IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DTCC DATA REPOSITORY (U.S.) LLC and THE DEPOSITORY TRUST & CLEARING CORPORATION, Plaintiffs, v. UNITED STATES COMMODITY FUTURES TRADING COMMISSION, Defendant.	Civil Action No. 13-cv-624 (ABJ)

BRIEF OF BETTER MARKETS, INC. AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT COMMODITY FUTURES TRADING COMMISSION

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Dated: June 16, 2014

IDENTITY AND INTEREST OF BETTER MARKETS

Better Markets, Inc. ("Better Markets") respectfully submits this brief in support of Defendant Commodity Futures Trading Commission ("CFTC"). Better Markets is a non-profit organization that promotes the public interest in the financial markets. It has submitted over 150 comment letters to the CFTC, the Securities and Exchange Commission ("SEC"), and other financial regulators advocating for strong and swift implementation of the comprehensive reforms Congress established in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") to prevent another financial crisis and recession. As part of that advocacy, Better Markets has argued extensively for the adoption of appropriately strong rules governing the derivatives markets under Title VII of the Dodd-Frank Act.[1]

Better Markets has also defended the rules of the CFTC and the SEC in court against a series of legal challenges from some sectors in the financial industry. Those attacks have been intended not only to invalidate specific rules, but to delay, weaken, and ultimately derail the entire process of financial reform under the Dodd-Frank Act. *See, e.g.,* Brief of Better Markets, Inc. as *Amicus Curiae* in Support of Defendant Commodity Futures Trading Commission, *Sec. Indus. & Fin. Mkt. Ass'n v. CFTC,* No. 13-cv-1916 (ESH) (D.D.C. 2013) (filed Mar. 19, 2014). The principal tactic has been to raise the specter of alarming but unsubstantiated costs and burdens that will allegedly flow from regulation and to insist that the rule-writing agencies catalogue, quantify, and weigh all of those costs before issuing their rules. Yet those plaintiffs typically ignore not only the law governing cost-benefit analysis, but also the horrendous costs of the financial crisis, from which many Americans have yet to recover, and the enormous benefits

[1] *See, e.g.*, letters *available at* https://www.bettermarkets.com/sites/default/files/cross%20border%20comment%20letters.pdf.

of re-regulating Wall Street to prevent another crisis.

Whether or not the Plaintiffs in this case harbor the same hostility to regulatory reform exhibited in prior attacks on CFTC and SEC rules, their misinterpretation of the CFTC's obligation to conduct economic analysis poses the same type of potential harm. In fact, the Plaintiffs' distortion of the CFTC's economic analysis obligation in this case is doubly flawed, as it mischaracterizes not only **when** the duty to consider costs and benefits arises under Section 19(a) of the CEA, but also the **nature** of that duty if it were to apply. The potential harm underlying the Plaintiffs' argument is thus multiplied: Whenever the CFTC is burdened with the task of conducting cost-benefit analysis **at times** and **in ways** that Congress did not require or intend, the process of reform suffers, and therefore so does the public interest. The agency's already meager resources are depleted, rules are delayed, and regulatory protections are at risk of being diluted. Moreover, if the Plaintiffs were to succeed in persuading this Court that the CFTC was required to conduct a so-called "cost-benefit analysis" before approving CME's rule—despite Congress's obviously contrary intent—the resulting precedent would encourage and facilitate future assaults on the CFTC's regulatory reforms. Such challenges would further undermine the CFTC's ability to regulate the derivatives markets as Congress intended.

Better Markets has an interest in helping to avoid this outcome so that all of the Dodd-Frank Act reforms may begin to restore transparency, accountability, and oversight in the financial markets without delay.

ARGUMENT

The CFTC was under no obligation to consider costs and benefits under 7 U.S.C. § 19(a) ("Section 19(a)") when it approved CME Rule 1001. Even if the CFTC's approval of a registered entity rule were somehow deemed to trigger a duty to consider of costs and benefits

under Section 19, that exercise would not entail a cost-benefit analysis, as suggested by Plaintiff, but a far more limited consideration of factors in light of the public interest.

I. Section 19(a) does not apply to the CFTC approval of registered entity rules.

The DTCC's claim that the CFTC must consider costs and benefits under Section 19(a) when approving a registered entity's rule is erroneous on multiple grounds. It conflicts with the plain language of Section 19, well-established canons of statutory construction, and Congressional intent. It also threatens to impose practical burdens on the CFTC that will impair its ability to fulfill its overall regulatory mission.

A. Congress carefully determines if, when, and how it wants an agency to conduct cost-benefit analysis, and absent a clear indication from Congress, that obligation does not apply.

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."). In two recent decisions, the D.C. Circuit has reaffirmed this important principle and applied it in rejecting industry challenges to both a CFTC and an SEC rule. *See Inv. Co. Inst. v. CFTC*, 720 F.3d 370 (D.C. Cir. 2013); *Nat'l Ass'n of Mfrs.*, 2014 U.S. App. LEXIS 6840 (D.C. Cir. Apr. 14, 2014). For example, in *Inv. Co. Inst. v. CFTC*, 720 F.3d at 379, the court made clear that the CFTC's Section 19(a) duty simply to "consider" such factors is a limited one and does not require a cost-benefit analysis: "Where 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).

While the focus of these and other decisions is on the **nature** of an agency's obligation to

conduct economic analysis as it promulgates rules, the underlying principle is equally applicable to the question of **when** that obligation arises. And, in accordance with these precedents, that duty only applies when Congress has clearly and explicitly required it.

B. The plain language of Section 19 and canons of statutory construction make clear that the duty to consider costs and benefits does not apply to the CFTC's approval of CME Rule 1001.

The CFTC was under no obligation to consider costs and benefits under Section 19(a) when it approved CME Rule 1001. The language and structure of Section 19 make this clear. Section 19(a) specifies when the CFTC must consider the costs and benefits of its actions, and that subsection limits the obligation to occasions when the CFTC is "promulgating a regulation" or "issuing an order." In contrast, Section 19(b) specifies when the CFTC must consider certain antitrust issues, and that subsection separately includes (in addition to issuing orders or adopting rules or regulations), occasions when the CFTC is "**approving** any bylaw, rule, or regulation of a contract market or registered futures association." (Emphasis added). Thus, in Section 19, Congress (1) clearly distinguished between promulgating regulations and issuing orders on the one hand, and approving the rules of various entities on the other, and (2) expressly limited the obligation to consider costs and benefits to the former situation, not the latter.

Familiar canons of statutory construction support this reading of Section 19. Statutes must be read "so as to avoid rendering superfluous any parts thereof." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991). Section 19 differentiates "promulgating" regulations and "issuing" orders from "approving" rules of certain entities. Accordingly, these actions cannot be read as synonymous, or else the "approving" language in subsection (b) would become superfluous.

Courts also adhere to the canon that a word defined in one part of an act retains its

meaning in other parts, unless otherwise expressly stated. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994) (there is "a presumption that a given term is used to mean the same thing throughout a statute."). By virtue of Section 19(b), the terms "issuing" orders and "adopting" rules clearly exclude "approval" of entity rules. Thus, according to the canon, the references to issuing orders and promulgating rules in Section 19(a) must also exclude approval of entity rules. Therefore, approval of entity rules cannot be brought within the ambit of Section 19(a), which sets forth the CFTC's duty to consider costs and benefits.

Finally, courts also apply the principle of *expressio unius est exclusion alterius*, meaning that "when the items expressed are members of an 'associated group or series,' . . . items not mentioned were excluded by deliberate choice." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (internal citation omitted). Here, Section 19(a) requires the CFTC to consider costs and benefits before "promulgating a regulation" or "issuing an order." Applying *expressio unius*, the CFTC is **not** required to consider the costs and benefits of any action not enumerated in Section 19(a), such as the approval of an entity's rule.

C. Congress did not intend the CFTC to conduct economic analysis for approval of entity rules.

The claim that the CFTC was required to consider costs and benefits when approving CME Rule 1001 conflicts with Congressional intent in two respects. First, such an approach would be a pointless and wasteful endeavor, a result that Congress could not have intended. In 5 U.S.C. § 7a-2, Congress expressly limited the permissible grounds on which the CFTC could disapprove a registered entity's rule. That provision mandates that "[t]he Commission ***shall*** approve a new rule, or rule amendment, of a registered entity unless the Commission finds that the new rule, or rule amendment, is **inconsistent** with this subtitle (including regulations)." 7 USC 7a-2(c)(5)(A) (emphasis added). The law gives the CFTC no discretion to disapprove a

rule unless the agency deems the rule inconsistent with the CEA. Therefore, any consideration of costs and benefits associated with a registered entity's rule—regardless of any conclusions drawn from that consideration—could have no impact on the CFTC's decision to approve or disapprove the rule. The exercise of considering costs and benefits would thus be futile and plainly inconsistent with Congressional intent.

In addition, requiring the CFTC to consider the costs and benefits of a registered entity's rule as a condition of approval would conflict with the overall approach to self-regulation envisioned in the Commodity Futures Modernization Act ("CFMA"), which added Section 7a-2. The purpose clause of those amendments explains that they were intended to ensure that the CEA:

> serve[s] the public interests described in subsection (a) ["managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities"] **through a system of effective self-regulation** of trading facilities, clearing systems, market participants and market professionals **under the oversight of the Commission**.

CFMA § 108, 7 U.S.C. § 5 (emphasis added).

Thus, it appears that Congress envisioned a framework that would allow registered entities a certain leeway and discretion to establish rules governing their operations, subject to the boundaries set forth in the CEA. Only when a registered entity's rule "is inconsistent with" the CEA may the CFTC reject it. Whatever virtues or flaws this self-regulatory model may have, it was the approach Congress chose, and notwithstanding the Dodd-Frank Act reforms, it remains intact and must be respected.

D. Requiring the CFTC to conduct economic analysis for every registered entity rule would impose unwarranted burdens on an already overworked and underfunded agency.

To require the CFTC to consider the costs and benefits of **every** rule of **every** registered

entity would impose significant burdens on the CFTC, draining its resources and hampering its ability to effectively discharge its overall mission. These burdens would fall on an agency that is already well short of the resources it needs to carry out its ever-increasing responsibilities, which have dramatically increased from overseeing the futures and options markets to also regulating the $400 trillion domestic swaps markets and the broad array of new market participants created under the Dodd-Frank Act. Thus, in addition to being legally indefensible, imposing such an economic analysis obligation on the CFTC would have extremely negative practical consequences.

II. Even when Section 19(a) does apply, it only requires a consideration of various factors in light of the public interest, something far different from a cost-benefit analysis.

The Plaintiffs not only argue that the CFTC must consider costs and benefits when approving a registered entity's rule, they also contend that such an analysis must adhere to the standards set forth in a few inapplicable cases from the D.C. Circuit involving challenges to SEC rules. *See* Pl's Mem. of P & A in Supp. of Mot. to Dismiss ("DTCC Mem.") at 34-35; *Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011); *Am. Equity Life Ins. Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010); *Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005). In those cases, the D.C. Circuit essentially held—notwithstanding contrary statutory language, precedent, and legislative history—that the SEC must conduct an exhaustive cost-benefit analysis when promulgating rules under the securities laws. However, the Plaintiffs' reliance on these cases is misplaced, and in fact, the CFTC's obligation under Section 19(a) is far more limited that the Plaintiffs suggest.

A. The obligation to "consider" certain factors is a statutorily-limited duty conferring broad discretion on the CFTC.

Section 19(a) directs the CFTC to "consider the costs and benefits of [its] action" and

"evaluate" those considerations in light of five enumerated "considerations." The Supreme Court has long recognized that when statutorily-mandated considerations are not "mechanical or self-defining standards," they "imply wide areas of judgment and therefore of discretion." *Sec'y of Agric. v. Cent. Roig Ref. Co*., 338 U.S. 604, 611-12 (1950). According to this Circuit, 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." *N.Y. 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). Indeed, when an agency must "consider" certain factors during rulemaking, a reviewing court's role is limited. Courts are not to find a rule arbitrary and capricious under the APA, 5 U.S.C. § 706(2)(A), unless the agency "wholly failed" to consider an enumerated factor. *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004).[2]

B. Section 19(a) contains no language requiring cost-benefit analysis.

In Section 19(a), Congress also **refrained** from using language that would require the CFTC to engage in cost-benefit analysis. As noted above, *supra* at 3, 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."). Therefore, when Congress intends cost-benefit analysis to apply, it explicitly specifies the nature of the analysis. *See id.* and statutes cited therein; *see also*

[2] *Public Citizen*, 374 F.3d at 1221, suggested that the agency had to "weigh" costs and benefits even though the statute simply required the agency to "consider" them. However, that suggestion was pure dicta, and it arose from prescriptive language in a separate provision of the applicable statute. *Id.* at 1216.

42 U.S.C. § 300g-1(b)(3).[3]

In keeping with the principle that Congress makes its intentions clear, when Congress wants agencies to be free from cost-benefit constraints, it imposes a less burdensome requirement, thus giving overriding importance to particular statutory objectives.[4] *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1039 (D.C. Cir. 2012) (statutes requiring agencies to "consider" the "economic consequences" or "costs" do not require cost-benefit analysis); *Cent. Ariz. Water Conservation Dist. v. EPA*, 990 F.2d 1531, 1542 n.10 (9th Cir. 1993) (42 U.S.C. § 7491(g)(1) requiring "consideration" does not require a cost-benefit analysis). And sometimes, Congress actually forbids an agency to conduct cost-benefit analysis. *See Whitman v. Am. Trucking Ass'ns., Inc.*, 531 U.S. 457, 471 (2001) (§ 109(b) of the Clean Air Act "unambiguously bars cost considerations"). Courts respect these congressional choices, and even when a statute refers to "costs" and "benefits," they refuse to impose a duty to conduct cost-benefit analysis absent language of comparison in the statute. *Am. Petroleum Inst. v. EPA*, 858 F.2d 261, 265 & n.5 (5th Cir. 1988); *Reynolds Metal Co. v. EPA*, 760 F.2d 549, 565 (4th Cir. 1985); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1045 (D.C. Cir. 1978).

The D.C. Circuit recently confirmed these principles. In *Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 379 (D.C. Cir. 2013), the court made clear that the CFTC's Section 19(a) duty to "consider" such factors is a limited one and does not require a cost-benefit analysis: "Where Congress has required 'rigorous, quantitative economic analysis,' it has made that requirement

[3] Legislative proposals seeking to impose a cost-benefit analysis obligation on the CFTC, *see, e.g.*, H.R. 1840, 112th Cong. (introduced May 11, 2011), also support a finding that the CEA does not already mandate cost-benefit analysis. *See Am. Textile Mfrs.*, 452 U.S. at 512 n.30.

[4] Congress is equally clear when it wants an agency to quantify the benefits of a rule. *See, e.g.* 42 U.S.C. § 300g-1(b)(3); *FMC Corp. v. Train*, 539 F.2d 973, 978-979 (4th Cir. 1976). Even where an agency has a duty to conduct cost-benefit analysis, this Circuit has recognized that agency "predictions or conclusions" need not be "based on a rigorous, quantitative economic analysis." *Am. Fin. Services Ass'n. v. FTC*, 767 F.2d 957, 986 (D.C. Cir. 1985).

clear in the agency's statute, but it imposed no such requirement here." (Cited authorities omitted).

In *Nat'l Ass'n of Mfrs. v. SEC*, 2014 U.S. App. LEXIS 6840 (D.C. Cir. Apr. 14, 2014), the D.C. Circuit upheld the **SEC's** economic analysis in what is known as the "conflicts minerals" rule. Signaling a departure from *Business Roundtable* and its predecessors, the court adhered to the actual statutory requirement in the securities laws, namely the duty to consider factors. The court correctly observed that "[a]n agency is not required to measure the immeasurable, and need not conduct a rigorous, quantitative economic analysis unless the statute explicitly directs it to do so."[5] *Id.* at 22.

C. The five factors in Section 19(a) further demonstrate Congress's primary concern with protecting the public interest.

All five factors in Section 19(a) relate to a public benefit arising from a robustly regulated marketplace, including preventing abuse, promoting competition, enhancing transparency, and limiting systemic risk. None mentions any industry-focused concerns, such as compliance costs or the feasibility of conforming to rule requirements. *Compare* 42 U.S.C. § 300g-1(b)(3)(C); 42 U.S.C. § 6295(d) (1976 ed., Supp. II). Removing any doubt, the fifth factor references "any other public interest considerations." 7 U.S.C. § 19(a)(2)(E). Under principles of statutory construction, each prior factor derives its meaning from this factor: the public

[5] In *Nat'l Ass'n of Mfrs.*, the Court also identified **two additional reasons** why agencies like the CFTC and the SEC cannot be expected to perform cost-benefit analysis: It forces them to make an **"apples-to-bricks" comparison** whenever benefits such as peace and security cannot be framed in terms of dollars and cents, 2014 U.S. App. LEXIS at 23, and it forces them to **second-guess** the judgments that Congress has already made about the costs and benefits of regulation, *id.* at 24.

interest. *See Neal v. Clark*, 95 U.S. 704, 708-09 (1877).[6]

D. The Plaintiffs' reliance on *Business Roundtable* and two other cases involving SEC rule challenges is misplaced.

Plaintiffs rely on three decisions from the D.C. Circuit that address the **SEC's** duty to assess the economic consequences of its rules. *Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011); *Am. Equity Life Ins. Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010); *Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005). *See* DTCC Mem. at 34. However, those cases are distinguishable. First, the language and structure of the statutory provisions in the securities laws is different from Section 19(a). Second, those panels never expressly held the SEC had a duty to conduct "cost-benefit analysis."

Finally, to the extent those decisions could be read as requiring such a duty, or any duty more onerous than what Congress actually imposed, that interpretation would not be entitled to precedential weight. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925); *Honeywell Int'l, Inc. v. EPA*, 374 F.3d 1363, 1374 (D.C. Cir. 2004). In **none of those cases** did the parties argue or the panels address the judicial precedents that interpret "consider" as imposing a limited duty, that require explicit statutory language before finding that cost-benefit analysis applies, and that recognize cost-benefit analysis can impede the achievement of regulatory objectives.

E. Any consideration of the costs and benefits of rules implementing financial reform must take into account the overriding goal of preventing another crisis.

Whenever the CFTC considers costs and benefits under Section 19(a), it must adopt a

[6] Even Executive Orders have carefully and expressly avoided imposing cost-benefit analysis on the independent regulatory agencies such as the CFTC. Executive Order 13,579, 76 Fed. Reg. 41,587 (July 14, 2011); Executive Order 13,563, 76 Fed. Reg. 3,821, § 7 (Jan. 21, 2011); Executive Order 12,866, 58 Fed. Reg. 51,735, § 3(b) (Oct. 4, 1993).

holistic approach that takes into account the enormous collective benefit that the Title VII rules will provide: helping to prevent another devastating financial crisis. Section 19(a) includes a broad mandate that the CFTC shall consider "**any other public interest considerations**." 7 U.S.C. § 19(a)(2)(E) (emphasis added). Today, as our economy still struggles to recover from the financial crisis, the most compelling public interest is preventing another crisis.

The Dodd-Frank Act also calls for this perspective. The overriding objective of a law confers broad discretion on an agency as it considers the costs and benefits of a rule necessitated by that law. *See FMC Corp.*, 539 F.2d at 978-79; *see also Fla. Manufactured Hous. Ass'n v. Cisneros*, 53 F.3d 1565, 1578 (11th Cir. 1995). The objective of the Dodd-Frank Act is "[t]o promote the financial stability of the United States" to prevent another financial crisis. Dodd-Frank Act, Preamble. Congress's intent was unmistakable from the breadth and depth of the law: Fundamentally change the regulatory structure so our financial markets can never again generate the levels of risk, recklessness, and abusive conduct that triggered the financial crisis.

The benefits of avoiding another financial crisis are enormous. By conservative estimates, the ongoing crisis will cost **at least $12.8 trillion**. BETTER MARKETS, THE COST OF THE WALL STREET-CAUSED FINANCIAL COLLAPSE AND ONGOING ECONOMIC CRISIS IS MORE THAN $12.8 TRILLION (2012);[7] *see also* GAO, FINANCIAL REGULATORY REFORM: FINANCIAL CRISIS LOSSES AND POTENTIAL IMPACTS OF THE DODD-FRANK ACT, GAO-13-180, 17 (Jan. 2013).

Thus, if a consideration of costs and benefits were somehow deemed required in connection with approval of a registered entity rule, the CFTC would need to perform this holistic analysis. That would include considering the extent to which the approval of CME Rule 1001 furthers the overarching goal of establishing a coherent, workable framework of rules that

[7] *Available at* http://bettermarkets.com/sites/default/files/Cost%20Of%20The%20Crisis.pdf.

will help make our markets more transparent, stable, and less likely to incubate another financial crisis.

CONCLUSION

For the foregoing reasons, Better Markets urges the Court to deny the Plaintiffs' Motion for Summary Judgment, to grant the CFTC's Cross-Motion for Summary Judgment, and to dismiss this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this *Brief of Better Markets, Inc. as Amicus Curiae in Support of Defendant Commodity Futures Trading Commission* was served this 16th day of June, 2014, upon counsel for the parties via the Court's CM/ECF electronic filing system, as follows:

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