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, Petitioners, v. UNITED STATES COMMODITY FUTURES TRADING COMMISION Respondent.	Case No. 11-1469

OPPOSITION OF BETTER MARKETS, INC.,

TO PETITIONERS' UNOPPOSED MOTION TO FILE UNDER SEAL

Pursuant to D.C. Circuit Rule 47.1(c), Better Markets, Inc. ("Better Markets") respectfully opposes the Petitioners' unopposed motion to file certain evidence under seal ("Motion to Seal"), for the following reasons:

First, the Motion to Seal would keep evidence secret from the public on an issue of enormous public interest: whether a key financial reform rule adopted to help prevent another financial collapse should be stayed, possibly for years, while the rule is challenged in court. *See* Petitioners' Emergency Motion to Stay Rule (filed Jan. 9, 2012) ("Motion for Stay"). That rule was promulgated pursuant to

the recently enacted financial reform law and is designed to protect the food, fuel, and other commodity markets from the harmful effects of excessive speculation. Any delay in the application of the rule poses a serious threat to the public interest and literally affects every American in that the commodity markets set prices for gas, food, and innumerable other staples of everyday life.

Second, unlike court proceedings among solely private parties, this matter involves the workings of a regulatory agency that is a party to the action. The public's presumptive right of access to the court filings of the parties is therefore especially strong in this case. Just as the process of formulating the rule was transparent, involving the submission of over 15,000 publicly available comment letters to the Commodity Futures Trading Commission ("CFTC"), the Petitioners' attempt to invalidate the rule in court should be equally transparent.

Third, the evidence that the Petitioners seek to keep secret from the public relates to one of the most critical issues in the Petitioners' attempt to overturn the rule: the costs and benefits of the rule and the agency's evaluation of those costs and benefits. That is the last type of evidence that should be kept secret from the public for any purpose, especially where it bears on whether or not the rule should be stayed pending conclusion of what will likely be lengthy legal proceedings, and where the Petitioners voluntarily submitted it to support their arguments.

For these reasons, as set forth in detail below, if the Court first finds that it has jurisdiction, then the Court should deny the Motion to Seal.

I. INTRODUCTION

The Petitioners seek to overturn an important rule adopted as part of the comprehensive financial reforms embodied in The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010) ("Dodd-Frank Financial Reform Law"). Those reforms were enacted by the Legislative and Executive Branches in response to the financial crisis of 2008, which nearly caused the collapse of the United States financial system and the nation's economy. The consequences of that crisis—many of which are ongoing—almost caused a Second Great Depression and did cause the worst recession since the 1930s.

Other than matters of national security or war and peace, nothing is more important to the public interest than making sure that another financial catastrophe—including the massive taxpayer funded bailouts and other costs that the public is still paying for and suffering through—never happens again. That requires restoring transparency, fairness, and comprehensive oversight in the financial markets, goals that the rule being challenged here will promote.

In particular, the Petitioners are seeking to invalidate a final rule adopted by the CFTC that is commonly referred to as the "position limits rule." Position

Limits for Futures and Swaps; Final Rule and Interim Final Rule, 76 Fed. Reg. 71,626 (Nov. 18, 2011) ("Position Limits Rule" or "Rule"). That rule is one of the most important measures that the CFTC has adopted as part of the comprehensive set of financial reforms embodied in the Dodd-Frank Financial Reform Law.

The Petitioners claim, among other things, that the CFTC failed to adequately assess the alleged costs that the rule will impose on industry. The Petitioners further claim that, in light of those alleged costs, in particular the alleged costs of implementation, the Rule should be stayed pending final resolution of the merits of their legal challenge. The three declarations that are the subject of the Motion to Seal, including in particular the evidence that the Petitioners seek to file in secret, bear directly on those alleged costs associated with the Rule, and therefore relate to the core issues raised by the Petitioners.[1]

The Petitioners must not be permitted to use secret evidence to achieve a result that will have such an enormous impact on the public interest. Whether and when the Position Limits Rule takes effect will profoundly affect our commodity markets and commodity prices. The public has a right to see the basis for the

[1] The three declarations that are the subject of the Motion to Seal are from Michael A. Camacho, on behalf of JP Morgan Chase & Co.; Simon Greenshields, on behalf of Morgan Stanley; and Roger Jones, on behalf of Barclay's Bank PLC.

Petitioners' attempt to prevent the implementation of this important regulatory reform, including the evidence that allegedly supports their claims.

II. ARGUMENT

A. Better Markets is an "interested person" within the meaning of Circuit Rule 47.1 and it therefore should be permitted to challenge the Petitioners' attempt to seal portions of the record in this case.

D.C. Circuit Rule 47.1 provides that "a party or **any other interested person** may move at any time to unseal any portion of the record in this court . . . ." D.C. Cir. Rule 47.1 (emphasis added). This broadly worded rule recognizes the serious injury to both public and private interests that can arise whenever litigants attempt to cloak their evidence or their arguments in secrecy. The rule helps ensure that **any** interested persons, including those like Better Markets who promote and defend the public interest rather than their own pecuniary advantage, have a means at their disposal for challenging attempts to keep court records secret and foreclose public scrutiny of a judicial proceeding.

Rule 47.1 is worded in terms of "unsealing" documents and, therefore, suggests that it should only be invoked after a portion of the record is sealed. That is entirely appropriate in most cases because a mere request to seal part of a court record will not necessarily be granted, and there may be no need for an interested party to seek relief under the rule.

However, in this case, the request is "unopposed" and therefore the likelihood of it being granted would seem to be quite high (assuming the Court finds jurisdiction). Moreover, that also means that the Court will not have the benefit of an opposition to the Motion to Seal when it considers that motion. Lastly, as stated above, this request to keep certain evidence secret arises in a case where a public agency is a party, where the subject matter relates to an historic financial crisis that impacts every American, and where, consequently, there is a very significant public interest. In these highly unusual, very narrow, and uncommon circumstances, it would be appropriate to allow an "interested person" like Better Markets (as more fully described below) to file an opposition to the Motion to Seal prior to the Court's ruling. This would also promote judicial economy because it would avoid the Court's having to revisit any decision to seal that the Court may make.[2]

Better Markets qualifies as an "interested party" within the meaning of Rule 47.1. It is a non-profit organization founded for the purpose of promoting the public interest in the financial markets. Better Markets advocates for greater transparency, accountability, and oversight in our financial system through a variety of activities, including regulatory comment, public advocacy, litigation, and

[2] If the Court concludes that a very narrow exception under these rare circumstances is not warranted, Better Markets will withdraw this Opposition, wait for the Court to rule and, if it grants the Motion to Seal, file this opposition as a motion to unseal.

independent research. For example, Better Markets has been heavily involved in commenting on proposed rules under the Dodd-Frank Financial Reform Law for over a year, submitting more than 80 comment letters to the financial market regulators, including the Commodity Futures Trading Commission, the Federal Deposit Insurance Corporation, the Federal Reserve Board, the Financial Stability Oversight Counsel, the Securities and Exchange Commission, and the Treasury Department. *See generally* Comment Letters submitted by Better Markets to financial regulators.[3]

Better Markets has an especially strong and demonstrable interest in the rule being challenged in this particular litigation. It submitted an extensive comment letter on the proposed position limits rule. *See* Comment Letter from Better Markets to the CFTC, "Position Limits for Derivatives" (Mar. 28, 2011) ("March 28 Comment Letter").[4] The March 28 Comment Letter is an exhaustive, 85-page analysis of excessive speculation in the commodity markets, the deleterious impact of that speculation, and the position limits that must be imposed to address the problem. It strongly supports a position limits rule and it demonstrates that excessive speculation increases volatility, disrupts the hedging environment, and causes significant and unwarranted increases in commodity prices and finished

[3] *Available at* http://www.bettermarkets.com/rulemaking
[4] *Available at* http://www.bettermarkets.com/sites/default/files/CFTC-%20Comment%20Letter-%20Position%20Limits%203-28-11_0.pdf.

goods that people in this country and around the world depend on in their daily lives, including food and energy.

In addition, Better Markets recently completed and released a new study based on extensive original empirical research providing further support for the conclusions in its March 28 Comment Letter. The study analyzes 27 years of commodity market activity. The results show that trading by commodity index funds every month has severely disrupted the commodity markets. As a direct consequence of this trading activity, hedging costs for businesses rise, and commodity prices increase. *See* Better Markets, *Commodity Index Traders and the Boom/Bust Cycle in Commodities Prices* (Oct. 14, 2011).[5] Better Markets recently filed that study in conjunction with a new comment letter on the interim final rule issued by the CFTC relating to position limits. *See* Comment Letter from Better Markets, Inc. to the CFTC, "Position Limits for Futures and Swaps" (Jan. 13, 2012).[6]

Thus, Better Markets has an overall commitment to advancing and safeguarding the public interest in the financial markets, as well as a concrete

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[5] *Available at* http://www.bettermarkets.com/sites/default/files/BM%20Report%20CIT%20FINAL.pdf.

[6] *Available at* http://www.bettermarkets.com/sites/default/files/CFTC-%20CL-%20Position%20Limits%20IFR-%201-13-12.pdf.

interest in the specific rule at issue here. It is therefore an "interested person" for purposes of Rule 47.1.

B. The Motion to Seal should be denied because it would deprive the public of access to evidence in a judicial proceeding that is of enormous importance to our markets, our economy, and the public interest.

The Petitioners' Motion to Seal should be denied because the public has a presumptive, common law right of access to judicial records and documents, *Nixon v. Warner Communications*, 435 U.S. 589, 597-598 (1978), and this right takes precedence over the tenuous claims of prejudice in the form of competitive disadvantage that the Petitioners have asserted. This Court has long recognized the "strong presumption in favor of public access to judicial proceedings." *EEOC v. Nat'l Children's Ctr., Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996) (citing *Johnson v. Greater Southeast Community Hosp. Corp.*, 951 F.2d 1268, 1277 (D.C. Cir. 1991)). That right of access to court documents is based on "the citizen's desire to keep a watchful eye on the workings of public agencies," *Nixon v. Warner Communications*, 435 U.S. at 597-598, and on the need to ensure "the integrity of judicial proceedings," *United States v. Hubbard*, 650 F.2d 293, 314-15 (D.C. Cir. 1980). Where the government is a party, as here, "the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch." *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) ("The citizens' right to know is not lightly to be deflected," and

"only the most compelling reasons can justify non-disclosure of judicial records."); *accord EEOC v. Nat'l Children's Ctr., Inc.*, 98 F.3d at 1409.

In determining whether this presumption of public access has been overcome, this Court weighs six factors: (1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings. *United States v. Hubbard*, 650 F.2d at 317-322; *see also EEOC v. Nat'l Children's Ctr., Inc.*, 98 F.3d at 1409.

The presumption in favor of the public's right of access cannot be overcome in this case, as these factors favor disclosure of the redacted material.

First, the public has a compelling need for access to the information. The decisions of this Court make clear that where information filed in court relates to an important public interest, disclosure is favored. *See EEOC v. Nat'l Children's Ctr., Inc.*, 98 F.3d at 1410 (public interest in disclosure found "compelling" where it would shed light on how public funds were being spent by a charity and on the quality of care being provided to the city's children); *Johnson v. Greater Southeast Community Hosp. Corp.*, 951 F.2d at 1277-78 (case remanded for a reconsideration

of the need for any sealing of the record, in light of the "obvious public interest" in being informed about the quality of available healthcare).

Here, the declarations in general and the portions sought to be kept secret relate to the alleged costs of implementing the Position Limits Rule, and they are offered to support the Petitioners' Motion for Stay until all related legal proceedings are concluded. That Motion for Stay clearly implicates the public interest as a legal matter, since the Court must consider where the public interest lies whenever it decides a motion for stay. *Wash. Metro Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Moreover, the disposition of that Motion will have an enormous practical impact on the public interest, in that it will determine whether the benefits of the Position Limits Rule will be allowed to take effect as soon as possible to address the deleterious effects of excessive speculation in our commodity markets, or whether the public will be deprived of those benefits pending the outcome of this litigation. Accordingly, the public has an interest, as well as a right, to understand how the Court resolves this important issue and on what basis. That entails bringing to light the facts, evidence, and arguments advanced by the parties on the issues, including the evidence that the Petitioners wish to keep secret.[7]

[7] To ensure that the public has full access to the views of all who comment on a pending rule proposal, the CFTC's clearly enunciated policy is not to redact any information from comment letters. *See*

Second, the possibility of prejudice to those opposing disclosure is vague and conjectural in this case. To support a claim of prejudice, more than conclusory assertions are necessary; the party requesting secrecy must offer a particularized, factual demonstration of potential harm. *See FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 412 (1st Cir. 1987) (claims of prejudice from disclosure of financial statements, without supporting affidavits or meaningful details, could not overcome presumption in favor of access to judicial records). Here, the Motion to Seal contains a few generalized and speculative assertions to the effect that the evidence sought to be withheld from public view relates to "commercially sensitive facts" that "**could** cause competitive harm to the declarants." Motion to Seal ¶ 3 (emphasis added). Although courts are sometimes persuaded to protect "trade secrets," *In re National Broadcasting Co.*, 653 F.2d 609, 613 (D.C. Cir. 1981), the Petitioners' vague statement that publishing the evidence "could" cause competitive harm falls short of sustaining the burden they must carry to justify sealing of the records.

Moreover, a major factor in determining if a party wishing to file under seal faces prejudice is "whether disclosure of the documents will lead to prejudice in future litigation to the party seeking the seal." *Friedman v. Sebelius*, 672 F. Supp. 2d 54, 60 (D.D.C. 2009) (*citing United States v. Hubbard*, 650 F.2d at 320-21); *see*

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http://comments.cftc.gov/PublicComments/CommentForm.aspx?id=1092.

also In re National Broadcasting Co.,653 F.2d at 616 (possibility of a retrial and the uncertain impact of disclosure on such a retrial were too speculative to overcome presumption). Here, the Petitioners "have not claimed that unsealing this matter would affect them in any future litigation." *Friedman v. Sebelius*, 672 F. Supp. 2d at 60.

Petitioners only claim that making this evidence public "**could** cause competitive harm." Motion to Seal ¶ 3 (emphasis added). This is simply insufficient. Even if the claimed harm is taken at face value, an unspecified competitive disadvantage among some of the wealthiest financial institutions in the world pales in comparison to the much larger interest in ensuring that the public has access to court records and proceedings by which the fate of the Position Limits Rule will be decided.

Third, the purpose for which the Petitioners have offered the declarations favors disclosure. Where information is offered on a party's own initiative and for the purpose of advancing their own case on the merits of a request for relief, disclosure is more appropriate. *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d at 412 ("appellants themselves chose to submit the documents to the FTC as part of the settlement process—a process they could have foregone"); *United States v. Hubbard*, 650 F.2d at 321 ("single most important element" militating against

disclosure was fact that evidence was offered solely for the purpose of challenging a search and seizure, not to influence the merits of the criminal case).

Here, the Petitioners chose to offer the declarations that contain the allegedly sensitive evidence to the Court for the purpose of supporting their claim for a stay, and in addition, their position on the merits of their rule challenge. This is decidedly not a case where a party seeks to protect sensitive information that was seized involuntarily or that was obtained through discovery. *See United States v. Hubbard*, 650 F.2d at 319 (documents were seized in connection with criminal case); *Friedman v. Sebelius*, 672 F. Supp. 2d at 61 ("Given that the plaintiffs introduced those documents to support their motion for preliminary injunction, and sought to seal those documents only through that motion's disposition, this factor weighs in favor of unsealing the case.").

The other factors in *Hubbard* are less significant and they do little to support the Petitioners' position. The identity of the person objecting to disclosure actually undermines the Petitioners' claim for secrecy, since the Motion to Seal was filed by the Petitioners, yet it includes no request for confidential treatment from the actual individuals or firms that made the declarations. The "strength of any property and privacy interest" presented is relatively weak insofar as no *privacy* interest is at stake, only an unquantified pecuniary interest. Finally, whether or not the information sought to be sealed is otherwise available to the public through, for

example, corporate filings or annual reports, is unclear. In any event, while that factor may establish the rudiments of a claim for secrecy, it does little to help illuminate the best resolution of such a claim, which must be decided in light of the other factors, and which in this case should be decided in favor of disclosure and transparency.

In short, this case provides no basis for overturning the normal presumption that the public has a right of access to the filings in a judicial proceeding. The Court should not allow the Petitioners to rely upon non-public evidence to justify a delay in the implementation of an important regulatory measure such as the Position Limits Rule.[8]

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[8]The Motion to Seal and the Motion for Stay to which it relates are objectionable for other reasons as well. The four declarations in support of the Motion for Stay, including those that are subject to the Motion to Seal, all deal extensively with the alleged costs of the Position Limits Rule. That evidence is also directly relevant to the Petitioners' argument on the merits that the CFTC failed adequately to assess the costs and benefits of the Rule. However, despite an explicit invitation from the CFTC during the rulemaking phase to comment on potential costs and benefits, and despite ample opportunity to do so, the Petitioners chose not to submit any of the declarations during the notice and comment period. Nor did they submit any of the declarations to the CFTC when they sought a stay from the agency. *See* Exhibit 2 to Petitioners' Emergency Motion to Stay Rule, filed Jan. 9, 2012. By filing them **only** in connection with the Motion for Stay, the Petitioners are in effect enlarging the rulemaking record with evidence that is advantageous to their position on the merits, yet immune from the type of public scrutiny and agency evaluation that the notice and comment procedure is meant to provide. This strategy subverts the rulemaking process and the process of judicial review and it should not be permitted. In short, the declarations are improper and should be disregarded; if they are deemed properly before the Court, then, as argued in the

III. CONCLUSION

For the foregoing reasons, Better Markets requests that the Petitioners' Motion to Seal be denied.

Dated: January 18, 2012

Respectfully submitted,

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body of this Opposition, they should only be accepted in their entirety and without redaction.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rules 26.1, 27(a)(4), and 47.1(c), Better Markets, Inc. ("Better Markets") hereby states as follows:

1. Better Markets is a non-profit, tax-exempt organization incorporated under the laws of the District of Columbia. The purpose of Better Markets is to promote the public interest in the capital and commodity markets, and to promote transparency, accountability, and regulatory oversight in those markets.

2. Better Markets has no parent company.

3. There is no publicly-held company that has a 10% or greater ownership interest in Better Markets.

Dated: January 18, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2012, I caused the foregoing documents 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. I also hereby certify that I caused four copies to be hand delivered to the Clerk's Office.

Service was accomplished on the following by the CM/ECF system, and two copies were hand-delivered that same day to the following addresses:

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January 18, 2012

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