IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION and SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, Plaintiffs, v. UNITED STATES COMMODITY FUTURES TRADING COMMISSION, Defendant.	Civil Action No. 11-cv-2146 (RLW)

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

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] A proposed order also accompanies this motion.

INTRODUCTION

Better Markets is a non-profit organization founded for the purpose of promoting 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.

[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 opposed the motion based upon concerns about a potential delay in the proceedings.

Better Markets should be granted leave to file the accompanying brief for two reasons. First, Better Markets has a strong interest in this case because the Court's disposition of the issues presented will profoundly affect three important goals that Better Markets has worked tirelessly to advance: establishment of effective position limits to address excessive speculation in the commodity markets, application of the proper statutory economic analysis test in the CFTC's rulemaking process, and implementation of regulatory reform in accordance with the Dodd-Frank Act. Better Markets' interest in the position limits rule at issue 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) ("March 28 Comment Letter").[2]

Second, Better Markets can assist the Court in addressing one of the core issues in the case, without duplicating the arguments of the parties. The accompanying brief analyzes the nature and extent of the proper cost benefit 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 to apply a holistic approach to assessing the economic impact of its rules, one that emphasizes the public interest and evaluates 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.

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

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[2] *Available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=34010&SearchText=better%20markets.

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," *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. Establishing position limits.

Better Markets has a strong and demonstrable interest in the specific rule being challenged in this case. On March 28, 2011, it submitted an extensive comment letter on the proposed position limits rule. The letter is a thorough, 85-page analysis of excessive speculation in the commodity markets, the harmful impact of that speculation, and the position limits that must be imposed to address the problem. The analysis in the letter supports a strong position limits rule. It 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 that people in this country and around the world depend on in their daily lives, including food and energy.[3]

[3] In addition, on October 14, 2011, Better Markets completed and released a new study ("Study") based on extensive original empirical research providing further support for the conclusions in the 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). 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. Better Markets recently filed the Study in conjunction with a 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).

The Court's ruling in this case will have a direct and powerful impact on the future of position limits. A decision striking down the Rule would substantially delay their implementation, and it would almost certainly result in the eventual adoption of a weaker rule.

B. Establishing an appropriately limited 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 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 the Section 15(a) of Commodity Exchange Act ("CEA"), 7 U.S.C. § 19(a), is not to conduct a comparative or quantitative cost benefit analysis when it issues rules. Rather, the statute requires the CFTC to conduct a limited consideration of costs and benefits, and to give the public interest the greatest weight in the process.

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 the Dodd-Frank Act. 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 Congress passed in 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

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That comment letter and the accompanying Study are not part of the administrative record for purposes of the instant rule challenge, but those documents illustrate and confirm the interest as well as the expertise that Better Markets brings to its role as an *amicus curiae.*

with litigation costs and induce a slower and much more 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 the Dodd-Frank Act. Better Markets has submitted almost 90 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.[4] The purpose of these comment letters is to help ensure that the rules promulgated by the financial regulators will fulfill 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.

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 position limits; 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.

[4] *Available at* http://comments.cftc.gov/PublicComments/CommentList.aspx and http://sec.gov/rules/proposed.shtml.

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 position limits rule. *See* Count II of the Plaintiffs' Complaint; Plaintiffs' Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment, at 25-29. 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 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 position limits rule as one component of an entire set of reforms that Congress imposed to avoid the 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) (emphasis added). In this case, the party being supported by Better Markets is the CFTC, and the CFTC filed its principal brief on Friday, April 13, 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 any *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 Friday 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, which, by our calculation, is not due until at least April 27. Alternatively, and again drawing on the appellate rules, this Court could always exercise its discretion, as it deems necessary and appropriate, and specify a time within which the Plaintiffs may "answer" the *amicus* brief from Better Markets. *See* Fed. R. Civ. P. 29(e).

CONCLUSION

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

Dated: April 20, 2012

Respectfully submitted,

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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; the attached Brief of Better Markets, Inc. as *Amici Curiae* in Support of Defendant Commodity Futures Trading Commission; and the attached Proposed Order were served this 20th day of April, 2012, upon the following counsel for Plaintiffs International Swaps and Derivatives Association and Securities Industry and Financial Markets Association and for Defendant Commodity Futures Trading Commission, by mail and email as follows:

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