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

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

Appellants,

v.

UNITED STATES COMMODITY FUTURES TRADING COMMISSION,

Appellee.

No. 12-5413

EMERGENCY MOTION BY APPELLANTS FOR EXPEDITED CONSIDERATION OF THIS APPEAL AND AN EXPEDITED BRIEFING SCHEDULE

Pursuant to Federal Rule of Appellate Procedure 27 and this Court's Rule 27, Appellants Investment Company Institute ("ICI") and Chamber of Commerce of the United States of America (the "Chamber") respectfully move for expedited briefing and oral argument in the above-captioned appeal. Appellants propose the following schedule for expedited briefing:

January 30	Joint Brief for Appellants
March 1	Brief for Appellee
March 15	Reply Brief for Appellants

Appellants respectfully request that oral argument be scheduled as soon as practicable upon completion of briefing, so that a decision in the case may be issued by Summer 2013. Without expedition, it is likely that Appellants will had to have waited two years before they receive a final decision in their challenge to a February 2012 rule that they have sought to litigate expeditiously at every turn.

Counsel for Respondent Commodities Future Trading Commission ("CFTC" or "the Commission") has authorized Appellants to represent that the CFTC takes no position at this time with respect to the dates proposed by Appellants, although it reserves the right to respond to any assertion by Appellants regarding the need for expedition. The CFTC has further stated to Appellants that it would reserve the right to request additional time to prepare its brief in the event that amicus briefs are filed in support of Appellants.

Appellants respectfully request a ruling on this Emergency Motion no later than January 18, 2013.[1]

BACKGROUND

This case involves a challenge to a final rule issued by the Commission, which requires advisers to certain investment companies registered with the Securities and Exchange Commission ("SEC") to also register with the CFTC as com-

[1] Expedited consideration of this Emergency Motion is appropriate under Local Rule 27(f) in light of the potential for irreparable injury set out below. *See supra* pp. 13-15. Appellants have notified the Clerk of Court and opposing counsel of this motion by telephone.

modity pool operators ("CPOs"). *See* 77 Fed. Reg. 11,252 (Feb. 24, 2012) (the "Rule").

The Rule requires advisers to affected registered investment companies (principally, mutual funds) to register as CPOs not later than December 31, 2012. *See* 77 Fed. Reg. at 11,252. The Rule further provides that affected investment companies and their advisers must comply with various "recordkeeping, reporting, and disclosure requirements" for CPOs within 60 days after the effective date of a rule in a separate, ongoing rulemaking intended to "harmonize" CFTC and SEC regulations. *See id.* The Commission issued a notice of proposed rulemaking in its "harmonization" proceeding on February 24, 2012, and closed the comment period on April 24. Appellants expect that a final harmonization rule could issue at any time.

Appellants—whose members include registered investment companies and advisers—challenged the Rule under the Administrative Procedure Act, 5 U.S.C. § 706(2), and under a provision of the Commodity Exchange Act ("CEA") that requires the CFTC to "evaluate" the "costs and benefits" of its proposed regulations, 7 U.S.C. § 19(a).

Appellants have sought from the start to litigate this suit expeditiously. The final Rule issued on February 24, 2012, and Appellants filed a lengthy complaint in district court on April 17. Before the district court, Appellants and the CFTC filed a joint motion requesting an expedited briefing schedule that would permit the district court to resolve the challenge prior to the December 31 registration deadline. Under the expedited schedule adopted by the court, Appellants' summary judgment motion was filed on May 18, and briefing was completed on July 16. Oral argument was held October 5, and the district court issued its opinion and order upholding the Rule on December 12. Appellants filed a notice of appeal on December 27.

ARGUMENT

Expedited consideration is appropriate because the decision below "is subject to substantial challenge"; because "delay will cause irreparable injury" to Appellants' members; and because the public has an "interest in prompt disposition" of this matter. U.S. Court of Appeals for the District of Columbia Circuit, Handbook of Practice and Internal Procedures 33 (2011).

I. The Decision Of The District Court Is Subject To Substantial Challenge

The Commission's Rule resulted from a rulemaking process that was flawed in multiple, significant respects. The district court's opinion upholding the Rule is accordingly subject to substantial challenge.

A. It is axiomatic that "[r]easoned decision making . . . requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent." *Dillmon v. NTSB*, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009). In a 2003 rulemaking, the Commission had exempted investment companies from registration as CPOs, citing the extensive regulation of investment companies by the SEC, and the "greater liquidity and market efficiency" that would result if mutual funds could invest in futures, options, and other commodity interests without incurring the cost associated with being regulated by the CFTC in addition to the SEC. 68 Fed. Reg. 47,221, 47,230 (Aug. 8, 2003) ("2003 Adopting Release"). There "should be no decrease in the protection of market participants and the public," the Commission determined, since the amendments merely relaxed the Commission's regulatory requirements "in order to be consistent with existing requirements under the federal securities laws and the SEC's rules." *Id.* Meanwhile, the exemption would remove "barriers to participation in the commodity interest markets, resulting in greater liquidity and market efficiency." *Id.*

In the rulemaking at issue here, the Commission reversed that decision, instituting a registration requirement similar to the requirement eliminated in 2003. Yet the Commission failed to address the rationale for its earlier action or to explain why it was no longer convincing—a failure that is particularly striking with regard to effects on liquidity, since consequences for market "efficiency" and "competiveness" are subjects that the Commission is required by law to "evaluat[e]" in its rulemakings. 7 U.S.C. § 19(a). The Commission in 2003 identified liquidity as a principal *benefit* of eliminating dual regulation; it follows logically that a loss of liquidity is a *cost* of the instant Rule. Yet the Commission in the Rule Release failed even to mention the word "liquidity," and provided no substantive discussion of the issue. Even after extensive briefing and oral argument, we do not know to this day what effect the Commission believes the Rule will have on the liquidity of the commodity markets. Does the Commission believe that substantial liquidity will be lost, but that the supposed benefits of the Rule will overcome that cost? Or has it concluded that there will be no liquidity effects? In either event, what is the basis for the Commission's determination? *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (agency must provide "a more detailed justification" when "its new policy rests upon factual findings that contradict those which underlay its prior policy"). Silence on such a key issue is not consistent with the requirement of reasoned agency decisionmaking; the Commission "crossed the line from the tolerably terse to the intolerably mute." *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 329 (D.C. Cir. 2006).[2]

The district court dismissed this concern as "crocodile tears," suggesting that the Commission had no obligation to address its 2003 rulemaking because a former "deregulatory philosophy" had given way to a new era of re-regulation in the wake

[2] Effects on liquidity were raised by commenters, including the Chamber, during the rulemaking process. *See* CCMC, Comment (Apr. 12, 2011), at 7; ICI, Comment (Apr. 12, 2011), at 21. The Commission's failure to address this issue therefore also constitutes a failure to respond to significant comments in the rulemaking record. *See*, *e.g.*, *La. Fed. Land Bank Ass'n v. Farm Credit Admin.*, 336 F.3d 1075, 1080 (D.C. Cir. 2003).

of the financial crisis. Mem. Op. 50-51. But a pro-regulatory "philosophy" does not suspend the APA or immunize all new regulations that an agency adopts, any more than a de-regulatory "philosophy" would justify all de-regulatory measures. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983). And, despite its undoubted significance, the financial crisis does not provide a blank check for agency action; instead, an agency must address its prior conclusions and explain *why* it no longer finds them compelling.

In fact, the Commission itself acknowledged that "the CFTC has not attributed the financial crisis specifically to" investment companies. D.E. 15, at 24 n.10. The district court attempted to cast doubt on this concession by citing legislative history (not relied on by the parties) regarding investment *banks*—an error that the Commission attempted to correct in an "Erratum" that asked the district court to change the reference from "investment banks" to "investment companies." *See* Mem. Op. 49; D.E. 43. The district court implemented the Commission's suggestion, D.E. 46, but changing a word does not correct the error—and evident misunderstanding—underlying the court's reasoning: Investment companies are not the same as investment banks, and extra-record legislative history regarding investment banks cannot properly be used to retroactively justify the Commission's regulation of mutual funds.

B. The Commission, in promulgating its Rule, also failed to comply with its independent statutory obligation to perform a meaningful cost-benefit analysis. Under the CEA, the "costs and benefits of the proposed [rule] shall be evaluated" in light of "protection of market participants and the public," "efficiency, competitiveness, and financial integrity of futures markets," "price discovery," and "sound risk management practices," among other things. *See* 7 U.S.C. § 19(a). The Commission's approach to that directive cannot be squared with this Court's decisions interpreting a similar provision applicable to the SEC, including *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011), *American Equity Life Insurance Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010), and *Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005).

As the district court acknowledged, "[t]here is no dispute that [investment companies] are heavily-regulated." Mem. Op. 3. Indeed, "'[a] mutual fund is one of the most regulated types of companies in the United States.'" Clifford E. Kirsch & Bibb L. Strench, 1 *Mutual Funds And Exchange Traded Funds Regulation* § 1:4.1 (3d ed. 2011). Existing regulation by the SEC (as well as the Financial Industry Regulatory Authority, or "FINRA," a self-regulatory organization with responsibility conferred by federal law) covers virtually every aspect of the business of mutual funds, their advisers, and the broker-dealers who distribute investment company shares—including, among other things, registration and disclosure, periodic reporting, bookkeeping, limitations on leverage, independent board oversight, and qualifications testing. CFTC regulation of CPOs covers many of the same areas, including, again, registration and disclosure, periodic reporting, bookkeeping, and qualifications testing.

The Commission nonetheless made no meaningful effort to compare these regulatory regimes, or to determine that subjecting investment companies and their advisers to regulation as CPOs would yield any meaningful benefits not already provided by existing regulations. Indeed, the relevant portions of the Commission's Rule Release fail even to cite a single SEC regulation, much less undertake an analysis of the protections afforded by the SEC's regime. The Commission thus "fail[ed] to determine whether, under the existing regime, sufficient protections existed," *Am. Equity*, 613 F.3d at 179, and "failed adequately to address whether the regulatory requirements of the [Investment Company Act of 1940 ("ICA")] reduce the need for, and hence the benefit to be had from," the Rule, *Business Roundtable*, 647 F.3d at 1154.

Rather than conduct the analysis required by this Court's precedents, the Commission sought to justify potentially duplicative and conflicting regulation of investment companies and their advisers through conclusory and boilerplate invocations of its regulatory jurisdiction. *See*, *e.g.*, 77 Fed. Reg. at 11,278 (asserting that the Commission's "programs are structured and its resources deployed to meet the needs of the markets it regulates"). This Court rejected as inadequate similar assertions in *American Equity*. In that case the SEC argued that, because Congress had given the SEC authority to regulate the products at issue, state regulation "could not substitute" for regulation by the SEC, but this Court concluded that the agency's citation to its regulatory authority as a substitute for meaningful analysis was "misplaced." 613 F.3d at 178.

Rather than squarely address the similarities between this case and *American Equity* and *Business Roundtable*, the district court repeatedly attempted to minimize the significance of those decisions. It began its discussion of a financial regulatory agency's cost-benefit obligations with no reference to this Court's recent decisions on the subject—other, less apposite cases were used to frame the legal standard, *see* Mem. Op. 38-39—and, even more remarkably, the court concluded its analysis with a lengthy footnote citing academic commentary that is critical of this Court's cost-benefit jurisprudence, *see id.* at 92 n.35. The district court characterized this Court's decisions as holding only that the SEC erred in those prior cases by failing to give *any* consideration to existing regulations; the court deemed the CFTC's lip service to SEC regulation adequate by comparison. *See id.* at 54-55. That purported distinction, however, falls apart under even minimal scrutiny. In *American Equity*, for instance, the SEC engaged in more extensive analysis of existing regulations than occurred in this case; the SEC described "recent ongoing efforts by state insurance regulators" and mentioned particularly relevant state laws, whereas the CFTC here did not cite or discuss a single SEC regulation. *See* 74 Fed. Reg. at 3,148.

Moreover, the lower court's "first" and "most fundamenta[l]" basis for distinguishing *American Equity* was simple factual error. The SEC in that case took the position that "'it was not required [by statute] to undertake'" a cost-benefit analysis, the district court stated, and "its assumption that it was not required to do so naturally would have" weakened the analysis it did perform. Mem. Op. 86 (citing 613 F.3d at 177). But what the court described was the SEC's *litigating position*, 613 F.3d at 177, whereas in the rulemaking itself the Commission purported to conduct a full economic analysis and never intimated that it was not required by law to do so, *see* 74 Fed. Reg. at 3,161.

It is instructive, ultimately, to compare the CFTC's brief discussion of SEC regulation in its Rule Release with the space devoted by the district court to academic criticism of this Court's precedents. The district court may disagree with those decisions, but they are the law of the Circuit and were required to be faithfully applied in this case. The court's treatment of the CFTC's cost-benefit responsibilities is subject to a "substantial challenge."

C. Finally, the Commission repeatedly invoked specific purported benefits of the Rule without determining that those benefits are not already provided by existing regulation. The Commission's Rule Release stated on multiple occasions that the Rule would yield "two significant benefits": *First*, the Rule would ensure that registrants meet "minimum standards of fitness and competency"; and, *second*, the Rule would provide "a direct means to address wrongful conduct by participants in the derivatives markets" because the Commission "has direct authority to take punitive and/or remedial action against registered entities." 77 Fed. Reg. at 11,254, 11,277. But the Commission failed to consider the extent to which these "two significant benefits" are already provided by the SEC and FINRA, and accordingly "failed adequately to address whether the regulatory requirements of the ICA reduce the need for, and hence the benefit to be had from," the Rule. *Business Roundtable*, 647 F.3d at 1154.

The Rule Release identified specific ways in which the Rule supposedly would advance "minimum standards of fitness and competency," nearly all of which are duplicative of existing SEC regulation of investment companies. For example, while the Commission stated that its Rule would ensure that registrants "are held to a high financial standard through periodic account statements, disclosure of risk, [and] audited financial statements," 77 Fed. Reg. at 11,280, those are all features of the existing SEC regulatory regime. *See*, *e.g.*, 15 U.S.C. § 80a-29(a), (b) (annual and semi-annual reporting); *id.* § 80a-29(g) (auditing of financial statements); Forms N1-A, N-2, and ADV (risk disclosure).

The Commission's second "significant" benefit—that the Commission "has direct authority to take punitive and/or remedial action against registered entities"—is similarly flawed. The SEC has ample authority to investigate, subpoena, and bring enforcement actions against investment companies and their advisers; and FINRA has additional authority to discipline misconduct by broker-dealers that distribute investment company shares. Yet that fact went unmentioned in the Rule Release.

These serious weaknesses to the two "significant" benefits identified by the Commission went unaddressed by the district court. While the court's opinion quoted the portion of the Rule Release identifying the benefits, Mem. Op. 41, it never sought to explain how it was proper for the Commission to rely heavily on these specific "benefits" that already were supplied by existing SEC regulation. Rather, as with the Commission's failure to address its Rule's effects on "liquidity," the court effectively ignored Appellants' argument.

II. Expedition Is Necessary To Prevent Irreparable Injury To Appellants And Their Members.

Expedition is appropriate to avoid imposition of significant, unrecoverable costs on investment companies and their advisers.

Although the Rule's registration provisions became effective on December 31, affected investment companies and advisers are temporarily exempted from extensive "recordkeeping, reporting, and disclosure requirements" that would otherwise apply as a result of the Rule, pending the conclusion of a separate rulemaking intended to "harmonize" the recordkeeping, reporting and disclosure requirements the SEC imposes on investment companies and their advisers with those that are imposed on CPOs under the CFTC's regulatory regime. Appellants seek expedition in order to increase the likelihood that this Court has sufficient time to consider and resolve the merits of this appeal before the effective date for those recordkeeping, reporting, and disclosure obligations, thereby avoiding the need for investment companies and their advisers to comply with burdensome regulations that flow from the Rule even as Appellants pursue a legal challenge to the promulgation of the Rule in the first place. Moreover, expedition will reduce the extent to which investment companies and their service providers experience the unrecoverable costs resulting from being subject to additional regulatory oversight, examination, and potential enforcement by the CFTC and the National Futures Association, the self-regulatory agency for the commodities industry.

The CFTC has acknowledged that "significant burdens may arise from the modifications" effected by the Rule, 77 Fed. Reg. at 11,278, and the expenditures required for investment companies and their advisers to come into compliance with CFTC regulations would likely be substantial. Anticipated costs include the need to reconcile and satisfy disparate regulatory requirements; develop policies and procedures to comply with CFTC regulations; upgrade systems to produce additional reports; hire additional compliance personnel; prepare and distribute additional required disclosure documents and reports; and establish controls necessary to monitor and assure compliance with trading restrictions. *See id.* at 11,277-78. These costs are likely to ultimately be borne by investment company shareholders. The imposition of this harm is "irreparable per se" because the government cannot be made to pay damages to redress it. *Feinerman v. Bernardi*, 558 F. Supp. 2d 36, 51 (D.D.C. 2008); *see also Sottera, Inc. v. F.D.A.*, 627 F.3d 891, 898 (D.C. Cir. 2010).

III. The Public Has An Interest In The Prompt Disposition Of This Case.

The public interest also favors expedition. The final rule in issue here was published in February 2012, and Appellants filed their complaint in April 2012; if this Court does not expedite consideration, it is likely to be two full years before a final determination of the Rule's validity is reached. By contrast, expedition will minimize the changes that occur to the status quo before the Court rules, and may avoid significant costs for investors and the public.

The public interest generally favors maintaining the status quo pending judicial review. Expedition in this case would further that interest by allowing this Court to resolve the merits of the appeal *before* investment companies and their advisers are required to comply with the full panoply of CFTC regulation of CPOs. *See Indep. Bankers Ass'n v. Smith*, 534 F.2d 921, 951 (D.C. Cir. 1976) ("[A] *fait* *accompli* is hardly in the public interest."). Without expedition, investment companies and their advisers may be required to adopt changes to internal compliance policies, as well as trading strategies, in order to comply with CFTC regulations. Those changes could be difficult to reverse.

Expedition would also avoid unnecessary disruption of the markets, and attendant costs for the public and investors. To avoid costs associated with regulation by the CFTC, some investment companies and their advisers may limit or even forego participation in the commodity markets; this, in turn, may restrict investors' access to the commodity markets and may disrupt the markets as investment companies seek to exit existing positions. The CFTC previously exempted investment companies and their advisers from its registration, reporting, and disclosure requirements in substantial part to avoid precisely these costs. *See* 2003 Adopting Release at 47,230. Although these costs began to be incurred when the registration requirement became effective on December 31, they will be magnified when affected investment companies and advisers are subjected to full CFTC regulation, as those regulations will increase the costs associated with registration and the corresponding incentive for investment companies and their advisers to limit their participation in the commodity markets.

The public interest would not be served by requiring investment companies and their advisers to comply with the array of CFTC regulations governing CPOs even as this Court considers a legal challenge to the Rule subjecting them to those regulations. And, conversely, the public interest *would* be served by an expedited schedule that could clarify the legality of the CFTC's registration requirement before the regulatory requirements that flow from registration become fully effective.

CONCLUSION

For the foregoing reasons, the motion for expedited briefing and oral argument should be granted.

Dated: January 3, 2013

Respectfully submitted,

/s/ Eugene Scalia

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellants Investment Company Institute ("ICI") and Chamber of Commerce of the United States of America ("the Chamber") state as follows:

1. Appellant ICI is a non-profit, tax-exempt organization incorporated in the State of Delaware.

2. Appellant the Chamber is a non-profit, tax-exempt organization incorporated in the District of Columbia.

3. Appellants are each non-stock corporations and have no parent organizations.

4. Because Appellants are non-stock corporations, no publicly held corporations hold 10% or more of their stock.

5. Appellants are unaware of any publicly held corporation that is not a party to the proceeding before this Court that has any direct financial interest in the outcome of this proceeding.

PROVISIONAL CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1)(A), Appellants Investment Company Institute ("ICI") and Chamber of Commerce of the United States of America ("the Chamber") state as follows:

(A) <u>Parties and Amici:</u>

The parties in this case are Investment Company Institute (Appellant), the Chamber of Commerce of the United States of America (Appellant), and the United States Commodity Futures Trading Commission (Appellee).

Before the district court, the following entities submitted briefs as *amicus curiae*: the Mutual Fund Directors Forum, the National Futures Association, and Better Markets, Inc.

(B) <u>Rulings Under Review:</u>

Appellants have sought review of the district court's opinion and order issued December 12, 2012, in *Investment Company Institute v. CFTC*, No. 12-cv-612 (D.D.C.).

(C) <u>Related Cases:</u>

Appellants are not aware of any cases related to this appeal.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 2013, I caused the foregoing Emergency Motion to be filed with the Clerk of Court for the United States Court of Appeals for the D.C. Circuit using the appellate CM/ECF system. I also hereby certify that I caused four copies to be hand delivered to the Clerk's Office.

I further certify that I caused the foregoing Emergency Motion to be served on counsel for all parties by the CM/ECF system.

/s/ Eugene Scalia
Eugene Scalia