No. 12-5362
Oral Argument Scheduled Not Yet Scheduled

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

U.S. COMMODITY FUTURES TRADING COMMISSION,

Appellant,

v.

INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, AND SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION,

Appellees.

On Appeal from the United States District Court for the District of Columbia
No. 11-CV-2146-RLW (Hon. Robert L. Wilkins)

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

Dennis M. Kelleher
Stephen W. Hall
Katelynn O. Bradley
Better Markets, Inc.
1825 K Street N.W., Suite 1080
Washington, D.C. 20006
dkelleher@bettermarkets.com
(202) 618-6464

Counsel for Amicus Curiae

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 26.1 and 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and *Amici*

All parties and *amici* appearing before the District Court and in this Court are listed in the Appellant's and Appellees' Briefs. This brief is filed on behalf of *amicus curiae* Better Markets, Inc., who also filed an *amicus* brief in the District Court.

B. Rulings Under Review

The rulings under review are as stated in the Appellant's Brief.

C. Related Cases

The undersigned is not aware of any cases related to this appeal currently pending in any court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, *amicus curiae* Better Markets, Inc. ("Better Markets") states as follows:

1. 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 commenting on rules proposed by the financial regulators, public advocacy, litigation, congressional testimony, and independent research.

2. Better Markets has no parent corporation and there is no publicly held corporation that owns 10% or more of the stock of Better Markets.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act, 5 U.S.C. § 551 *et seq*.
Appellant	U.S. Commodity Futures Trading Commission
Appellees	International Swaps and Derivatives Association and Securities Industry and Financial Markets Association
Dodd-Frank	Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010)
CEA	Commodity Exchange Act
CFTC or the Commission	U.S. Commodity Futures Trading Commission
ISDA	International Swaps and Derivatives Association
ISDA Br.	Brief for International Swaps and Derivatives Association and Securities Industry and Financial Markets Association page citation
Rule	Position Limits Rule for Futures and Swaps, 76 Fed. Reg. 71,626 (Nov. 18, 2011) (to be codified at 17 C.F.R. Part 151)
SEC	Securities and Exchange Commission

STATUTES AND REGULATIONS

The Briefs for Appellant and Appellees contain the pertinent statutes and regulations.

***AMICUS CURIAE*'S IDENTITY AND INTEREST**[1]

Better Markets is a non-profit organization that promotes the public interest in the financial markets. One way it furthers its mission is by defending rules promulgated by financial regulators against parties seeking to overwhelm those agencies with a burdensome and unwarranted economic analysis obligation, typically labeled "cost-benefit analysis," that has no legal basis.

Here, Appellees claim that the CFTC failed to conduct a "cost-benefit analysis" when it promulgated the Rule. A decision invalidating the Rule on this ground would (1) eliminate important investor and consumer protections; (2) perpetuate and promote the erroneous view that, under CEA Section 15(a), 7 U.S.C. § 19(a), Congress intended to burden CFTC with the costly, time-consuming, and ultimately counter-productive duty to conduct cost-benefit analysis for each of its rules; and (3) undermine the agency's ability to finalize a host of essential reforms under Dodd-Frank and to defend its already-implemented rules in court.

SUMMARY OF ARGUMENT

CFTC fulfilled its duty to consider the Rule's costs and benefits. First, Section 15(a) of the CEA imposes a limited obligation on CFTC to **consider** its

[1] No party's counsel authored this brief in whole or in part, and no person other than Better Markets funded, or contributed money to fund, the preparation of this brief.

rules' costs and benefits in light of five specific **public interest** factors. Under the statutory language and the relevant case law, CFTC has broad discretion in discharging this duty. It has no obligation to quantify costs or benefits, weigh them against each other, or find that a rule will confer a net benefit.

Second, in considering the costs and benefits of rules implementing financial reform after the 2008 crisis, CFTC must give proper weight to the overriding objective of preventing another crisis. Against the backdrop of the worst economic collapse since the Great Depression, it is inconceivable that implementation of those reforms should hinge on rule-by-rule cost-benefit analyses that subordinate the purpose of the new regulatory framework and give controlling weight to cost concerns from the very industry responsible for the crisis.

Finally, CFTC fulfilled its Section 15(a) duty by considering the Rule's costs and benefits and placing the utmost importance on the ultimate benefit of avoiding another financial crisis.

ARGUMENT

I. SECTION 15(A) REQUIRES THE CFTC TO CONSIDER THE COSTS AND BENEFITS OF ITS RULES IN LIGHT OF THE PUBLIC INTEREST, NOT TO CONDUCT COST-BENEFIT ANALYSIS

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

CEA Section 15(a) directs the CFTC to "consider the costs and benefits of [its] action," and "evaluate" those considerations in light of five enumerated "considerations." 7 U.S.C. § 19(a). This wording and the relevant case law make clear that Congress intended the CFTC to exercise broad discretion in fulfilling this obligation. 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 Court, 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]

Section 15(a)'s structure, its repeated reliance on the judicially interpreted term "consider," and the enumerated factors demonstrate the CFTC's wide discretion. The core obligation is a duty to "consider the costs and benefits." Each factor is a "consideration." And, all five considerations concern the public interest, resist quantitative analysis, and omit reference to any industry-focused cost concerns.

B. The five factors in Section 15(a) demonstrate Congress's primary concern that regulations protect the public, not limit the inevitable costs of regulation to industry.

All five factors in Section 15(a) relate to a public benefit arising from a robustly regulated marketplace, including preventing abuse, promoting competition, enhancing transparency, and limiting systemic risk.[3] 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).

---

[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.

[3] Section 15(a) also closely parallels the public interest objectives of the CEA. 7 U.S.C. § 5(a)-(b).

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 interest. *See Neal v. Clark*, 95 U.S. 704, 708-09 (1877). Thus, CFTC correctly recognized the dispositive role of the public interest under Section 15(a). 76 Fed. Reg. 71,662.

C. Section 15(a) contains no language requiring cost-benefit analysis.

CFTC's statutory obligation is also determined by the **absence** of language Congress uses when it intends an agency to conduct cost-benefit analysis. The Supreme Court has declared that a cost-benefit analysis duty is not to be inferred lightly or without a clear indication from Congress. *Am. Textile Mftrs. Inst., Inc., v. Donovan*, 452 U.S. 490, 510-512 & n.30 (1981); *see also Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 471 (2001). When Congress intends cost-benefit analysis to apply, it explicitly refers to "costs" and "benefits" and specifies the nature of the analysis, requiring a specific weighing and often quantification.

For example, unlike Section 15(a), statutes that mandate a **balancing** of costs and benefits explicitly include language of comparison. *See Am. Textile Mftrs.*, 452 U.S. at 511-12, n.30 and statutes cited therein. Accordingly, courts refuse to require a specific balancing of costs and benefits when not plainly mandated by statute. For example, the Court in *Weyerhaeuser Co. v. Costle*, 590

F.2d 1011, 1045 (D.C. Cir. 1978), found that statutory language requiring the agency to "take into account" costs and other "appropriate" factors does **not** require the agency "to use any specific structure such as a balancing test in assessing the . . . factors" nor "to give each . . . factor any specific weight." *See also 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" impact 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) (statute requiring "consideration" does not require cost-benefit analysis).

Similarly, statutes requiring **quantification** of costs and benefits, unlike Section 15(a), are explicit. *See, e.g.*, 42 U.S.C. § 300g-1(b)(3). Accordingly, courts have held that quantification is not required when not statutorily mandated. *See FMC Corp. v. Train*, 539 F.2d 973, 978-79 (4th Cir. 1976) (quantification of benefits in monetary terms not required); *cf. Am. Fin. Services Ass'n. v. FTC*, 767 F.2d 957, 986 (D.C. Cir. 1985) (even cost-benefit analysis need not be "based on a rigorous, quantitative economic analysis").

Clearly, the CFTC is not required to balance or quantify its rules' costs and benefits.[4]

[4] 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

D. Appellees' reliance on three cases involving the SEC's duty is mistaken.

Appellees rely heavily on three cases from this Court 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). They contend that under those decisions, the CFTC must quantify the Rule's costs and benefits and evaluate them in relation to a baseline. ISDA Br. 45-48.

This contention is misplaced. First, those cases are distinguishable because the statutes at issue differ, particularly the enumerated considerations. For example, Section 15(a) explicitly refers to "other public interest considerations," a powerful indication that Congress intended above all to protect the public.

Second, those panels never expressly held that SEC had a duty to conduct "cost-benefit analysis."

Third, 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*,

---

finding that the CEA does not already mandate cost-benefit analysis. *See Am. Textile Mfrs.*, 452 U.S. at 512 n.30.

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 as a potential impediment to the achievement of Congress's regulatory objectives.

Finally, to the extent those cases require compliance with principles of cost-benefit analysis found in Executive Orders, such as conducting a baseline analysis, they would be wrong. The CFTC and all independent regulatory agencies are expressly **excluded** from those provisions. Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 14, 2011); Exec. Order No. 13,563, 76 Fed. Reg. 3,821, § 7 (Jan. 21, 2011); Exec. Order No. 12,866, 58 Fed. Reg. 51,735, § 3(b) (Oct. 4, 1993). Executive Order 13,579 addresses the independent agencies, but it does not obligate them to conduct cost-benefit analysis. It uses entirely advisory language. And, although it encourages agencies to follow a list of guidelines in prior orders, and to conduct retrospective rule review, it carefully excludes from that list any reference to the specific sections on cost-benefit analysis. *Id.* at § 1(c).[5]

[5] Nor is there any other law subjecting the CFTC to a cost-benefit duty. The APA does not require such an analysis. *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 670-71 (D.C. Cir. 2011). Indeed, requiring the CFTC to conduct cost-benefit analysis would conflict with the rationale for the Supreme Court's

II. WHEN CONSIDERING THE COSTS AND BENEFITS OF RULES IMPLEMENTING FINANCIAL REFORM AFTER THE 2008 CRISIS, THE CFTC MUST CONSIDER THE OVERRIDING GOAL OF PREVENTING ANOTHER CRISIS.

The CFTC's obligation to consider the goal of preventing future financial crises derives from Section 15(a) and Dodd-Frank. Section 15(a) requires the CFTC to consider "any other public interest considerations." This imposes a contextual obligation to consider whatever public interest goals a rule serves under the prevailing conditions.

The prevailing conditions today are obvious: In the aftermath of the worst crisis since the Stock Market Crash of 1929, which triggered the worst economic downturn since the Great Depression, the most compelling public interest is preventing a recurrence of these devastating events. The Rule serves this purpose, and its costs and benefits must therefore be considered in this context.

A second rationale for this holistic approach springs from Dodd-Frank itself. 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.*,

---

prohibition against imposing procedural requirements on agencies beyond the APA. *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978). The Court's respect for agency expertise, *id.* at 524-25, applies with even greater force to an agency's economic analysis. *See AFL-CIO v. Marshall*, 617 F.2d 636, 665 n.167 (D.C. Cir. 1979).

539 F.2d at 978-79; *see also Fla. Manufactured Hous. Ass'n v. Cisneros*, 53 F.3d 1565, 1578 (11th Cir. 1995).

Here, the law necessitating the Rule is Dodd-Frank, and its objective is "[t]o promote the financial stability of the United States" to prevent another financial crisis. Dodd-Frank, 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. *See* S. REP. No. 111-176, at 2 (2010).

As required by Section 737 of Dodd-Frank, the Rule is clearly an important component of the larger, integrated collection of reforms deemed necessary for bringing stability to the financial markets and preventing another crisis. *See* Senator Cantwell, 156 Cong. Rec. S 3606-07(daily ed. May 12, 2010) (discussing the importance of position limits as part of financial reform); Representative Collin Peterson, 156 Cong. Rec. H 14705-06 (daily ed. Dec. 10, 2009) (same). Its benefits must therefore be considered in terms of the benefit of the overriding objective of the entire collection of Dodd-Frank reforms.

The benefit of avoiding another financial crisis is 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 (Sept. 15, 2012).[6] And the Government Accountability Office has found that "the present value of cumulative output losses [from the crisis] could exceed $13 trillion." GAO, FINANCIAL REGULATORY REFORM: FINANCIAL CRISIS LOSSES AND POTENTIAL IMPACTS OF THE DODD-FRANK ACT, GAO-13-180, 17 (Jan. 2013). These estimates evidence the cost of any future financial crisis and reveal the importance and benefits of regulatory reform—including the Rule. CFTC was obligated to consider this overarching goal when promulgating the Rule, and this perspective must inform the Court's review.

III. THE CFTC COMPLIED WITH SECTION 15(A) AS CORRECTLY INTERPRETED.

A. The CFTC considered costs and benefits.

As demonstrated throughout the Adopting Release, the CFTC considered the costs and benefits of the Rule in light of the five public interest factors. For example, the CFTC clearly tied the Section 15(a) considerations to the statutory objectives of Congress set forth in CEA Section 4a(a)(3)(B), 7 U.S.C. § 6a(a)(3)(B). *See, e.g.*, 76 Fed. Reg. 71,675 ("With regard to the non-spot-month position limits, which are set at a percentage of open interest, the Commission believes such limits will also protect market participants and the public through

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

maximization, to the extent practicable, of the four objectives set forth in CEA section 4a(a)(3)(B)."); *id*. at 71,678 (Although Congress narrowed the definition of bona fide hedge contracts, the agency "expanded the list of enumerated hedging transactions to clarify the application of the statutory definition" and "removed the application of class limits outside the spot-month" and thus estimated that the definition of bona fide hedge contracts "will not negatively affect the competitiveness or efficiency of the markets."). It also found that the position visibility levels "should protect market participants by giving the Commission data to monitor the largest traders" so that CFTC can determine "whether to reset position limits to maximize further the four statutory objectives" and so that CFTC can "prevent or detect potentially manipulative behavior." 76 Fed. Reg. 71,675.

In sum, the CFTC satisfied its obligation to consider the Rule's costs and benefits under Section 15(a).[7]

[7] The CFTC actually exceeded its duty by quantifying costs and benefits "wherever feasible." 76 Fed. Reg. 71,662; *cf. BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 657 (1st Cir. 1979) ("[G]iven the reticence of the industry to supply information, [the agency] needed to develop no more than a rough idea of the costs the industry would incur.").

B. The CFTC also considered the benefits of preventing another crisis.

In accordance with Section 15(a), Dodd-Frank, and the relevant case law, the CFTC considered the overriding objective of preventing another financial crisis.

The CFTC was fully cognizant of the crisis, Congress's resolve to prevent its recurrence through Dodd-Frank, and the CFTC's own duty to promulgate regulations that fulfill the letter and spirit of the law. For example, the CFTC observed that "the Dodd-Frank Act amended the [CEA] to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system . . . ." 76 Fed. Reg. 71,626.

Other parts of the record, including comment letters and statements by CFTC Commissioners, articulate in greater detail the importance of regulatory reform and the Rule as part of that regulatory framework. The CFTC "considered all [15,000] of the comments received in formulating the final regulations," 76 Fed. Reg. 71,626, many of which discussed the need to implement the Rule in light of the continuing effects of the last crisis and the need to prevent another.

Numerous members of the legislative branch submitted letters highlighting the importance of the Rule in contributing to comprehensive

financial reform.[8] Hundreds of concerned citizens submitted letters referencing the hardships currently facing Americans and warning of the dire consequences without the Rule. In fact, over 700 members of the public filed comment letters urging adoption of the Rule "[e]specially right now, with so many families struggling, and unemployment barely beginning to decrease." *See generally* http://comments.cftc.gov/PublicComments/CommentList.aspx?id=965. And other interested parties and academics similarly advocated for the Rule. *See, e.g.*, Fifty-six national coalitions and organizations, and 28 international coalitions and organizations from 16 countries Comment, at 2 (Mar. 28, 2011); Professor Michael Greenberger, University of Maryland School of Law Comment, at 3 (Mar. 28, 2011); The National Farmers Union Comment, at 2 (Mar. 28, 2011).

These important considerations are also reflected in speeches made by CFTC Commissioners, which are part of the administrative record.[9] For example, when adopting the Rule, Chairmen Gary Gensler found it "critical to remember why we are here in the first place," stating:

---

[8] *See* Congressmen Joe Courtney Comment, at 1 (Jan. 4, 2011); Congressman Peter Welch *et al.* Comment, at 1 (Jan. 13, 2011); Congressmen Walter B. Jones Comment (Mar. 8, 2011); Senator Bill Nelson *et al.* Comment, at 2, (Jan. 12, 2011); Senator Carl Levin Comment, at 4, 1 (Mar. 28, 2011); Senator Jeanne Shaheen Comment, (Jan. 11, 2011); Senator Sherrod Brown Comment, at 2, (Jan. 20, 2011).

[9] All statements of Commissioners referenced here can be found at http://www.cftc.gov/PressRoom/SpeechesTestimony/index.htm.

> [W]e cannot forget the weaknesses that [the financial crisis] exposed in both our financial system and our financial regulatory system . . . . The **package of reforms** included in the Dodd-Frank Act will help address the contributing factors to the 2008 crisis to protect those Americans. They are concrete measures that will bring transparency, openness and competition to the swaps markets while lowering the risk they pose to the American public . . . .
>
> Some have raised cost considerations about our rulemakings. We are going through those comments and they have been very helpful. **But the greatest cost is having a public that is not protected from the risks of the swaps market and that does not get the benefits of transparent markets. That is why it is so essential that we finish implementing the Dodd-Frank reforms.**

Opening Statement Before a Meeting of the CFTC, Oct. 18, 2011 (emphasis added); *see also* Statement of Commissioner Bart Chilton, CFTC, Before the CFTC Public Meeting, "Huggy Bear and Position Limits," Oct. 18 2011 (noting that position limits bring "needed transparency and accountability to markets that were part and parcel to the economic meltdown in 2008").

In addition, the CFTC's understanding of the dire need for regulatory reform, and position limits as part of that reform, is evident from the testimony and speeches by Chairman Gensler prior to the Rule's implementation, and even prior to the enactment of Dodd-Frank. *See, e.g.*, Testimony of Chairman Gary Gensler, CFTC, Before the Senate Committee on Energy and Natural Resources, Mar. 9, 2010; Testimony of Chairman Gary Gensler, CFTC, Before the House Committee On Agriculture, Sept. 22, 2009; Testimony of Chairman

Gary Gensler, CFTC, Before the Senate Permanent Subcommittee on Investigations, July 21, 2009. Chairman Gensler's views were evidently well-received by Congress, since Dodd-Frank requires the CFTC to impose new position limits, subject to firm deadlines.

Moreover, Chairman Gensler continued advocating for position limits in light of the costs of the crisis and the need to "reduce the chance of the next crisis" on numerous occasions between the proposal of the Rule in January 2011 and the adoption of the Rule in October 2011. *See, e.g.,* Testimony of Chairman Gary Gensler, CFTC, Before the Senate Committee on Banking, Housing and Urban Affairs, July 21, 2011; Remarks of Chairman Gary Gensler, CFTC, OTC Derivatives Reform, European Parliament, Economic and Monetary Affairs Committee, Brussels, Belgium, Mar. 22, 2011.

All of this evidence, compiled before and during promulgation of the Rule, demonstrates that the CFTC was appropriately guided by a full appreciation of the need for reform and the important role of the Rule in achieving that primary congressional objective.

CONCLUSION

For the foregoing reasons, the Court should vacate the lower court's ruling and uphold the Rule.

June 24, 2013

Respectfully submitted,

/s/Dennis M. Kelleher
Dennis M. Kelleher
D.C. Circuit Bar No. 53927
Counsel of Record
Stephen W. Hall
D.C. Circuit Bar No. 43530
Katelynn O. Bradley
BETTER MARKETS, INC.
1825 K. Street, NW
Suite 1080
Washington, D.C. 20006
Telephone: 202-618-6464
Fax: 202-618-6465
dkelleher@bettermarkets.com
shall@bettermarkets.com
kbradley@bettermarkets.com

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(a), I hereby certify that the foregoing brief complies with the applicable type-volume limitations. This brief was prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font. The brief, excluding the parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1), contains 3,525 words. This certification is made in reliance on the word-count function of the word processing system used to prepare the brief.

June 24, 2013

/s/ Dennis M. Kelleher
Dennis M. Kelleher

CERTIFICATE OF SERVICE

I certify that on June 24, 2013, I caused the foregoing Brief for Better Markets, Inc. as *Amici Curiae* in Support of Appellant to be filed with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit via the CM/ECF system, which will serve counsel listed below.

Jonathan L. Marcus
Lawrence DeMille-Wagman
Mary T. Connelly
Ajay B. Sutaria
U.S. Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, D.C. 20581
JMarcus@cftc.gov
LWagman@cftc.gov
MConnelly@cftc.gov
ASutaria@cftc.gov

Miguel A. Estrada
Eugene Scalia
Jason J. Mendro
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
MEstrada@gibsondunn.com
EScalia@gibsondunn.com
JMendro@gibsondunn.com

Leon Dayan
Bredhoff & Kaiser, PLLC
805 15th Street, NW Suite 1000
Washington, D.C. 20005
ldayan@bredhoff.com

Paul Joseph Pantano Jr.
Cadwalader, Wickersham & Taft LLP
700 6th Street, NW
Washington, D.C. 20001
paul.pantano@cwt.com

Henri D. Bartholomot
Edward Comer
Edison Electric Institute
701 Pennsylvania Avenue, NW
Washington, D.C. 20004-2696
hbartholomot@eei.org
ecomer@eei.org

Jess Randall Nix
Kenneth Daniel Sansom
Spotswood Sansom & Sansbury, LLC
1819 Fifth Avenue North Suite 1050
Birmingham, AL 35203
jnix@spotswoodllc.com
ksansom@spotswoodllc.com

Lawranne Jean Stewart
U.S. House of Representatives
2120 Rayburn Office Building
Washington, D.C. 20515
lawranne.stewart@mail.house.gov

/s/ Dennis M. Kelleher
Dennis M. Kelleher