomes and rule in favor of the Respondents.

IDENTITY AND INTEREST OF BETTER MARKETS

Better Markets, Inc. ("Better Markets") is a non-profit organization that promotes the public interest in the securities, commodities, and credit markets. It has submitted over 150 comment letters to the SEC, the Fed, and other financial regulators advocating for strong and swift implementation of the comprehensive reforms Congress established in the Dodd-Frank Act to address systemic risk and to

prevent another financial crisis and recession—calamities brought on by some of the institutions that the Petitioner represents in this case. As part of that advocacy, Better Markets has argued extensively for the adoption of appropriately strong rules governing the securitization markets and for broad application of those rules to all market participants.[3]

Better Markets also has expertise in elucidating the obligations that Congress has chosen to impose on regulatory agencies under their organic statutes and under the Administrative Procedure Act ("APA").[4] The organization has defended SEC and other agency rules in court multiple times against persistent legal challenges,[5] focusing specifically on the scope of an agency's duty to conduct economic impact analysis to support its actions, a line of attack advanced in this case.

Better Markets has an interest in this case, because the Court's ruling will have an impact on both of the issues highlighted above: the Agencies' ability to effectively implement post-crisis reforms in the securitization markets, and the ability of all administrative agencies to exercise their expert judgment free from the impossible economic analysis demands that industry would impose upon them, but which Congress never intended.

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[3] *See* Comment Letters, *available at* http://www.bettermarkets.com/rulemaking.
[4] 5 U.S.C. § 553 *et seq*.
[5] *See Amicus Curiae* Briefs of Better Markets, Inc., *available at* https://www.bettermarkets.com/about/better-markets-amicus-briefs.

SUMMARY OF ARGUMENT

First, Petitioner's insistence on an exemption from the Rule is flawed on at least two grounds. It portrays CLO securitizations as safe investments that do not warrant application of the risk retention safeguards, yet current trends suggest just the opposite. And Petitioner exaggerates the likely impact on the credit markets if CLO managers must adhere to the risk retention rule.

Second, along with their *amicus*, Petitioner insists that the Agencies must calculate the costs and benefits of their rules and proceed only if the benefits justify the costs. However, neither Agency is subject to such a requirement under its organic statute or the APA. Congress chose not to impose that obligation, and for good reason, as it would impair their ability to implement the reforms—including the risk retention rule at issue here—that are necessary to help protect our markets and our economy from another devastating financial crisis.

I. THE AGENCIES REASONABLY DECIDED NOT TO CREATE AN EXEMPTION FOR CLO'S.

The Agencies properly exercised their broad discretion not to create an exemption for CLOs. Contrary to the Petitioner's claims, CLOs pose potentially systemic risks, and recent market trends reinforce those concerns. At the same time, Petitioner has exaggerated the need for regulatory relief from the risk retention requirements and the impact that the Rule will have on the credit markets.

A. <u>As a threshold matter, the Agencies' discretion is exceptionally broad.</u>

In addition to the high level of deference generally afforded to agency judgments, *see Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), deference to agency decision-making is especially high where predictive and expert assessments come into play. As the D.C. Circuit noted in *Agape Church, Inc. v. FCC*, 738 F.3d 397, 408 (D.C. Cir. 2013), courts "must accord 'substantial deference'" to an agency's "predictive judgments," and "cannot substitute [their] judgment for the agency's, especially when, as here, the decision under review requires expert policy judgments of a technical, complex, and dynamic subject." *See also Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989) (where the agency's analysis "requires a high level of technical expertise," courts "must defer to the informed discretion of the responsible federal agencies") (internal citation and quotation marks omitted); *Fox v. Clinton*, 684 F.3d 67, 75 (D.C. Cir. 2012) ("arbitrary and capricious review is fundamentally deferential—especially with respect to matters related to an [agency's] areas of technical expertise") (internal citation and quotation marks omitted).

This is such a case. Determining the impact that any exemption would have on investors or on the credit markets requires substantial expertise, including a thorough knowledge of the relevant financial market and the ability to rationally estimate how that market is likely to respond to changes in the regulatory

environment. In this case, six of the leading federal agencies responsible for the oversight of our financial markets considered the possible effects of an exemption for CLOs, applied their expertise, and unanimously concluded that it was unwarranted under the statutory guidelines. There is no basis for second-guessing this collective judgment.

B. The guidelines that Congress set forth in Section 941 reflect an obvious intent to protect investors and the public interest above all other factors.

The risk retention provision in Section 941 of the Dodd-Frank Act requires the Agencies to create total or partial exemptions for certain types of securitizations, where the underlying assets are loans of extraordinarily high quality or protected with a government backstop. Included among those assets are "qualified residential mortgages" and loans guaranteed by the U.S. However, there is no carve-out for CLOs, which can only be exempted if they meet the high standards set forth in the general exemptive provision of Section 941.

That general provision requires, first and foremost, that any exemption "be appropriate in the public interest and for the protection of investors." 15 U.S.C. § 78*o*-11(c)(1)(G). Elsewhere the statute elaborates on these criteria, providing that any exemptions or adjustments must "help ensure appropriate underwriting standards," "encourage appropriate risk management practices by securitizers," or – again – "otherwise be in the public interest and for the protection of investors." 15

U.S.C. § 78*o*-11(e)(2). The sole factor relating to market impact is that the exemption "improve access of consumers and businesses to credit on reasonable terms." *Id*. However, nowhere in any of these provisions did Congress stipulate that exemptions would be appropriate to alleviate the regulatory costs or burdens on any class of market participant, least of all CLO managers.

C. CLOs pose risks to investors and the public interest.

In light of these criteria, and the paramount importance of protecting investors and the public interest, the Agencies reasonably declined to provide an exemption for CLOs. Contrary to the Petitioner's comforting portrayal of CLOs, the available evidence indicates they pose risks to investors and also threaten the public interest by accumulating significant levels of systemic risk.

CLOs are comprised of high-risk business loans that cannot be underwritten absent securitization, the majority of which are owned by the largest banks in the country.[6] "CLOs are investment funds that consist of 'leveraged loans,' (huge corporate loans with low to very low credit ratings) . . . CLOs are NOT backed by loans to small business[es] or individuals, but rather are typically composed of the

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[6] Ronald Orol, *House Oks IPO help, Volcker Rule relief*, THE DEAL (Jan. 14 2015), *available at* http://www.thedeal.com/content/regulatory/house-oks-ipo-help-volcker-rule-relief.php ("[A]s of Sept. 30 four big banks, JPMorgan Chase & Co. (JPM), Wells Fargo & Co. (WFC), Citigroup Inc. (C) and State Street (STT) control roughly 82% of the CLO securities held by the U.S. banking industry.").

debt that companies incur after being taken over by a private equity firm."[7] And despite Petitioner's argument that CLOs are transparent instruments backed entirely by business loans, "CLOs can be made up both of loans and other risker assets such as sovereign debt, structured derivatives and credit default swaps."[8]

Petitioner argues that CLOs do not fit within the "originate to distribute" model because the securitization and distribution take place through a third party, the CLO itself. Experts disagree. As described by a Harvard Business School professor and a member of the Federal Reserve Bank of New York, "the development of CLOs provided banks with yet another opportunity to move away from the traditional originate-to-hold model of corporate lending and adopt the so-called originate-to-distribute model of lending." Vitaly Bord and Joao A. C. Santos, *Does Securitization of Corporate Loans Lead to Riskier Lending?* at 1 (Mar. 2, 2014), *available at* SSRN: http://papers.ssrn.com/sol3/papers.cfm ?abstract_id=1838383. "CLOs became appealing to banks because they gave them an opportunity to sell loans off their balance sheet, particularly riskier loans which have been traditionally more difficult to syndicate." *Id*. at 2; *see also* Andreas Jobst, *Collateralized Loan Obligations (CLOs) – a Primer*, International Monetary Fund

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[7] *Fact Sheet: Return of the CLO Attack on the Volcker Rule*, Better Markets (Jan. 12 2015), *available at* http://www.bettermarkets.com/blogs/fact-sheet-return-clo-attack-volcker-rule#.VXcmc89VhBc.

[8] *House Oks IPO help, Volcker Rule relief*, Ronald Orol, THE DEAL (Jan. 14 2015).

(IMF) European Department at 13 (Dec. 2002), *available at* http://ssrn.com/abstract=370640 (CLO transactions enable banks to "improve risk-adjusted efficiency after removing risky assets off-balance from the loan book."). This "reduces [banks'] incentives to screen loan applicants and to monitor borrowers during the life of the loan. These problems are likely to be acute when banks sell loans to CLOs, particularly if this happens at the time of their origination." *Id*.

Bord and Santos identified two factors that make CLOs opaque and vulnerable to default. *Id*. First, "CLOs acquire predominantly risky loans and loans of private and often unrated corporations." *Id*. Second, CLO loans are "bundled with many other loans, usually originated by different banks," making it difficult for investors to link the performance of the CLO with any particular originating bank. *Id.* In other words, CLOs are not as transparent as Petitioner asserts, harkening back to a core problem with the securitizations that fueled the financial crisis: investors could not determine the quality of the mortgage-backed securities they were being sold. Overall "banks, CLOs, and the remaining investors that invest in the loans that banks securitize expect these loans to perform worse." *Id*. at 23.

Commenters have noted that "a bank that has transferred a significant portion of its exposure to a borrower's default has less incentive to monitor the borrower, control the borrower's risk-taking, or exit the lending relationship in a timely manner." Darrell Duffie, *Innovations in Credit Risk Transfer: Implications for*

Financial Stability, Bank for International Settlements Working Paper No. 255 at 1-2 (Jul. 2008), *available at* SSRN: http://ssrn.com/ abstract=1165484. Thus CLOs "could raise the total amount of credit risk in the financial system to inefficient levels and lead to inefficient economic activities by borrowers." *Id*. at 2. Credit transfer by banks to investors via CLOs is "likely to lead to a reduction in the efforts of banks and other loan servicers to mitigate default risk." *Id*. Conversely, "[r]etention by lenders of portions of loans and of CLO toxic waste improve incentives in this regard." *Id*.

Petitioner argues that CLO managers are already incented to minimize risk because their management fees are subject to the performance of the CLO. This is small comfort. As the Agencies noted, this structural feature was shared by other managed instruments, such as CDOs of asset-backed securities, which performed poorly during the financial crisis. Release at 77656. In addition, the deferred fees "typically have small expected value." *Id*. Moreover, if "a portfolio's default rate significantly exceed[ed] anticipated losses," then a CLO manager might make highly imprudent decisions to salvage his expected compensation. *Id.* Finally, there is no current law or regulation that requires CLO managers to accept deferred fees. If CLOs win an exemption from risk-retention, then CLO manager fee structures could be changed, thus eliminating the very safeguard that was used to justify the exemption.

As the Agencies noted, despite the controls that, according to Petitioner, adequately incentivize CLO managers to follow prudent loan selection procedures, leveraged loan[9] underwriting has recently come into question. *See* Release at 77727 n. 450 ("[T]here is evidence that increased activity in the leveraged loan market has coincided with widespread loosening of underwriting standards and that many banks have not fully implemented standards" created by federal banking agencies.). According to the Office of the Comptroller of the Currency, "[e]xaminers have observed erosion in the underwriting standards for syndicated leveraged loans."[10] The Fed has reported that "[a] focused review of leveraged loans found material widespread weaknesses in underwriting practices, including excessive leverage, inability to amortize debt over a reasonable period, and lack of meaningful financial covenants."[11]

The Bord and Santos study found that, due to poor underwriting standards, the loans sold by banks to CLOs underperform those retained on the banks' ledgers.

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[9] CLO managers "currently hold 53 percent of the leveraged loans" market. Release at 77728.

[10] Semiannual Risk Perspective: Spring 2014, Office of the Comptroller of the Currency, at 5 (June 2014), *available at* http://www.occ.gov/publications/publications-by-type/other-publications-reports/semiannual-risk-perspective/semiannual-risk-perspective-spring-2014.pdf.

[11] National Credits Program: 2013 Review, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency at 3 (Sept. 2013), *available at* http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20131010a1.pdf.

Vitaly Bord and Joao A. C. Santos, *Does Securitization of Corporate Loans Lead to Riskier Lending?* at 3 (Mar. 2, 2014), ("[O]ur results show that the loans banks sell to CLOs perform worse than the loans they originate but do not securitize"). Bord's and Santos' "investigation of banks' lending standards suggests that banks use more lax standards to underwrite the loans they sell to CLOs and that this could be a contributing factor for their worse performance." *Id.* Banks "put less weight on the hard information on borrower risk available to them" and "retain less skin in the game when they sell loans to CLOs." *Id.* Bord and Santos also found that "banks charge higher spreads on the loans that they sell to CLOs." *Id.* at 5.

Thus, recent evidence shows that banks are underwriting shoddy loans which are being purchased by CLOs and divided into tranches for investors. If CLO managers were adequately incentivized to create sound investments, those investments would not be filled with poor quality loans. As the agencies concluded, "without a risk retention requirement, there is little economic incentive to discourage practices associated with an originate-to-distribute model from developing." Release at 77727.

As investors search for yield, CLOs may be replacing other asset-backed securities as the preferred method for packaging risky debt. "The market for CLOs, which use leveraged bank loans as assets, has rebounded tremendously since the

financial crisis, with more than $124 billion of these securities issued last year."[12] An overheated CLO market could trigger the next crisis if the loans supporting CLOs are subject to widespread failure.[13] "'Banks have been scolded and they have been warned, and yet you are seeing a lot of signals that the market is heating up . . . . We have seen this bad movie before. The issue now is, will the regulators deploy the rest of the arsenal of tools they have?'"[14]

While Petitioner claims that CLOs maintained their value during the 2008 financial crisis, the Agencies concluded that "this claim has the benefit of hindsight, and that during the financial crisis, there were considerable concerns with the ability of borrowers to meet their financial obligations through their collateralized loans."

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[12] *The Watering Down of Wall Street Reform*, Aimee Picchi, MONEYWATCH (Jan. 14 2015), *available at* http://www.cbsnews.com/news/the-watering-down-of-wall-street-reform/

[13] "The U.S. CLO market printed $124.1 billion of new issues from 234 deals in 2014, . . . up from $83 billion in 2013 and blow[ing] through the previous high of $97 billion in 2006." *U.S. CLO Issuance Hits Record $124.1B in 2014*, LeveragedLoan.com (Jan. 7 2015), *available at* http://www.leveragedloan.com/us-clo-issuance-hits-record-123-6b-in-2014/. CLO issuance has increased significantly each year from 2010 to 2014. *Id.*

[14] Quote from Mayra Rodriguez Valladares, managing principal at MRV Associates in New York, a consultant on regulation to some of the world's largest banks, to Bloomberg News, *Fed Scrutiny of Leveraged Loans Grows Along With Bubble Concern*, BLOOMBERG NEWS (Oct. 1, 2014), *available at* http://www.bloomberg.com/news/articles/2014-10-01/fed-scrutiny-of-leveraged-loans-grows-along-with-bubble-concern.

Release at 77728.[15] In any event, this reliance on CLOs' alleged track record ignores a fundamental truth about the purpose of the Dodd-Frank Act: It was intended not solely to address the specific debt instruments that caused the financial breakdown of 2008, but also as a forward-looking piece of legislation designed to address new accumulations of risk that could lead, if unchecked, to the next financial crisis.

D. The Petitioner overstates the possible impact of CLO risk retention on the credit markets.

Petitioner invokes the notion that applying risk retention requirements to CLOs will adversely affect the availability or cost of credit. The Agencies reasonably discounted these concerns for a variety of reasons. First, the CLO industry can be expected to adapt, as many large managers have the capacity to comply with the Rule as written. The Agencies found that CLO managers responsible for 63% of CLO issuance by dollar volume, constituting 52% of the population of CLO managers analyzed, would continue managing CLOs while

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[15] "Both CDOs and CLOs paid interest that often exceeded that of conventional bonds. Both were popular when real estate was hot, and both are hurting now as the loans inside them go bad." Anthony Effinger and Daniel Taub, *Credit Suisse Resort Loans Default From Beverly Hills to Idaho*, BLOOMBERG (Mar. 5. 2009), *available at* http://www.bloomberg.com/apps/news?sid=aT4PzNc1EgrU&pid=newsarchive; "By April 2009, amid the worst financial crisis since the Great Depression, the slices of CLOs with BBB ratings plummeted to 6 cents on the dollar, while the safest portions fell to 69 cents, Morgan Stanley data show." Pierre Paulden and Kristen Haunss, *New Signs of Life for Collateralized Loans*, BLOOMBERG BUSINESS (Dec. 15 2009), *available at* http://www.businessweek.com/investor/content/dec2009/pi20091215_097871.htm.

retaining the five-percent interests, reasoning that "given their affiliations, diversified business lines and demonstrated ability to raise capital in public capital markets," these managers "would have greater access to capital, whether internal or external, and would face fewer obstacles and lower funding costs to obtain the capital necessary to satisfy the risk retention requirements." Release at 77730.

Second, other sources of lending are available to ensure that highly leveraged corporate debtors can access funding. "Mutual funds, private equity funds, private equity mezzanine loan funds and credit funds . . . currently invest directly in the leveraged loan market and may increase their direct purchase of leveraged loans if smaller CLO managers exit the market." *Id.* Petitioner notes that these alternative sources of funding are not subject to Section 941 and argue that their expansion into the leveraged loan market would not serve the interests that motivated Congress to include that provision in Dodd-Frank. However, there is good reason for their exclusion. Mutual funds, private equity funds, private equity mezzanine loan funds, and credit funds do not issue securities of varying investment grades by aggregating pools of loans, but instead purchase investment vehicles for their own investment purposes. Since they do not issue complex, asset-backed securities to investors, there can be no concern as to whether these entities have retained an interest in such securities. Their "skin in the game" is their investment.

Third, the Agencies created an alternative for CLO managers: CLOs can comply with the risk retention rule via participation by the lead arranger, leaving managers free to invest or not invest in the underlying securities. Release at 77726. While Petitioner argues that banks may be unwilling to invest in the securities they sell to CLOs, that fact may indicate that many leveraged loans simply should not be underwritten. One purpose of the "risk retention" rule is to eliminate debt instruments that are so unsafe that their originators and packagers will not invest in them.

Finally, as to the claimed impact on the costs of credit, the Agencies concluded that the willingness of investors to participate in CLOs may actually rise, given the added risk retention protections and correspondingly increased investor confidence. To the extent the cost of credit does rise, it is expected to be minimal.[16] In any case, whatever the increased cost of credit may be in this sector of the lending market, it will better reflect **all** costs of credit. Slightly less expensive credit for highly leveraged companies is decidedly contrary to the public interest, where it threatens the stability of our markets and sets the stage for another financial crisis.

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[16] The Agencies projected a "minimal impact on the cost of credit (approximately 0-10 basis points)" under the lead arranger option, and a "modest incremental impact" under the manager option. Release at 77700.

E. Petitioner is relying on familiar but false arguments to nullify the Rule.

Petitioner is engaging in a classic but unavailing strategy to defeat the Rule: Discount the need for regulation, overstate the harms from regulation, and ignore the profoundly important goals that Congress seeks to achieve by protecting investors and limiting systemic risk in our markets. This strategy has been deployed for nearly a century.[17] For instance, when the federal securities laws were adopted 75 years ago in the wake of the Great Depression, Wall Street complained that they would impede economic recovery by discouraging the issuance of new securities; however, the securities markets flourished following those sweeping reforms.[18] "It really began with the Securities Act of 1933," which was enacted "amid fears that the industry would be devastated. The strategy is well-known and has been played many times before."[19]

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[17] *Setting the Record Straight on Cost-Benefit Analysis and Financial Reform at the SEC, a Report from Better Markets, Inc.*, 44-48 (Jul. 30, 2012), *available at* http://www.bettermarkets.com/sites/default/files/Setting%20The%20Record%20Straight.pdf.

[18] *Setting the Record Straight on Cost-Benefit Analysis and Financial Reform at the SEC, a Report from Better Markets, Inc.*, at 45.

[19] Marcus Baram, *The Bankers Who Cried Wolf: Wall Street's History of Hyperbole about Regulation*, The Watchdog, HUFFINGTON POST (Jun. 21, 2011), *available at* http://www.huffingtonpost.com/2011/06/21/wall-street-history-hyperbole-regulation_n_881775.html, quoting Charles Geisst, author of *Wall Street: A History*.

The financial sector similarly complained about the economic impact of deposit insurance. The day Congress passed the Banking Act of 1933, creating the FDIC, the president of the American Bankers Association wired his member banks with the following grim resolve: "The American Bankers Association fights to the last ditch deposit guarantee provisions of Glass-Steagall Bill as unsound, unscientific, unjust and dangerous."[20] Mutual fund reform, and the national market initiatives of the mid-1970s, were also harshly criticized.[21]

Notwithstanding these industry forecasts of doom, our financial markets thrived and our economy experienced a sustained period of growth in the wake of

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[20] Nicholas Economides *et al.*, *The Political Economy of Banking Restrictions and Deposit Insurance: A Model of Monopolistic Competition Among Small and Large Banks*, 39 J. L. & ECON. 667, 698 (1996); *see also* David Min, *How Government Guarantees Promote Housing Finance Stability*, 50 HARV. J. ON LEGIS. 437, 472 n. 195 ("Critics of the New Deal-era reforms argued that the combination of federal deposit insurance and heavy prudential regulation would ruin the U.S. banking system.")

[21] *Setting the Record Straight on Cost-Benefit Analysis and Financial Reform at the SEC, a Report from Better Markets, Inc.*, at 45; *see also* Marcus Baram, *The Bankers Who Cried Wolf: Wall Street's History of Hyperbole about Regulation*, The Watchdog, HUFFINGTON POST (Jun. 21, 2011); Nicholas Economides *et al.*, *The Political Economy of Branching Restrictions and Deposit Insurance: A Model of Monopolistic Competition Among Small and Large Banks*, 39 J.L. & ECON. 667, 698 (1996); William R. Keech, *Economic Politics Revisited*, paper presented at the 6th Annual Appalachian Spring Conference in World History and Economics Role of Government in Economic Development, Appalachian State University, *available at* http://history.appstate.edu/sites/history.appstate.edu/files/William%20Keech.pdf (One key to explain "why the US went so many years without banking panics is surely deposit insurance, which was established in the Banking Act of 1933").

those reforms—at least until the de-regulatory movement of the late 1990s set the stage for the 2008 financial crisis. This history affirms the wisdom of trusting the expertise and predictive powers of the regulatory agencies tasked with protecting investors and the public interest, rather than relying on the industry those agencies are required by law to regulate.[22]

II. THE AGENCIES HAVE A LIMITED DUTY TO ANALYZE THE ECONOMIC IMPACT OF THEIR RULES, AND THEY EACH FULFILLED THAT DUTY.

In its role as *amicus* supporting Petitioner, the Chamber argues that the Rule as applied to CLOs should be set aside because the Agencies failed to adequately assess the Rule's costs and benefits and failed to show that the Rule's benefits "justify" its costs. Brief of Chamber of Commerce as *amicus curiae* ("Chamber Brief") at 21-30. This argument has become a staple for the financial services industry seeking to nullify the regulatory reforms that Congress established in the Dodd-Frank Act. However, it vastly overstates what the law actually requires of the Agencies: The SEC only had to consider three specific economic factors, none of

[22] Elisabeth Keller and Gregory A. Gehlmann, *SYMPOSIUM: CURRENT ISSUES IN SECURITIES REGULATION: Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 OHIO ST. L.J. 329, 348 (1988).

which mention costs or benefits,[23] and it met that obligation in this case. As to the Fed, Congress has never required it to conduct anything akin to a cost-benefit analysis.

A. The SEC is not required to conduct cost-benefit analysis.

Whether or not an agency must conduct cost-benefit or economic impact analysis, and the exact nature of that exercise, is determined by what Congress has actually said in the agency's organic statute. The Supreme Court has declared that an agency's duty to conduct cost-benefit analysis is not to be inferred lightly or without a clear indication from Congress. *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-512 & n. 30 (1981) ("Congress uses specific language when intending that an agency engage in cost-benefit analysis."). Sometimes Congress insists on a rigorous cost-benefit analysis, *see, e.g.,* 2 U.S.C. § 1532(a) (requiring the agency to "prepare a written statement containing . . . a qualitative and quantitative assessment of the anticipated costs and benefits . . . [and] estimates by the agency of the [action's] effect on the national economy"); sometimes it requires an agency simply to consider certain economic factors, *see* 7 U.S.C. § 19 (requiring

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[23] *Setting the Record Straight on Cost-Benefit Analysis and Financial Reform at the SEC, a Report from Better Markets, Inc*. at 15-32.

the CFTC to "consider the costs and benefits of the action"); and often it does not impose any cost-benefit or economic impact analysis obligation whatsoever.

In two recent decisions, the D.C. Circuit has reaffirmed this principle and applied it in rejecting industry challenges to agency rules. For example, in *ICI v. CFTC*, 720 F.3d 370, 379 (D.C. Cir. 2013) the court made clear that "[w]here Congress has required 'rigorous, quantitative economic analysis,' it has made that requirement clear in the agency's statute, but it imposed no such requirement here." (cited authorities omitted); *see also Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 369 (D.C. Cir. 2014) ("*NAM*").

The applicable provisions of the Exchange Act do not contain any language requiring the SEC to conduct cost-benefit analyses, to compare the benefits of its rules with their costs, or to conclude as a condition of rulemaking that the benefits justify the costs. [24]

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[24] *Amicus* Chamber of Commerce cites the Riegle-Neal Community Development and Regulatory Improvement Act in support of its contention that the Board must conduct cost-benefit analysis. Chamber Brief at 22, n. 6. However, that statute relates **only** to insured depository institutions; it focuses narrowly on the "administrative" burdens that may arise from reporting and disclosure obligations; and it only requires the *consideration* of those factors, a task that gives the Fed wide discretion. 12 U.S.C. § 4802(a); discussion *infra* at II.B. It has never been the subject of a reported case, and its Congressional history shows that the intent was to eliminate duplicative paperwork, rather than to require cost-benefit analyses. *See* 139 CONG REC H10500 (1993) (statement of Representative Stephen Neal) ("Most important, it seems to me, it reduces the paperwork burden on banks, customers, regulators and reduces duplication in regulation and supervision.").

B. <u>The SEC need only "consider" certain specific factors, none of which include costs or benefits.</u>

Exchange Act Section 3(f) merely requires the SEC, after considering "the public interest" and the "protection of investors," "to **consider** . . . whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. § 78c(f) (emphasis added). In a similar vein, Section 23(a)(2) requires the SEC to "**consider** among other matters the impact any such rule or regulation would have on competition," and to refrain from adopting the rule if it "would impose a burden on competition not necessary or appropriate in furtherance of the purposes of [the statute]." 15 U.S.C. § 78w(a)(2) (emphasis added).

Long before Congress added the applicable statutory provisions to the Exchange Act in 1975 and 1996, the Supreme Court held that when statutorily mandated "considerations" are not "mechanical or self-defining standards," they "in turn imply wide areas of judgment and therefore of discretion." *Sec'y of Agriculture v. Cent. Roig Refining Co.*, 338 U.S. 604, 611-12 (1950) ("Congress did not think it was feasible to bind the Secretary as to the part his 'consideration' of these three factors should play in his final judgment—what weight each should be given, or whether in a particular situation all three factors must play a quantitative share in his computation.").

Following this approach, this Court has explained that where "Congress did not assign the specific weight the [agency] should accord each of these factors, [it]

is free to exercise [its] discretion in this area." *New York v. Reilly,* 969 F.2d 1147, 1150 (D.C. Cir. 1992); *see also Brady v. FERC*, 416 F.3d 1, 6 (D.C. Cir. 2005). As discussed above, when Congress requires an agency to "consider" certain factors in its rulemaking, a reviewing court's role is limited. Courts are not to find a rule arbitrary and capricious unless the agency has "wholly failed" to comply with a statutory requirement, or if there is a "complete absence of any discussion of a statutorily mandated factor." *Pub. Citizen v. Fed. Motor Carrier Safety Admin.,* 374 F.3d 1209, 1216 (D.C. Cir. 2004). And courts give agencies special deference in this area, as "[economic] analyses epitomize the types of decisions that are most appropriately entrusted to the expertise of an agency." *Office of Commc'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1440 (D.C. Cir. 1983).[25]

C. The legislative history confirms the limited nature of the SEC's duty.

The legislative history of the securities laws confirms the limited and discretionary nature of the SEC's duty, and it shows that Congress did not intend economic considerations to supersede the SEC's paramount duty to protect investors and the public interest.

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[25] The APA's arbitrary and capricious standard does not require an agency to engage in cost-benefit or economic impact analysis. *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 670-671 (D.C. Cir. 2011).

For example, when Congress enacted the Securities Acts Amendments of 1975, which added Section 23(a)(2) to the Exchange Act requiring the SEC to consider the anticompetitive effects of its rules, it intended this consideration to be flexible and entitled to deference. Congress did **not** require "the Commission to justify that such actions be the least anti-competitive manner of achieving a regulatory objective." S. REP. No. 94-75, at 13 (1975). Moreover, "[c]ompetition was simply not to 'become paramount to the great purposes of the Act.'" *Bradford Nat'l Clearing Corp. v. SEC*, 590 F.2d 1085, 1105 (D.C. Cir. 1978) (citing S. REP. No. 94-75, at 14).

The National Securities Markets Improvement Act of 1996 added Section 3(f) to require the SEC to "consider" "efficiency, competition, and capital formation," but here again, Congress did not require rigid analysis nor did it subordinate the SEC's primary duty to protect investors. In fact, during the deliberations over the 1996 amendments, Congress actually considered but rejected a much more prescriptive obligation, which would have required:

> (a) an analysis of the likely costs of the regulation on the U.S. economy, particularly the securities markets and the participants in those markets; and (b) the estimated impact of the rule on economic and market behavior, including any impact on market liquidity, the costs of investment, and the financial risks of investment.

S. REP. NO. 104-293, at 28-29 (1996). Congress declined to impose this "mechanical or self-describing" process on the SEC, choosing instead to enact a limited duty to

consider certain factors, affording the SEC wide discretion in determining what "part" those factors should play in the rulemaking process. *See Sec'y of Agriculture v. Cent. Roig Refining Co.*, 338 U.S. at 611-12.[26]

D. <u>The SEC considered all three economic factors.</u>

The SEC went above and beyond its duty to consider whether the Rule would promote efficiency, competition, and capital formation. A full 36 pages of the 166-page Release was dedicated to the SEC's economic analysis. Release at 77705-77740. The analysis is at once broad, discussing expansive economic considerations such as the effects of requiring risk retention and the impact of asset-level disclosure; and detailed and in-depth, including the economic baseline and an analysis of the Rule's effects on the different types of securitizations covered by the Rule.

The SEC engaged in a number of analyses on the issues specifically raised by Petitioner and *amicus* Chamber. For example, as to the decision not to vary the percent of risk to be held based on underlying assets, the SEC observed that "excessive required risk retention levels may lead to less capital available to lenders," which would "have a negative impact on competition due to the increased cost of securitizing non-qualified assets." Release at 77716. Similarly, the Rule

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[26] Congress also could have imposed further economic analysis obligations on the Agencies in the Dodd-Frank Act, and specifically as to risk retention, but it chose not to.

allows securitizers to decide whether to retain a horizontal or vertical interest, as this option "increases competition among sponsors because it allows sponsors to adjust several dimensions of the securitization." Release at 77721.

In the subsection dedicated to CLOs, the SEC detailed how the Rule would impact efficiency, competition, and capital formation. For example, the SEC wrote that "[a] reduction in CLO managers may reduce the number of CLOs, which may lead to a decrease in capital formation, a decrease in price efficiency for leveraged loans, and a decrease in competition for leveraged loans." Release at 77729. However, the SEC noted that "[t]his potential impact . . . is ameliorated to the extent that larger CLO managers—or other potential investors—are able to replace smaller CLO managers as buyers of leveraged loans." *Id.* Other considerations of the required factors are found throughout the section. *See id.* at 77726-77730.

E. A stringent economic analysis obligation would frustrate the SEC's ability to implement Congressional policy objectives.

The fundamental rationale for Congress's determination not to require the SEC – or the Fed – to conduct extensive economic analysis is clear: It would frustrate the Agencies' ability to implement Congress's paramount objectives of protecting investors and preventing another financial crisis. Congress could not have intended that measures to protect our financial system from the ravages of another financial crisis should hinge on the costs that any particular company or group of companies might have to shoulder in the reform process.

This is obviously true with respect to mandatory rulemakings. This Court has held that when Congress has required an agency to establish a rule to achieve certain ends that it considers beneficial, regulators cannot second-guess that legislative judgment. In *NAM*, the court found that Congress had "conclude[d], as a general matter, that transparency and disclosure would benefit the Congo," by helping to reduce the violence accompanying trade in certain types of minerals. *NAM*, 748 F.3d at 370. The court held that, while the SEC could not rely on Congress's decision for its "discretionary choices," it could not "question the basic premise that a disclosure regime would help promote peace and stability in the Congo." *Id.* "If the Commission second-guessed Congress on that issue, then it would have been in an impossible position." *Id.*; *see also Sec. Indus. & Fin. Mkts. Ass'n v. CFTC,* 2014 U.S. Dist. LEXIS 130871 at 126 (D. D.C. 2014) (the CFTC's cost-benefit analysis requirement applied only to "its own discretionary choices regarding the substantive requirements of the Rule," and it "could not have . . . second-guessed Congress's decision that the Rule apply" in a specific manner).

Here, Congress **required** the Agencies to promulgate a rule requiring "any securitizer to retain an economic interest in a portion of the credit risk for any asset that . . . securitizer . . . transfers, sells, or conveys." 15 U.S.C. § 78o-11(b)(1). The Agencies cannot be asked to second-guess the fundamental value of imposing a risk retention on securitizations. While Congress also gave the Agencies leeway in

creating exemptions from the risk retention requirement, they were required, when exercising that discretion, to abide by the priorities and policy objectives that Congress intended. As shown above, *supra* at II.C, the specific exemptive authority in Section 941 invoked by the Petitioner and the Chamber reflects Congress's intent that any "exemptions, exceptions, or adjustments" to the risk retention rules must serve the public interest and the protection of investors. In addition, as also discussed above, the securities laws have always required the SEC to put investor protection and the public interest ahead of its consideration of efficiency, competition, and capital formation.

In short, nowhere in Section 941 did Congress evince any desire to spare market participants from the costs that might accrue from compliance with the risk retention requirement. Congress made the obvious calculation—and the correct one—that the securitization market had to be significantly reformed so it could not incubate the same type of systemic risk that nearly destroyed our financial markets and our economy in 2008. The SEC and the Fed were duty-bound to act in furtherance of that goal, and they did so.

CONCLUSION

For all of the foregoing reasons, the petitions should be denied.

Dated: June 15, 2015

Respectfully submitted,

/s/ Dennis M. Kelleher

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32(e)(2)(C), the undersigned certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 6,930 words, excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as computed by Microsoft Word 2013. The undersigned also certifies that this brief complies with the type-face requirements of Fed. R. App. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using 14-point Times New Roman typeface, is double-spaced (except for headings and footnotes), and is proportionally spaced.

/s/ Stephen W. Hall
Stephen W. Hall

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2015, a true and correct copy of the foregoing Brief of Better Markets, Inc. as *Amicus Curiae* in Support of Respondents Securities and Exchange Commission and Board of Governors of the Federal Reserve System was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system. Counsel for all parties and *amici* are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Stephen W. Hall
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ADDENDUM PURSUANT TO FED R. APP. P. 28 AND CIRCUIT RULE 28(a)(7)

15 USCS § 78c(f) A1

15 USCS § 78w(a)(2) A2

15 USCS § 77b(b) A3

15 USCS § 80a-2(c) A4

7 USCS § 19 .... A5

12 USCS § 4802(a) A6

5 USCS § 553 .... A7

15 USCS § 78c(f)

Current through PL 114-22, approved 5/29/15

United States Code Service - Titles 1 through 54* > *TITLE 15. COMMERCE AND TRADE* > *CHAPTER 2B. SECURITIES EXCHANGES

§ 78c. Definitions and application

(f) Consideration of promotion of efficiency, competition, and capital formation. Whenever pursuant to this title the Commission is engaged in rulemaking, or in the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

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15 USCS § 78w(a)(2)

Current through PL 114-22, approved 5/29/15

United States Code Service - Titles 1 through 54 > *TITLE 15. COMMERCE AND TRADE* > *CHAPTER 2B. SECURITIES EXCHANGES*

§ 78w. Rules, regulations, and orders; annual reports

(a) Power to make rules and regulations; considerations; public disclosure.

(1) The Commission, the Board of Governors of the Federal Reserve System, and the other agencies enumerated in section 3(a)(34) of this title [15 USCS § 78c(a)(34)] shall each have power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this title for which they are responsible or for the execution of the functions vested in them by this title, and may for such purposes classify persons, securities, transactions, statements, applications, reports, and other matters within their respective jurisdictions, and prescribe greater, lesser, or different requirements for different classes thereof. No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with a rule, regulation, or order of the Commission, the Board of Governors of the Federal Reserve System, other agency enumerated in section 3(a)(34) of this title [15 USCS § 78c(a)(34)], or any self-regulatory organization, notwithstanding that such rule, regulation, or order may thereafter be amended or rescinded or determined by judicial or other authority to be invalid for any reason.

(2) The Commission and the Secretary of the Treasury, in making rules and regulations pursuant to any provisions of this title [15 USCS §§ 78a et seq.], shall consider among other matters the impact any such rule or regulation would have on competition. The Commission and the Secretary of the Treasury shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of this title [15 USCS §§ 78a et seq.]. The Commission and the Secretary of the Treasury shall include in the statement of basis and purpose incorporated in any rule or regulation adopted under this title [15 USCS §§ 78a et seq.], the reasons for the Commission's or the Secretary's determination that any burden on competition imposed by such rule or regulation is necessary or appropriate in furtherance of the purposes of this title [15 USCS §§ 78a et seq.].

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15 USCS § 77b(b)

Current through PL 114-22, approved 5/29/15

United States Code Service - Titles 1 through 54* > *TITLE 15. COMMERCE AND TRADE* > *CHAPTER 2A. SECURITIES AND TRUST INDENTURES* > *DOMESTIC SECURITIES

§ 77b. Definitions promotion of efficiency, competition, and capital formation

(b) Consideration of promotion of efficiency, competition, and capital formation. Whenever pursuant to this title [15 USCS §§ 77a et seq.] the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

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15 USCS § 80a-2(c)

Current through PL 114-22, approved 5/29/15

United States Code Service - Titles 1 through 54 > *TITLE 15. COMMERCE AND TRADE* > *CHAPTER 2D. INVESTMENT COMPANIES AND ADVISERS* > *INVESTMENT COMPANIES*

§ 80a-2. Definitions; applicability; rulemaking considerations

(c) Consideration of promotion of efficiency, competition, and capital formation. Whenever pursuant to this title [15 USCS §§ 80a-1 et seq.] the Commission is engaged in rulemaking and is required to consider or determine whether an action is consistent with the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

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7 USCS § 19

Current through PL 114-22, approved 5/29/15

United States Code Service - Titles 1 through 54 **>** ***TITLE 7. AGRICULTURE*** **>** ***CHAPTER 1. COMMODITY EXCHANGES***

§ 19. Consideration of costs and benefits and antitrust laws

(a) Costs and benefits.

(1) In general. Before promulgating a regulation under this Act [7 USCS §§ 1 et seq.] or issuing an order (except as provided in paragraph (3)), the Commission shall consider the costs and benefits of the action of the Commission.

(2) Considerations. The costs and benefits of the proposed Commission action shall be evaluated in light of--

(A) considerations of protection of market participants and the public;

(B) considerations of the efficiency, competitiveness, and financial integrity of futures markets;

(C) considerations of price discovery;

(D) considerations of sound risk management practices; and

(E) other public interest considerations.

(3) Applicability. This subsection does not apply to the following actions of the Commission:

(A) An order that initiates, is part of, or is the result of an adjudicatory or investigative process of the Commission.

(B) An emergency action.

(C) A finding of fact regarding compliance with a requirement of the Commission.

(b) Antitrust laws. The Commission shall take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of this Act [7 USCS §§ 1 et seq.], as well as the policies and purposes of this Act [7 USCS §§ 1 et seq.], in issuing any order or adopting any Commission rule or regulation (including any exemption under section 4(c) or 4c(b) [7 USCS § 6(c) or 6c(b)]), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 17 of this Act [7 USCS § 21].

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12 USCS § 4802(a)

Current through PL 114-22, approved 5/29/15

United States Code Service - Titles 1 through 54 **>** ***TITLE 12. BANKS AND BANKING*** **>** ***CHAPTER 48. FINANCIAL INSTITUTIONS REGULATORY IMPROVEMENT***

§ 4802. Administrative consideration of burden with new regulations

(a) Agency considerations. In determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, each Federal banking agency shall consider, consistent with the principles of safety and soundness and the public interest--

(1) any administrative burdens that such regulations would place on depository institutions, including small depository institutions and customers of depository institutions; and

(2) the benefits of such regulations.

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5 USCS § 553

Current through PL 114-22, approved 5/29/15

United States Code Service - Titles 1 through 54 > *TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES* > *PART I. THE AGENCIES GENERALLY* > *CHAPTER 5. ADMINISTRATIVE PROCEDURE* > *SUBCHAPTER II. ADMINISTRATIVE PROCEDURE*

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title [5 USCS §§ 556 and 557] apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

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