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 A CORRECTED *AMICUS CURIAE* BRIEF

Better Markets, Inc. ("Better Markets") respectfully submits this Motion for leave to file the attached Corrected Brief of Better Markets, Inc. as *Amicus Curiae* in Support of Defendant Commodity Futures Trading Commission ("Corrected Brief").[1] The sole purpose of this Motion is to correct an editing error on one page (page 8) of the original *amicus* brief filed on April 20, 2012 by Better Markets ("April 20 *Amicus* Brief"). The error was identified in Plaintiffs' Motion for Leave to Respond to Better Markets' *Amicus Curiae* Brief, filed at the end of the day on Friday, April 27, 2012.

[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. The Defendant has no objection to this motion. The Plaintiffs oppose it.

As Plaintiffs noted and as set forth below, the April 20 A*micus* Brief incorrectly cited to and quoted from the case of *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009), for a proposition that was actually set forth in the dissent of Justice Stevens, not the majority opinion. *See* April 20 *Amicus* Brief at 8. This was an inadvertent mistake that resulted from an editing error. Better Markets did not intentionally mischaracterize the case and it regrets the error.

This is what the incorrect April 20 *Amicus* Brief stated (immediately above the block quote and the incorrect citation to *Entergy*):

> "Indeed, the Supreme Court has declared that an agency's duty to conduct cost benefit analyses is not to be inferred lightly or without a clear indication from Congress, because that obligation can profoundly affect an agency's approach to regulation. For example:"

This is what the brief should have said and does say in the attached Corrected Brief (also immediately above the corrected block quote and corrected citation to *Entergy*):

> "Indeed, the Supreme Court has declared that an agency's duty to conduct cost benefit analysis is not to be inferred lightly or without a clear indication from Congress. *See Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001); *American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 510 (1981). That's because such an obligation can profoundly affect an agency's approach to regulation:"

Whitman and *American Textile* were cited elsewhere in the April 20 *Amicus* Brief and, therefore, are not new authority in the brief.

Thus, the attached Corrected Brief is the same as the April 20 *Amicus* Brief, with the exception of the date (changed from April 20, 2012 to April 30, 2012), the changes above, the identification of the dissent of Justice Stevens, corrections to the block quote, and changes to page cites in the Table of Authorities. These corrections eliminate the errors regarding the misdescription of the dissent in *Entergy Corp. v. Riverkeep*.

For all of the foregoing reasons, Better Markets respectfully requests that it be granted leave to file the attached corrected *amicus* brief and that the Court enter the attached Proposed Order.

Dated: April 30, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Motion of Better Markets, Inc. for Leave to File a Corrected *Amicus Curiae* Brief; the attached Corrected Brief of Better Markets, Inc. as *Amici Curiae* in Support of Defendant Commodity Futures Trading Commission; and the attached Proposed Order were served this 30th 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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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)

CORRECTED BRIEF OF BETTER MARKETS, INC. AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT COMMODITY FUTURES TRADING COMMISSION

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IDENTITY AND INTEREST OF BETTER MARKETS

Better Markets respectfully submits this brief in support of Defendant Commodity Futures Trading Commission's ("CFTC") Opposition to Plaintiffs' Motion for Summary Judgment, and also in support of the CFTC's Cross Motion for Summary Judgment.

Better Markets is a non-profit organization founded for the purpose of promoting the public interest in the securities and commodities markets. It advocates for greater transparency, accountability, and oversight in the financial system through a variety of activities, including comment letters on proposed agency rules, public advocacy, litigation, and independent research.

As explained more fully below and in the accompanying motion seeking leave to file this *amicus* brief, Better Markets has an interest in this case because the Court's disposition of the issues presented will profoundly affect important goals that Better Markets has worked strenuously to advance, including: (1) the establishment of position limits in accordance with the Dodd-Frank Act to curb excessive speculation in our commodity markets and to protect consumers and businesses from unnecessarily inflated prices for essential goods; (2) the application by regulators and courts of an economic impact test that properly reflects the applicable statutory language and Congressional intent; and (3) the faithful and timely implementation of 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 Act"), through rulemaking that fulfills the letter and spirit of the law.

The Court's disposition of this case will significantly impact all of these interests. Of particular concern to Better Markets is the Plaintiffs' claim that the CFTC failed to conduct an adequate cost benefit analysis when it promulgated the Position Limits Rule for Futures and Swaps, 76 Fed. Reg. 71,626 (Nov. 18, 2011) (to be codified at 17 C.F.R. Part 151) ("Position

Limits Rule" or "Rule"). Requiring the CFTC to conduct such an exhaustive cost benefit analysis would conflict with Congress's statutory language, underlying intent, and policy objectives and pose a grave threat to financial reform. It would nullify an important component of the Dodd-Frank Act aimed at limiting systemic risk and restoring price stability in the commodity markets. It would also imperil regulatory reform more generally by forcing the CFTC to overcome high and unwarranted hurdles as it promulgates its rules. In this brief, therefore, Better Markets seeks to protect its interests in these issues by supporting the Rule, focusing specifically on cost benefit grounds, and bringing to the Court's attention arguments that neither party raises.

SUMMARY OF ARGUMENT

The CFTC fulfilled its duty to consider the costs and benefits of the Rule for three reasons. First, Section 15(a) of the Commodity Exchange Act ("CEA") imposes a limited obligation on the CFTC to consider the costs and benefits of its rules in light of five expressly specified factors, **all of which focus on protecting the public interest**. Congress's careful choice of words in Section 15(a), and the case law construing similar provisions, make clear that the CFTC has broad discretion in discharging this duty. The CFTC has no obligation to quantify costs or benefits, weigh them against each other, or find that a rule will confer a net benefit before promulgating it. The rationale for the flexible obligation in the law is clear: requiring the CFTC to conduct a resource intensive, time consuming, and inevitably imprecise cost benefit analysis as a precondition to rulemaking would significantly impair the agency's ability to implement Congress's regulatory objectives.

Second, as the CFTC considers the costs and benefits of rules implementing the Dodd-Frank Act, it must give proper weight to Congress's overriding objective in the statute. That fundamental objective was to institute a comprehensive set of reforms, including the Position Limits Rule, to prevent another financial collapse and economic crisis, including all the enormous financial losses and human anguish that would occur. Therefore, as the CFTC assessed the costs and benefits of the Position Limits Rule under Section 15(a), it was obligated to consider, above all, the benefits of the entire collection of reforms of which the Rule was an integral part. Indeed, against the backdrop of the worst financial and economic crisis since the Great Depression, it is inconceivable that Congress would enact sweeping reforms and then allow the implementation of those reforms to hinge on the outcome of a rule-by-rule cost benefit analysis that ignored the overriding purpose of the new regulatory framework—and that gave controlling weight to cost concerns from the very industry that precipitated the crisis.

Third and finally, the CFTC fully satisfied its obligations under Section 15(a), as correctly interpreted. The CFTC properly considered the costs and benefits of the Rule and, in fact, exceeded its statutory duty by endeavoring to quantify those elements where feasible. More importantly, throughout the rulemaking process, the agency was guided both implicitly and explicitly by an understanding of the ultimate benefit that Congress was determined to achieve when it enacted the Dodd-Frank Act: avoiding another financial and economic crisis that could very well become a Second Great Depression, with devastating consequences. The CFTC's consideration of the costs and benefits of the Rule was appropriate and should be upheld.

ARGUMENT

I. SECTION 15(A) REQUIRES THE CFTC TO CONSIDER THE COSTS AND BENEFITS OF ITS RULES IN LIGHT OF THE PUBLIC INTEREST, NOT TO CONDUCT A COMPARATIVE OR QUANTITATIVE COST BENEFIT ANALYSIS.

The CFTC has only a narrow statutory duty to **consider** the costs and benefits of its rules, given the plain wording of Section 15(a) of the CEA and the absence of any language requiring an exhaustive cost benefit analysis. It has no statutory obligation to compare or quantify costs and benefits, and it must be guided by the dictates of the public interest, not the burdens of regulation on industry. Congress clearly did not intend to subject the implementation of its regulatory objectives in the commodity markets to the impediments of exhaustive, broad, or particularized cost benefit analysis.

A. The obligation to "consider" certain factors in the rulemaking process is a statutorily limited duty that confers broad discretion on the CFTC.

The CFTC's obligation to assess the economic impact of its rules is determined first and foremost by what Congress actually required of the agency. Section 15(a) simply directs the CFTC to "consider the costs and benefits of the action of the Commission," in light of:

> (A) considerations of protection of market participants and the public; (B) considerations of the efficiency, competitiveness, and financial integrity of futures markets; (C) considerations of price discovery; (D) considerations of sound risk management practices; and (E) other public interest considerations.

7 U.S.C. § 19(a).

The language of this provision, and the case law that construes similar wording, make clear that Congress intended the CFTC to exercise wide discretion in the way it fulfilled this obligation. Where a statute mandates certain considerations without specifying how to evaluate those considerations or the weight they deserve, such as here, courts are to respect an agency's views. In fact, the Supreme Court has long recognized that when statutorily mandated considerations are not "mechanical or self-defining standards," they "imply wide areas of judgment and therefore of discretion." *Sec'y of Agric. v. Cent. Roig Ref. Co.,* 338 U.S. 604, 611 (1950).

Consequently, "[a]s long as the agency gives fair consideration to the relevant factors mandated by law, **the importance and weight to be ascribed to those factors is the type of judgment that courts are not in a position to make**." *Florida Manufactured Hous. Ass'n v. Cisneros*, 53 F.3d 1565, 1577 (11th Cir. 1995) (emphasis added); *see also Natural Res. Def. Council v. EPA,* 25 F.3d 1063, 1071 (D.C. Cir. 1994) (Since the Administrator considered the relevant factors, he "was free to emphasize or deemphasize particular factors, constrained only by the requirements of reasoned agency decision making."); *New York v. Reilly,* 969 F.2d 1147, 1150 (D.C. Cir. 1992) ("Because Congress did not assign the specific weight the Administrator should accord each of these factors, [he] is free to exercise his discretion in this area.").

Indeed, when Congress requires an agency merely to "consider" certain factors in its rulemaking, a court's role in reviewing the agency's discharge of that duty is extremely limited. Courts are not to find a rule arbitrary and capricious within the meaning of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* ("APA"), unless the agency has "wholly failed" to comply with the statutory requirement, or if there is a "complete absence of any discussion of a statutorily mandated factor" in the agency's reasoning. *Pub. Citizen v. Fed. Motor Carrier Safety Admin.,* 374 F.3d 1209, 1216 (D.C. Cir. 2004) (citing *United Mine Workers v. Dole,* 870 F.2d 662, 673 (D.C. Cir. 1989)).[1]

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[1] The court in *Public Citizen*, 374 F.3d 1209, expressed its view that the agency had a duty to "weigh" certain costs and benefits even though the applicable statute simply required the agency to "consider" costs and benefits. However, the court's discussion of cost benefit analysis was pure dicta. The court made very clear that its holding was based solely on the agency's "dispositive" failure "to consider a statutorily mandated factor—the impact of the rule on the

Thus, Congress's decision to frame Section 15(a) in terms of a simple duty to "consider" certain broad factors establishes that the CFTC has wide discretion in how it evaluates the economic impact of its rules. The Plaintiffs' argument that the CFTC must conduct a rigid, comparative, and quantitative cost benefit analysis in its rulemaking process conflicts with this statutory language.

B. <u>The nature of the five factors included in Section 15(a) demonstrates that Congress's primary goal was protecting the public interest, not limiting the costs of regulation imposed on industry.</u>

The nature of the five factors that the CFTC must consider under Section 15(a) reflects Congress's primary concern with the need to fashion regulations that serve the public interest and accomplish the agency's mission, not with a need to spare industry the costs of regulation. Without exception, each factor relates to a public benefit that arises from a robustly regulated marketplace, including preventing abuse, promoting competition, enhancing transparency, and limiting systemic risk. 7 U.S.C. § 19(a)(2). None of the listed factors mentions any industry-focused concerns, such as compliance costs or the feasibility of conforming to rule requirements.[2] Removing any doubt, the fifth and final factor in Section 15(a) requires the

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health of drivers." *Id.* at 1216. Furthermore, the court read the cost benefit obligation in tandem with a separate statutory provision, which required the agency not only to consider costs and benefits, but also to "deal with" a long list of specific issues relating to commercial motor vehicle safety. *Id.* at 1221.

[2] The factors set forth in Section 15(a) closely parallel the overall objectives of the CEA. According to the findings and purposes section of the CEA, Congress determined that transactions in the commodities markets "are affected with a national public interest." 7 U.S.C. § 5(a). To foster this public interest, the enumerated purposes of the CEA include "to protect all market participants," to promote "fair competition," to "prevent price manipulation," and to avoid "systemic risk," 7 U.S.C. § 5 (b). All of these purposes are reflected in Section 15(a). *See also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 54-55 (1983) ("Congress intended safety to be the pre-eminent factor under the [National Traffic and Motor Vehicle Safety Act of 1966] and "each standard must be related thereto.").

CFTC to consider generally "any **other** public interest considerations." 7 U.S.C. § 19(a)(2)(E) (emphasis added).

Thus, rather than incorporating a list of factors dominated by industry costs and concerns, or even a balanced mix of industry and public interest factors, Section 15(a) requires the CFTC to focus **exclusively** on public interest goals as it considers the costs and benefits of its rules. The CFTC's own interpretation of its duty under Section 15(a) recognizes the dispositive role of the public interest. In the Adopting Release for the Position Limits Rule, the CFTC confirmed that "[t]he Commission may, in its discretion, give greater weight to any one of the five enumerated areas and may determine that, notwithstanding costs, a particular rule protects the public interest." 76 Fed. Reg. 71,662.

The dominant emphasis in Section 15(a) on the public interest is further evidence that Congress did not intend the CFTC to engage in a weighing or netting of costs and benefits as if the two elements were of equal importance under this statutory provision. In fact, one of the few constraints on the CFTC under Section 15(a) is that it must place the public interest first among its regulatory objectives, and above concerns regarding the costs of regulation. This subordination of cost concerns can hardly be surprising, since the CFTC is indeed a regulatory agency, and Congress has already determined that costs are warranted when it directs such an agency to regulate.

C. <u>The absence of language in Section 15(a) requiring a comparative or quantitative cost benefit analysis conclusively refutes any attempt to impose such an onerous burden on the CFTC, as Congress carefully formulates an agency's obligation to assess the economic impact of its rules.</u>

The CFTC's obligation under Section 15(a) is also determined by the conspicuous **absence** of the type of language Congress uses when it wants an agency to conduct a rigorous cost benefit analysis. Nowhere in Section 15(a) did Congress incorporate any language requiring the CFTC to employ a specific methodology, to quantify costs and benefits, or to weigh them against each other as a precondition for promulgating a rule. Congress carefully chooses economic impact standards, and when it wants agencies to apply cost benefit analysis involving quantification, comparative weighing, or net benefit findings, it makes its intention clear.

The absence of such language in Section 15(a) was not unintentional. It reflects an underlying Congressional determination that financial market regulation is a legislative imperative that must not hinge on the outcome of an overly burdensome cost benefit analysis applied to each implementing rule. Thus, rigorous cost benefit analysis was never intended to apply to the CFTC and it cannot be established by implication.

Indeed, the Supreme Court has declared that an agency's duty to conduct cost benefit analysis is not to be inferred lightly or without a clear indication from Congress. *See Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001); *American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 510 (1981). That's because such an obligation can profoundly affect an agency's approach to regulation:

> Because benefits can be more accurately monetized in some industries than in others, Congress typically decides whether it is appropriate for an agency to use cost benefit analysis in crafting regulations. Indeed, this Court has recognized that "**[w]hen Congress has intended that an agency engage in cost benefit analysis, it has clearly indicated such intent on the face of the statute.**" *American Textile Mfrs. Institute, Inc., v. Donovan*, 452 U.S. 490, 510, 101 S. Ct. 2478, 69 L. Ed. 2d 185 (1981). Accordingly, we should not treat a provision's silence as an implicit source of cost benefit authority, particularly when such authority is elsewhere expressly granted and it has the potential to fundamentally alter an agency's approach to regulation. Congress, we have noted, "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions--it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001).

Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 238-39 (2009) (emphasis added) (Stevens, J., dissenting).

For decades, Congress has imposed a variety of distinct economic analysis obligations on regulatory agencies, as it deems necessary and appropriate, to achieve different Congressional objectives. When Congress intends cost benefit analysis to apply, it makes that obligation explicit, often requiring a specific weighing or quantification. When Congress does not intend that result, it imposes a rulemaking requirement that is entirely free from cost benefit analysis, given the overriding importance of the particular statutory objectives at stake. *See, e.g., Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 471 (2001) (holding that section of Clear Air Act requiring EPA to set air quality standards at a level to protect the public health "unambiguously bars cost considerations" from the standard-setting process). And, when Congress wants to impose a limited and flexible obligation on the agency to consider certain consequences of its rules in light of important goals that serve the public interest, it makes that intention clear, without requiring that a comparative or quantitative cost benefit analysis be performed.

The statutes in which Congress explicitly mandates a **balancing** of costs and benefits or some form of quantification stand in sharp contrast to Section 15(a). For example, the Flood Control Act, 33 U.S.C. § 701a, one of the earliest examples of a statute requiring cost benefit analysis, explicitly requires a balancing of enumerated benefits against enumerated costs. Many federal statutes incorporate this same detailed and highly prescriptive language requiring agencies to balance specific costs and benefit. Other examples include the Clean Water Act of 1977, 33 U.S.C. § 1314 (b)(4)(B) (1976 ed., Supp. III); the Energy Policy and Conservation Act of 1975, 42 U.S.C. § 6295 (c) and (d) (1976 ed., Supp. II); the Clean Air Act Amendments of 1970, 42 U.S.C. § 7545 (c)(2)(B) (1976 ed., Supp. III); the Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1347 (b) (1976 ed., Supp. III); and the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1312 (b)(1)-(2), 1314 (b)(1)(B).

Courts refuse to imply a duty to perform specific balancing of costs and benefits when a statute, like Section 15(a), does not explicitly mandate it. In so doing, courts readily distinguish between those statutes that require a balancing of costs and benefits, and those in which no balancing is required. *See Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 512 n.30 (1981); *Reynolds Metal Co. v. EPA*, 760 F.2d 549, 565 (4th Cir. 1985). For example, the Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1314(b)(2)(B), requires the agency to "take into account" direct and indirect costs and other "appropriate" factors in promulgating the best available technology levels. The court in *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1045 (D.C. Cir. 1978), found that this language does **not** require the agency "to use any specific structure such as a balancing test in assessing the . . . factors" nor "to give each . . . factor any specific weight." *See also Cent. Ariz. Water Conservation Dist. v. EPA*, 990 F.2d 1531, 1542, n.10 (9th Cir. 1993) (language in 42 U.S.C. § 7491(g)(1) requiring "consideration" does not require a cost benefit analysis); *American Petroleum Inst. v. EPA*, 858 F.2d 261, 265 & n.5 (5th Cir. 1988) (contrasting different standards based on specific statutory language).

Thus, the case law confirms what is plain from the statute: Section 15(a) does not include language of comparison and this is conclusive evidence that Congress did not impose a duty to balance costs against benefits.

Similarly, statutes that require a **quantification** of costs and benefits are worded very differently from Section 15(a). For example, the Safe Drinking Water Amendments of 1996, 42 U.S.C. § 300g-1(b)(3), impose a duty on the Environmental Protection Agency to seek public comment on, and use analysis of, specific factors, including the "[q]uantifiable and nonquantifiable health risk reduction benefits," the "[q]uantifiable and nonquantifiable costs" and "[t]he incremental costs and benefits associated with each alternative."

Recognizing these deliberate Congressional choices, courts have routinely held that an agency need not quantify the costs and benefits of a rule when a statute does not require it. *See, e.g., FMC Corp. v. Train*, 539 F.2d 973, 978-979 (4th Cir. 1976) (finding the Federal Water

Pollution Control Act, 33 U.S.C. §§ 1314(b)(1)(B), (b)(2)(B) and 1316 do not require quantification of the benefits in monetary terms). In fact, the D.C. Circuit has explicitly recognized that an agency's "predictions or conclusions" do not necessarily need to be "based on a rigorous, quantitative economic analysis." *American Fin. Services Ass'n. v. FTC*, 767 F.2d 957, 986 (D.C. Cir. 1985); *see also Pennsylvania Funeral Directors Ass'n v. FTC,* 41 F.3d 81, 91 (3d Cir. 1994) (recognizing that "much of a cost-benefit analysis requires predictions and speculation, in any context," and holding that the "absence of quantitative data is not fatal").

The Plaintiffs rely heavily on the D.C. Circuit's decision in *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011), for the proposition that the CFTC must quantify and compare the costs and benefits of its rules. *See* Plaintiffs' Memorandum at 25-29. However, that decision is distinguishable on multiple grounds. The court interpreted a different securities law provision, one that did not include the five public interest factors present in Section 15(a). Further, it dealt with an SEC rule that was authorized in the Dodd-Frank Act, whereas the Position Limits Rule was mandated. The court also failed to consider the precedents discussed above that interpret "consider" as imposing a limited duty, that require explicit statutory language before finding that cost benefit analysis applies, and that mandate judicial deference to agency judgments. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (In reviewing rules, "a Court is not to substitute its judgment for that of the agency.").

The court in *Business Roundtable* also failed to weight the unique challenges surrounding cost benefit analysis, discussed below, and the fact that it actually stands as an obstacle to effective, efficient, and timely implementation of Congress's objectives in the regulation of the financial markets. The impact of *Business Roundtable* proves the point. As a direct result of the court's decision, Congress's policy determination in the Dodd-Frank Act that proxy access was an appropriate regulatory measure was nullified. Investors have therefore been deprived of that enhancement in the regulation of corporate governance. Furthermore, the decision has induced regulatory paralysis at the SEC, slowing the agency's implementation of the Dodd-Frank Act to a crawl, and forcing the agency to reallocate scarce resources. *See* Jesse Hamilton, *Dodd-Frank Rules Slow at SEC After Cost Challenge*, Bloomberg, Mar. 6, 2012.

With respect to commodities regulation, Congress clearly chose **not** to require the CFTC to either balance or quantify the costs and benefits associated with its rules. Rather, it elected to impose a limited and flexible duty to "consider" the costs and benefits in light of five factors, with the public interest as the preeminent concern. This reflects Congress's longstanding and considered judgment that the benefits of protecting the public interest in commodity regulation must **not** be subordinated to concerns about the costs of regulation.[3]

D. <u>Requiring a stringent economic analysis under Section 15(a) would thwart the CFTC's ability to implement Congress's regulatory objectives, including, most importantly, the reforms in the Dodd-Frank Act.</u>

The fundamental rationale for Congress's determination not to require the CFTC to conduct comparative or quantitative cost benefit analysis in its rulemaking is clear: it would conflict with, and thereby frustrate, the CFTC's ability to implement Congress's objectives, including regulatory reform under the Dodd-Frank Act.

[3] The legislative proposals that seek to impose a duty to conduct cost benefit analysis on the independent regulatory agencies further confirm this view. *See, e.g.*, H.R. 1840, 112th Cong. (introduced May 11, 2011); Financial Regulatory Responsibility Act of 2011, S. 1615, 112th Cong. (introduced Sept. 22, 2011). For example, H.R. 1840 would amend Section 15(a) to require the CFTC to quantify costs and benefits, to refrain from promulgating a rule unless the benefits justify the costs, and to consider in the process a host of new factors aimed at protecting industry rather than the public interest. Courts have found that such proposed legislation is relevant in finding that an agency's current statute does not already mandate a specific analysis of a rule's costs and benefits. *See, e.g., American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 512, n.30 (1981) (citing a Senator's proposal as evidence that the current law did not require cost benefit analysis).

The process of evaluating the costs and benefits of regulation is complex, time intensive, costly, speculative, and imprecise. The Office of Management and Budget, the steward of executive branch compliance with cost benefit analysis, acknowledges the inherent difficulty in quantifying regulatory costs and benefits:

> Many rules have benefits or costs that cannot be quantified or monetized in light of existing information. . . . In fulfilling their statutory mandates, agencies must often act in the face of substantial uncertainty about the likely consequences. In some cases, quantification of various effects is highly speculative.

OFFICE OF MGMT & BUDGET, 2011 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES, at 4 (2011).[4]

Thus, under cost benefit analysis, many advantages of regulation, no matter how important to society or to properly functioning markets, may be disregarded or simply not captured in the calculation. *See American Fin. Services Ass'n v. FTC*, 767 F.2d 957, 986 (D.C. Cir. 1985); *Pennsylvania Funeral Directors Ass'n v. FTC*, 41 F.3d 81, 91 (3d Cir. 1994). The process is not only imprecise, it is also enormously time consuming and resource intensive.

[4] The CFTC and the other independent regulatory agencies are expressly **excluded** from executive order provisions that require agencies to conduct cost benefit analysis. For example, Executive Order 12,866 establishing the modern era duty to conduct cost benefit analysis, and providing for the Office of Management and Budget's ("OMB") review of agency rules, expressly excludes all agencies "considered to be independent regulatory agencies." Exec. Order No. 12,866, 58 Fed. Reg. 51,735, § 3(b) (Oct. 4, 1993). Similarly, OMB's guidance in Circular A-4 for conducting cost benefit analysis does not apply to the CFTC's rulemaking process. OFFICE OF MGMT & BUDGET, 2011 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES, at 4. The two recent executive orders issued by President Obama in 2011 did nothing to alter these limitations or to impose any obligation on independent regulatory agencies to conduct cost benefit analysis. In fact, those orders scrupulously avoided doing so. *See* Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011); Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 14, 2011).

Because of these challenges, the application of cost benefit analysis can delay or prevent the achievement of the ultimate objectives underlying a statutory scheme, whether it be controlling environmental pollution or ridding the financial markets of systemic risk and abusive conduct. *See* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 814 n.29 (2008) (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. 363, 391-93(1986) for the proposition that "judicial requirements of an exhaustive investigation of alternatives may prevent agencies with scarce resources from making even minor changes," and Jerry L. Mashaw & David L. Harfst, *The Struggle for Auto Safety*, at 149-51 (Harvard 1990), for the proposition that the "hard look" judicial review of cost benefit analysis led the "National Highway Traffic Safety Administration to avoid rulemaking and focus on product recalls").

In fact, critics of cost benefit analysis have long warned that it has been used as a "device not for producing the right kind and amount of regulation, but for diminishing the role of regulation even when it was beneficial." *See* Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHIC. L. REV. 1, 5-6 (1995). As observed by one court, the imposition of technical and burdensome requirements relating to cost benefit analysis "serve[s] as a dilatory device, obstructing the agency from proceeding with its primary mission." *FMC Corp. v. Train*, 539 F. 2d 973, 978-79 (4th Cir. 1976).

These challenges and uncertainties apply with special force in the context of financial market regulation, where the costs and benefits are often contingent, unpredictable, and exceedingly difficult to quantify. The costs of compliance will often vary greatly depending on how a market participant chooses to adapt to a new regulation. Assessing the benefits of a financial regulation is even more difficult, since it typically involves speculative predictions about injuries to investors or other market participants that are avoided because of the rule. It is impossible to reliably quantify the precise monetary value of the losses that are **never incurred** by investors as a result of a new regulatory protection, or the cascading economic harms that **are avoided** when financial institutions are subjected to a stronger prudential standard and, as a direct result, do **not** collapse.[5]

On an even larger scale, it is not an overstatement to say that the ultimate goal of the Dodd-Frank Act is preventing a Second Great Depression. While the enormous benefit of avoiding such a calamity can be monetized to a degree, the human suffering it would cause could never be adequately measured in a quantitative cost benefit analysis. *See* discussion *infra* at II.D.

In light of these difficulties, encumbering financial regulators like the CFTC with the duty to conduct rigorous cost benefit analysis on a rule-by-rule basis would severely hamper, if not defeat, their ability to implement crucial reforms, such as those found in the Dodd-Frank Act. This is a result that Congress clearly did not intend. After witnessing the financial destruction caused by the crisis and spending trillions of dollars in emergency measures to contain it, Congress determined that the sweeping reforms in the Dodd-Frank Act were essential to protect

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[5] One reason for the difficulty in quantifying costs and benefits stems from a lack of accessible data: it "doesn't (sic) exist or [it is] in the hands of market participants who don't want to share valuable intelligence." Josh Boak, *Dodd-Frank foes beating path to courthouse door*, POLITICO.COM, Nov. 29, 2011, http://www.politico.com/news/stories/1111/69353.html. Moreover, industry proponents themselves struggle with the challenge of developing concrete measurements of costs and benefits, preferring instead simply to criticize the analyses performed by the agencies. *See* John Kemp, *The Trojan Horse of cost benefit analysis*, REUTERS, Jan. 3, 2012, http://blogs.reuters.com/great-debate/2012/01/03/the-trojan-horse-of-cost-benefit-analysis/ (noting that Plaintiffs here, which are challenging the CFTC for failing to precisely estimate the benefits of the position limits rule, provided a study during the rule's comment period that "failed to measure its benefits, [and] dismiss[ed] them as 'very modest relative to the added costs of execution.'"); *see also* Peter Eavis, *Making a Theoretical Case About Volcker*, DEALBOOK N.Y. TIMES, Feb. 14, 2012, http://dealbook.nytimes.com/2012/02/14/making-a-theoretical-case-against-volcker/ (noting the lack of data provided by industry in its lengthy opposition to the Volcker rule, which prohibits proprietary trading).

investors, taxpayers, the financial system, and the economy from another financial crisis. It is inconceivable that Congress would intend the regulatory agencies to second guess this legislative determination and condition the implementation of those reforms on the outcome of cost benefit analyses.

II. WHEN EVALUATING THE COSTS AND BENEFITS OF RULES PROMULGATED UNDER THE DODD-FRANK ACT, THE CFTC MUST ALSO CONSIDER CONGRESS'S OVERRIDING GOAL, WHICH WAS TO PREVENT ANOTHER FINANCIAL CRISIS AND THE ENORMOUS COSTS IT WOULD INFLICT.

In considering the costs and benefits of its rules under Section 15 (a), the CFTC must also consider and place the highest importance on the overriding objective of the legislation that gave rise to the rule. Here that legislation is the Dodd-Frank Act, and its core objective is clear: preventing another financial crisis and avoiding the massive costs that it would impose. As the CFTC implements the Dodd-Frank Act, it must always consider this larger goal. Further, this Court, and any court called upon to review the CFTC's rules, must also be guided by Congress's decision to fundamentally reform our regulatory system for the purpose of avoiding another financial crisis.

A. <u>The CFTC's obligation to consider Congress's overriding goal of preventing a future crisis derives from Section 15(a) and from the Dodd-Frank Act itself.</u>

The CFTC's duty to consider the collective benefits of the Dodd-Frank Act is based upon Section 15(a) of the CEA and also upon the Act itself. As discussed above, Section 15(a) expressly requires the CFTC to consider not only specifically enumerated aspects of the public interest when it promulgates rules, but also "**any other public interest considerations**." This provision imposes a contextual obligation to consider whatever public interest goals a rule may serve under the conditions prevailing at the time of its promulgation. In the aftermath of the financial crisis, there is no more compelling public interest than helping to prevent another crisis.

In addition, courts recognize that the fundamental remedial objective of a law, such as the Dodd-Frank Act, confers broad discretion on an agency as it considers the costs and benefits of a rule. In the environmental context, for example, courts have long been guided by Congress's overriding statutory goals as they define the scope of an agency's duty to assess the economic impact of their rules. In *FMC Corp. v. Train*, 539 F.2d 973 (4th Cir. 1976), chemical manufacturers challenged water pollution standards set by the EPA, citing inadequate cost benefit analysis. The statute simply required the agency to "consider" costs in establishing effluent standards, but industry representatives claimed that this provision required the agency to both quantify and compare costs and benefits. The Fourth Circuit Court of Appeals rejected the claim, holding that the agency had extremely broad discretion in assessing the costs of pollution abatement measures, given Congress's overriding purpose in passing the Clean Water Act:

> The Act's overriding objective of eliminating by 1985 the discharge of pollution into the waters of our Nation indicates that Congress, in its legislative wisdom, has determined that the many intangible benefits of clean water justify vesting the Administrator with broad discretion, just short of arbitrary and capricious, in his consideration of the cost of pollution abatement.

Id. 978-79.

A similar analysis applies to the Dodd-Frank Act. The Act's overriding objective of reforming our financial system so that the financial markets never again precipitate a crisis gives the CFTC and this Court broad latitude—indeed, an affirmative obligation—to consider the impact of the agency's rules in terms of their much larger collective benefits.

B. <u>The indisputable objective of the Dodd-Frank Act is avoiding another financial crisis, and this imperative underlies each rulemaking provision included in the statute.</u>

The purpose of the Dodd-Frank Act is "[t]o promote the financial stability of the United States" in order to prevent another financial crisis. Dodd-Frank Act, Preamble. The statute itself reflects this core purpose through its sheer breadth and detail. It addresses weaknesses in every major financial sector, including derivatives, banking, securities, and insurance. It establishes an entirely new regulatory framework where none formerly existed in the swaps markets; it fundamentally revises the tools necessary to monitor, limit, and remediate systemic risk in the banking sector; and it expands the existing regulatory structure in the commodities markets.

Among its provisions are new standards relating to mandatory clearing and exchange trading of swaps, capital and margin requirements, business conduct standards, prohibitions on proprietary trading and investment in hedge funds by banks, position limits in the futures and swaps markets, resolution authority, and corporate governance. Congress's intent was unmistakable: Fundamentally change the entire regulatory structure so our financial markets can never again generate the levels of risk, recklessness, and abusive conduct that triggered the 2008 financial crisis.

The legislative history is replete with examples describing the Dodd-Frank Act in terms that clearly reflect this single overarching purpose. *See, e.g.*, S. REP. No. 111-176, at 2 (2010) (stating that "the primary purpose of the Act is to promote financial stability" and reciting the many different measures adopted to achieve that goal). Members of Congress consistently recognized the enormous costs of the crisis, and the need "to stop what happened from ever happening again," as the driving forces behind the Act. Senator Dorgan, 156 Cong. Rec. S 5931 (daily ed. July 15, 2010). For example, Senator Dodd, Chairman of the Senate Banking Committee, stated:

> The American public is sitting there in sort of stunned disbelief. Here we all acknowledge this huge problem that needs to be addressed for the 8.5 million people who have lost their job, the 7 million who have lost their homes, their retirement income. We know from the statistics what this financial crisis has caused.

156 Cong. Rec. S 2688 (daily ed. Apr. 27, 2010).

Similarly, Senator Dorgan expressed his concern for the taxpayers, estimating that it cost them "the Federal Reserve bailout commitment, $7.8 trillion; FDIC, $2 trillion; Treasury, $2.7 trillion; HUD, $300 billion—that is $12.8 trillion . . . lent, spent or committed on behalf of the American taxpayer to try to get out of this deep hole." 156 Cong. Rec. S 2684 (daily ed. Apr. 27, 2010). He also recognized that "15 or 16 million got out of bed [that] morning jobless, looking for work and can't find work," *id.* and that they are the "victims of this cesspool of greed we have watched for far too long." 156 Cong. Rec. S 5931 (daily ed. July 15, 2010).

Senator Carl Levin, Chairman of the Senate Permanent Subcommittee on Investigations, also commented that "for too long, too many firms on Wall Street have had free reign to profit at the expense of their own clients, to engage in the riskiest sorts of speculation, to prosper from their risky bets when they pan out, and to have the taxpayers cover the losses when they do not pan out." 156 Cong. Rec. S 5931 (daily ed. July 15, 2010). The solution was the Dodd-Frank Act, which Senator Levin declared was necessary to "put an officer back on the beat on Wall Street so the jobs, homes, and futures of Americans are not again destroyed by excessive greed." *Id.*[6]

Members of Congress also viewed position limits as a key component of the law. In acknowledging the benefits of the Act, Senator Dianne Feinstein championed not only the provisions on "reporting, clearing, and capital requirements," but also those on position limits. 156 Cong. Rec. S 2698-99 (daily ed. Apr. 27, 2010) ("Position limits provide an important restriction on market manipulation and the amount of risk that can build up in any one market

[6] When signing the Dodd-Frank Act, President Obama also explicitly recognized the costs of the crisis and proclaimed that the Act would "put a stop to taxpayer bailouts once and for all." President Barak Obama, Office of the Press Secretary, The White House, Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act (July 21, 2010).

participant.”). Senator Cantwell also recognized the benefits of position limits as part of the comprehensive financial reform, and repeatedly lamented the prior law under which “we had no speculation limits, we had no capital requirements, and we had this high-risk manipulation and excessive speculation.” 156 Cong. Rec. S 3606-07(daily ed. May 12, 2010); *see also* 156 Cong. Rec. S 5932 (daily ed. July 15, 2010); 156 Cong. Rec. S 3966 (daily ed. May 19, 2010); 156 Cong. Rec. S 2676-78 (daily ed. Apr. 27, 2010).

During a discussion of the amendment that became the text of Section 737 of the Dodd-Frank Act, which required the CFTC to impose position limits, Representative Collin Peterson stated that the provisions were designed “to finally bring real accountability and oversight to the over-the-counter derivatives market,” through mandatory clearing, capital and margin requirements, business conduct standards, and position limits. 156 Cong. Rec. H 14705-06 (daily ed. Dec. 10, 2009). According to Representative Peterson, “[t]he amendment strengthens confidence in trader position limits on physically deliverable commodities as a way to prevent excessive speculation.” *Id.*

Section 737 of the Dodd-Frank Act was thus an important component of the larger, integrated collection of reforms deemed necessary for bringing stability to the financial markets and preventing another crisis. In this context, it is untenable to claim that the benefits of the Rule, or any other element of the reform package, can only be viewed in isolation, divorced from the larger, congressionally established framework.

C. Congress passed the Dodd-Frank Act knowing that it would impose significant costs on industry, and determined those costs were not only justified but necessary to stabilize our financial system and avoid another financial crisis.

Congress determined that the financial industry would have to bear very substantial costs to make our financial markets more stable and to ensure that the public would never again have to pay for Wall Street's abuses. Those costs include the elimination of extremely profitable lines of business as well as significant and ongoing compliance costs.

For example, the Dodd-Frank Act prohibits bank holding companies from almost all proprietary trading and investing in hedge funds, which has been a source of tens of billions of dollars in revenue for the largest banks. The law also provides that many derivatives now traded over-the-counter must henceforth be traded on exchanges and swap execution facilities and cleared through derivatives clearing organizations. This too will require the financial industry to incur significant set-up costs, ongoing compliance costs, margin and collateral costs, and the costs of reduced revenues and profits. And of course, Congress determined that new speculative position limits would have to be established for futures and swaps, reducing the profits previously available to free-reigning speculators in those markets.

Congress fully understood these consequences. It knew that every one of these regulatory reforms would impose costs, in some cases totaling billions of dollars. The Dodd-Frank Act reflects Congress's unflinching determination to increase the financial industry's costs across the board and very substantially—or, more accurately, to shift those costs back to industry from a society that has paid the bill for industry's unregulated excesses. In short, Congress conducted its own cost benefit analysis and concluded that the enormous collective benefits of the law far exceeded the costs and lost profits that industry would have to absorb. *Cf. BASF Wyandotte Corp. v. Costle,* 598 F.2d 637, 657 (1st Cir. 1979) ("Congress 'self-consciously made the legislative determination that the health and safety gains that achievement of the Act's aspirations would bring to future generations will in some cases outweigh the economic dislocation it causes to the present generation.'") (citing *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1037 (D.C. Cir. 1978)).

Requiring the financial regulators like the CFTC to subject their congressionally mandated rulemaking to a cost benefit analysis would ignore this calculation that Congress has already made. Indeed, it would threaten to defeat the very purpose of the law. Congress did not enact such a vital set of reforms only to have the implementing agencies—or reviewing courts—effectively repeal them out of concern for the imposition of costs that Congress has already determined to impose.

D. <u>The benefits of avoiding another financial crisis are enormous, easily exceeding $5.7 trillion, measured not just in terms of the current crisis but also in light of a potentially worse financial disaster that may befall our country if reform is not fully implemented.</u>

A reasonable starting point for determining the cost of a future crisis is the cost of the crisis that began in 2007, reached a crescendo in 2008, and continues to be felt to this day. It is impossible at this point to quantify all of the consequences of the still-unfolding financial crisis, but one widely accepted measure is the difference between actual and potential gross domestic product ("GDP"). **By this formula, the cost of the 2008 financial crisis is currently $2.6 trillion and it is expected to eventually total $5.7 trillion.** CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2012 TO 2022 at 26, Jan. 2012 ("CBO Outlook 2012-2022").

This measure of the crisis is actually incomplete, however, because the enormous loss of output reflected in the GDP figures does not include other economic costs, such as the destruction of human capital on a wide scale through prolonged unemployment;[7] the elimination

[7] Unemployment now rests at 8.3 percent, representing 12.8 million Americans without work, 42.9 percent of whom have been jobless for 27 weeks or more. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, NEWS RELEASE, THE EMPLOYMENT SITUATION – JANUARY 2012 (Feb. 13, 2012). *See also* BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, ECONOMIC NEWS RELEASE, TABLE A-15. ALTERNATIVE MEASURES OF LABOR UNDERUTILIZATION, Mar. 09, 2012 (discussing U-6 rate, a broader measure of unemployment).

of future policy flexibility due to recession-created government deficits;[8] dramatic losses in household wealth such as home values[9] and assets held retirement accounts;[10] and widespread human suffering.[11]

Moreover, the actual costs of a future crisis are almost certain to be far greater than what we have witnessed since 2007. This is attributable to the fact that our fiscal and monetary capacities to institute remedial measures and to absorb the costs of a future crisis have now become so depleted. With the annual budget deficit currently exceeding 1.2 trillion dollars, *see* CBO Outlook 2012-2022, at Summary Table 1, the Treasury will have far fewer fiscal tools at its disposal with which to manage another financial crisis. This vulnerability will persist until something approximating a full recovery has been achieved, a milestone that is not expected to be reached for a very long time.

In short, the financial collapse caused the worse economic conditions since the Great Depression, and a future crisis may well precipitate a Second Great Depression if the reform

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[8] *See* KATHY RUFFING & JAMES R. HORNEY, CENTER ON BUDGET AND POLICY PRIORITIES, ECONOMIC DOWNTURN AND BUSH POLICIES CONTINUE TO DRIVE LARGE PROJECTED DEFICITS: ECONOMIC RECOVERY MEASURES, FINANCIAL RESCUES HAVE ONLY TEMPORARY IMPACT, at 7 (May 10, 2011) (discussing the deficit resulting from the deterioration in the economy and government responses to the crisis).

[9] Home values, for example, have declined 33.7% since the crisis began, representing $7 trillion in household wealth lost. BOARD OF GOVERNORS OF THE FED. RESERVE SYS., WHITE PAPER, THE U.S. HOUSING MARKET: CURRENT CONDITIONS AND POLICY CONSIDERATIONS (Jan. 4, 2012).

[10] During 2008, retirement accounts lost $2 to $3 trillion in value. AARP's International Idea Exchange Series, Executive Summary of Global Financial Crisis - Implications for Retirement in the US and Abroad, Idea Exchange with Robert Holzmann, Dec. 16, 2008.

[11] For example, the number of families falling below the poverty line has climbed steadily since 2007, rising from 12.5 to 15.1 percent in 2010. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010, at 14 (Sept. 2011). *See also* USDA, SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (Mar. 1, 2012), http://www.fns.usda.gov/pd/34snapmonthly.htm (discussing number of people on food stamps); USDA, NATIONAL SCHOOL LUNCH PROGRAM: PARTICIPATION AND LUNCHES SERVED, Feb. 1, 2012, http://www.fns.usda.gov/pd/slsummar.htm (discussing the number of children receiving free or reduced price lunches).

effort fails. The costs of that scenario are almost unimaginable, and they starkly reinforce the need to implement regulatory reform as quickly and effectively as possible, as Congress intended.

As discussed above, the costs of the crisis, both quantifiable and unquantifiable, were all considered by Congress as it wrote the Dodd-Frank Act. Congress's resolve to prevent another crisis, and to spare the American people the trauma it would cause, must serve as the guiding objective for regulators and courts as the implementation of the Dodd-Frank Act unfolds.

III. THE CFTC COMPLIED WITH ITS OBLIGATIONS UNDER SECTION 15(A) BY CONSIDERING THE COSTS AND BENEFITS OF THE RULE IN LIGHT OF THE OVERRIDING NEED TO IMPLEMENT REFORMS THAT WOULD HELP AVERT ANOTHER FINANCIAL CRISIS.

The CFTC complied with its statutory duty under Section 15(a). First, the agency **considered** costs and benefits in light of each of the Section 15(a) factors, performing a thorough qualitative assessment of the effects of the Rule. Second, the CFTC appropriately considered, both implicitly and explicitly, Congress's determination that all of the reforms in the Dodd-Frank Act, including the Rule, were necessary to avoid a recurrence of the financial crisis.

A. <u>The CFTC complied with Section 15(a) by considering costs and benefits.</u>

As demonstrated throughout the Adopting Release, and in particular Section III. A., 76 Fed. Reg.71,662-80, the CFTC considered the costs and benefits of the Rule in light of the five public interest factors. *Id*. For example, the CFTC clearly tied the Section 15(a) considerations to the statutory objectives of Congress set forth in CEA Section 4a(a)(3)(B), 7 U.S.C. § 6a(a)(3)(B). *See, e.g.*, 76 Fed. Reg. 71,675 ("With regard to the non-spot-month position limits, which are set at a percentage of open interest, the Commission believes such limits will also protect market participants and the public through maximization, to the extent practicable, of the four objectives set forth in CEA section 4a(a)(3)(B)."); *id*. at 71,678 (Although Congress narrowed the definition of bona fide hedge contracts, the agency "expanded the list of enumerated hedging transactions to clarify the application of the statutory definition" and "removed the application of class limits outside the spot-month" and thus estimated that the definition of bona fide hedge contracts "will not negatively affect the competitiveness or efficiency of the markets."). It also found that the position visibility levels "should protect market participants by giving the Commission data to monitor the largest traders" so that the CFTC can determine "whether to reset position limits to maximize further the four statutory objectives" and so that the CFTC can "prevent or detect potentially manipulative behavior." 76 Fed. Reg. 71,675.

Therefore, on the most basic level, the CFTC complied with its Section 15(a) duty. *Pub. Citizen v. Fed. Motor Carrier Safety Admin.,* 374 F.3d 1209, 1216 (D.C. Cir. 2004) (A court will not find a rule arbitrary and capricious unless the agency has "wholly failed" to comply with a specific statutory requirement, or if there is a "complete absence of any discussion of a statutorily mandated factor" in the agency's reasoning.).[12]

[12] The CFTC actually exceeded its duty and "wherever feasible endeavored to estimate or quantify the costs and benefits of the final rules." 76 Fed. Reg. 71,662. For example, it estimated that "trading firms that currently track compliance with DCM or Commission position limits will incur an additional implementation cost of two or three labor weeks" and that, "assuming an hourly wage of $78.61" this "would amount to approximately $12,300 per firm." 76 Fed. Reg. 71,666. Although neither its statute nor the relevant case law requires such quantification, the CFTC's effort to do so illustrates its good faith attempt to address industry concerns, despite the fact that "public comment letters provided little quantitative data." *Id*. at 71,662. *Cf. BASF Wyandotte Corp. v. Costle,* 598 F.2d 637, 657 (1st Cir. 1979) ("There is no way the cost analysis could be more than an estimate, especially given the reticence of the industry to supply information, and EPA needed to develop no more than a rough idea of the costs the industry would incur.").

B. <u>The CFTC also considered the benefits arising from the entire Dodd-Frank Act.</u>

In accordance with Section 15(a), the Dodd-Frank Act, and the relevant case law discussed above, the CFTC also considered the core objective that Congress sought to achieve by enacting a comprehensive collection of regulatory reforms: preventing another financial and economic crisis. This consideration was implicit in the sense that, at the time it promulgated the Rule, the CFTC was fully cognizant of the damage done by the financial crisis, Congress's resolve to prevent a recurrence of the crisis through the Dodd-Frank Act, and the agency's own duty to promulgate and finalize over 50 separate regulations.

In fact, the CFTC has been consumed with rulemaking under the Dodd-Frank Act for the past two years. In this context, the need for reform has guided all of the CFTC's rulemaking under the Dodd-Frank Act, and it would be entirely unnecessary for the agency to recount the history of the crisis and the enormous benefits of regulatory reform in connection with each and every rule release.

In addition, there is ample evidence in the rulemaking record showing that the CFTC explicitly considered the need to implement the Rule not only to contain excessive speculation, but also to contribute to the entire regulatory reform effort. The Adopting Release includes the basic but all-important observation that the "the Dodd-Frank Act amended the [CEA] to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system . . . ." 76 Fed. Reg. 71,626.

Other parts of the record, including comment letters and statements by CFTC Commissioners, articulate in greater detail the importance of regulatory reform and the role of the Position Limits Rule as part of that regulatory framework. The CFTC "considered all

[15,000] of the comments received in formulating the final regulations," 76 Fed. Reg. 71,626, and many of those letters discussed the need to implement the Rule in light of the continuing effects of the last crisis and the need to prevent another.[13]

For example, Senator Carl Levin advocated for quick implementation of the Rule, stating that without position limits, "American businesses and consumers will continue to be at risk," and that "price disruptions threaten to undermine the economic recovery now underway." Comment letter No. 33866, at 4, 1, Mar. 28, 2011. Congressmen Joe Courtney also recognized that:

> Speculation in the commodity markets was one of the great harbingers of destruction to our financial markets that has left the nation battling record unemployment and economic uncertainty. That is why Congress targeted new regulations for the previously unregulated derivative markets in the Dodd-Frank [Act]. To this end, I ask the Commission to move forward as soon as possible with a new rule imposing position limits that will add stability to the market.

Comment Letter No. 27367, at 1, Jan. 4, 2011.

Other Congressmen expressed this same sense of urgency and called for quick adoption of the Rule to stabilize the economy and prevent further economic turmoil. *See, e.g.*, Senator Bill Nelson, Senator Bernard Sanders, Senator Carl Levin, Senator Robert Menendez, Senator Maria Cantwell, Senator Patty Murray, Senator Sheldon Whitehouse & Senator Ron Wyden, Comment Letter No. 27370, at 2, Jan. 12, 2011 (urging the CFTC "to move boldly to protect the interests of middle-class Americans by putting in place strong new position limits"); Congressmen Walter B. Jones, Comment Letter No. 32545, Mar. 8, 2011 ("Further delay by the Commission [in finalizing the Rule] leaves consumers and markets exposed to manipulation at a time when this nation can least afford it. It also threatens to derail any hope of economic recovery.").

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[13] Comment letters for the proposed Position Limits Rule, referenced here, can be found at http://comments.cftc.gov/PublicComments/CommentList.aspx?id=965.

Some members of Congress submitted comment letters to the CFTC emphasizing the importance of position limits specifically in the energy commodity markets and cautioning that "if energy prices continue to rise, the economic recovery could either slow further, or worse, could plummet into a double-dip recession." Congressman Peter Welch, Congressman Joe Baca, Congressman Steve Cohen, Congresswoman Rosa Delauro, Congresswoman Barbara Lee, Congressman Rob Andrews, Congressman Russ Carnahan, Congressman Peter Defazio & Congressman Dennis Kucinich, Comment Letter No. 27368, at 1, Jan. 13, 2011; *see also* Senator Jeanne Shaheen, Comment Letter No. 27369, Jan. 11, 2011 (same); Senator Sherrod Brown, Comment Letter No. 27371, at 2, Jan. 20, 2011 (urging CFTC to quickly finalize rules and warning that "[g]as price bubbles not only harm consumers and businesses, they hinder economic recovery.").

In addition to the members of the legislative branch who submitted letters highlighting the importance of the Rule in contributing to comprehensive financial reform, hundreds of concerned citizens submitted comment letters referencing the hardships currently facing Americans and warning of the dire consequences without the Rule. In fact, over 700 members of the public filed comment letters urging adoption of the Rule "[e]specially right now, with so many families struggling, and unemployment barely beginning to decrease." *See generally* http://comments.cftc.gov/PublicComments/CommentList.aspx?id=965. Americans for Financial Reform also advocated for the Rule, warning that "speculation increases prices paid by households for staple goods such as food and gasoline, and also increases systemic risks to the financial system." Comment Letter No. 34046, at 2, Mar. 29, 2011.

Other groups voiced similar concerns. The National Farmers Union emphasized the particular impact on farmers, who "are at the core of our nation's recovery from a difficult economic time" and who would have difficulty weathering "[a]nother commodity price bubble, such as the one that occurred in 2008." Comment Letter No. 33951, at 2, Mar. 28, 2011. Fifty-six national coalitions and organizations, and 28 international coalitions and organizations from 16 countries, emphasized the global need for swift action, stating that "[w]e are very concerned that, if the CFTC does not move forward quickly in implementing Dodd- Frank reforms, the world faces the danger of experiencing unnecessary price bubbles similar to 2008 when over 100 million people were pushed into hunger." Comment Letter No. 33791, at 2 Mar. 28, 2011.

Respected academics also articulated the threat to economic recovery and stability arising from a failure to control commodity price increases:

> As this country struggles to emerge from the worst financial crisis since the Great Depression, the recent run up in basic commodity staple prices presents a dire threat that the financial stability of the United States and world economy will reach its breaking point and that we will plunge back into a double-dip recession with no safety net. This time there will certainly be no bailouts or stimulus package to provide the economy with a soft landing. Indeed, as universally predicted in September 2008 without TARP and stimulus, we would have been headed into a Second Great Depression. Further price spikes in everyday necessities will tank any potential economic recovery, leading to further and more sustained economic hardship for the already financially overburdened American taxpayer, consumer, worker, and retiree.

Professor Michael Greenberger, University of Maryland School of Law, Comment Letter No. 33850, at 3, Mar. 28, 2011.

In addition, these important considerations are found in the administrative record in speeches made by CFTC Commissioners.[14] For example, when adopting the final Position Limits Rule, Chairmen Gary Gensler found it "critical to remember why we are here in the first place," stating:

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[14] All statements of Commissioners referenced here can be found at http://www.cftc.gov/PressRoom/SpeechesTestimony/index.htm.

> Though it has been three years since the financial crisis, we cannot forget the weaknesses that it exposed in both our financial system and our financial regulatory system.
>
> We cannot forget the millions of Americans who had no connection to derivatives or other exotic financial contracts but still lost their jobs due to a poorly regulated industry. We cannot forget the millions more who lost their homes or whose homes are now worth less than their mortgages, in part because of how the financial system – including the unregulated swaps market – brought the economy to the edge of the cliff. The **package of reforms** included in the Dodd-Frank Act will help address the contributing factors to the 2008 crisis to protect those Americans. They are concrete measures that will bring transparency, openness and competition to the swaps markets while lowering the risk they pose to the American public.
>
> There are those who might like to roll the Dodd-Frank Act's reforms back and put us back in the same regulatory environment that preceded the crisis three years ago. But that regulatory system failed to protect the American public. We must not forget about the 8 million lost jobs – the majority of which were lost by people who have never used derivatives. We must not forget what the nation went through three years ago – and what the nation continues to recover from now.
>
> Some have raised cost considerations about our rulemakings. We are going through those comments and they have been very helpful. **But the greatest cost is having a public that is not protected from the risks of the swaps market and that does not get the benefits of transparent markets. That is why it is so essential that we finish implementing the Dodd-Frank reforms.**

Opening Statement Before a Meeting of the Commodity Futures Trading Commission, Washington, DC, Oct. 18, 2011 (emphasis added).

In a similar vein, Commissioner Chilton voiced support for the Rule by saying that "this rule will bring all derivatives within the Commission's jurisdiction—futures and swaps—the formerly dark OTC markets—under the same position limits. This brings needed transparency and accountability to markets that were part and parcel to the economic meltdown in 2008." Statement of Commissioner Bart Chilton, CFTC, Before the CFTC Public Meeting, "Huggy Bear and Position Limits," Oct. 18 2011.

In addition, the Commission's understanding of the dire need for regulatory reform is evident from the testimony and speeches by Chairman Gensler prior to the Rule's implementation. For example, on September 22, 2009, before the enactment of the Dodd-Frank Act, Chairman Gensler stated in his testimony before the House Committee on Agriculture that:

> One year ago, the financial system failed the American public. The financial regulatory system failed the American public. We must now do all we can to ensure that it does not happen again. While a year has passed and the system appears to have stabilized, we cannot relent in our mission to vigorously address weaknesses and gaps in our regulatory structure. **As a critical component of reform,** I believe that we have to bring comprehensive regulation to the over-the-counter (OTC) derivatives markets. We must lower risk, promote greater market integrity and improve market transparency.

Testimony of Chairman Gary Gensler, CFTC, Before the House Committee On Agriculture.

Thus, recognizing the benefits and necessity of a comprehensive regulatory system in preventing another financial crisis, Chairman Gensler detailed the specific CFTC regulations that would combine to create this system. In addition to central clearing, exchange trading, and regulation of derivatives dealers, Gensler specifically focused on position limits. He advocated for:

> statutory authority to set aggregate position limits across all markets and trading platforms on all persons trading OTC derivatives that perform or affect a significant price discovery function with respect to regulated markets that the CFTC oversees. This will ensure that traders cannot evade position limits by moving to a related exchange or market. Exemptions to position limits should be limited and well defined.

Id.; *see also* Speech of Chairman Gary Gensler, CFTC, Before the International Energy Agency, Sept. 23, 2009 (same). Indeed, Chairman Gensler repeatedly made this same argument while testifying before Congress prior to the enactment of Dodd-Frank.[15] Chairman Gensler's views

[15]*See, e.g.*, Testimony of Chairman Gary Gensler, CFTC, Before the Senate Committee on Energy and Natural Resources, Mar. 9, 2010; Testimony of Chairman Gary Gensler, CFTC, Before the Senate Permanent Subcommittee on Investigations, July 21, 2009; *see also* Testimony

were well-received by Congress, since the Dodd-Frank Act required the CFTC to impose new position limits, subject to firm deadlines.

Chairman Gensler continued advocating for position limits in light of the costs of the crisis and the need to "reduce the chance of the next crisis" shortly after the Position Limits Rule was proposed on January 26, 2011,[16] in anticipation of consideration of the final rule in October 2011,[17] and on numerous occasions in between.[18]

All of this evidence, compiled before and during promulgation of the Rule, demonstrates that the CFTC was appropriately guided by a full appreciation of the need for reform and the important role of the Position Limits Rule in achieving that primary Congressional objective.

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of Chairman Gary Gensler, CFTC, Before the House Financial Services Committee, July 22, 2009; Testimony of Chairman Gary Gensler, CFTC, Before the Senate Banking Subcommittee on Securities, Insurance, and Investment, June 22, 2009; Statement of Chairman Gary Gensler, CFTC, Before the Senate Committee on Agriculture, Nutrition and Forestry, June 4, 2009; Testimony of Chairman Gary Gensler, CFTC, Before the Senate Subcommittee on Financial Services and General Government Committee on Appropriations, June 2, 2009.

[16] *See* Remarks of Chairman Gary Gensler, CFTC, OTC Derivatives Reform, European Parliament, Economic and Monetary Affairs Committee, Brussels, Belgium, Mar. 22, 2011; *see also* Remarks of Chairman Gary Gensler, CFTC, Implementing the Dodd-Frank Act, "Public Citizen," Feb. 28, 2011 (discussing position limits and stating that "[w]e can't lose sight of the fact that we had a financial crisis in 2008. Congress responded and determined that significant changes must be made to market regulation. . .").

[17] Remarks of Chairman Gary Gensler, CFTC, Before the Futures Industry Association, Oct. 11, 2011; Remarks of CFTC Chairman Gary Gensler, CFTC, Closing Keynote Address, Georgetown University Conference, "Financial Institutions in the New Regulatory Environment: Opportunities, Constraints and Global Challenges," Sept. 22, 2011.

[18] Testimony of Chairman Gary Gensler, CFTC, Before the Senate Committee on Banking, Housing and Urban Affairs, Washington, DC, July 21, 2011; Testimony of Chairman Gary Gensler, CFTC, Before the House Committee on Agriculture, Washington, DC, June 21, 2011; Testimony of Chairman Gary Gensler, CFTC, Before the Senate Committee on Agriculture, Nutrition & Forestry, Washington, DC, June 15, 2011; Remarks of Chairman Gary Gensler, CFTC, Sandler O'Neill Global Exchange and Brokerage Conference, June 9, 2011; Remarks of Chairman Gary Gensler, CFTC, Bringing Oversight to the Swaps Market, 20th Annual Hyman P. Minsky Conference on the State of the U.S. And World Economics, New York, NY, Apr. 13, 2011; Testimony of Chairman Gary Gensler, CFTC, Before the House Committee on Appropriations, Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies, Mar. 17, 2011.

This process, along with the agency's reasoned consideration of costs and benefits in accordance with Section 15(a), fully satisfied the CFTC's obligation.

CONCLUSION

For all of the foregoing reasons, the Court should uphold the Rule, grant the CFTC's Cross-Motion for Summary Judgment, deny the Plaintiffs' Motion for Summary Judgment, and dismiss the Plaintiffs' Complaint.

Dated: April 30, 2012

Respectfully submitted,

/s/ Stephen W. Hall

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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)

ORDER

Upon consideration of the Motion of Better Markets, Inc. for Leave to File a Corrected *Amicus Curiae* Brief, it is hereby

ORDERED that the motion is **GRANTED.**

Date: ____________________

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ROBERT L. WILKINS
United States District Judge