IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' RESPONSE TO BETTER MARKETS' *AMICUS CURIAE* BRIEF

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RESPONSE TO BETTER MARKETS' *AMICUS CURIAE* BRIEF

In a remarkable display of candor, Better Markets virtually concedes that upholding the Position Limits Rule would require a court to *overrule* the D.C. Circuit's decision last year in *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011). *See* Br. of *Amicus Curiae*, Dkt. 50, at 11 (Apr. 24, 2012) ("Better Markets Br."). According to Better Markets, in construing the statutory provisions at issue in that case, the D.C. Circuit "failed to weight [sic] the unique challenges surrounding cost benefit analysis," and "failed to consider the precedents" that Better Markets believes support its position. *Id.* at 11. Indeed, Better Markets goes so far as to ask this Court to hold that by enforcing preexisting cost-benefit provisions, *Business Roundtable* "nullified" "Congress's policy determination in the Dodd-Frank Act that proxy access was an appropriate regulatory measure." *Id*. at 11–12.

Better Markets is right about one thing: The cost-benefit analysis conducted by the Commission in this case is irreconcilable with the D.C. Circuit's holding in *Business Roundtable*. Indeed, Better Markets' attempt to resuscitate the Commission's deficient analysis relies on a statutory argument that is expressly foreclosed by the D.C. Circuit's decision. According to Better Markets, the presence of the word "consider" in Section 19(a) of the Commodity Exchange Act absolves the Commission of any serious obligation to assess the costs and benefits of a proposed rule. Better Markets Br. 4–6. But as it acknowledges, the securities statutes at issue in *Business Roundtable* use the same word. *See* 15 U.S.C. § 78w(a)(2) ("The Commission and the Secretary of the Treasury . . . shall consider among other matters the impact any such rule or regulation would have on competition."); *id.* § 78c(f) ("The Commission shall also consider . . . whether the action will promote efficiency, competition, and capital formation."); *id.* § 80a-2(c) (same).

In fact, the text of Section 19(a) is far more explicit than the statutes in *Business Roundtable* in requiring the Commission to conduct a thorough assessment of the costs and benefits of any new rule. Unlike those statutes, Section 19(a) compels the Commission to "evaluate[]" costs and benefits: "The costs and benefits of the proposed Commission action *shall be evaluated* in light of" the statutory factors. 7 U.S.C. § 19(a)(2) (emphasis added). That verb connotes an assessment of the *value* of both the costs and the benefits of any rule. *See* Random House Webster's Unabridged Dictionary 670 (2d ed. 2001) (evaluate: "1. to determine or set the value or amount of . . . . 2. to judge or determine the significance, worth, or quality of . . . ."). Better Markets entirely ignores that word in its statutory arguments.

Even accepting Better Markets' mistaken view that the only operative verb in Section 19(a) is "consider," its argument that *Business Roundtable* ignored precedents construing similar provisions deeply misunderstands the cited cases. In each of them, the court concluded that the agency *was* required to balance the costs and benefits of the proposed action. *See*, *e.g.*, *Fla. Manufactured Hous. Ass'n v. Cisneros*, 53 F.3d 1565, 1571, 1578 (11th Cir. 1995) ("Not only is it permissible for HUD to balance the cost to the general public of wind damage to manufactured housing against price increases, [the statute] requires the agency to do so."); *State of New York v. Reilly*, 969 F.2d 1147, 1153 (D.C. Cir. 1992) ("[T[he [Clean Air Act] allows EPA to balance air and nonair benefits and costs, which it did . . . ."). And Better Markets has no answer to the D.C. Circuit's subsequent interpretation of a statute requiring an agency to "consider the costs and benefits" of regulatory action as imposing a "duty to *weigh* the costs and safety benefits," except to dismiss it as dicta. *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1212, 1221 (D.C. Cir. 2004) (internal quotation marks omitted) (emphasis added); *see also* Better Markets Br. 5 n.1. The D.C. Circuit, however, has repeatedly cited the relevant discussion from

Public Citizen as authoritative. *See Chamber of Commerce v. SEC*, 443 F.3d 890, 894 (D.C. Cir. 2006); *Chamber of Commerce v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005).

Tellingly, Better Markets places great weight on a 128-word block quotation from *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009), claiming that the quotation shows that the "Supreme Court has declared that an agency's duty to conduct cost benefit analyses is not to be inferred lightly." Better Markets Br. 8. But Better Markets fails to inform this Court that the quoted passage is taken from a *dissent* joined by only two other Justices. *See Entergy*, 556 U.S. at 238–39 (Stevens, J., dissenting).

In any event, the quotation is irrelevant to this case. In *Entergy*, the Supreme Court held that the EPA *could* consider costs and benefits in deciding whether to impose certain restrictions on power plants, even though the relevant statute contained no cost-benefit provision and provided that the EPA "shall require" restrictions that "reflect the best technology available for minimizing adverse environmental impact." 556 U.S. at 213 (majority opinion). In his dissenting opinion, Justice Stevens disagreed. *Id*. at 237 (Stevens, J., dissenting). Relying on the absence of an express provision requiring the agency to evaluate costs and benefits, Justice Stevens reasoned that the agency was compelled to impose stringent restrictions irrespective of their costs. *Id*. Contrary to Better Markets' strained arguments, *Entergy* has nothing to do with determining when a "duty" to conduct "cost-benefit analyses" should be "inferred"; it merely addresses when an agency has the discretion to withhold costly regulations in the absence of a cost-benefit provision. And even if Justice Stevens' view had commanded a majority of the Court, it would have no application to a statute like Section 19(a), which expressly requires the Commission to "evaluate[]" the "costs and benefits" of its rules. 7 U.S.C. § 19(a)(2).

Better Markets continues its rewrite of Section 19(a) by arguing that the statute's residual reference to "other public interest considerations" means the Commission is not required to evaluate "industry-focused concerns, such as compliance costs or the feasibility of conforming to rule requirements." Better Markets Br. 6–7. The majority of the considerations in Section 19(a), however, relate specifically to the impact of a regulation on industry, including the "protection of market participants"; "the efficiency, competitiveness, and financial integrity of futures markets"; and the preservation of the markets' "price discovery" function. 7 U.S.C. §§ 19(a)(2)(A)–(C). Each of those factors requires the Commission to assess whether a new rule will impede market participants from engaging in economically beneficial transactions. That is fully consistent with the statute's focus on the public interest: As three members of the Commission recognized in this case, imposing high costs on market participants, as the Position Limits Rule does, will harm the public interest by increasing the prices of everyday goods for consumers.

At bottom, Better Markets argues that what it perceives as the exclusive purpose of the Dodd-Frank Act (the prevention of a financial crisis) authorized the Commission to ignore the express statutory requirement to conduct a cost-benefit analysis. *See*, *e.g.*, Better Markets' Br. 16. In its view, "Congress conducted its own cost benefit analysis" in enacting the Dodd-Frank Act, abrogating the preexisting command of Section 19(a). *Id.* at 21. The D.C. Circuit, of course, already foreclosed any argument that Dodd-Frank rules are exempt from cost-benefit provisions in *Business Roundtable*.

In any event, Better Markets' argument makes no sense on its own terms: Even if it were true that "Congress conducted its own cost benefit analysis" in requiring the Commission to promulgate *some* rule on position limits, there is no plausible argument that Congress conducted

such an analysis for the specific provisions of *this* rule, including the levels that the Commission selected and the various aggregation and hedging rules.

Better Markets' real dispute is ultimately not with Plaintiffs or even with the D.C. Circuit, but rather with Congress itself. It complains that "[t]he process of evaluating the costs and benefits of regulation"—a requirement that Congress has included in countless statutes governing agency action—"is complex, time intensive, costly, speculative, and imprecise." Better Markets Br. 13. It offers a detailed discussion of law-review articles written by the "critics of cost benefit analysis." *Id.* at 14. And it highlights what it sees as the unique "challenges and uncertainties" of "[a]ssessing the benefits of a financial regulation" in particular—an odd claim, given that there are many other fields, such as health and safety regulation, that entail far greater conceptual and empirical challenges for balancing costs and benefits, yet regulators in those fields routinely perform such analyses. *Id.*

Better Markets' evident belief that the Position Limits Rule could be justified only by doing away with meaningful cost-benefit analysis altogether is undoubtedly correct. But its arguments should be directed at Congress, not this Court.

Respectfully submitted,

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