

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

INVESTMENT COMPANY INSTITUTE and
CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA,

Plaintiffs,

v.

UNITED STATES COMMODITY
FUTURES TRADING COMMISSION,

Defendant.

Civil Action No. 1:12-cv-00612 (BAH)

**MOTION OF BETTER MARKETS, INC. FOR LEAVE
TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT
COMMODITY FUTURES TRADING COMMISSION**

Better Markets, Inc. (“Better Markets”) respectfully submits this motion for leave to file the attached *amicus* brief in support of Defendant Commodity Futures Trading Commission (“CFTC”).¹ Better Markets should be granted leave to file the accompanying brief because (1) it has a strong interest in the Court’s disposition of this case, and (2) it can assist the Court by providing helpful analysis that addresses a core issue presented without duplicating the arguments of the parties. A proposed order also accompanies this motion.

INTRODUCTION AND SUMMARY

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

¹ Pursuant to Local Civil Rule 7(m), Better Markets states that it contacted counsel for Plaintiffs and Defendant in a good faith effort to determine whether there is any opposition to the relief sought in this motion. Defendant CFTC consented to the filing of an *amicus* brief by Better Markets. The Plaintiffs did not consent.

financial system through a variety of activities, including comment letters on agency rules, public advocacy, litigation, and independent research. Of specific relevance to this case, Better Markets has conducted extensive research on the limited scope of the economic analysis that Congress intended financial regulators, including the CFTC, to conduct when they engage in rulemaking.²

The Plaintiffs are challenging a rule that requires investment companies acting as “commodity pool operators” (“CPOs”) to register with the CFTC, the agency that bears primary responsibility for regulating the commodities markets. Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed. Reg. 11,252 (Feb. 24, 2012) (“Rule”). In effect, the Rule re-imposes a traditional registration regime that applied to investment companies engaged in commodity trading for nearly twenty years, from 1985 until 2003—a span of time during which the investment company industry expanded and thrived. The Rule also establishes new reporting requirements for all CPOs, sensibly scaled to the size and systemic significance of each reporting entity.

Adopted as a clearly appropriate component of the regulatory reforms necessitated by the financial crisis of 2008, the Rule will protect millions of mutual fund investors from the heightened levels of risk, fraud, and abuse often associated with 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

² Better Markets was recently granted leave to file an *amicus* brief addressing the same issue presented here—the scope of the CFTC’s duty to analyze the economic impact of its rules. See Corrected Brief of Better Markets, Inc. as *Amicus Curiae* in Support of Defendant Commodity Futures Trading Commission, *Int’l Swaps and Derivatives Ass’n v. CFTC*, No. 11-cv-2146 (RLW) (D.D.C. 2011) (filed May 1, 2012) (filed in defense of the CFTC’s rule establishing position limits in the commodities and swaps markets to contain excessive speculation).

comprehensive regulatory oversight and systemic risk controls. The Rule accomplishes these objectives while imposing minimal burdens on industry.

One of the Plaintiffs' 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 oversight tools that the Rule provides through its registration and reporting requirements. Second, it would perpetuate and strengthen the erroneous view that under Section 15(a) of the Commodity Exchange Act ("CEA"), 7 U.S.C. § 19(a), Congress intended to burden the CFTC with a costly, time-consuming, and ultimately wasteful duty to conduct an exhaustive cost-benefit analysis for each of its rules. Finally, and most important, interpreting Section 15(a) of the CEA as requiring the CFTC to conduct a cost-benefit analysis when promulgating rules would pose a serious threat to the entire process of financial reform—a process that must be completed to prevent another financial crisis and the incalculable human suffering it would inflict. Forcing the CFTC to overcome such a high and unwarranted hurdle would cripple the agency's ability to finalize its regulatory reforms and to defend its already-implemented rules against challenges in court.

Better Markets can assist the Court by providing a novel perspective on the central issue of cost-benefit analysis. The accompanying brief examines the true nature and extent of the economic analysis that the CFTC must conduct under applicable law, and it provides a perspective that none of the parties have included in their submissions. The brief argues that rather than a comparative or quantitative cost-benefit analysis, the law requires the CFTC simply to "consider" the costs and benefits of its rules. The brief further argues that, as the CFTC conducts this limited analysis, the law requires the agency to apply a holistic approach to

assessing the economic impact of its rules, one that emphasizes the public interest and evaluates every rule as part of a larger set of reforms collectively designed to prevent another financial crisis and the enormous costs it would inflict.

The grounds for this motion are set forth in greater detail below.

ARGUMENT

- I. Federal District Courts have broad discretion to allow the participation of an *amicus curiae*, and it is generally permitted where the *amicus* has an interest in the matter and can offer timely and useful information to the court.

District courts have “inherent authority” to grant participation by an *amicus curiae*, which is derived from Federal Rule of Appellate Procedure 29. *Youming Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008). In determining whether to grant leave to participate as an *amicus*, this Court has “broad discretion,” *District of Columbia v. Potomac Elec. Power Co.*, 826 F. Supp. 2d 227, 237 (D.D.C. 2011); *Nat’l Ass’n of Home Builders v. U.S. Army Corps of Eng’rs*, 519 F. Supp. 2d 89, 93 (D.D.C. 2007), and *amicus* status is generally allowed when “the information offered is timely and useful,” *Ellsworth Assocs. v. U.S.*, 917 F. Supp. 841, 846 (D.D.C. 1996).

Specifically, this Court “normally allow[s]” an *amicus* brief “when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Youming Jin v. Ministry of State Sec.*, 557 F. Supp. 2d at 137 (citing *Ryan v. Commodity Futures Trading Comm’n*, 125 F. 3d 1062, 10564 (7th Cir. 1997)); *Cobell v. Norton*, 246 F. Supp. 2d 59, 62 (D.D.C. 2003) (same). This assistance to the court may take many forms, including “ideas, arguments, theories, insights, facts or data that are not to be found in the parties’ briefs.” *See Northern Mariana Islands v. United States*, 2009 U.S. Dist. LEXIS 125427, 3-4 (D.D.C. Mar. 6, 2009).

This Court has granted participation by an *amicus* in a variety of cases, including those involving challenges to agency action, where the *amicus* sought “to support the government’s arguments in favor of the validity of its action and its interpretation of the scope of [a statute],” finding that “the court may benefit from [the *amicus*’s] input.” *Nat’l Ass’n of Home Builders v. U.S. Army Corps of Eng’rs*, 519 F. Supp. 2d at 93. The Court has also granted leave to participate as *amicus* to non-profit organizations, where those organizations had “a special interest in [the] litigation as well as a familiarity and knowledge of the issues raised therein that could aid in the resolution of [the] case.” *Ellsworth Assocs. v. United States*, 917 F. Supp. at 846.

Under these standards, Better Markets should be granted leave to file the accompanying *amicus* brief, as demonstrated below.

II. Better Markets has the requisite interest.

A. Restoring investor protections and regulatory tools relating to commodity pools.

Better Markets promotes transparency, oversight, and accountability in the financial markets. A decision invalidating the Rule would undermine all three of these goals. First, of course, it would deprive tens of millions of investors who participate in mutual funds (and other investment companies) of the time-honored protections that Congress intended when it established a mandatory registration regime for all entities that operate commodity pools, subject only to limited exemptions. Those investor protections include fitness and competency standards governing those who offer and sell commodity pool interests; mandatory risk disclosures (a critical measure as to high-risk derivatives such as swaps); and remedies for investors who suffer losses resulting from the wrongful conduct of registrants. These protections are especially vital with respect to **investment companies** that offer commodity interests: Over

90 million Americans own shares in mutual funds, and the rulemaking record in this case documents an alarming increase in the offer and sale of commodity interests to investors via investment companies or their subsidiaries.

In addition, nullification of this Rule will deprive the CFTC of important regulatory tools that, in light of the financial crisis, are obviously necessary and appropriate. Foremost among those tools are the reporting provisions of the Rule that will enable the CFTC to adequately monitor activity in the swaps market—a financial sector that has been opaque for decades and that contributed more than any other market to the near collapse of our financial system in 2008.

B. Establishing an appropriate economic impact test.

This case involves another core interest that Better Markets seeks to advance: the application of an appropriate economic impact test in the rulemaking process. Better Markets is attempting to correct the misperception that Congress (or the Executive Branch) intended the financial regulators, such as the CFTC, to apply a rigid, comparative, and quantitative cost-benefit analysis before promulgating rules. In reality, Congress intended quite the opposite. The CFTC’s obligation under Section 15(a) of CEA is not to conduct a comparative or quantitative cost-benefit analysis when it issues rules. Rather, the statute requires a limited consideration of costs and benefits, and its language and structure make clear that the CFTC must give the public interest the greatest weight in the process. Moreover, the overarching goal of the Dodd-Frank Act, in addition to specific language in Section 15(a), requires the CFTC to consider the benefit of each financial reform rule in terms of the enormous benefit that financial reform in its entirety will provide: staving off another financial crisis and its dreadful costs.

If the CFTC were subjected to the Plaintiffs’ interpretation of Section 15(a), contrary to congressional intent, then the agency would face high and unwarranted hurdles as it attempts to

implement crucial financial reforms necessitated by the 2008 financial crisis. The agency would be forced to divert already scarce resources in an effort to conduct cost-benefit analysis that is time consuming, inherently imprecise, and in many cases, impossible to perform. The result would be slower and weaker implementation of the reforms that are necessary to fulfill the letter and spirit of the Dodd-Frank Act.

In addition, such a ruling would engender new lawsuits seeking to invalidate any number of rules that the financial regulators are promulgating. This in turn would burden the agencies with litigation costs and induce a slower and overly cautious approach to rulemaking. The chilling effect of this threat has already been felt. *See, e.g.,* Jesse Hamilton, *Dodd-Frank Rules Slow at SEC After Cost Challenge*, BLOOMBERG, Mar. 6, 2012.

C. The process of regulatory reform.

Since its inception, Better Markets has focused on promoting regulatory reform through faithful implementation of rules that are in accordance with the Dodd-Frank Act. Better Markets has submitted almost 100 comment letters to the financial market regulators engaged in rulemaking under the Dodd-Frank Act, including the CFTC, the SEC, and the agencies that oversee banks.³ The purpose of these comment letters is to help ensure that the rules promulgated by the financial regulators will achieve the goals of the Dodd-Frank Act, and will thereby establish a comprehensive regulatory system capable of preventing a recurrence of the financial crisis that began in 2007, reached a crescendo in 2008 and, in many respects, continues to this day.

³ Available at <http://comments.cftc.gov/PublicComments/CommentList.aspx>; <http://www.federalreserve.gov/apps/foia/dfproposals.aspx>; <http://www.fdic.gov/regulations/reform/initiatives.html>; <http://www.regulations.gov>; and <http://sec.gov/rules/proposed.shtml>.

A ruling in this case that fails to apply the proper statutory cost-benefit standard set forth in Section 15(a) will have a far reaching and profound impact on financial reform and the protection of the American people in all of the ways described above: delaying and weakening implementation of the specific Rule at issue on CPO registration and reporting; draining agency resources by requiring compliance with a more onerous standard of cost-benefit analysis than the law requires; inducing a slower and weaker approach to rulemaking under the Dodd-Frank Act; and subjecting the agencies to additional and costly rule challenges in court, which threaten to invalidate important regulatory provisions.

III. Better Markets can provide helpful information to the Court that will not duplicate arguments presented by the parties.

The accompanying *amicus* brief from Better Markets addresses the Plaintiffs' contention that the CFTC failed to conduct an adequate cost-benefit analysis when it promulgated the Rule. *See* Count I & V of the Plaintiffs' Complaint. The brief contains legal analysis that will assist the Court in resolving the parties' competing claims on that issue, without duplicating the parties' arguments. For example, the brief includes detailed statutory and case law analysis on the meaning of Section 15(a) of the CEA (requiring the CFTC to consider costs and benefits) that the parties have not provided to the Court. In addition, the brief advances the view, also absent from the parties' submissions, that in light of the financial crisis, the CFTC must evaluate the Rule as one component of an entire set of reforms that Congress intended to avoid the enormous costs of another financial crisis.

IV. Defendant CFTC has consented to Better Markets' filing an *amicus* brief in this case.

In determining whether to grant leave to file an *amicus* brief, this Court also takes into account whether the parties object to the filing. *See, e.g., Cobell v. Norton*, 246 F. Supp. 2d 59, 63 (D.D.C. 2003) (denying leave to file an *amicus* brief in part because both parties submitted

motions in opposition). Better Markets satisfies this test at least in part, since the CFTC has consented to Better Markets' filing a brief.

Moreover, even where the parties to an action have objected to the participation of an *amicus*, this Court will still evaluate a motion for leave, drawing on the tests set forth in Federal Rule of Appellate Procedure 29(b): "(1) the movant's interest; and (2) the reason why an *amicus* brief is desirable and why the matters asserted are relevant to the disposition of the case." *Youming Jin v. Ministry of State Sec.*, 557 F. Supp. 2d at 137 (citing *Ryan v. Commodity Futures Trading Comm'n*, 125 F. 3d 1062, 10564 (7th Cir. 1997)). As the discussion above demonstrates, Better Markets satisfies these standards, since it has a strong interest in this case; an *amicus* brief from Better Markets is desirable; and the matters that it asserts in the brief are relevant to the Court's disposition of the issues presented.

V. The *amicus* brief is timely.

The filing of this motion with the accompanying brief is timely. Using the Federal Rules of Appellate Procedure as a guide, the brief of an *amicus* is due "no later than seven days after the principal brief of the party being supported is filed." Fed. R. Civ. P. 29(e). In this case, the party being supported by Better Markets is the CFTC, and the CFTC filed its principal brief on Monday, June 18, 2012. Accordingly, the instant motion and brief are being filed within the seven day time frame that would apply under the appellate rules.

This timing also serves an important purpose. Under the case law governing the filing of *amicus* briefs in this Court, *see* cases cited at 3-4 *supra*, and under the local appellate rules, *see* D.C. Circuit Rule 29(a), *amici* are expected to avoid duplicating the arguments of parties. The only way that an *amicus* can be sure to meet this expectation is to review the brief of the party it supports prior to filing its *amicus* brief. That was the case here. Better Markets had no access to

the CFTC brief until after it was filed last Monday, June 18, 2012, and it used the seven day period as contemplated by Rule 29.

Finally, the parties will suffer no prejudice from the timing of this motion. As noted above, the CFTC has consented to the filing, and for their part, the Plaintiffs will have an opportunity to address the arguments in Better Markets' brief in their opposition to the CFTC's Cross-Motion for Summary Judgment or in their reply to the CFTC's Opposition to Plaintiffs' Motion for Summary Judgment, neither of which are due until July 2.

CONCLUSION

For all of the foregoing reasons, Better Markets respectfully requests that it be granted leave to file the attached *amicus* brief.

Dated: June 25, 2012

Respectfully submitted,

/s/ Stephen W. Hall
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Motion for Leave to File *Amicus Curiae* Brief in Support of Defendant Commodity Futures Trading Commission; the attached Brief of Better Markets, Inc. as *Amici Curiae* in Support of Defendant Commodity Futures Trading Commission; and the attached Proposed Order were all served this 25th day of June, 2012, upon counsel for the parties and for *Amicus Curiae* Mutual Fund Directors Forum, via email, the Court's CM/ECF filing system, and first-class mail, as follows:

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