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. COMMODITY FUTURES TRADING COMMISSION, Defendant.	)	No. 11-cv-2146 (RLW)

DEFENDANT COMMODITY FUTURES TRADING COMMISSION'S OPPOSITION TO PLAINTIFFS' APPLICATION FOR A PRELIMINARY INJUNCTION

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In 2010, in response to the recent financial crisis, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010) ("Dodd-Frank"), to improve and protect the financial system by reducing risk, increasing transparency, and promoting market integrity. To accomplish these objectives, Congress directed the Commodity Futures Trading Commission ("Commission") to promulgate rules, including a rule to address Congress' longstanding concern about the harmful effect excessive speculation may have on the price of oil, natural gas, and other physical commodities. The Commission followed Congress' mandate, and issued its rule regarding Position Limits for Futures and Swaps, 76 Fed. Reg. 71626, 71684-71699 (Nov. 18, 2011) (to be codified at 17 C.F.R. Part 151) ("Rule"). This new position limits rule is not a regulatory innovation; it builds on a long history of position limits to prevent excessive speculation. For more than 70 years, the

Commission, its predecessors, and the exchanges the Commission supervises have set position limits with respect to certain agricultural and other commodities, thereby limiting the number of speculative futures contracts and options that any person could hold. Now, consistent with Congress' mandate, the Commission has extended those speculative limits to swaps, largely unregulated financial instruments whose regulation is a basic goal of Dodd-Frank. Plaintiffs challenge the Rule, and they seek a preliminary injunction that would thwart the will of Congress by preventing the Rule from taking effect pending judicial review.

BACKGROUND

A. The history of position limits

The Commission regulates commodity futures, options, and swaps pursuant to the Commodity Exchange Act, 7 U.S.C. §§ 1-27 (2011) ("CEA"). The CEA serves the public interest by, *inter alia*, "deter[ring] and prevent[ing] price manipulation or any other disruptions to market integrity; [] ensur[ing] the financial integrity of all transactions subject to" the Act, and "avoid[ing] . . . systemic risk[.]" 7 U.S.C. § 5(b).

In furtherance of these objectives, the Commission and its predecessors have, since the 1930s, been authorized to set position limits – limits on the number of speculative derivatives that any person may hold. In 1922, Congress found that "sudden or unreasonable fluctuations in the prices" of certain commodity futures transactions "frequently occur as a result of [] speculation, manipulation or control . . . ." Grain Futures Act of 1922, ch. 369 at § 3, 342 Stat. 998, 999 (1922), codified at 7 U.S.C. § 5 (1925-26). Congress further found that "such fluctuations in prices are an obstruction to and a burden upon" interstate commerce. *Id.* In 1936, following congressional debates and federal reports on whether position limits were necessary to prevent excessive speculation, and the burden of such speculation on interstate commerce, Congress approved the use of position limits as a regulatory tool, specifically authorizing the Commission to "fix such limits on the amount of trading . . . which may be done by any person as the [C]ommission finds is necessary to diminish, eliminate, or prevent such burden." Commodity Exchange Act of 1936, Pub. L. No. 74-675, ch. 545 at §5, 49 Stat. 1491, 1492, codified at 7 U.S.C. § 6a(1) (1940).[1]

Pursuant to this longstanding authority, the Commission and its predecessors have directly imposed limits on speculative positions, or required exchanges to do so. This statutory authority permits the Commission to impose limits without first finding that excessive speculation causing unreasonable price spikes already exists or that position limits are strictly necessary to combat the problem. Rather, the Commission may impose limits prophylactically to prevent an undue burden that Congress determined may result from "excessive speculation," *i.e.*, unduly large speculative positions. *See* 7 U.S.C. § 6a(a)(1). As the Commission explained in 1981, when it issued a final rule requiring exchanges to set position limits for futures and options contracts that were not already subject to Commission-imposed limits:

> [CEA] Section 4a(1) [7 U.S.C. § 6a(1) (1976)], represents an express Congressional finding that excessive speculation is harmful to the market, and a finding that speculative limits are an effective prophylactic measure . . . The prevention of large and/or abrupt price movements which are attributable to extraordinarily large speculative positions is a Congressionally endorsed regulatory objective of the Commission. Further, it is the Commission's view that this objective is enhanced by speculative position limits since it appears that the capacity of any contract market to absorb the establishment and liquidation of large speculative positions in an orderly manner is related to the relative size of such positions, *i.e.*, the capacity of the market is not unlimited.

[1] Congress exempted positions attributable to bona fide hedging – the use of the futures markets by commodity producers, merchants or end-users to manage their price risks – an exemption that remains integral to the position limits regime to this day. 7 U.S.C. § 6a(1) (1940); 7 U.S.C. § 6a(c). Because the limits only restrict positions obtained for speculative purposes, this brief refers interchangeably to "position limits," "speculative position limits," or "speculative limits."

46 Fed. Reg. 50938, 50940 (Oct. 16, 1981). The Commission dismissed objections regarding the effectiveness and need for position limits, objections similar to those raised in this rulemaking: "The Commission believes that the observations concerning the general desirability of limits are contrary to Congressional findings in Section 3 and 4a of the Act [7 U.S.C. §§ 5, 6a] and considerable years of Federal and contract market regulatory experience." *Id.*

The rule adopted by the Commission in 1981 required exchanges to set position limits for *all* commodity futures that did not have Commission-set limits, and also to set limits for exchange-traded options. 46 Fed. Reg. 50938, codified at 17 C.F.R. § 1.61(a), (b) (1982) (currently codified at 17 C.F.R. § 150.5).[2] By that time, exchanges had already imposed their own position limits for some commodities. 45 Fed. Reg. 79831, 79832 (Dec. 2, 1980) (observing that, by April 1975, "position limits were in effect for almost all actively traded commodities then under regulation, and . . . limits for positions in about one half of these actively traded commodities had been specified by the contract markets"). However, at the time the Commission acted, nearly 40 contracts had neither Commission nor exchange-set limits. 45 Fed. Reg. at 79835 & n.12.

One year later, Congress enacted the Futures Trading Act of 1982, which, *inter alia*, amended the CEA to "clarify and strengthen the Commission's" position limits authority. S. Rep. 97-384, at 44 (1982). As amended, CEA section 4a(a) affirmed the Commission's authority to fix position limits by rule or regulation, as well as by order. Pub. L. No. 97-444, 96 Stat. 2294, 2299-2300, § 205 (1982); S. Rep. 97-384, at 44. The 1982 Act also added a new subsection to the CEA, which provided that nothing in the CEA prohibited the exchanges from

[2] Rule 1.61 also established guidelines for exchanges to use in setting limits. Exchanges were to set limits based on such factors as position sizes customarily held by speculative traders (but not positions extraordinarily large relative to total open positions), market breadth and liquidity, and opportunity for arbitrage. 17 C.F.R. § 1.61(a)(2) (1982).

establishing positions limits themselves, so long as such limits were not higher than any limits the Commission may have established. Pub. L. No. 97-444, 96 Stat. 2294, 2300, § 205(5) (codified at 7 U.S.C. § 6a(e)). And Congress provided that violations of exchange-set limits would constitute violations of the CEA. *Id.*

The legislative history of the 1982 Act shows that Congress was aware of the prophylactic approach the Commission had taken with respect to position limits, and, as a result, the passage of the 1982 Act, which enhanced the Commission's authority, effectively ratified that approach. *See*, *e.g.*, S. Rep. 97-384, at 44 (referring to Rule); *Futures Trading Act of 1982: Hearings on S. 2109 before the S. Subcomm. on Agricultural Research*, 97th Cong. 28, 29, 44-45, 337, 340-45 (1982) (oral and written statements of Commission Chair Phillip McBride Johnson and Commodity Exchange Executive Vice Chair Lee Berendt concerning, *inter alia*, the Commission's omnibus approach to position limits).

In fact, in connection with its consideration of the 1982 Act, Congress rejected futures industry proposals that would have substantially weakened the Commission's authority to set position limits. One proposed amendment would have obligated the Commission, prior to requiring an exchange to review or revise limits, to make specific findings, following a hearing on the record, that position limits were necessary to curb manipulation or squeezes. S. Rep. 97-384, at 44, 79. Another proposed amendment would have eliminated from the CEA Congress' finding regarding the harmful effects of excessive speculation. *Id.* Congress rejected these amendments and, in doing so, reaffirmed its determination that "speculative limits [are] . . . important regulatory tools for preventing unreasonable fluctuations or unwarranted changes in commodity prices that may arise even in the absence of manipulation"; and the Commission's authority to "set speculative position and trading limits on futures contracts [was] important to ensure orderly trading and to prevent market excesses." S. Rep. 97-384, at 44-45, 79.[3]

In 2008, in response to high prices and volatility in the energy markets, Congress amended the CEA, again with the goal of strengthening the Commission's authority both to set position limits and to police position limits on certain swaps. Pub. L. 110-246, 122 Stat. 1651 (2008) (Title XIII). Pursuant to that authority, in 2010 the Commission proposed new position limits for certain energy commodities. At that time, it reiterated that section 4a(a) authorized it to impose limits "prophylactically," "render[ing] unnecessary a specific finding that an undue burden on interstate commerce had actually occurred." 75 Fed. Reg. 4144, 4146 (Jan. 26, 2010). The Commission further explained that "[r]equiring a specific demonstration of the need for position limits is contrary to section 4a(a) of the Act [7 U.S.C. § 6a(a)], ...]" *Id*. at 4146 n. 13.

B. Dodd-Frank

In July 2010, Congress enacted Dodd-Frank. Congress passed the Act in response to the financial crisis, including energy price spikes that it believed were attributable to excessive speculation. Accordingly, it strengthened CEA section 4a(a), and required the Commission to impose speculative limits, to impose them quickly, and to do so prophylactically.

During the hearings that led up to the passage of Dodd-Frank, Senator Carl Levin, chair of the Senate Permanent Subcommittee on Investigations (which had conducted hearings and issued reports on excessive speculation in energy and other commodity markets), urged passage

[3] Beginning in the 1990s, the Commission took a different approach to some position limits. With respect to certain commodities, it permitted exchanges to establish position accountability, which allowed the exchanges to substitute trader reporting obligations for position limits. *See* 17 C.F.R. § 150.5(e) (2000) (formalizing accountability standards). But even during that period, the Commission retained its limits on certain agricultural contracts and required exchanges to set position limits on physical commodity contracts during the spot month. (The spot month is not actually a month, but is the period time, typically several days, when contracts are closest to expiring). 17 C.F.R. §§ 150.2; 150.5(e)(3) (2000).

to ensure "a cop on the beat in all commodity markets where U.S. commodities are traded . . . that can enforce the law to prevent excessive speculation and market manipulation." 156 Cong. Record S. 4064 (daily ed. May 20, 2010). Senator Dianne Feinstein observed that "[p]osition limits provide an important restriction on market manipulation and the amount of risk that can build up in any one participant." 156 Cong. Rec. S 2699 (daily ed. April 27, 2010). She further stated that Dodd-Frank would build on these restrictions by "requir[ing] position limits to be set in the aggregate for each commodity, instead of contract by contract." Thus, "[f]or the first time the CFTC [would] [] be able to prevent speculators from assembling massive positions in a particular commodity, such as oil, by assembling large positions in multiple contracts . . . ." *Id.* Senator Cantwell agreed: if "we are not truly going to have," among other things, "aggregate position limits across all exchanges, we are not going to rein in the derivatives problem." 156 Cong. Rec. S 3966 (daily ed. May 19, 2010).

And in the House of Representatives, Representative Collin Peterson, Chairman of the House Committee on Agriculture, reminded his colleagues that his committee's own:

> in-depth review of derivative markets began when we experienced significant price volatility in energy futures markets due to excessive speculation – first with natural gas and then with crude oil. We all remember when we had $147 oil . . ..This conference report [now] includes the tools we authorized and the direction to the CFTC to mitigate outrageous price spikes we saw 2 years ago.

156 Cong. Rec. H5245 (daily ed. June 30, 2010).

In addition, numerous references in the legislative history attest to the importance of applying regulatory tools, including position limits, to the largely unregulated swaps markets. Congress viewed the nearly $600 trillion swaps market as a "major contributor to the financial crisis" because excessive risk taking, hidden leverage, and under collateralization in these transactions created a systemic risk of harm to the entire financial system. S. Rep. 111-176, at

29 (2010). As Senator Cantwell and others explained, it was imperative that the CFTC have the ability to regulate swaps through "position limits," "exchange trading," and "public transparency" to avoid a recurrence of the instability that rippled through the entire financial system in 2008. *See e.g.* 156 Cong. Rec. S 2676-78, S 2698-99, S 3606-07, S 3966, S 5919 (daily ed. April 27, May 12, 19, July 15, 2010 (statements of Sens. Cantwell, Feinstein, Lincoln).

Thus, Dodd-Frank amended section 4a(a) of the CEA, 7 U.S.C. § 6a(a), to direct that:

> In accordance with the standards set forth in [subsection 4a(a)(1) of the CEA, 7 U.S.C. § 6a(a)(1)] . . ., with respect to physical commodities . . . the Commission shall by rule . . . establish limits on the amount of positions, as appropriate, other than bona fide hedge positions, that may be held by any person with respect to contracts of sale for future delivery or with respect to options on the contracts or commodities traded on or subject to the rules of a designated contract market.

7 U.S.C. § 6a(a)(2)(A). Congress further specified that "the limits required under subparagraph (A)" be imposed expeditiously, "within 180 days" for "exempt commodities"[4] and "within 270 days" for "agricultural commodities." *Id*. § 6a(a)(2)(B).[5] Congress directed the Commission, "[i]n establishing the limits required in paragraph (2)," to exercise discretion in determining the number of positions a trader may hold for the spot month, each other month, and all months and in setting the required limits to maximize four specific objectives. *Id*. § 6a(a)(3) (directing the Commission to establish limits that, to the maximum extent practicable: (1) diminish, eliminate or prevent excessive speculation; (2) deter and prevent manipulation; (3) ensure sufficient

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[4] "Exempt" commodities are all commodities except "excluded" commodities (primarily financial) and agricultural commodities. 7 U.S.C. § 1a(20). In practice, exempt commodities are mostly energy and metals.

[5] Although the Commission did not meet these deadlines, it completed the rulemaking as expeditiously as possible under the circumstances.

liquidity for bona fide hedgers; and (4) ensure that the price discovery function of the underlying market is not disrupted).[6]

Reflecting its concern about the lack of regulation for swaps, Congress also required the Commission concurrently to impose position limits on swaps that are "economically equivalent" to physical commodity futures and options. *Id*. § 6a(a)(5). Here too Congress directed the Commission to exercise discretion in determining the levels of the required limits on speculation, providing that "the Commission shall establish limits on the amount of positions, including aggregate position limits, as appropriate, other than bona fide hedge positions, that may be held by any person with respect to swaps that are economically equivalent to contracts of sale for future delivery . . . ." *Id*. Finally, Congress required the Commission to establish limits "on the aggregate number or amount of positions in contracts based upon the same underlying commodity" that a person may hold across designated contract markets, foreign boards of trade, and significant price discovery swaps. *Id*. § 6a(a)(6).

Not only did Congress mandate that the Commission impose position limits, it also directed the Commission to "conduct a study of the effects (if any) of the position limits imposed pursuant to [7 U.S.C. §6a] on excessive speculation and on the movement of transactions from exchanges in the United States to trading venues outside the United States" and to submit a report to Congress on the study "[w]ithin 12 months after the imposition of position limits pursuant to [7 U.S.C. § 6a]." Dodd-Frank § 719.

C. The Rule

Pursuant to Congress' mandate, the Commission issued its notice of proposed rulemaking in January 2011. 76 Fed. Reg. 4752 (Jan. 26, 2011). The Commission received more than

[6] The price discovery function refers to the process of determining the price level for a commodity.

15,000 comments from, *inter alia*, industry, trade organizations, academics, and the general public. A large number of the commenters generally supported the Rule. 76 Fed. Reg. 71626 (Nov. 18, 2011). The Commission also received and considered dozens of studies; some were supportive of the Rule, some were opposed, and some expressed no view on position limits. *Id.* at 71663-64. The Commission and staff met with hundreds of interested parties.

As in previous Commission rulemakings, some commenters offered opinions and studies questioning whether speculation causes price spikes or market disruptions, and whether position limits are an effective regulatory tool. 76 Fed. Reg. at 71663-64. Commenters also opined as to whether the Commission was required, before it could promulgate the rule, to make findings that an undue burden or excessive speculation already existed, and that position limits were necessary to remedy those harms. 76 Fed. Reg. at 71627-28, 71662-63.

The Commission carefully considered all the comments and studies it received, and issued the Final Rule on November 18, 2011. 76 Fed. Reg. 71626. It determined, as it had in prior rulemakings, that criticism of the general efficacy of speculative position limits reflected a disagreement with a congressional determination that only Congress could change. "In light of the congressional mandate to impose position limits, the Commission disagrees with comments asserting that the Commission must first determine that excessive speculation exists or prove that position limits are an effective regulatory tool." *Id*. at 71663. Rather, as the Commission observed, section 6a(a), as amended by Dodd-Frank, required it to impose position limits, and to do so expeditiously, without first having to make findings that excessive speculation was already burdening interstate commerce, or that position limits were strictly necessary to prevent or remedy those harms. *Id*.

As required by Congress, the Rule, for the first time, imposes federal position limits on swaps. The Rule otherwise substantially parallels the pre-existing position limits regime of the Commission and the exchanges. In particular, the Rule imposes limits on speculative positions both for the spot month and non-spot months on 28 physical commodity futures contracts and economically equivalent swaps. As the Commission noted, "all of the 28 Core Referenced Futures Contracts have some form of spot-month position limits currently in place." *Id.* at 71669. The Rule contains a statutory-based exemption for transactions that constitute bona fide hedging. *See* 7 U.S.C. § 6a(c). The Rule also incorporates account aggregation standards, which determine when certain traders are sufficiently interconnected so that their positions must be combined to assess whether they exceed the position limits. The Rule's aggregation standards are consistent with the Commission's current aggregation policy. *Compare* 76 Fed. Reg. at 71692-93 *with* 17 C.F.R. §§ 150.3, 150.4.

The Rule provides for phased implementation. The spot-month limits, and the non-spot-month limits for commodities already subject to Commission-imposed limits pursuant to 17 C.F.R. Part 150, will become effective 60 days after the Commission and SEC jointly publish in the Federal Register a rule further defining the term "swap." 76 Fed. Reg. at 71632. Until that time, market participants must continue to comply with the Commission's current position limits regime. Non-spot-month limits on other commodities will take effect only after the Rule takes effect and the Commission has received one year of open interest data (*i.e.*, data regarding open contracts). *Id*. The Rule exempts positions that have been established in good faith prior to its effective date. *Id.* at 71655-56.

SUMMARY OF ARGUMENT

Plaintiffs cannot satisfy any of the four criteria for a preliminary injunction. First, they fail to show that, if the Rule is not enjoined, they will be irreparably harmed. This failure is more than enough to derail Plaintiffs' Application, because the basis for injunctive relief is irreparable harm. And not just any showing of harm is sufficient – to get the relief they seek, Plaintiffs have to show that they will suffer harm that is substantial relative to their size, that is certain, and that is imminent. But with respect to each of these showings, Plaintiffs miss the mark. The harm that a few of their members contend that they will incur – the cost of preparing to comply with the Rule – is insubstantial relative to the billions of dollars they make annually. Because these costs are so small relative to their members' revenues, it is irrelevant that they may not be able to recover some portion of these amounts if the Rule is ultimately overturned. Nor is there even any certainty with respect to the costs Plaintiffs allege. Only two of the five declarations even attempt to quantify the costs, and the costs alleged in those declarations are no more than speculative estimates. Plaintiffs' other claims of harm, such as the possibility that their members would have to divest from various entities, are similarly conjectural. And Plaintiffs also fail to show imminence because it remains uncertain when the Rule will take effect. (Part A, i*nfra*.)

Second, Plaintiffs are not likely to succeed on the merits, because their challenge to the Rule is based on a fundamental misreading of the CEA. They contend that, before the Commission can impose any speculative position limits, it must find that the limits are "necessary" and "appropriate." The language, structure, and history of the statute refute their contention. Numerous provisions of the CEA – all of which Plaintiffs conspicuously ignore – make clear that the Commission lacks the discretion to not impose position limits: Congress mandated that the Commission issue the Rule. Congress directed the Commission to impose speculative position limits on physical commodity futures and options contracts and economically equivalent swaps, to do so within specified time deadlines, to study the effects of the limits, if any, and, within 12 months after imposition of the limits, to submit to Congress a report on the limits imposed. Congress would not have imposed all of these requirements on the Commission if Congress wanted the Commission to impose limits, but only in the event the Commission found them to be necessary. The Commission thus correctly recognized that the discretion Congress conferred only extended to setting the level of the limits, so that the Commission could bring its expertise and experience to bear on how to maximize four objectives Congress sought to achieve through the mandated limits. Plaintiffs' reading of the CEA is not only contrary to the language and structure of the statute, but also to the Commission's longstanding interpretation of its authority as *not* requiring the very sorts of findings Plaintiffs would require, an interpretation Congress has ratified. (Part B.1, *infra*.)

In addition to their misguided attack on the Commission's authority, Plaintiffs also raise a series of meritless challenges to various decisions that the Commission made during the course of the rulemaking. They contend that the Commission ignored certain studies submitted during the rulemaking – studies that they claim support their view that position limits do not prevent excessive speculation. The Commission did not ignore those studies, or any comment submitted during the rulemaking. But those studies were at odds with Congress' mandate, and, as a result, even if the Commission had wanted to adopt the point of view of those studies (as opposed to other studies that reached a different conclusion), the Commission was not free to do so. Plaintiffs also contend that the Commission lacked a reasoned basis for the particular limits it set. But the limits the Commission set were hardly arbitrary. Given the expedited timeline set by

Congress, the Commission took the eminently reasonable approach of adopting, wherever possible, limits that were already in effect and have worked well.

Plaintiffs also mount barely-developed challenges to the Commission's definition of deliverable supply, the choice of commodities covered by the Rule, the limits set for cash-settled contracts (*i.e.*, those that are settled not by delivery of a commodity but by a cash payment) and for swaps, and the Rule's exemptions from aggregation. The Commission's decision with respect to each of these aspects of the Rule, and many others, rests on the Commission's exercise of its technical expertise and historical experience. Indeed, the Rule represents the Commission's best efforts to implement a congressional mandate expeditiously but also with care and deliberation, and to do so in a manner that, where possible, mitigates the costs of compliance. Because a court is not to substitute its judgment on these sorts of technical issues for that of the agency, none of Plaintiffs' challenges is likely to succeed. (Part B.2, *infra*.)

Plaintiffs' final challenge is to the Commission's consideration of costs and benefits. But like their other challenges, this one is also based on their mistaken belief that the Commission can only implement position limits if it first finds that they are necessary to combat excessive speculation. This argument gets no stronger with repetition, and the Commission's response is the same: because Congress required the Commission to impose federal position limits, including on swaps, the Commission was not free to weigh costs and benefits so as to override Congress' mandate. For that reason, this case bears no similarity to the D.C. Circuit's decision in *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011), a case that involved a discretionary rule. In any event, the Commission did conduct as thorough a consideration of costs and benefits as possible given the highly predictive and uncertain nature of the task. It estimated the costs of creating systems for monitoring positions and the number of traders who would be affected by the limits. It also explained how, with respect to various aspects of the Rule, it attempted to mitigate costs. In addition, the Commission analyzed the costs and benefits in light of five factors set forth in the CEA. This sort of undertaking is dependent on the Commission's expertise, and is entitled to great deference from this Court. (Part B.3, *infra*.)

The final two criteria for a preliminary injunction – the balance of equities and the public interest – go against Plaintiffs because there is inherent harm in preventing implementation of rules that Congress has required the agency to promulgate. Although Plaintiffs contend there is no immediate need for the Rule, Congress, by setting tight deadlines, plainly believed otherwise. (Part C, *infra*.)

ARGUMENT

Plaintiffs' Application fails because they cannot satisfy even one, let alone all four, of the criteria for a preliminary injunction.[7]

A. Plaintiffs fail to show irreparable harm.

To justify a preliminary injunction, Plaintiffs must show injury that is "both certain and great," "actual and not theoretical," "beyond remediation," and "of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." Because "the basis of injunctive relief . . . has always been irreparable harm," Plaintiffs' "failure to show any irreparable harm is therefore grounds for refusing to issue a preliminary injunction . . .."

[7] Plaintiffs contend that it is "unusual" that two members of the five-member Commission dissented. Memorandum in Support of Plaintiffs' Application for a Preliminary Injunction ("Mem.") at 1. But the Commission acts by majority vote, as it did here with respect to the Rule and the preamble, and there is nothing unique when its members do not act in lockstep. Plaintiffs also note that one member of the majority expressed skepticism regarding the possible impact of the Rule and the need for position limits. *See* Mem. at 1, 36-37. In fact, however, Commissioner Dunn voted to adopt both the Rule and its preamble.

Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006) (internal citations and quotation marks omitted; emphasis in original).

Plaintiffs fail to show that the harm they assert is irreparable under this Circuit's demanding standard. *See* Mem. at 30-36; *Chaplaincy*, 454 F.3d at 297. It is well settled that economic harm of the type Plaintiffs allege does not generally constitute irreparable harm, unless such harm threatens "the very existence of [their] business." *Wisconsin Gas v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam); *Sterling Commercial Credit-Mich., LLC v. Phoenix Indus. I, LLC*, 762 F. Supp. 2d 8, 15-16 (D.D.C. 2011) (critical consideration is *the effect* of the purported economic harm on movant's business, not the monetary amount *per se*, and loss must be placed in context of the overall financial condition of movant's business). Although Plaintiffs allege that, to develop systems to comply with the Rule, some of their members may incur significant compliance costs measured in the millions of dollars, Camacho Decl. ¶ 3 (Pl. Ex. 5); Mem. at 31, they never allege that these costs come anywhere close to threatening any member's business. Nor could they. Two of Plaintiffs' five declarants provide estimates of compliance costs.[8] But these costs are minuscule when compared to the annual revenues of their companies, which are in the tens of *billions* of dollars. *Compare* Declaration of CFTC staff economist Hannah Ropp ("Ropp Dec.," attached hereto as CFTC Exhibit 1) at ¶¶ 5, 10, 15, 19, *with* Camacho Decl. ¶¶ 17-18 (Pl. Ex. 5); Greenshields Decl. ¶¶ 4, 9-11 (Pl. Ex. 6).[9]

[8] The declarations submitted on behalf of Barclays and Goldman Sachs (and the declaration from economist Craig Pirrong (Pl. Ex. 4)) do not estimate compliance costs. *See* Jones Decl. (Pl. Ex. 7); Casturo Decl. (Pl. Ex. 8).

[9] The annual bonuses that these companies pay their top executives are also a matter of public record, *see* Ropp Decl. at ¶¶ 7, 8, 12, 13, 17, 21, 22, and this Court may easily compare Plaintiffs' estimates of member compliance costs with those bonuses.

Nor is the harm irreparable merely because the costs cannot be recovered if Plaintiffs succeed in overturning the Rule. *See* Mem. at 32-33. Alleged economic injury must be "more than simply irretrievable; it must also be serious in terms of its effect on the plaintiff." *Navistar, Inc. v. Environmental Protection Agency*, 2011 WL 3743732 at *3 (D.D.C. 2011) (internal citations and quotations omitted); *LG Electronics v. Dep't of Energy,* 679 F. Supp. 2d 18, 36 (D.D.C. 2010) (losses that are a "minuscule portion of the company's worldwide revenues" do not constitute irreparable harm even if unrecoverable).[10] Again, Plaintiffs have not shown that the compliance costs they allege (costs that amount to a tiny portion of their net revenues, *see supra*) would cause any substantial harm to their members' operations. If irretrievability alone constituted irreparable injury, then any new regulation that imposed compliance costs, however insignificant, would automatically cause irreparable harm. Such a result would upend the principle that agency action is presumptively valid, *City of Santa Monica v. FAA*, 631 F.3d 550, 559 (D.C. Cir. 2011), and would allow any litigant challenging a regulation that might impose only minimal compliance costs to obtain an injunction pending resolution of the challenge. *See Am. Hosp. Ass'n v. Harris,* 625 F.2d 1328, 1331 (7th Cir. 1980) (injury from attempted compliance with government regulation is usually not irreparable harm); *Air Transp. Ass'n v.*

[10] Plaintiffs mistakenly suggest that, in the Commission's Opposition to the Emergency Motion to Stay, which it filed in the Court of Appeals, *ISDA v. CFTC*, No. 11-1469 (D.C. Cir.), the Commission somehow misquoted the D.C. Circuit's decision in *Wisconsin Gas. See* Mem. at 33. In particular, Plaintiffs contend that the Commission relied on *Wisconsin Gas* to respond to Plaintiffs' argument that its compliance expenses justify a stay because they are unrecoverable. Plaintiffs misread the Stay Opposition. The Commission cited *Wisconsin Gas* to show that harm justifying a stay must be substantial. *See* Stay Opp. at 8. Plaintiffs imply that *Wisconsin Gas* can be read to hold that unrecoverable expenses that are not substantial somehow justify a preliminary injunction. But *Wisconsin Gas* does not address whether insubstantial unrecoverable expenses constitute irreparable harm. The decisions from this Court cited above do address that issue, and they make clear that costs of the relative magnitude alleged by Plaintiffs do not justify the relief they seek.

Export-Import Bank, 2012 WL 119557 at *7 (D.D.C. Jan. 13, 2012) (contention that any harm that is unrecoverable (because the defendant has sovereign immunity) is sufficient to justify preliminary injunction is "not only … not the law of this Circuit,[] it would also effectively eliminate the irreparable harm requirement").[11]

Plaintiffs' argument that their members' compliance costs constitute irreparable harm is also flawed because it wrongly assumes that those members could avoid position limits altogether if their lawsuit succeeds. *See* Mem. at 32. But it was Congress, not the Commission, that required the extension of position limits to swaps. 7 U.S.C. § 6a(a)(5). Thus, even if Plaintiffs could show that some aspect of the Rule is arbitrary (which they cannot), the Declarants' companies would ultimately have to comply with the will of Congress by developing or adapting systems to monitor compliance with position limits for swaps.

Plaintiffs' other allegations, *see* Mem. at 33-36, do not establish irreparable harm because they are general, vague, and conjectural. Plaintiffs' economist asserts that unspecified "market participants will have to adjust their trading strategies." Pirrong Decl. ¶¶ 4, 27-33 (Pl. Ex. 4). But he did not attempt to quantify any costs that would result from such an adjustment. *See id*. Plaintiffs' economist also contends that the Rule will "[i]mpair [m]arket [l]iquidity and [r]isk [b]earing [c]apacity." *Id.* at ¶¶ 34-43. But the Commission specifically concluded otherwise,

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[11] Although *Feinerman v. Bernardi*, 558 F. Supp. 2d 36, 50-51 (D.D.C. 2008), states that irretrievable costs are sufficient to establish irreparable harm, *see* Mem. at 32, Feinerman alleged that he would lose up to 40 percent of his business if preliminary injunctive relief were not granted. Plaintiffs here allege no similar harm. Plaintiffs also rely on *Sottera v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010), but that case says nothing about irretrievability. Finally, Plaintiffs cite *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers), but Justice Scalia noted only that irretrievable expenditures "may" constitute irreparable harm and found such harm there because if a stay were not granted, a substantial portion of the money at issue would have been unrecoverable. In any event, as explained in the text, the compliance costs plaintiffs' declarants assert they will incur as a result of having to develop systems to monitor position limits for swaps are attributable to a decision by *Congress* to extend position limits to those instruments. As such, those costs provide no basis for staying the Rule.

see, *e.g.*, 76 Fed. Reg. at 71634-37, and the Commission's conclusion is entitled to deference. *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009). In any event, Plaintiffs' economist provides no specific facts as to the effect of these possible consequences on any of Plaintiffs' members. *See* Pirrong Decl. ¶¶ 4-5, 27-43 (Ex. 4). The generalized harms he asserts provide no basis for relief.

The other declarations are similarly deficient. They allege only the possibility that the declarants *might* lose customers to competitors who are not subject to position limits, *might* have to divest ownership interests, or *might* have to alter trading strategies as a result of the Rule's position limits, account aggregation requirements, and bona fide hedging exemptions. *E.g.*, Camacho Decl. ¶¶ 19-20 (Pl. Ex. 5) (risk that business could be lost); Greenshields Decl. ¶¶ 7 (Pl. Ex. 6) (Rule aggregation requirements "may" require divestment); Jones Decl., ¶ 5 (Pl. Ex. 7) (could "potentially" restrict services). While one of Plaintiffs' declarants "expects that there will be instances" in which some of these results will occur if the Rule takes effect, Casturo Decl., ¶¶ 10-12 (Ex. 8), this is still nothing more than an unsupported allegation. "Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur." *Wisconsin Gas*, 758 F.2d at 674 (emphasis in original) (movant must provide proof that the harm has occurred and is likely to occur again, or proof that the harm is certain to occur in the near future, and that it will directly result from the action at issue).[12] The declarants' generalized, speculative assertions of injury, "couched as they are here in mere

[12] For example, Mr. Casturo "expects" that there will be instances where his company would be required by the Rule to "divest from entities in which it currently owns a stake" but at the same time would be "bound by shareholder agreements that prohibit" such divestment. Casturo Decl. ¶ 10. But Mr. Casturo's expectation does not account for the process available to his company under the statute and the regulations to seek an exemption from the account aggregation rules in that circumstance. *See* 7 U.S.C. § 6a(a)(7); 17 C.F.R. § 140.99.

possibilities, however, 'are of no value since the court must decide whether the harm will *in fact* occur.'" *Sterling Commercial Credit*, 762 F. Supp. 2d at 16 (quoting *Wis. Gas*, 758 F.2d at 674) (emphasis in original).

Finally, Plaintiffs fail to establish that the harm they allege is "of such imminence" to justify a preliminary injunction. The Rule does not become effective until 60 days after the CFTC and SEC promulgate a rule further defining the term "swap," and neither agency has yet scheduled the issuance of such a rule.[13] Plaintiffs accordingly fail to establish that their harm is "of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Chaplaincy*, 454 F.3d at 297 (internal quotations and citations omitted; emphasis in original).

B. Plaintiffs fail to show they are likely to prevail on the merits.

1. *Prior to imposing position limits, the Commission was not required to find that the limits were necessary.*

Plaintiffs are wrong when they contend that, before the Commission can impose position limits, subsection 6a(a)(1) requires it to find that such limits are "necessary," and that subsection 6a(a)(2)(A) requires it to find that limits are "appropriate." *See* Mem. at 19-23. This argument is irreconcilable with the plain text of Dodd-Frank, which makes clear that Congress mandated that the Commission impose speculative position limits. That mandate is reflected in Congress' repeated characterization of the limits as "required," the deadlines it imposed for establishing the "required" limits, and its demand that, within 12 months after the limits are imposed, the

[13] Plaintiffs claim that, because they do not know when the Rule will become effective, they must "assume at all times" that the Rule "could" become effective "within 60 days." Mem. at 31. But it has already been 90 days since the Rule was published in the Federal Register. Presumably, therefore, Plaintiffs have, by this time, completed most of the preparations necessary to comply with the Rule. Expenses that have already been incurred are no longer imminent and therefore cannot justify a preliminary injunction.

Commission produce a report to Congress on the effects of the limits, "if any," on excessive speculation.[14] Plaintiffs' argument is also at odds with the Commission's longstanding interpretation of subsection 6a(a)(1), and Congress' ratification of that interpretation.

When Congress enacted Dodd-Frank, it retained section 6a(a)(1), which authorizes the Commission to issue position limits.[15] As explained above (pp. 3-6), the Commission and Congress have long understood that section 6a(a) authorizes the Commission to impose position limits as a prophylactic measure, without any finding either that excessive speculation already exists or that such limits would prevent or limit such speculation. Congress also added several subsections to section 6a(a) that make it clear that Congress was mandating that the Commission impose the limits. Subsections 6a(a)(2)(B)(i) and (ii) direct the Commission to impose position limits on futures and options contracts for exempt and agricultural commodities within specific time deadlines, and both of those subsections refer to those limits as "required." If, as Plaintiffs suggest, Congress intended the Rule to be discretionary, it would make little sense for Congress to provide time deadlines within which such limits were to be in place or to refer to the limits as "required." Plaintiffs' interpretation also cannot account for new subsection 6a(a)(2)(C), which directs the Commission to try to ensure that traders cannot avoid the "required" position limits by trading on foreign boards of trade. Nor can it explain new subsection 6a(a)(3), which

[14] Plaintiffs cite *Gerber v. Norton*, 294 F.3d 173 (D.C. Cir. 2002), and *Public Citizen v. Federal Motor Carrier Safety Admin.*, 374 F.3d 1209 (D.C. Cir. 2004), to support their contention that the Commission should have made findings regarding the Rule's necessity. Mem. at 19. But those cases are not relevant here, because neither involved a mandatory rule.

[15] Congress made only minor amendments to subsection 6a(a)(1), thereby extending its reach to swaps.

identifies for the Commission the types and objectives of the limits "required" by subsection 6a(a)(2).[16]

Congress similarly did not leave it to the Commission's discretion to impose position limits on economically equivalent swaps. To the contrary, Congress directed the Commission to establish limits on such swaps "simultaneously" with the required limits on futures and options contracts, thereby subjecting limits on swaps to the same tight deadlines. 7 U.S.C. § 6a(a)(5)(B)(ii). It also required that the Commission ("[t]he Commission shall") establish limits that apply across designated contract markets and that apply to certain contracts on foreign boards of trade. 7 U.S.C. § 6a(a)(6). Congress would not have imposed the numerous substantive requirements and procedural deadlines set forth in section 6a(a) if Congress meant for the limits to be optional.

Plaintiffs also ignore Section 719 of Dodd-Frank, which requires the Commission, "[w]ithin 12 months after the imposition of limits pursuant to [Dodd-Frank]" to provide Congress with a study of "the effects (if any) of the position limits" on "excessive speculation" and on the movement of transactions from the United States to foreign venues. Dodd-Frank § 719.[17] The section further provides that, within 30 days after the receipt of the study, the House Committee on Agriculture shall hold a hearing to examine the Commission's findings. *Id.*

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[16] Plaintiffs contend that the Commission acted in a manner that was internally inconsistent because it imposed limits only with respect to 28 physical commodities. Mem. at 23. But as explained below, pp. 31-32, there was ample justification for that initial choice.

[17] Plaintiffs assert that the potential movement of transactions to foreign venues constitutes a form of irreparable harm that justifies a preliminary injunction. *See* Camacho Decl. ¶¶ 19, 20. But Congress clearly contemplated that such flight might occur, and it directed the Commission, within one year, to report the extent to which the position limits have, in fact, caused such flight. Thus, it would frustrate the Congressional scheme to block the rule based on a consequence that Congress foresaw but was clearly willing to accept, at least for an initial period pending its receipt of the Commission's report.

Congress would not have mandated a study on the effects of a rule, and subsequent hearings, with respect to a rule that was merely discretionary and might never be promulgated.

Section 719 refutes Plaintiffs' argument for additional reasons. By requiring the Commission to report on the "effects (*if any*) of the position limits" (emphasis added), section 719 demonstrates that Congress contemplated that the position limits it mandated might not have any effect on excessive speculation. Congress wanted the Commission to act expeditiously to impose position limits and then to study their effects *after* their imposition. Had Congress wanted the Commission to make an independent, predicate determination of the appropriateness *vel non* of position limits or contract-by-contract findings of necessity, it would not have enacted section 719 nor would it have established short deadlines for establishing the limits it "required."[18]

Plaintiffs devote more than four pages of their Memorandum to arguing that, prior to imposing position limits, the Commission was required by the CEA to make a finding of necessity. In doing so, it is telling that they make *no mention* of any of the subsections of the CEA in which Congress repeatedly refers to the position limits as "required." *See* Mem. at 19-23. Instead, they focus on subsections 6a(a)(1) and 6a(a)(2)(A), but the language of those subsections does not support their argument. The relevant (lengthy) sentence of subsection 6a(a)(1) provides that:

> For the purpose of diminishing, eliminating, or preventing such burden [*i.e.*, the burden caused by excessive speculation that results in unreasonable commodity price fluctuation], the Commission shall, from time to time, after due notice and opportunity for hearing, by rule, regulation, or order, proclaim and fix such limits

[18] Contrary to Plaintiffs' claim, the Commission's Notice of Proposed Rulemaking does not suggest that it construed the statute otherwise. *See* Mem. at 20 (citing 76 Fed. Reg. at 4755). In fact, the notice refers to Congress' mandate that the Commission impose position limits, and notes the Commission's discretion only with respect to the specific numerical limits that the Commission sets. 76 Fed. Reg. at 4754, 4755.

> on the amounts of trading which may be done or positions which may be held by any person, including any group or class of traders, under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility, or swaps traded on or subject to the rules of a designated contract market or a swap execution facility, or swaps not traded on or subject to the rules of a designated contract market or a swap execution facility that performs a significant price discovery function with respect to a registered entity, as the Commission finds are necessary to diminish, eliminate, or prevent such burden.

The relevant sentence of subsection 6a(a)(2)(A) provides that:

> In accordance with the standards set forth in paragraph (1) of this subsection [*i.e.*, section 6a(a)(1)] and consistent with the good faith exception cited in subsection (b)(2), with respect to physical commodities other than excluded commodities as defined by the Commission, the Commission shall by rule, regulation, or order establish limits on the amount of positions, as appropriate . . ..

Plaintiffs seize on the phrase "as the Commission finds are necessary" in subsection 6a(a)(1) and the words "as appropriate" in subsection 6a(a)(2)(A), contending that they each modify the verb "shall." Mem. at 21-22. But in subsection 6a(a)(1), "necessary" is more closely preceded by the phrase "proclaim and fix such limits on the amounts of trading," and in 6a(a)(2)(A) "as appropriate" is more closely preceded by the phrase "establish limits on the amount of positions." Thus, even under Plaintiffs' approach of considering these two subsections in isolation, it is far more plausible to interpret the two subsections as a direction to the Commission, when it imposes the required position limits, to set them at an appropriate level. *See* 2A *Sutherland Statutes and Statutory Construction*, § 47:33 (7th ed. 2011) (referential and qualifying words generally refer solely to closest antecedent).[19]

[19] Plaintiffs also claim that the Commission's interpretation is inconsistent with three other provisions of the CEA that give futures or swaps exchanges discretion in establishing their own limits or accountability levels as "necessary and appropriate." Mem. at 22 & n.10, citing 7 U.S.C. §§ 6a(e); 7(d)(5); 7b-3(f)(6)(A). There is no inconsistency. As explained above, Congress required the Commission to impose limits as to physical commodities (*i.e.*, agricultural products, metals, and energy). But that mandate does not apply to financial derivatives. Section 6a(e), which authorizes contract markets to set position limits for any commodity, provides that,

Plaintiffs also misinterpret the introductory clause of subsection 6a(a)(2), which provides that the Commission shall issue the Rule "[i]n accordance with the standards set forth in [subsection 6a(a)(1)]." *See* Mem. at 21. This clause does not, as Plaintiffs contend, require the Commission to make findings of necessity prior to imposing limits. The key word in the clause is "standards." The first relevant dictionary definition of "standard" is "something set up and established by authority as a rule for the measure of quantity, weight, extent, value, or quality." *Merriam-Webster's Collegiate Dictionary* 1216 (11th ed. 2011). That is, "standards" refer to factors that relate to the level at which the Commission sets the limits, not the prerequisites for setting them. In particular, subsection 6a(a)(1) provides, *inter alia*, that the limits set by the Commission must provide for the aggregation of "positions held and trading done by any persons directly or indirectly controlled by such person," that the Commission may set different limits "for different commodities, markets, futures, or delivery months, or for different number of days remaining until the last day of trading in a contract," or that the Commission may "exempt[] transactions normally known to the trade as 'spreads' or 'straddles' or 'arbitrage.'" Because the Commission did promulgate the Rule "in accordance with the standards set forth in" subsection 6a(a)(1), Plaintiffs' argument is unavailing.

Plaintiffs' argument also fails because the Commission has, since at least 1981, construed its authority under 7 U.S.C. § 6a as *not* requiring the very sorts of findings that Plaintiffs contend the Commission must make before imposing any limits, and Congress ratified that construction.

"if the Commission shall have fixed limits under this section for any contract . . .," then any limit set by the contract market may be no higher than the one set by the Commission. 7 U.S.C. § 6a(e). This language in no way undermines Congress' mandate with respect to physical commodities. It merely means that, if a contract market sets limits with respect to a commodity, it must determine if the Commission has already set a limit for that commodity, and then it must set its limit accordingly. Subsections 7(d)(5) and 7b-3(f)(6)(A) apply the same principle to facilities that trade swaps.

See 46 Fed. Reg. at 50940; 75 Fed. Reg. at 4146 n.13 ("[r]equiring a specific demonstration of the need for position limits is contrary to [7 U.S.C. § 6a(a)]").[20] Had Congress disagreed with the Commission's interpretation, it would have changed the language of (what is now) section 6a(a)(1) to make clear that such predicate findings were required. *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 129 S. Ct. 2484, 2492 (2009) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.") (internal quotation marks omitted).[21] Instead of changing the language in Dodd-Frank to require predicate findings of the kind that the Commission insisted it

[20] Plaintiffs incorrectly infer from several orders issued by the Commission's predecessor during the 1930s, 1940s, and 1950s that the Commission has conceded that it must make a finding of necessity prior to imposing position limits. *See* Mem. at 19 & n.9. Although the Commodity Exchange Commission stated in those orders that position limits effectuated the purposes of section 6a(a), it did not state that it was required to find that an undue burden or excessive speculation already existed before imposing limits. Subsequently, the CFTC has made clear that no such finding is required. *See* 46 Fed. Reg. at 50940 (section 6a(a)(1) "represents an express *Congressional* finding that excessive speculation is harmful to the market, and a finding that speculative limits are an effective prophylactic measure") (emphasis added); 75 Fed. Reg. at 4146 n.13.

[21] Plaintiffs are mistaken in contending that, in 1981, the Commission did not interpret its authority as permitting it to impose position limits without a finding of necessity. Mem. at 20-21. The Commission unequivocally construed its authority under the CEA as "represent[ing] an express Congressional finding that excessive speculation is harmful to the market, and a finding that speculative limits are an effective prophylactic measure." 46 Fed. Reg. at 50940. Since that time, the Commission has imposed limits prophylactically, without making a predicate finding of necessity. Plaintiffs also assert that there is insufficient evidence that Congress was actually aware of the Commission's interpretation. *Id.* But as the Supreme Court held in *Forest Grove*, Congress' awareness is presumed. In any event, the history of various modifications to the CEA shows that Congress was aware of the Commission's interpretation, strengthened the Commission's authority to set and enforce position limits, and rejected industry attempts to weaken that authority, including an attempt to strip out language the Commission relied on in 1981 to conclude that Congress had authorized imposing position limits as a prophylactic measure. *See* p. 5, *supra*. "[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 846 (1986) (internal quotation marks omitted).

did not have to make, Congress left the relevant language of subsection 6a(a)(1) unchanged and added several new provisions that conveyed unequivocally that *Congress* had determined position limits were necessary by directing the Commission to establish the "required" limits and to do so under tight deadlines.

In sum, the language and structure of Section 6a, together with the legislative and regulatory history of position limits since 1981, provide clear support for the Commission's view that Congress in Dodd-Frank mandated imposition of position limits. Indeed, the Commission's view is the only one that gives effect to the position limits statute as an integrated whole.

2. *The Rule reflects reasoned decision-making and is entitled to deference.*

Plaintiffs contend that several provisions of the Rule do not evince the exercise of reasoned discretion. Mem. at 23-27. They are mistaken. With respect to each of these provisions, the Commission considered all the comments it received, applied its expertise, and explained its decision in the preamble. Thus, with respect to these specific challenges, Plaintiffs have not shown any likelihood of success on the merits.

Recognizing that it was under a statutory mandate to set position limits, the Commission considered all comments and relied on decades of experience setting such limits when enacting the Rule. The Administrative Procedure Act requires no more. The Supreme Court has long made clear that the scope of review of agency action is "narrow." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 1810 (2009). Although an agency is required to "examine the relevant data and articulate a satisfactory explanation for its action[,] . . . a court is not to substitute its judgment for that of the agency" and should uphold agency action if "the agency's path may reasonably be discerned[.]'" *Id.* (internal quotation marks omitted). When evaluating regulations – like the Rule – that are "essentially legislative and rooted in inferences from complex scientific and factual data," the court's "task is not to second-guess an agency decision that falls within a zone of reasonableness." *Nat'l Mar. Safety Ass'n. v. OSHA*, 649 F.3d 743, 751-52 (D.C. Cir. 2011) (internal quotation marks omitted).

Plaintiffs' claim that the Commission ignored record evidence regarding the advisability and efficacy of position limits, Mot. at 23-25, suffers from the same flaw as their claim that the Commission was required to make findings supporting the necessity of position limits: Plaintiffs fail to understand that Congress already restricted the scope of the Commission's discretion and directed it to impose position limits. *See* pp. 20-26, *supra*. Accordingly, studies that Plaintiffs contend should have convinced the Commission to terminate its rulemaking, *see* Mem. at 24, were misdirected; they should be provided to Congress. *See* 76 Fed. Reg. at 71629 n.32. Further, the Commission did consider all the studies it received, but noted that some studies failed to recognize that, in implementing position limits, the Commission did not have discretion to ignore a mandate from Congress. And the Commission noted that other studies simply were not useful because they provided no guidance on how to implement the limits that Congress required. *Id.* at 71663-64.

In the same vein, Plaintiffs argue that the Commission ignored record evidence regarding the advisability of subjecting energy contracts to position limits. *See* Mem. at 24. But the record is clear that the Commission *did* consider the potential effect of limits on natural gas contracts. As the Commission pointed out, all energy futures contracts – as well as a cash-settled swap – were already subject to exchange-set spot-month position limits. 76 Fed. Reg. at 71634 & n.88. A commenter claimed that the preexisting position limits regime for cash-settled and physically-delivered natural gas contracts had an adverse effect on the physically-settled contract (*i.e.*, a contract that is settled by delivery of the commodity). After analyzing data, the Commission rejected that claim, concluding that the position-limits regime for those contracts had resulted in "little (if any) adverse impact on market liquidity" and had not impaired price discovery. 76 Fed. Reg. at 71635. Thus, contrary to Plaintiffs' claim, the Commission did consider the ramifications of federal position limits on energy contracts, and the Commission's conclusion is entitled to deference from this Court.

Plaintiffs' related claim that the specific levels at which the Commission set position limits were "without a reasoned basis," Mem. at 24, is equally misguided. The Commission did not arbitrarily cut new limits from whole cloth. Rather, implementing Congress' directive in Dodd-Frank, the Commission acted expeditiously but judiciously by extending to the financial instruments covered by the Rule the same speculative position limits that it and the exchanges had long used for futures contracts, options and a certain narrow class of swaps.[22] The Commission selected this approach because, in the Commission's estimation, the position limits had worked well, and because using the same position limit formulas would facilitate a transition to Commission-set limits without unduly disrupting the market. *See, e.g.*, 76 Fed. Reg. at 71634, 71639, 71669.

Thus, the Commission fixed the Rule's spot-month limits "based on existing [exchange-set] limits and data that is available." 76 Fed. Reg. at 71632. Specifically, the Commission set the spot-month limits at 25% of estimated deliverable supply for all contracts except cash-settled natural gas contracts. The Commission used this formula because it is the "existing industry standard," it "provide[s] clarity" for market participants, and because, in the Commission's experience, it "has appeared to work effectively as a prophylactic tool to reduce the threat of corners and squeezes without compromising market liquidity." 76 Fed. Reg. at 71634. Further,

[22] All 28 core referenced futures contracts subject to the Rule were subject to federal or exchange-set position limits before the Rule was enacted. 76 Fed. Reg. at 71669.

the Commission explained that it chose to use the spot-month limits currently in place to facilitate compliance by market participants. 76 Fed. Reg. at 71669. Continuing its deliberate approach, the Commission set spot-month limits for cash-settled contracts on an interim final basis to allow for additional comments and data collection.[23] 76 Fed. Reg. at 71635-38.

With respect to non-spot-month limits, the Commission received a range of comments: some urged the Commission not to impose any such limits, and others advocated more stringent limits than originally proposed. 76 Fed. Reg. at 71639. Plaintiffs argue that the Commission improperly rejected comments that suggested that only less restrictive non-spot-month limits would be appropriate unless the Commission first made a finding that excessive speculation existed. Mem. at 25. But once again, because Congress mandated the imposition of non-spot-month limits, 7 U.S.C. §§ 6a(a)(3)(A), 6a(a)(5), the Commission was compelled to impose them. Faced with a deadline to enact such limits, 7 U.S.C. § 6a(a)(2)(B), and comments pointing in all directions, the Commission ultimately imposed the same non-spot-month limits on speculative positions as were previously imposed by exchanges on other contracts.[24] As the Commission explained, based on its extensive experience, these limits have "helped prevent excessive

[23] The Commission received thirteen comment letters in response to its request for comment on the interim final rule. The Commission is considering those comments, and will respond to them in due course.

[24] Plaintiffs cite *Chemical Manufacturers Ass'n v. EPA*, 217 F.3d 861 (D.C. Cir. 2000), and contend that it suggests that Dodd-Frank's deadlines are irrelevant to the Commission's defense of the Rule. *See* Mem. at 16. But that case says nothing of the sort. In *Chemical Manufacturers*, EPA was under no deadline with respect to the promulgation of the Clean Air Act ("CAA") regulation that was at issue. The only deadline was a statutory provision that required EPA, once it had identified a source of air pollution, to require that the source come into compliance as expeditiously as practicable, but no later than three years after the source had been identified. The court held that, where the EPA imposed a two-year deadline, it had to show how that deadline advanced the purposes of the CAA, and could not simply rely on the statutory goal of expedition. *Id.* at 867.

speculation and deter and prevent market manipulations, squeezes and corners . . . [while also] ensur[ing] sufficient liquidity for bona fide hedgers and avoid[ing] disruption to the price discovery process." 76 Fed. Reg. at 71639.[25] This was a reasonable line for the Commission to draw, and it is entitled to deference. "When a line has to be drawn, the Commission is authorized to make a 'rational legislative-type judgment.' If the figure selected by the agency reflects its informed discretion and is neither patently unreasonable nor a 'dictate of unbridled whim,' then the agency's decision adequately satisfied the standard of review." *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1242 (D.C. Cir. 2007) (quoting *WJG Tel. Co. v. FCC*, 675 F.2d 386, 388-89 (D.C. Cir. 1982)).

Plaintiffs cursorily challenge several additional aspects of the Rule as lacking a reasoned explanation, Mem. at 25-26, devoting no more than two sentences to any of these arguments. Such undeveloped arguments are not properly before the Court. *U.S. ex rel. Miller v. Bill Harbert Intern. Const., Inc.*, 608 F.3d 871, 879 (D.C. Cir. 2010) ("We need not address the arguments . . . because they were raised in only two conclusory sentences."); *see also Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001). In any event, these claims are meritless.

1. Plaintiffs argue that the Commission rejected, without adequate explanation, their proposed definition of deliverable supply. Mem. at 25. Rather than accept Plaintiffs' broader definition, the Commission chose to retain its long-standing definition of the term. The Commission explained that, based on its historical practice and extensive experience "overseeing

[25] The Commission also explained that the non-spot-month limits it proposed and ultimately adopted (limits that were based on the number of outstanding contracts) were "purposely designed to be high [i.e., less restrictive] in order to ensure sufficient liquidity for bona fide hedgers and avoid disrupting the price discovery process given the limited information the Commission has with respect" to the size of the swaps market. 76 Fed. Reg. at 71639 (quotation marks omitted).

position limits established at the exchanges as well as federally-set position limits, 'spot-month speculative position limits are based most appropriately on an analysis of current deliverable supply and the history of various spot month expirations.'" 76 Fed. Reg. at 71633 (quoting 64 Fed. Reg. 24038, 24039 (May 5, 1999)) (further quotation omitted). The Commission further reasoned that continuing to rely on a definition of deliverable supply that was consistent with current exchange practice was desirable because "this consistent approach facilitates an orderly transition [from exchange-administered limits] to Federal limits." 76 Fed. Reg. at 71669. Thus, the Commission provided a reasonable explanation for rejecting Plaintiffs' proposal. The APA requires no more.

2. Plaintiffs take issue with the methodology that the Commission used when it selected the commodity contracts that it would regulate directly. Mem. at 25. Lacking sufficient resources simultaneously to set and administer position limits for all of the physical commodity contracts that are currently traded, the Commission selected 28 contracts to include within the Rule. It chose those contracts that had the highest levels of open interest (*i.e.*, the highest levels of outstanding activity), or that were important because they served as a reference price for other cash market derivative transactions. 76 Fed. Reg. at 71629. Plaintiffs contend that, instead, the Commission should have selected those contracts that are most prone to speculation. But since Congress mandated that the Commission adopt position limits prophylactically, the Commission reasonably decided first to deploy its limited resources policing the contracts that, in its judgment, are most important to the economy.[26] Moreover, the Commission explained that it

[26] "Agencies often must contend with matters of degree. Regulations, in other words, are not arbitrary just because they fail to regulate everything that could be thought to pose any sort of problem." *Nat'l Mining Ass'n v. MSHA,* 116 F.3d 520, 549 (D.C. Cir. 1997) (internal citations and quotations omitted).

intends to propose position limits for other physical commodity derivatives "as soon as practicable in the future." 76 Fed. Reg. at 71659-60. "In the interim, the Commission will rigorously enforce [exchange] compliance with [the] Core Principles," *id.*, which generally require exchanges to craft position limits or accountability levels. *See* 17 C.F.R. § 38 App. B, Core Principle 5(b)(4). This was a reasonable exercise of the Commission's discretion.

3. Plaintiffs dispute the Commission's rationale for setting spot-month limits for cash-settled contracts at the same level as physical-delivery contracts. Plaintiffs claim that "the need to avoid market manipulation tactics like 'corners and 'squeezes' – does not apply to cash-settled contracts." Mem. at 25 (citing 76 Fed. Reg. at 71634-36). However, corners and squeezes are not the only forms of market manipulation and, contrary to Plaintiffs' contention, the Commission did, in fact, conclude that setting spot-month limits for cash-settled contracts at the same level as physically-delivered contracts would deter manipulation. 76 Fed. Reg. at 71636. The Commission explained that imposing parity between physical-delivery and cash-settled contracts would help protect against price distortion that could undermine price discovery in the linked physical-delivery contract. *Id.* at 71635. ("[P]arity should exist in all position limits . . . between physical delivery and cash-settled Referenced Contracts (other than natural gas); otherwise, these limits would permit larger positions in look-alike cash-settled contracts that may provide an incentive to manipulate and undermine price discovery in the underlying physical delivery futures contract.").

4. Plaintiffs challenge the Commission's decision to subject economically equivalent swaps to the same position limits as their related physical futures and options. Mem. at 25-26. That decision too was reasonable. Congress directed the Commission to develop concurrently, and establish simultaneously, position limits for physical commodity futures and options and

economically equivalent swaps. 7 U.S.C. §§ 6a(a)(5)(B)(i), (ii). Congress further mandated that the limits for swaps be tailored to achieve the same goals as physical commodity futures and options. 7 U.S.C. § 6a(a)(5)(B)(i) (citing § 6a(a)(3)(B)). Implementing Congress' mandate, the Commission concluded that a trader's unlimited exposure to cash-settled contracts, including swaps, would create "a significant incentive to manipulate the physical-delivery market to benefit a large position in the cash-settled economically equivalent contract." 76 Fed Reg. at 71670. Recognizing both the policy need for—as well as the congressional mandate to establish—*some* limits on speculative positions for swaps, the Commission, consistent with its historical practice,[27] chose to set limits for physical commodity swaps largely at the same level as those for economically equivalent futures and options. The Commission made this choice because it concluded, based on its experience and expertise, that such limits "ensure market liquidity for bona fide hedgers and protect price discovery while deterring excessive speculation and the potential for market manipulation." *Id*. at 71636.[28]

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[27] The Commission explained that parity in position limits between cash-settled contracts (including swaps) and physical-delivery contracts "is consistent with the level that the Commission staff has historically deemed acceptable for cash-settled contracts, as well as the formula for physical-delivery contracts under Acceptable Practices for Core Principle 5 set forth in part 38 of the Commission's regulations." 76 Fed Reg. at 71670. The Commission also specifically noted that this approach had historically worked well in a cash-settled energy contract. *Id*. at 71635-36.

[28] Plaintiffs complain that the Commission chose to regulate swaps with insufficient data. Mem. at 25-26. However, Congress directed the Commission to enact position limits on swaps on an expedited timetable, 7 U.S.C. § 6a(a)(5)(B) (subjecting limits on swaps to same deadlines applicable to futures), knowing that there was not much information available regarding the largely unregulated swaps market. Congress did not intend a quest for perfection to obstruct expeditious action. When Congress makes such a choice, courts (and the agency) are bound to respect it. As one court observed in the context of another rule for which abundant data was lacking, "Congress was aware that perfect regulatory standards could not be developed in so short a period of time. But so too must it have appreciated that whatever levels were promulgated initially by the Administrator could be amended should later studies demonstrate that a different level is more appropriate . . . ." *N.Y. v. Gorsuch*, 554 F. Supp. 1060, 1064

5. Plaintiffs challenge the Commission's decision *not* to enact an owned-nonfinancial entities ("ONF") exemption from the Rule's policy of aggregating positions across different accounts. Mem. at 26. The Commission initially proposed this new exemption, which had not been a part of the preexisting regulatory regime. 76 Fed. Reg. at 71653. However, in response to comments, the Commission ultimately declined to adopt this exemption, choosing instead largely to carry forward its preexisting aggregation policy, including an independent account controller (IAC) exemption that the Commission had proposed to drop. In making that choice, the Commission explained that it believed its current aggregation policy had functioned effectively. *Id*. at 71654. The Commission further noted that, because it had decided to retain the pre-existing IAC exemption and to provide new aggregation exemptions for federal law information sharing restrictions and underwriting, it would not be appropriate to "further expan[d]" aggregation exemptions "at this time." *Id*. The mere fact that the Commission proposed the ONF exemption did not thereby create any obligation to implement it, *Long Island Care at Home Ltd. v. Coke*, 551 U.S. 158, 174-75 (2007), and the Commission's explanation, which reflects the Commission's cautious approach to implementing the congressionally mandated position limits regime, satisfies the legal standard.

(S.D.N.Y. 1983); *see also Sierra Club v. Jackson*, No. 01-cv-1537, 2011 WL 181097, at *7 (D.D.C. Jan. 20, 2011) ("[A]ll agencies should always strive to develop the most effective and sound regulations, [but] that quest must give ground in favor of expedition where Congress directs the [agency] to establish standards promptly") (internal quotation marks omitted). Here too, Congress directed that the Commission impose limits expeditiously. 7 U.S.C. § 6a(a)(2)(B). But, recognizing the unavailability of useful swaps data, Congress also directed the Commission to study the effect of its limits. Dodd-Frank § 719(a). Both Congress and the Commission can take appropriate action in light of the results of the Commission's study. Indeed, the Commission issued the limits on cash-settled contracts as an interim final rule, recognizing that it was acting on limited information and thus would "revisit the issue after [] evaluat[ing] the effects of the interim final rule." 76 Fed. Reg. at 71636.

6. Plaintiffs contend in one sentence that the Commission acted unreasonably when it did not provide an exemption from its aggregation rules for those situations where compliance might result in a violation of state or foreign law. Mem. at 26. However, the Commission provided an exemption from aggregation rules where compliance threatens a violation of federal law, 76 Fed. Reg. at 71653, and persons who are concerned that compliance with the Rule might result in a violation of state or foreign law may seek an exemption pursuant to the Commission's broad exemptive authority. *See* 7 U.S.C. § 6a(a)(7); *see also* 17 C.F.R. § 140.99 (providing for staff level guidance or relief).[29]

7. Plaintiffs also assert a notice violation, contending that the Commission failed to afford interested persons an opportunity to comment on the Commission's decision not to adopt the spot-month limits that it initially proposed. Mem. at 26-27. Plaintiffs are incorrect. In its Notice of Proposed Rulemaking, the Commission proposed a conditional limit that would permit a trader to hold "five times the spot-month limit if such positions [were] exclusively in cash-settled contracts . . . ." 76 Fed. Reg. at 4758. In so doing, the Commission specifically sought comment on the question of whether the Commission "should adopt the proposed conditional-spot-month limits or adopt a uniform spot-month limit." *Id*. Accordingly, Plaintiffs had sufficient notice that the Commission was considering an alternative to its proposed conditional spot-month limit.

Furthermore, Plaintiffs fail to note that the Commission adopted its spot-month formula for cash-settled contracts on an interim final basis and permitted additional comment on that

[29] The Commission has received a petition seeking changes to the aggregation policy, including exemptions for state or foreign law compliance and for owned non-financial entities. *See* Petition of Working Group of Comm. Energy Firms to Exempt Non-Financial Entities from Aggregation for Compliance with Position Limits and to Broaden and Clarify Rule 151.7(i) (Jan. 19, 2012). It is currently under consideration.

formula through January 17, 2012. 76 Fed. Reg. at 71637-38. Plaintiffs had ample opportunity to comment on the limits that apply to cash-settled contracts.[30]

3. *Plaintiffs' challenge to the Commission's cost-benefit analysis is not likely to succeed.*

Plaintiffs' challenge to the Rule's cost-benefit analysis fails for two basic reasons. First, Plaintiffs continue to ignore that Congress mandated the Rule, and, as a result, they mistakenly fault the Commission for failing to evaluate the costs and benefits of issues decided by Congress.[31] And second, when an agency issues a rule of prospective application, such as the one in this case, it is simply not possible to conduct the sort of precise evaluation of costs and benefits that Plaintiffs would have this Court require. Despite the relative paucity of data on the swaps market on which Congress directed the Commission to impose limits, the Commission conducted a substantial cost-benefit analysis that provides no basis for overturning the Rule.

Plaintiffs mistakenly contend that the Commission ignored "evidence . . . submitted by commenters demonstrating that the Rule is unnecessary . . .." *See* Mem. at 27; *see also* Mem. at 28. In fact, the Commission did not "ignore" any of the more than 15,000 comments that it

[30] Plaintiffs also complain that they had insufficient opportunity to comment on a severability clause that is included in the Rule. But the absence of a severability clause in the Commission's proposed rule "had no practical effect" on Plaintiffs' rights, *Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 212 (D.C. Cir. 2011), because the key question is whether the agency would have enacted a regulation in the absence of a provision that is later found invalid. *See Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1393-94 (D.C. Cir. 1990). Resolution of that question turns on an analysis of whether the rule can operate as intended without the invalid provision. *See Free Enterprise Fund v. Pub. Co. Accounting Bd.*, 130 S. Ct. 3138, 3161-62 (2010). Because the mere fact that there was no severability clause in the proposed rule caused Plaintiffs no harm, they are entitled to no relief. *See PDK Labs, Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004).

[31] Congress recognized that the limits it was requiring the Commission to impose would carry costs, including the possibility that transactions would migrate to trading venues overseas. Dodd-Frank § 719(a)(1). Congress directed the Commission to study the limits and provide a report on their effects. *Id*. § 719(a)(2).

received during the rulemaking. Indeed, it considered all of them, many of which were supportive of the Rule. *See* 76 Fed. Reg. at 71626; *see also id*. at 71663-65 (addressing conflicting studies). But Plaintiffs' argument misses the fundamental point. As the Supreme Court has made clear, "[f]irst, always is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). That is what the Commission did here – "Congress has directly spoken to the precise question at issue" because, as explained above, pp. 20-25, it mandated that the Commission impose position limits. Accordingly, the Commission's consideration of costs and benefits could not justify a decision to forgo establishment of position limits on the ground that "evidence" did not support them or otherwise. As the D.C. Circuit has explained, agencies are not "empowered to weigh the costs and benefits of regulation at every turn; agencies surely do not have inherent authority to second-guess Congress' calculations." *Public Citizen v. FTC*, 869 F.2d 1541, 1557 (D.C. Cir. 1989). Thus, regardless of the nature of the comments and studies received during the rulemaking, the Commission could not second-guess Congress by refusing to impose position limits.

Plaintiffs also misunderstand the role of this Court in reviewing a consideration of costs and benefits in a case such as this one. A cost-benefit analysis of rule provisions that have yet to take effect necessarily involves predictive calculations, which "are a murky science in the best of circumstances." *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1314 (D.C. Cir. 2010). That is the situation here because, as Congress required, the Rule governs swaps, financial derivatives that heretofore were largely unregulated. When "an agency is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer, [the reviewing court's] role is more limited; we require only that the agency so state and go on to identify the considerations it found persuasive." *Jifry v. FAA*, 370 F.3d 1174, 1180 (D.C. Cir. 2004) (brackets in original; internal quotation marks omitted). Because that is precisely what the Commission did here, and because the Commission had to evaluate the costs and benefits of its discretionary choices in light of five different factors specified by the statute, the Commission's cost-benefit consideration is entitled to substantial deference.

During the rulemaking, the Commission sought information regarding costs and benefits of the Rule, but commenters provided little quantitative data.[32] 76 Fed. Reg. at 71662. Plaintiffs contend that the Commission somehow erred during the rulemaking by failing to produce the sort of speculative data contained in their exhibits – data that, even now, Plaintiffs seek to keep out of the public record. *See* Mem. at 28. But, as explained above, where, as here, a rule is based on predictive judgments, an agency is free to rely on its experience and expertise and is not precluded from acting merely because those affected by the rule withhold information within their control. *See Southwest Airlines Co. v. TSA*, 650 F.3d 752, 756 (D.C. Cir. 2011) (court "will not second-guess [agency's] determination of this obscure calculation in a data-poor environment in which [a]ny decision . . . would have required considerable guesswork) (internal quotation marks omitted; brackets and ellipsis in original); *see also Chamber of Comm. of the*

[32] The cost data regarding the Rule's impact that are contained in the exhibits submitted by Plaintiffs to this Court were not made available to the Commission during the rulemaking. Parties cannot "withhold relevant data and blind side the agency on appeal." *Chamber of Comm. of the U.S. v. SEC,* 443 F.3d 890, 904 (D.C. Cir. 2006). Contrary to Plaintiffs' contention (Mem. 28), the Commission has pointed out that it did not receive data in response to its request to illustrate that concrete data on the effects of the new rule, particularly with respect to swaps, are not available. As the case law mentioned above makes clear, this fact is relevant in assessing what can reasonably be expected of an agency implementing a mandate in previously unregulated markets.

U.S. v. SEC, 412 F.3d 133, 142 (D.C. Cir. 2005) (agency need not base every action upon empirical data).

In any event, the Commission quantified or estimated costs wherever possible, *see* 76 Fed. Reg. 71662-71674, and considered them in light of the five factors that it is required to consider: (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)(2); *see* 76 Fed. Reg. 71674-80 (separately discussing each of the CEA section 15(a)(2), 7 U.S.C. § 19(a)(2) factors in connection with each of the Rule's three elements – position limits, exemptions, and aggregation).[33] In particular, the Commission estimated the cost of creating or adjusting systems for monitoring the futures and swaps contracts covered by the Rule to track compliance with the position limits. *Id*. at 71666. In so doing, the Commission recognized that "swaps-only traders may incur larger start-up costs to develop a compliance system" since the swaps market was previously not subject to position limits. *Id*. The Commission also estimated, where feasible, the number of traders that would be affected by the position limits in light of the formulas the Commission adopted. *Id*. at 71668, 71672. The Commission further noted that the position limits could lead traders to alter their business strategies, but explained that it could not quantify such costs because they "would necessarily be based on the underlying business models and strategies of the various market participants" to which the Commission was not privy. *Id*. at

[33] The number and scope of factors the Commission must evaluate is a measure of the extent of the discretion Congress delegated to the Commission in conducting its cost benefit consideration. *See U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 234 (D.C. Cir. 2000) (where an agency is required to consider multiple factors that might be in some tension one with another, the agency is not required to show that its action advances every one of those factors).

71672. The Commission also identified numerous ways in which both it and Congress had mitigated the costs of the new speculative position limits. *See id*. at 71666 (adopting objective test for identifying contracts subject to limits); *id*. at 71667 (noting exemption for pre-existing positions); *id*. at 71669 (noting adoption of historical formulas will promote continuity and orderly transition to new limits); *id*. at 71672 (noting costs of complying with non-spot-month limits should be "minimal for most market participants" because of high level of limits); *id*. at 71676 (noting reduction in frequency of bona fide hedge reports and streamlining of recordkeeping requirements); *id*. (noting adoption of policy allowing netting of futures and swaps that will mitigate cost of statutory exclusion of risk management hedge exemption).

After a thorough discussion of the Rule's costs and benefits, the Commission turned to evaluating them in light of the five statutory factors. In conducting this analysis, the Commission emphasized that its historical experience with the limit formulas it was adopting for the new regime persuaded it that such formulas would protect market participants, the efficiency, competitiveness, and financial integrity of the futures markets, and the price discovery function. *Id.* at 71674-80.

Plaintiffs attack the Commission's consideration of costs and benefits by taking one sentence of the 18-page analysis out of context. *See* Mem. at 27. In particular, Plaintiffs contend that, with respect to the spot-month and non-spot-month limits, "the Commission failed to consider or demonstrate in any way 'the extent to which' those [section 15(a)] objectives [*i.e.*, efficiency, competitiveness, and financial integrity] would be achieved." *See* Mem. at 27-28. Plaintiffs ignore the previous sentence, which makes clear that the Commission had earlier in the preamble explained how the limits it selected "are designed in accordance with [CEA] section 4a(a)(3)(B), to deter and prevent manipulative behavior and excessive speculation, while also maintaining sufficient liquidity for hedging and protecting the price discovery process." 76 Fed. Reg. at 71675. Indeed, the Commission explained in some detail how each of the limits imposed by the Rule addresses the objectives of CEA section 4a(a)(3)(B), 7 U.S.C. § 6a(a)(3)(B). *See, e.g.*, 76 Fed. Reg. at 71636, 71639. Read in the context of the discussion preceding it, including the immediately preceding consideration of the effects of the Rule on market participants, *see id*. at 71674-75, the sentence that Plaintiffs seize upon merely recognizes that the objectives of CEA section 4a(a)(3)(B), 7 U.S.C. § 6a(a)(3)(B) – which the Commission specifically determined that the limits would serve – correspond to the efficiency, competition, and financial integrity objectives of section 15(a)(2)(B), 7 U.S.C. § 19(a)(2)(B).

Plaintiffs cite *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011), *see* Mem. at 17, 27-28, but that case bears little similarity to this one. Unlike here, the proxy access rule at issue in *Business Roundtable* was discretionary; it was not a rule that was mandated by Congress, nor was it a rule that was subject to a time deadline. (Indeed, the SEC spent more than six years considering a possible proxy access rule.) The court of appeals noted that, in connection with its proxy access rule, the SEC had "a unique obligation to consider the effect of a new rule upon 'efficiency, competition, and capital formation,'" an obligation that the court concluded the SEC failed to meet. 647 F.3d at 1148 (internal quotation marks omitted). Although the Commission must consider the costs and benefits of certain actions that it takes under the CEA, the Commission could not, based on that consideration, issue a rule that is in any way at odds with Congress' mandate. In any event, as discussed above, pp. 39-41, the Commission did quantify costs where possible and explain why certain costs could not be quantified. Consistent with CEA Section 15(a), the Commission also evaluated those costs not only with respect to efficiency and competition concerns, but also in light of the need to protect market participants and the public. Accordingly, *Business Roundtable* does not support overturning the Rule.

Finally, there is absolutely no basis for Plaintiffs' closing salvo that the Commission's "responsibility was to minimize at every available opportunity the burdens that [the] rule would impose." *See* Mem. at 29. In fact, the Commission's responsibility was to comply with the will of Congress as expressed in CEA section 4a, 7 U.S.C. § 6a, and to consider costs and benefits of the Rule in relation to the five CEA section 15(a) factors. Because the Commission complied with those statutory obligations, and, as explained above, mitigated the costs of the Rule where feasible, Plaintiffs have not demonstrated a likelihood of succeeding in their challenge to the Commission's cost benefit consideration.

C. The public interest and balancing the equities militate against entry of a preliminary injunction.

By mandating the imposition of speculative position limits, Congress has already made the public interest and balance-of-equities determinations here. "There is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct an agency to develop and enforce." *Nat'l Propane Gas Ass'n v. Dep't of Homeland Sec.*, 534 F. Supp. 2d 16, 20 (D.D.C. 2008). Plaintiffs contend that whether Congress mandated the expeditious implementation of the position limits is a "disputed point of law." Mem. at 39. But the fact that they dispute the mandate provides no basis for enjoining the Rule. As explained above, the plain language and structure of the Dodd-Frank amendments to the position limits statute admit of only one plausible interpretation. Because Congress mandated the expeditious imposition of federal position limits on physical commodity futures contracts and economically equivalent swaps, neither the views of individual Commissioners nor the cost predictions of Plaintiffs' economist (which in any event largely relate to the choices Congress made), *see* Mem.

37-38, provide any basis for contravening Congress' judgment that prompt implementation of speculative position limits is in the public interest. Any delay pending judicial review will only frustrate Congress' mandate and the public interest that Congress determined the required position limits would serve.

CONCLUSION

For the reasons stated above, this Court should deny Plaintiffs' Application for a Preliminary Injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2012, I filed the Commodity Futures Trading Commission's Opposition to Plaintiffs' Application for a Preliminary Injunction using this Court's CM/ECF electronic filing system. Also on February 17, I served the Opposition on the following counsel for Plaintiffs using the CM/ECF system:

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