

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

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

Appellees,

v.

UNITED STATES COMMODITY
FUTURES TRADING COMMISSION,

Appellant.

Case No. 12-5362

**MOTION OF BETTER MARKETS, INC., TO FILE AN
AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT OUT OF TIME**

Pursuant to Rule 29(e) of the Federal Rules of Appellate Procedure, Better Markets, Inc. (“Better Markets”) respectfully moves this Court for leave to file the accompanying *amicus curiae* brief in support of Appellant Commodity Futures Trading Commission (“CFTC”), and to file the brief out of time. This motion should be granted for the following reasons:

- (1) Better Markets has a strong interest in this case.

(2) Better Markets can assist the Court by providing helpful analysis on an issue that has become potentially central to the disposition of this appeal, concerning the role of “cost-benefit analysis” in the CFTC’s rulemaking.

(3) Until the Appellees filed their brief one week ago (on June 17, 2013), Better Markets had no indication, either from the lower court’s opinion or from the CFTC’s brief, that the issue of cost-benefit analysis would be argued as a basis for affirmance, and Better Markets reasonably concluded that the submission of an *amicus* brief on that issue was unnecessary at that time and would in fact burden the Court. Moreover, once Better Markets received the Appellees’ brief and understood that the issue of cost-benefit analysis had been argued, notwithstanding the limited scope of the lower court’s ruling, it drafted this motion and the accompanying brief as quickly as possible, for submission to the Court within seven days.

(4) Any potential prejudice to the Appellees can be eliminated by granting them the opportunity, in the Court’s discretion, to respond to the *amicus* brief of Better Markets, as contemplated by Rule 29(e) of the Federal Rules of Appellate Procedure.

(5) The accompanying brief conforms to the word limit imposed under Federal Rule of Appellate Procedure 29, and, it actually falls well below that limit.

(6) The CFTC has consented to this motion.

ARGUMENT

I. Better Markets has a strong and demonstrable interest in this case.

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 letters on agency rules, public advocacy, litigation, and independent research.

Better Markets has a strong interest in this case because the Court's disposition of the issues presented will profoundly affect two important goals that Better Markets has worked tirelessly to advance:

(1) Establishment of effective position limits to address excessive speculation in the commodity markets; and

(2) Application of the appropriate economic analysis test in the CFTC's rulemaking process so that strong implementation of regulatory reform under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010) ("Dodd-Frank Act"), can proceed unimpeded.

A. Establishing position limits.

Better Markets' interest in the challenged Position Limits Rule for Futures and Swaps, 76 Fed. Reg. 71,626 (Nov. 18, 2011) ("Rule"), is reflected in an extensive comment letter submitted to the CFTC highlighting the problem of

excessive speculation in the commodity markets and calling for the imposition of strong position limits in accordance with the Dodd-Frank Act. *See* Comment Letter from Better Markets to the CFTC, “Position Limits for Derivatives” (Mar. 28, 2011).¹ The letter demonstrates that excessive speculation in the commodity markets is increasing volatility, disrupting the hedging environment, and causing significant price increases for commodities and finished goods, including food and energy, that people in this country and around the world depend upon in their daily lives.²

The Court’s ruling in this case will have a direct and powerful impact on the future of position limits. A decision affirming the lower court would substantially delay their implementation, and it would almost certainly result in the eventual adoption of a weaker Rule. A decision reversing the lower court, on the other hand, would help ensure that strong position limits go into effect with minimal delay, to curb excessive speculation.

¹ *Available at* <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=34010&SearchText=better%20markets>.

² In addition, on October 14, 2011, Better Markets completed and released a new study based on extensive original empirical research providing further support for the conclusions in the March 28 comment letter. *See* Better Markets, *Commodity Index Traders and the Boom/Bust Cycle in Commodities Prices* (Oct. 14, 2011) (available at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=50063&SearchText=better%20markets>).

B. Establishing an appropriately limited economic analysis test to protect regulatory reform.

This case involves a second and broader interest that Better Markets seeks to advance: the application of an appropriate economic impact test in the rulemaking process. Better Markets advocates for the application of economic analysis in rulemaking that reflects the actual legal duties of the regulatory agencies. Congress did not intend financial regulators, such as the CFTC, to apply a rigid, comparative, and quantitative cost-benefit analysis before promulgating rules. Rather, for example, in Section 15(a) of Commodity Exchange Act (“CEA”), 7 U.S.C. § 19(a), Congress sought to impose a narrowly-framed obligation simply to consider costs and benefits and give the public interest the greatest weight in the process.

Despite this clear legal duty, the Appellees argue that Section 15(a) requires a “rigorous cost-benefit analysis.” Appellees’ Brief, at 42. If the CFTC is subjected to this unjustified interpretation of Section 15(a), then the agency will face enormous hurdles as it attempts to implement financial reform. It will 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 immediate result will be slower and weaker implementation of the reforms that Congress passed in the Dodd-Frank Act—

reforms that are essential to prevent a recurrence of the financial crisis that began in 2007, reached a crescendo in 2008 and, in many respects, continues to this day.

II. Better Markets can assist the Court.

The accompanying *amicus* brief squarely addresses the Appellees' contention, advanced in its June 17 Response Brief, that the CFTC failed to conduct an adequate cost-benefit analysis when it promulgated the Rule. *See* Appellees' Brief, at 41-49. The *amicus* brief contains legal analysis that will assist the Court in resolving that issue.

For example, the brief includes statutory and case law analysis on the meaning of Section 15(a) of the CEA, which requires the CFTC to "consider" costs and benefits. In addition, the brief advances the argument that rather than a comparative or quantitative cost-benefit analysis, the CFTC must follow a holistic approach when assessing the economic impact of its rules, one that emphasizes the public interest and considers the Rule as part of a larger set of reforms in the Dodd-Frank Act designed to prevent another financial crisis and the enormous costs it would inflict.

III. Leave to file the accompanying brief out of time is warranted.

Under the scheduling order issued in this case on March 22, 2013, briefs from *amici* for the CFTC were due on April 22, 2013. However, Federal Rule of Appellate Procedure 29 expressly provides that the Court "may grant leave for

later filing” of any *amicus* brief. In this case, the facts and circumstances justify the exercise of that discretion to extend the due date for the Better Markets *amicus* brief.

The U.S. Supreme Court has granted leave to file an *amicus* brief out of time when the *amicus* was unable to determine as of the original due date whether any briefing was appropriate or necessary. For example, in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 551 U.S. 1180 (2007) (order granting leave to file *amici curiae* brief out of time), former Commissioners of the Securities and Exchange Commission (“SEC”) moved for leave to file an *amicus* brief out of time in a case with far-reaching implications under the federal securities laws. *See* Motion for Leave to File Brief Out of Time and Brief *Amici Curiae* of Former SEC Commissioners in Support of Petitioner at 1, *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 551 U.S. 1180, (No. 06-43). The movants explained that they had refrained from filing an *amicus* brief because they expected the Solicitor General of the United States to do so in support of the SEC. *Id.* Therefore, they “saw no need” to offer a brief of their own. *Id.* However, once it became apparent that the Solicitor General would not be submitting a brief, they perceived the necessity of tendering their own brief to the Court. *Id.* The Supreme Court granted their motion and accepted their *amicus* brief. 551 U.S. at 1180; *see also* Motion for Leave to File Brief of *Amicus Curiae*

the Government of the United Mexican States Supporting Vitro, S.A.B. de C.V. and Reversal & Oct. 16 Order, In the Matter of Vitro SAB DE CV, 701 F.3d 1031 (5th Cir. 2012) (No. 12-10542) (motion and subsequent order granting leave to file *amicus* brief out of time to the Mexican government, which was, “at the early stages of appeal, unable to determine whether participation would be necessary”).³

Similar factors are present here and they justify the filing of the accompanying *amicus* brief from Better Markets out of time. The court below did not reach the issue of cost-benefit analysis. As it explained, “[t]he Court declines, however, to reach a determination on whether the aggregation standards promulgated in the final rule are arbitrary and capricious under 5 U.S.C. § 706(2)(A) **or in violation of the cost-benefit analysis requirements of 7 U.S.C. § 19.**” *Int’l Swaps & Derivatives Ass’n v. United States CFTC*, 887 F. Supp. 2d 259, 278 (D.D.C. 2012) (emphasis added). The lower court’s holding was instead confined to the narrow issue of whether the CFTC correctly interpreted the Dodd-Frank Act as **mandating** the imposition of new position limits.

Furthermore, the principal brief of the CFTC, filed on April 5, 2013, did not address any issues surrounding the scope of the agency’s duty to consider costs and

³ In its decision on the merits in *Vitro*, the Fifth Circuit expressly noted that Mexico’s *amicus* brief was “of assistance” on one of the issues presented—an observation that highlights the potential value of *amicus* briefs, especially in complex cases, and the value of the discretion conferred by Federal Rule of Appellate Procedure 29(e) to accept briefs out of time. *See In the Matter of Vitro SAB DE CV*, 701 F.3d 1031, 1059 n. 31 (5th Cir. 2012).

benefits, or the extent to which it had fulfilled its obligations to perform any type of economic analysis under the CEA. In fact, neither the CFTC’s brief nor any of the *amicus* briefs previously filed in support of the CFTC refer to “cost-benefit analysis” or to Section 15(a) of the CEA, 7 U.S.C. § 19(a).

Thus, in light of the narrow focus of both the lower court’s ruling and the CFTC’s brief, Better Markets reasonably concluded that it was unnecessary to submit an *amicus* brief on the issue of cost-benefit analysis or any related topics. Better Markets further concluded that it should avoid burdening this Court with what appeared to be unnecessary advocacy on the subject of cost-benefit analysis—a decision in furtherance of judicial economy that should not prejudice Better Markets.

Once Better Markets received the Appellees’ brief and understood that the issue of cost-benefit analysis had been argued, notwithstanding the limited scope of the lower court’s ruling, it drafted this motion and the accompanying brief as quickly as possible, for submission to the Court within seven days.

In short, because Better Markets was justified in not attempting to file an *amicus* brief until now, and because it has acted promptly to prepare and file its brief, it should be granted leave to file out of time.

IV. Any potential prejudice to the Appellees can be avoided by allowing them an opportunity to respond to the brief of Better Markets.

Any potential prejudice to the Appellees can be eliminated by affording them the opportunity, in the Court's discretion, to respond to the arguments in Better Markets' brief. Federal Rule of Appellate Procedure 29(e) expressly provides for this remedy to ensure fairness to the parties whenever a deadline for an *amicus* brief is extended. *See also* October 16, 2012 Order at 3, In the Matter of Vitro SAB DE CV, 701 F.3d 1031 (5th Cir. 2012) (No. 12-10542) (allowing a party to file a response, in letter-brief form, to a late-filed *amicus* brief).

V. The accompanying *amicus* brief is well under the allowable word limit.

Federal Rule of Appellate Procedure 29(d) provides that "an *amicus* brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief." Under this provision, the applicable word limit for Better Markets' brief is 7,000 words (or one-half of the CFTC's 14,000 word allowance). The accompanying brief not only satisfies this limit, but falls well short of the permitted length, as it contains only 3,525 words. It is also significantly shorter than two briefs already accepted by the Court from other *amici*. *See Amicus* brief of Commodity Markets Oversight Coalition (filed Apr. 22, 2013) (containing 6,757 words); *Amicus* brief of Senator Carl Levin *et al.* (filed Apr. 22, 2013) (containing 6,821 words).

- VI. Appellant CFTC has consented to Better Markets' filing an *amicus* brief in this case.

Before filing this motion, Better Markets sought the consent of all parties. Although the Appellees oppose this motion, the CFTC has consented to Better Markets' filing an *amicus* brief out of time.

CONCLUSION

For the foregoing reasons, Better Markets requests that the Court grant this motion and accept the accompanying *amicus* brief for filing.

Respectfully submitted,

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Dated: June 24, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 24 day of June, 2013, I caused the foregoing motion to be filed with the Clerk of Court for the United States Court of Appeals for the D.C. Circuit using this Court's CM/ECF system, which will serve counsel listed below. I also hereby certify that I caused four copies to be hand delivered to the Clerk's Office.

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ADDENDUM
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.