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BY CM/ECF

Mark Langer
Clerk of Court
United States Court of Appeals
for the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: *Investment Company Institute v. CFTC*, No. 12-5413

Dear Mr. Langer:

I write to inform the Court of two recent rulemakings that are strikingly at odds with the CFTC's complete failure to address liquidity in the rulemaking at issue here, *see* Opening Br. 29-38; Reply Br. 7-11, and bear directly on the Court's questions about liquidity during oral argument. *See* Final Rule: Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. 33,476, 33,497, 33,502, 33,508, 33,564, 33,566, 33,581 (June 4, 2013) ("SEF Rule"); Final Rule: Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade, 78 Fed. Reg. 33,606, 33,617, 33,622, 33,628, 33,629 (June 4, 2013) ("Available-to-Trade Rule").

Both rulemakings consider the impact on liquidity in the course of conducting the cost-benefit analysis required by the CEA. *See, e.g.*, SEF Rule 33,560 (concluding that "increased participation and competition among liquidity providers should result in tighter spreads and greater depth, both key components of improved liquidity"); Available-to-Trade Rule 33,623 (concluding that rule will "provide the building blocks for the development of a robust and liquid centralized trading market . . . thus inviting market participation"). By contrast, when adopting the rule under review here (and proposing its "harmonization" rule) the CFTC *never* addressed whether it would increase or decrease liquidity, even though the Commission was rescinding amendments primarily intended to increase liquidity. To this day, we do not know what effect the Commission believes its rule will have on liquidity.

The extensive attention given to liquidity in these recent rulemakings also contradicts the CFTC's claim at oral argument that liquidity is not necessarily an important consideration when regulating financial markets. Indeed, in considering the appropriate scope of the

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registration requirement for swap execution facilities, the CFTC emphasized that it “believes that the confluence of trading interests from a diverse range of motivations (*e.g.*, risk mitigating and risk taking trades) brings depth to the marketplace and helps to build liquid markets.” SEF Rule 33,483.

Respectfully submitted,

/s/ Eugene Scalia

Eugene Scalia

Enclosure

cc: Counsel of Record (by CM/ECF)