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 REPLY IN FURTHER SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In Plaintiffs' view, the Commission's only new "mandate" from Dodd-Frank is to study whether there is a need for speculative position limits, and then to impose a limit only if it has found that such limit is necessary to combat excessive speculation that is about to occur, or is already occurring, in a particular contract market. But there is nothing new about this. Section 6a(a)(1) of Title 7 has long obliged the Commission to impose limits where excessive speculation is occurring or imminent. Further, Plaintiffs' contention that this is the extent of the Commission's authority to impose position limits requires entirely ignoring two key legislative events, events that they seek to undo through this lawsuit. The first was Congress' enactment of the Futures Trading Act of 1982, which ratified the Commission's discretionary imposition of "prophylactic" and "omnibus" limits on *all futures contracts*. 46 Fed. Reg. 50938, 50939-40 (Oct. 16, 1981). The second was Congress' enactment of Dodd-Frank. Dodd-Frank transformed the Commission's discretionary authority to impose prophylactic limits into a mandate. Under the new mandate, the Commission must impose the "required" limits on speculative positions in physical commodity derivatives, must impose them expeditiously, and must promptly conduct a study *after* their imposition to determine their effects, "if any."

Plaintiffs clearly are not happy with what Congress did – requiring the Commission to impose limits, and then study their effects. Plaintiffs' insistence on pre-limit-imposition studies and findings gets it exactly backwards; this Court should not.

Just as Plaintiffs ignore the sections added to the CEA by Dodd-Frank, their cost-benefit challenge ignores altogether the impact of Congress' mandate. Plaintiffs would have the Commission assess the costs and benefits of excessive speculation and speculative position limits. But Congress determined that excessive speculation was harmful and mandated position limits. *Public Citizen v. FTC*, 869 F.2d 1541 (D.C. Cir. 1989), a case to which Plaintiffs have no response (and thus never even acknowledge), makes clear that the Commission cannot use cost-benefit analysis to second-guess those determinations. That is why this case is so different from *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011) – the rule in that case was discretionary. In any event, even judged by the standards of that case, the Commission's analysis passes muster because, with respect to those aspects of the Rule as to which the Commission had discretion, it quantified costs where data were available, addressed pertinent comments, and made no internally inconsistent assumptions.

Finally, Plaintiffs' attempt to pick apart the discrete provisions of the Rule fails because it is largely a rehash of their meritless position that there really is no mandate – they would have the Commission study the role of excessive speculation and make particularized findings before imposing speculative position limits. Charged with imposing prophylactic limits expeditiously – and imposing those limits on new markets – the Commission relied on its experience and past practice. That reliance was prudent and reasonable, especially in the absence of any evidence that the limit formulas that had long been in place had caused problems. And, in any event, during the first year that the Rule is in effect, the Commission will, as Congress required, study and report to Congress on its effects, and will then be able to make whatever adjustments that either the Commission or Congress decides are needed to help ensure that the Rule achieves Congress' goals.

I. PLAINTIFFS' INTERPRETATION OF THE CEA'S DODD-FRANK AMENDMENTS RENDERS THEM A NULLITY.

Plaintiffs attempt to gut Dodd-Frank's mandate by misinterpreting 7 U.S.C. § 6a(a)(1), and by ignoring sections 6a(a)(2)-(7), sections that were added by Dodd-Frank.

A. Since 1936, section 6a(a)(1) has provided that the Commission "shall" establish speculative position limits as it "finds" are "necessary" to "diminish, eliminate, or prevent" excessive speculation. This provision requires that the Commission impose limits when it finds that excessive speculation is occurring or is imminent. Plaintiffs contend that, since 1936, the Commission (or its predecessor) has imposed limits only when it has first made a finding of necessity. But the only orders Plaintiffs have cited in support of this contention are ones that were entered in the 1930s, '40s and '50s. *See* CFTC Mem. at 19 n.12. By 1981, however, the Commission had concluded that section 6a(a)(1) also gives it the authority to impose limits prophylactically. That conclusion justified the Commission's 1981 speculative position limits rulemaking, pursuant to which the Commission required the exchanges to establish limits on all futures contracts. Since then, the Commission can, and has, imposed limits without first making the sort of necessity finding that Plaintiffs would require, *i.e.*, without finding that excessive speculation was occurring, was imminent, or was "reasonabl[y] likel[y]" (*see* Pl. Opp. at 2). Moreover, the Commission also has long enforced violations of such prophylactic limits pursuant to authority that Congress granted it in the immediate wake of the Commission's 1981 rulemaking. *See* 7 U.S.C. § 6a(e) (1994); 7 U.S.C. § 6a(5) (1982).[1]

Plaintiffs ask this Court to overturn the Commission's longstanding interpretation of section 6a(a)(1) (and, presumably, all the prophylactic limits that the Commission has imposed or required the exchanges to impose since 1981). *See* Pl. Opp. at 2-11. They contend that it is somehow "counter-textual" to permit the Commission to impose any limits unless it first makes the sort of necessity findings discussed above. *See id.* at 3. Putting aside for the moment that their argument ignores the 1981 rulemaking and 1982 Congressional ratification, their argument

[1] Since the 1981 rulemaking, courts have upheld the Commission's authority to bring actions for violations of exchange-set position limits. *See, e.g. Saberi v. CFTC*, 488 F.3d 1207 (9th Cir. 2007).

also overlooks that enabling provisions such as section 6a(a)(1) do not require that an agency make evidentiary-type "findings" of necessity as a prerequisite to imposing regulations.[2] Rather, the agency's action will be upheld so long as it is "reasonably related to," and thus in furtherance of either "the purpose of the enabling legislation" in general or the particular provision under which the action is authorized. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973). *See* CFTC Mem. at 18-19; *see also* 46 Fed. Reg. at 50939 (citing *Mourning*).

Plaintiffs contend that *Mourning* is limited to the particular "broad" grant of agency rulemaking authority that was under review in that case. Pl. Opp. at 3-4. Not so. This "reasonably-related" principle was already "well established under [the Court's] prior cases" at the time *Mourning* was issued, and had been applied in other situations to statutory provisions that give agencies general rulemaking authority to promulgate regulations to effectuate the purposes of a statute. 411 U.S. at 369. Since *Mourning*, courts have applied that principle to a variety of general and specific statutory enabling provisions, including provisions similar to those at issue here, *i.e.*, provisions that authorize agencies to act as they find necessary to achieve a specific statutory goal (such as prevention of a Congressionally recognized harm). *See, e.g. AFL-CIO v. Chao*, 409 F.3d 377, 379, 384-91 (D.C. Cir. 2005) (rule requiring unions to itemize expenses in disclosure reports was rationally related to statute authorizing regulations to require unions to provide information "as may be necessary" to accurately disclose their financial condition and operations); *see also id.*, at 393-95 (Roberts, J., concurring in part and dissenting

[2] Plaintiffs continue to harp on what they contend was a concession that the Commission may only impose limits at a necessary level. *See* Pl. Opp. at 4. Actually, what the Commission said was that, even accepting Plaintiffs' interpretive approach to the CEA, *i.e.*, reading provisions in isolation, the phrase "as necessary" would only mean that the Commission had to set limits at an *appropriate* level. *See* Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Dkt. 25 (Feb. 17, 2012) at 24. Of course, the Commission does not accept Plaintiffs' interpretation of the CEA, which, among other flaws, ignores the Commission's 1981 interpretation of section 6a(a)(1).

in part) (collecting cases); *Navellier v. Sletten*, 262 F.3d 923, 944-45 (9th Cir. 2001); *Touche Ross and Co. v. SEC*, 609 F.2d 570, 579 (2d Cir. 1979).

The holding in *Mourning* makes good sense. A statute that authorizes an agency to promulgate regulations as it "finds" "necessary" to "prevent" something is an "inherently discretionary standard that clearly invites further definition by the" agency. *Chao,* 409 F.3d at 393 (Roberts, J., concurring in part and dissenting in part). The use of the phrase "as the [agency] [] find[s]" calls for a subjective determination by the agency that "'fairly exudes deference.'" *Id.* (internal citations omitted). And the delegation of authority to an agency to "prevent" "a future contingency" "necessitates a predictive judgment about risk, and 'an agency's predictive judgment regarding a matter within its sphere of expertise is entitled to particularly deferential review.'" *Id.* (internal citations omitted). Plaintiffs cite no authority for their contention that such enabling language requires proof that the policy choices made by the agency are necessary to combat a Congressionally determined harm.[3]

Plaintiffs' attempt to limit *Mourning* to decisions describing the heightened deference given to an agency's interpretation of an ambiguous provision under *Chevron* step two fares no better. On the contrary, decisions relying on *Mourning* confirm that the Commission's longstanding interpretation of section 6a(a)(1) is entitled to *Chevron* deference. *Chao,* 409 F.3d at 387 (because the term "necessary" in enabling statute is "inherent[ly]" "ambiguous[]" the

[3] The decisions cited by Plaintiffs merely stand for the unremarkable proposition that such enabling provisions do not give agencies discretion to promulgate regulations at odds with specific provisions in a statute. Opp. at 3 (citing *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n,* 383 F.Supp. 2d 123, 143 (D.D.C. 2005); *Ragsdale v. Wolverine,* 535 U.S. 81, 92 (2002)).

question is whether the agency's determination of what is necessary is "a reasonable application of [the agency's] authority, and therefore [] permissible and entitled to deference").[4]

B. As described above, since 1981, the Commission has interpreted section 6a(a)(1) as authorizing it to establish position limits prophylactically to prevent excessive speculation, without having to first make a finding of necessity. At that time, the Commission explained that Congress had made all the findings that were necessary to authorize it to impose speculative position limits, and that it could impose limits on all futures contracts, including those for which there was *no historical trading data*. CFTC Mem. at 4-5, 19-20; 46 Fed. Reg. at 50939-41. The Commission reiterated its interpretation in a 2010 rulemaking. CFTC Mem. at 7-8, 75 Fed. Reg. 4144, 4146 (Jan. 26, 2010).[5]

Plaintiffs seek to escape the implications of the Commission's 1981 interpretation of section 6a(a)(1) by contending that it was not ratified by Congress. *See* Pl. Opp. at 6-7. But Congress ratified the Commission's interpretation in the most unequivocal, forceful way: it

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[4] Plaintiffs' misunderstand the Commission's use of *Chevron*. *See* Pl. Opp. at 3 n.3. The Commission is not claiming deference with respect to Congress' mandate (which comes from the Dodd-Frank amendments, sections 6a(a)(2)-(7)). Instead, if this Court were to find that section 6a(a)(1) is ambiguous, then the Commission's interpretation of that section is entitled to deference. *See Barnhart v. Walton*, 535 U.S. 212, 219-220 (2002) (longstanding agency construction is entitled to deference). Of course, the Commission believes that, to the extent there was ambiguity when, in 1981, the Commission interpreted what is now section 6a(a)(1), Congress eliminated that ambiguity through its passage of the Futures Trading Act in 1982.

[5] Plaintiffs assert that the Commission "disregarded" its 1981 interpretation throughout the 1990s when it permitted exchanges to establish position accountability levels in lieu of position limits. Pl. Opp. at 5. Again Plaintiffs misunderstand section 6a(a)(1). That section provides the Commission with discretionary authority to impose prophylactic limits. Just as the Commission in 1981 exercised that authority to require the exchanges to set such limits, so too in the 1990s it exercised discretion to permit exchanges to substitute alternate means of addressing excessive speculation. (Moreover, this modification applied only to *some* contracts. As to spot month contracts for physical commodities, the requirement of exchange-set hard position limits never changed. CFTC Mem. at 7. Commission-set (federal) position limits also remained in place during this time period.) In sum, the Commission *never* retracted its 1981 interpretation.

authorized the Commission *to bring enforcement actions* against violations of the prophylactic exchange-set limits that the Commission approved. To demonstrate ratification, the Commission need not prove that Congress was actually aware of the Commission's 1981 interpretation, even where Congress does not take any affirmative action reflecting approval of the agency's approach. Pl. Opp. at 5-6. Rather, Congress' awareness is presumed.[6]

In any event, the legislative history shows that Congress *was* aware of the Commission's 1981 Rule (and, *a fortiori*, of its interpretation of section 6a(a)(1)). Plaintiffs ignore that the Senate Report for the 1982 amendments to the CEA expressly refers to the 1981 rule. S. Rep. 97-384, at 44 ("During 1981, the Commission promulgated a final rule requiring exchanges, by February 14, 1982, to submit speculative position limits proposals for Commission approval *for all futures contracts traded as of that date.*") (emphasis added).[7] Plaintiffs also ignore that Commission Chair Philip McBride Johnson explained to Congress that the 1981 Rule required that there be speculative position limits for each and every futures contract traded on an exchange. *See* CFTC Mem. at 6. And Plaintiffs fail to acknowledge that Congress rejected industry attempts to undercut the Rule (and the Commission's corresponding interpretation of

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[6] Plaintiffs contend that Congressional ratification may be presumed only where the agency interpretation has been officially published and consistently followed. Pl. Opp. at 6. Recent Supreme Court and D.C. Circuit decisions do not contain this limitation. CFTC Mem. at 21. In any event, the Commission's interpretation was officially published and has been consistently followed. Further, that interpretation not only was clearly articulated in the 1981 preamble, but it was also reflected in the text of the rule. 17 C.F.R. § 1.61(a)(1), 46 Fed. Reg. at 50945 ("[f]or the purpose of *preventing* excessive speculation in *any* . . . [commodity futures contract] . . .each contract market shall, for *each* separate type of contract" adopt a position limit) (emphases added). Thus, *Autolog Corp. v. Regan*, 731 F.2d 25 (D.C. Cir. 1984), *see* Pl. Opp. at 6, is irrelevant.

[7] The 1982 Senate Report states that the Commission was expected to consider objective economic data in establishing limits. But this has no bearing on whether Congress ratified the Commission's interpretation in the 1981 Rule that it could establish limits prophylactically. Pl. Opp. at 7.

section 6a(a)(1)) by, *inter alia,* deleting from section 6a the congressional findings about excessive speculation on which the Commission expressly relied in justifying its prophylactic approach. CFTC Mem. at 20.

Plaintiffs also fail to show that the Commission's long-standing interpretation of section 6a(a)(1) is unreasonable. Plaintiffs would deny the Commission the authority to set limits unless it first could show that a market was in turmoil, or that turmoil would soon occur – that the horse was already out of (or almost out of) the barn. As former Commission Chair Johnson explained during Congressional hearings on the 1982 amendments to the CEA that followed the crisis in the silver markets: "'reasonable limits in place *before* the buildup of large (silver futures) occurred, would have helped prevent the accumulation of such large positions and the resultant dislocations created when the holders of these positions stood for delivery...' "'it seems clear from the silver crisis that the orderly imposition of speculative limits *before a crisis develops* is one of the more promising means of solving such difficulties in the future.'" *See* CFTC Mem. at 6. Because Plaintiffs' interpretation would preclude the Commission from acting prophylactically, and would thwart Congress' mandate that it do so, it cannot stand.

C. Plaintiffs misunderstand the mandate that Congress imposed on the Commission through the addition of sections 6a(a)(2)-(7) – they misunderstand the relationship between those sections and section 6a(a)(1). *See* Pl. Opp. at 7-11. Section 6a(a)(1) provides the Commission with the authority to impose prophylactic limits on speculation. The subsequent sections, added by Dodd-Frank, turned that discretion into a mandate as to physical commodity derivatives such as food, gas, and metals, which are of vital importance to the economy.[8]

[8] As the Commission has explained, under Plaintiffs' interpretation, the Dodd-Frank amendments do no work at all. Plaintiffs respond that the amendments add swaps to the Commission's "regulatory ambit." *See* Pl. Opp. at 10. What Plaintiffs fail to note, however, is

Plaintiffs seek to turn that mandate on its head by arguing that the "standards" that the Commission must follow in implementing the mandate include evidentiary findings on the role of excessive speculation in each contract market and the need for limits on speculation to combat it. Plaintiffs' interpretation of the "standards" in section 6a(a)(1) is wrong for all the reasons discussed above. It is also wrong because, as a definitional matter, a finding of necessity is not a "standard." *See* CFTC Mem. at 24-25.[9]

But most important, Plaintiffs' interpretation of "standards" is irreconcilable with the entire thrust of the Dodd-Frank amendments. *Stafford v. Briggs*, 444 U.S. 527, 535 (1980) (particular words must be interpreted in context of the whole statute and its purposes). In Plaintiffs' view, Congress was of two utterly irreconcilable minds: it demanded that the Commission establish the "required" limits on short deadlines, but also directed the Commission to conduct studies on the role of excessive speculation in each individual contract market to determine if the "required" limits are actually required.[10] The notion that the Commission could conduct an investigation into even a *single* contract market and make the findings that Plaintiffs would require within the time frames Congress established is fanciful. It borders on the absurd to think that, within those time frames, the Commission could conduct such an inquiry with respect to entire categories of commodities. Congress did require the Commission to conduct a

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that Congress amended section 6a(a)(1) to add swaps to the Commission's "regulatory ambit," so unless section 6a(a)(5) mandates limits on economically equivalent swaps, it is surplusage.

[9] Plaintiffs select a different definition of "standard," *see* Pl. Opp. at 7-8, but it is far from clear that even their definition would encompass findings of necessity.

[10] Plaintiffs make the facile argument that "required" does not mean "mandatory" because the word does not appear in section 6a(a)(5). Pl. Opp. at 8. But that section applies to swaps and it provides that the Commission "shall establish" limits on economically equivalent swaps "simultaneously" with the limits that section 6a(a)(2) requires. Plainly, limits on economically equivalent swaps are required to the same extent as the "required" limits with which they must be established simultaneously.

study, but *after* imposing the limits, not before. 15 U.S.C. § 8307. This Court should reject Plaintiffs' complete inversion of the speculative position limits regime that Congress established.[11]

Finally, Plaintiffs dispute the value of the legislative history in interpreting sections 6a(a)(2)-(7). Pl. Opp. at 9-10. Certainly, courts differ as to the weight they attach to legislative history. But, as described in the Commission's Memorandum, CFTC Mem. at 8-11, 23-24, in the Amicus Brief filed by 19 Senators, and in the Amicus Brief filed by the House Democratic Conferees, the legislative history hee reaffirms what the language and structure of the Dodd-Frank amendments make clear: that the Commission was to impose speculative position limits without the preconditions that Plaintiffs would require.[12]

II. THE COMMMISSION'S CONSIDERATION OF COSTS AND BENEFITS WAS SUFFICIENT.

A. Plaintiffs continue to fault the Commission for failing to analyze whether excessive speculation is a problem. Pl. Opp. at 11-16. It is telling, however, that in repeating this

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[11] Plaintiffs argue that Congress' use of the term "as appropriate" modifies the mandatory terms "shall" and "required" rather than "the amount of positions." Pl. Opp. at 8. This is yet another way for Plaintiffs to try to render the Dodd-Frank amendments meaningless. The Commission already possessed the authority to impose speculative position limits when it believed they were appropriate. Read in light of the language and structure of the Dodd-Frank amendments as a whole, "as appropriate" refers to the Commission's authority to set the required limits at "appropriate" levels in light of four specific objectives in section 6a(a)(3)(B). Plaintiffs' contention that the Commission's reading of "as appropriate" renders those words superfluous lacks merit because those words are commonly used by Congress to confer discretion. Congress here chose to channel that discretion by specifying four objectives the Commission must seek to further when it sets the levels of the limits. *Id*.

[12] Plaintiffs dispute the significance of a discussion in the Senators' Brief as to how the provisions were strengthened during the drafting process. *See* Pl. Mem. at 9-10. Plaintiffs contend that only the aggregation requirement in section 6a(a)(6) was strengthened. But Plaintiffs have failed to account for the fact that Congress added (1) the term "required"; (2) deadlines; and (3) a study and reporting requirement during the drafting process, thereby emphasizing that the speculative position limits were required.

argument, Plaintiffs' still ignore the D.C. Circuit's decision in *Public Citizen v. FTC,* 869 F.2d 1541 (D.C. Cir. 1989), *see* Pl. Opp. at 11-18, because that case – which they never cite much less address – provides the answer to their argument. *Public Citizen* holds that an agency engaged in rulemaking may not use cost-benefit analysis to second-guess a determination made by Congress. 869 F.2d at 1557. But that is exactly what Plaintiffs contend the Commission was required to do here. *See* Pl. Opp. at 12. Plaintiffs continue to insist that the Commission was required either to refute or give credence to certain studies that Plaintiffs contend show that excessive speculation causes no harm.[13] *See* Opp. at 9, 11, 12, 14, 16, 18-19. But as the Commission explained in the preamble to the Rule, 76 Fed. Reg. at 71663-64, and as it has reiterated throughout this proceeding, those studies, which the Commission thoroughly reviewed, were not helpful to implementing Congress' mandate, which arises from Congress' contrary determination that excessive speculation does cause harm.[14] Because the Commission takes its

[13] The Commission noted that some of the studies cited by Plaintiffs as questioning the role of speculation in the futures market were, in fact, not as one-sided as Plaintiffs depict. *See* CFTC Mem. at 11-12. The Commission included this discussion not, as Plaintiffs suggest, to bolster the rulemaking record, *see* Opp. at 19 n.14, but to show that Plaintiffs had not fairly described the studies they cited. On this go-around, Plaintiffs cite an OECD study, which they claim provides data that is relevant to whether the Commission should impose position limits on the swaps market. *See* Opp. at 14. Again, that study is irrelevant because Congress required that economically equivalent swaps be subject to speculative position limits. 7 U.S.C. § 6a(a)(5). And again, the study is not as favorable to Plaintiffs as they depict – it concludes that further research is needed to determine the impact of speculation in commodities markets. *See* Irwin and Sanders, *The Impact of Index and Swap Funds on Commodity Futures Markets*, ¶ 22 (2010).

[14] Just as those studies were irrelevant to whether the Commission should impose position limits, so too were they irrelevant to the level at which the Commission set the limits. *See* Pl. Opp. at 11-12. While Plaintiffs continue to insist that the Commission could not set the appropriate levels without "taking account" of those studies (*id*. at 19), they never explain how studies concluding that excessive speculation is not a problem could help the Commission set the limits at levels designed to address Congress' determination that excessive speculation is a problem. Plaintiffs' argument amounts to nothing more than that, if the Commission did not rely on their preferred studies to reject position limits, it should have relied on them to impose the limits at an infinite level. The latter argument disregards the mandate no less than the former.

directions from Congress, not from the authors of studies, the Commission correctly determined that those studies that implicitly urged the Commission to ignore Congress' explicit directions were not helpful to the rulemaking.[15]

Plaintiffs are also wrong when they claim that the Commission somehow "punted" its obligation to analyze costs and benefits.[16] *See* Pl. Opp. at 12. Plaintiffs repeatedly suggest that the Commission's analysis is undermined because, in their view, a majority of the Commission believed the Rule was unnecessary or harmful. *See* Pl. Opp. at 1, 2, 11, 12, 18. They base this conclusion on several comments made by Commissioner Dunn during the meeting at which the Commission adopted the Rule. But, although Commissioner Dunn initially expressed some concerns regarding the Rule, later in that meeting he indicated that his concerns were addressed, and he voted in favor of the Rule without any qualification. *See* CFTC Mem. at 12-13.

The Commission has never suggested that the already deferential standard of review that applies in a case such as this one, *see*, *e.g.*, *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F3d

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[15] Although Plaintiffs do not cite *Public Citizen*, they attempt to respond by citing a report from the Inspector General of the SEC. *See* Opp. at 11 & n.8. Of course, *Public Citizen*, not the Inspector General's Report, is binding precedent in this Circuit. In any event, that Report does not advance Plaintiffs' cause because, consistent with *Public Citizen*, the Report recognizes that, "[w]here the Commission has no discretion, the [rulemaking] release should say so. Because the Commission is making no policy choices, there are no choices to analyze or explain." SEC Office of Inspector General, *Follow-up Review of Cost-Benefit Analyses in Selected SEC Dodd-Frank Act Rulemakings* 10 (2012). That is the situation here – the Commission had no discretion with respect to whether to impose position limits, and thus no choices to analyze with respect to that threshold decision.

[16] Plaintiffs again complain about the Commission's use of the phrase "to the extent that" in the cost-benefit analysis. *See* Pl. Opp. at 12, 18. As the Commission has explained, it used the words not because it "punted" any obligation, but to candidly reflect uncertainty that is inherent where, as here, a rule will regulate transactions that have not been previously regulated. Such uncertainty in no way undermines the Rule. *See Consumer Elec. Ass'n v. FCC*, 347 F.3d 291, 303 (D.C. Cir. 2003) (Roberts, J.). Indeed, Congress decided to exercise close oversight of the Rule in light of that uncertainty. *See* 15 U.S.C. § 8307.

659, 669 (D.C. Cir. 2009), should be relaxed merely because the Commission lacks experience regulating swaps, or because it was subject to a tight congressionally-imposed time deadline. *See* Pl. Opp. at 13, 15-16. But the facts that the swaps market has been largely unregulated and that Congress required speculative position limits to be imposed on this market expeditiously are surely relevant in determining whether the Commission's consideration of costs and benefits was reasonable under the circumstances. With respect to experience, the deferential standard of review recognizes that agencies may be required to make judgments in areas where data are not available, and that in such a situation, the agency must "so state and go on to identify the considerations it found persuasive." *See* CFTC Opp. at 34 (citing *Jifry v. FAA*, 370 F.3d 1174, 1180 (D.C. Cir. 2004)).[17]

Similarly, the Commission never suggested that Congress' time deadlines justify a more deferential standard of review. What the Commission actually suggested was that, when an agency is subject to a deadline, this will naturally have an impact on the amount of evidence it can amass in support of a rule. That is what the D.C. Circuit recognized in *California v. Watt*,

[17] *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006), *see* Pl. Opp. at 13, is in no way contrary. In that case, FERC justified its decision to regulate the interactions between pipeline companies and their non-marketing affiliates on evidence that the relationship had been abused. The court overturned the rule because the rulemaking record contained no such evidence. 468 F.3d at 841. This case is completely different: FERC's rule was not mandated by Congress, and the Commission here never claimed to rely on evidence that it did not actually have. Plaintiffs cite to a portion of *National Fuel* that is clearly dicta: confronted by FERC's lack of the very evidence on which it purported to have relied, FERC's attorneys attempted to justify that failure by claiming that such evidence was not available. The court pointed out that if this were so, then the agency should not have attempted to rely on evidence it did not have. It also noted that in a previous rulemaking, FERC had been able to obtain evidence regarding the abuse of an affiliate relationship. *Id.* at 844. FERC's situation bears no relationship to the situation here.

712 F.2d 584, 600 (D.C. Cir. 1983).[18] Here, Congress could not have made its choice more clear: it directed the Commission to issue the Rule promptly and to conduct a study of the impact of the limits *after* they go into effect. This Court should reject Plaintiffs' attempt to nullify Congress' choice by imposing on the Commission exacting requirements that the CEA does not require, and that the Commission might never satisfy.

Plaintiffs complain that the Commission cannot justify imposing position limits on swaps until it defines "excessive speculation," because, until it has such a definition, it cannot determine whether such limits would be cost-effective. *See* Pl. Opp. at 14. Of course, the Commission could not have refused to impose speculative position limits on swaps because that would have defied Congress' mandate. In any event, the Commission does not need an explicit definition of excessive speculation to achieve Congress' goal because, as the Commission previously explained, that goal has been clear since 1936 – preventing any trader (or group of traders acting in concert) from controlling extraordinarily large positions that could result in unreasonable fluctuations in the price of a commodity. *See* CFTC Opp. at 35; *see also* 76 Fed. Reg. at 71629 n.30. The Commission set limits sufficiently high to achieve exactly that result – restricting only those who control the very largest of speculative positions. *See id.* at 71672 (explaining basis for conclusion that non-spot-month limits will affect relatively few swaps market participants).[19]

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[18] Plaintiffs cite *American Mining Cong. v. EPA*, 907 F.2d 1179 (D.C. Cir. 1990), *see* Pl. Opp. at 15, but that case merely holds that a time deadline cannot justify an agency's failure to consider evidence already before it. *Id.* at 1191. Here, the data regarding swaps that Plaintiffs would require the Commission to obtain does not exist.

[19] Illustrating the relatively unrestrictive nature of the limits, the Commission has explained that its non-spot-month limits would permit a trader to hold or control up to 108,000 contracts for NYMEX Light Sweet Crude Oil. Each contract is for 1000 barrels. http://www.cftc.gov/ucm/groups/public/@swaps/documents/ file/nsmposlimits.pdf. At a price of

B. Plaintiffs' specific challenges to the Commission's consideration of costs and benefits fare no better. The Commission never "virtually concedes" that the analysis could not survive the standards set forth in *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011). *See* Pl. Opp. at 11. To the contrary, the Commission argued that the cost-benefit analysis was thorough and did not suffer from any of the shortcomings that prompted the D.C. Circuit to invalidate the SEC's rule.[20] CFTC Mem. at 33-34. But the Commission's larger point, to which Plaintiffs have no response, is that *Business Roundtable*'s reasoning does not apply here, because the SEC rule was not mandatory. CFTC Mem. at 33. Had Congress required the proxy access rule, the *Business Roundtable* court would, like here, have been evaluating a far narrower set of agency choices, and the reasoning of *Business Roundtable* would have been much different. Finally, even assuming that *Business Roundtable* applied here and that the Commission's analysis did not meet its standard, the Commission notes that the standard of review *Business Roundtable* applied is inconsistent with the substantial deference to which, according to the Supreme Court, an agency action is entitled. *See FCC v. Fox Television Stations, Inc.* 556 U.S. 502, 513-14 (2009).

Nor is Plaintiffs' challenge helped by *Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005). *See* Pl. Opp. at 16-17. In that case, the court faulted the SEC for failing to provide any estimate of the costs imposed by the rule or to explain why it was unable to estimate them. 412 F.3d at 143-44. Here, by contrast, the Commission provided estimates of many of the costs

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$100 per barrel, a single trader could control contracts representing 108 million barrels of oil with a present market value in excess of $10 billion.

[20] Plaintiffs complain that, in its Memorandum in Support of Its Cross-Motion for Summary Judgment, the Commission explained how the spot-month and non-spot-month limits satisfied the criteria set forth in 7 U.S.C. § 6a(a)(3)(B), but failed to provide a cite to the Rule's preamble. *See* Pl. Opp. at 17-18 (citing CFTC Mem. at 31). The citation omitted from the Commission's Memorandum is 76 Fed. Reg. at 71675.

that the Rule could impose.[21] And where it did not quantify costs that could result from the Rule, the Commission provided a reasoned explanation.[22] *See* CFTC Mem. at 30; 76 Fed. Reg. at 71679.

Plaintiffs further contend that the Commission did not provide an estimate of the percentage of the market that will be affected by the Rule's speculative position limits. Pl. Mem. at 17. In fact, the Commission did provide such an estimate, which showed that position limits would affect only a small percentage of speculative traders. *See* CFTC Mem. at 30 (citing 76 Fed. Reg. 71668 & n.413). And contrary to Plaintiffs' contention that the Commission did not consider the size of the market these traders represent or the impact of the limits on the economy, the Commission concluded that the limits it set would ensure sufficient liquidity and protect price discovery, while preventing excessive speculation and manipulation. 76 Fed. Reg. at 71675. Plaintiffs also complain that the Commission never explained why the costs of complying with the Rule would be low. *See* Pl. Opp. at 17. In fact, what the Commission actually said was that the costs for most traders would be minimal, because the limits are so high that the vast majority of traders will not be affected. 76 Fed. Reg. at 71672.

[21] Plaintiffs contend that the Commission ignored the "considerable costs" that the Rule will impose on futures commission merchants ("FCMs"), *see* Pl. Opp. at 17 n.10, but they provide neither an explanation of what additional costs the Rule would impose nor a citation to the administrative record where this concern was raised. An argument that has not been first presented to an agency during a rulemaking may not be raised for the first time on review. *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001). In any event, to the extent Plaintiffs are suggesting that FCM monitoring costs will increase because of the extension of position limits to swaps, those costs, like most in the Rule, are attributable to Congress' mandate.

[22] Plaintiffs fault the Commission for not quantifying "the enormous costs from prohibiting a range of beneficial economic activity." Pl. Opp. at 16. Presumably, the costs they are referring to are those that could result from changes to speculative trading strategies. There was simply no evidence in the rulemaking that such costs – which the Commission could not quantify because of the highly individualized and proprietary nature of business strategy data – would be "enormous." Indeed, a change in strategy might be profitable for some speculative traders.

Finally, Plaintiffs complain, without any elaboration, that certain cost-mitigation measures the Commission adopted are "marginal," "incomplete," or "illusory." Pl. Opp. at 17. But this is little more than a claim that, if they had been charged with writing the Rule, Plaintiffs would have written it differently. Plainly, and in accordance with Congress' mandate, the Rule imposes some costs on some traders, perhaps even on some of Plaintiffs' members, who include some of the largest speculative traders. But that is no reason for overturning the Rule. *See* 15 U.S.C. § 8307 (requiring the Commission to conduct a study of the impact of the limits, including the migration of transactions to foreign venues).[23]

III. THE RULE IS REASONABLE AND ENTITLED TO DEFERENCE.

Plaintiffs deploy the same line of attack with respect to the specific provisions of the Rule, arguing that the Commission had to do more with data that they claim support their view that excessive speculation is not harmful. Pl. Opp. at 16; 18-19. But that was not the mandate Congress gave the Commission; rather, Congress already determined that excessive speculation is a problem and directed the Commission to impose limits to prevent it. In light of the mandate, the Commission reasonably focused on how markets had functioned with positions limits in place. Relying on its longstanding experience in both setting limits and monitoring exchange-set limits, the Commission determined that the most effective way to implement Congress' mandate with the least market disruption was to apply limit formulas that had a solid track record as applied to physical commodity futures and options contracts. This Court should defer to the

[23] Plaintiffs repeat that the Commission did not include a detailed analysis of the Rule's costs and benefits in its Notice of Proposed Rulemaking, Pl. Opp. at 18 n.12, but without responding to the Commission's contention that no such analysis is required at that preliminary stage, CFTC Mem. at 37 n.28. They now complain that they were denied the opportunity to comment on critical data, but they never identify what the "critical" data was. *See* Pl. Opp. at 18 n.12.

Commission's reasonable exercise of its discretion. *Nat'l Mar. Safety Ass'n v. OSHA*, 649 F.3d 743, 751-52 (D.C. Cir. 2011).[24]

A. Spot-Month Limits – Plaintiffs dispute the Commission's characterization of the spot-month formula as the "industry standard," but, as the Commission explained, all of the core referenced futures contracts (cash-settled and physical delivery) subject to the Rule were previously subject to spot-month limits, 76 Fed. Reg. at 71669, and many contracts were subject to spot-month limits at 25% of deliverable supply, the formula enshrined in the Commission's acceptable practices for the exchanges with respect to physical delivery contracts. *Id*. at 71633-34. Plaintiffs claim that this long-standing industry standard is somehow not a true "industry" standard because the Commission had a hand in shaping it, Pl. Opp. at 19-20, but the Commission's involvement does not alter the undeniable fact that the Commission, the exchanges, and market participants have substantial experience with spot-month limits of 25% of deliverable supply.

Plaintiffs also contend that "not all cash-settled contracts were subject to the 25% formula." Pl. Opp. at 20. That not all cash-settled contracts had been subject to the formula hardly renders unreasonable the Commission's decision to apply that formula to the cash-settled contracts covered by the Rule (other than natural gas). As the Commission explained, exchanges currently set spot-month limits for cash-settled contracts on agricultural and exempt commodities "at some percentage of calculated deliverable supply." 76 Fed. Reg. at 71633-34. There is

[24] While Plaintiffs repeatedly attack the Commission for not giving effect to the studies that take issue with Congress' determinations, they do not point to any evidence that the limits that the Commission and the exchanges have long applied have created problems. One commenter did provide data that it claimed demonstrated problems arising from a position limit in the natural gas market, but the Commission specifically addressed the data and explained why it did not agree with the commenter's assertions. 76 Fed. Reg. at 71635. Plaintiffs do not take issue with the Commission's assessment of that data.

nothing new about this practice; the Commission has generally insisted that exchanges set spot-month limits for cash-settled contracts at a level "no greater than necessary to minimize the potential for manipulation or distortion of the contract's or the underlying commodity's prices," which, in practice, has typically been 25% of deliverable supply. *See* 64 Fed. Reg. 24038, 24041 & n.13 (May 5, 1999). And exchanges have largely set spot-month limits for cash-settled contracts at 25% of deliverable supply.[25]

Cash-settled contracts have a long history of spot-month limits because they are subject to manipulation. Plaintiffs do not dispute the Commission's explanation of the incentive that a trader with a large position in cash-settled contracts would have to manipulate the underlying physical-delivery futures contract to benefit that cash-settled position, Pl. Opp. at 20, but they fault the Commission for not providing examples of traders acting on that undisputed incentive. *Id*. "Banging the close," or "marking the close," however, is a well-known manifestation of a manipulation that can result from such an incentive, which Congress has prohibited. *See* 7 U.S.C. § 6c(a)(5)(B). Indeed, the Commission recently concluded a successful enforcement action involving banging the close in closely related instruments. *See CFTC v. Optiver US, LLC*, No. 08-cv-6560, Dkt. 45 (S.D.N.Y. Apr. 19, 2012). In any event, the Commission was not required to include examples of a common form of manipulation to provide a reasoned explanation for its decision to apply the same limits to cash-settled contracts (other than natural gas). It was sufficient to explain why manipulation is a concern in cash settled markets and to

[25] For example, the New York Mercantile Exchange subjects most of its cash-settled contracts to what it calls "expiration month" limits, which are another name for spot-month limits. *See* http://www.cmegroup.com/rulebook/NYMEX/1/5.pdf#page=55. The spot-month limit for Heating Oil Last Day Financial Futures, a cash-settled contract, is the same (1000 contracts) as the level for physical delivery New York Harbor Heating Oil Contracts in the Rule. 76 Fed. Reg. at 71696.

survey each of the relevant markets and conclude based on their size that the same limit was appropriate. 76 Fed. Reg. at 71634-37.

Plaintiffs continue to quibble with the Commission's definition of deliverable supply, Pl. Opp. at 20, but ignore the Commission's explanation for adhering to its longstanding definition. In the Commission's experience, its definition is the "best estimate" of the amount of a commodity actually available in the cash market. As such, the Commission explained, its definition provides the most useful baseline for deterring manipulation. 76 Fed. Reg. at 71669. In other words, the Commission was concerned that counting additional supply committed to long-term contracts or not meeting contract specifications could make the market more susceptible to manipulation. *Id.* at 71633 & n.71, 71669. The path to the Commission's reasoning thus can be discerned, and the APA requires no more. *FCC v. Fox Television Stations Inc.*, 556 U.S. at 513-14.[26]

B. Non-Spot-Month Limits – Plaintiffs' challenge to the non-spot-month limits fails for the same reason its other arguments fail: Congress mandated the limits to ensure a minimum number of distinct market participants and to keep any one trader from amassing extraordinarily large speculative positions, thereby lessening the risk of market manipulation or disruption. *See* 7 U.S.C. § 6a(a)(3)(A); 76 Fed. Reg. at 71638-39, 71678-79; *see also* Tr. of Open Mtg. on Two Final Rule Proposals (Oct. 18, 2011) at 190. Plaintiffs argue that the Commission should have "analyzed whether a higher limit would accomplish the same objectives," Pl. Opp. at 21, but the Commission explained that, based on its experience administering the non-spot-month 10 and

[26] In addition, the Commission explained that retaining its long-established measure of deliverable supply, which both the Commission and exchanges currently use, would facilitate an orderly transition to the federal position limits. 76 Fed. Reg. at 71669. This is another independent and sufficient reason for upholding the Commission's definition of deliverable supply.

2.5 percent formula since 1999, these limits "will ensure sufficient liquidity for bona fide hedgers and avoid[] disruption to the price discovery process." 76 Fed. Reg, at 71639. Given that experience and the Commission's conclusion, based on the available data, that the formula sets limits at highly permissive levels, 76 Fed. Reg. at 71639, 71672; *see also supra* at 14 n.19, it was entirely reasonable for the Commission to not conduct a study of the possible effects of even less restrictive levels, especially in light of the Commission's charge to act expeditiously and to maximize Congress' objectives to prevent excessive speculation and deter manipulation. 7 U.S.C. § 6a(a)(3)(B). And, as the Commission observed, Congress directed the Commission to conduct a study of the limits *after* their imposition because it "recognized the inherent uncertainty regarding future effects associated with setting limits prophylactically." 76 Fed. Reg. at 71639-40; *see also* 15 U.S.C. § 8307.

Contrary to Plaintiffs' unsupported claim, the Commission never conceded that the non-spot-month limits would apply "disproportionate[ly]" to swaps. Pl. Opp. at 21. Here, Plaintiffs oddly appear to fault the Commission for analyzing the available data and making a change from the proposed rule to *reduce* any impact the non-spot-month limits would have on swap dealers by permitting all traders to net physical-delivery and cash-settled contracts (including swaps) outside of the spot month. *Id*. The Commission did so because it recognized that swap dealers "generally use futures contracts to offset" the risk associated with providing liquidity to commercial entities. Accordingly, by permitting netting, the Commission "reduce[d] [liquidity providers'] exposure to an applicable position limit." *Id*. Thus, the Commission carefully implemented the non-spot-month limits to ensure that they furthered the CEA's goals.

C. Extension of Limits to Swaps – Plaintiffs' challenge to the Commission's extension of speculative position limits to swaps founders on the Dodd-Frank amendments, which require the Commission to establish position limits on swaps economically equivalent to physical commodity futures and options. 7 U.S.C. § 6a(a)(5); *see supra* at 8-9 & nn. 8, 10. The statute is the only "reasoned defense," Pl. Opp. at 21, the Commission needs to explain the extension of speculative limits to swaps.[27]

D. Selection of Contracts to Regulate – The Commission has consistently interpreted Dodd-Frank as mandating that it impose limits on all physical commodity futures, options, and economically equivalent swaps. Plaintiffs' contention that this is a "made-for-litigation" position is erroneous. Pl. Opp. at 22. The Commission made clear that it was initially selecting 28 contracts to regulate based on their importance to the economy, 76 Fed. Reg. at 71629, 71665, but the Commission also explained that it intended to regulate other contracts as soon "as practicable in the future." *Id*. at 71659-60. There is nothing post-hoc about this explanation.

Further, contrary to Plaintiffs' contention, there is nothing illogical about choosing to begin by imposing federal limits on the contracts most important to the economy. Congress determined that even large, liquid markets (like the market for natural gas) were subject to excessive price speculation and significant price distortions. *See* 76 Fed. Reg. at 71664 n.374 (citing *Excessive Speculation in the Nat. Gas Mkt.*, Staff Report, Permanent Subcommittee on Investigations, U.S. Senate (June 25, 2007) ("Excessive Speculation")); *Excessive Speculation*

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[27] Plaintiffs attempt to find a contradiction in the Commission's discussion of the history of swaps regulation, but there is none. Pl. Opp. at 21-22. Before Dodd-Frank, swaps were never subject to *federal* limits, but pursuant to the Commission's authority under the CFTC Reauthorization Act of 2008, Pub. L. 110-246, 122 Stat. 1651 (2008) (Title XIII), the Commission directed *exchanges* to impose position limits or accountability levels on significant price discovery contracts, including exchange-traded swaps. *See* 17 C.F.R. Part 36, App. B, Core Principle IV. Indeed, an exchange-traded swap, the ICE Henry Hub LD1 Natural Gas Swap, has been subject to exchange-set spot-month limits (not accountability) since early 2010. 76 Fed. Reg. at 71634 & n.88; *see also* ICE OTC Markets, *Updated Notice Regarding Position limit Exemption Request Form for Significant Price Discovery Contracts* (Jan. 4, 2010) at 1 *available at* https://www.theice.com/publicdocs/otc/advisory_notices/ICE_OTC_ Advisory 0110001.pdf.

at 3, 6. In light of that evidence, and the fact that position limits are a prophylactic tool, the Commission's decision to combat the greatest potential threats to the economy was reasonable. *See WorldCom Inc. v. FCC*, 238 F.3d 449, 458 (D.C. Cir. 2001) (agency's "judgment about the best regulatory tools to employ is . . . entitled to considerable deference").

E. Aggregation – The Commission explained that the purpose of this policy was to ensure that a single trader, through control or ownership of multiple accounts, does not control positions in excess of the limits. 76 Fed. Reg. at 71678. In addition, the aggregation policy is designed to ensure a minimum number of market participants trading independently of each other. *Id*. at 71678-79. Plaintiffs fail to understand that when the Commission said its aggregation policy had worked well, the Commission meant that the policy was fulfilling these objectives. Pl. Opp. at 23. The Commission considered suggestions that it relax its aggregation policy by allowing pro-rata attribution of positions, 76 Fed. Reg. at 71651 n.245, but the Commission decided not to make such a significant revision to a longstanding policy that worked well. *Id*.; *see* 44 Fed. Reg. 33839, 33843 (June 13,1979) (adopting 10% threshold). The decision not to adopt such a substantial change was reasonable, particularly since the Commission was charged with implementing Congress' mandate expeditiously, made other modifications to reduce the impact of the aggregation policy, such as adding an aggregation exemption where federal law prohibits information sharing, and stressed that it remains open to revisiting this and other approaches to aggregation.[28] *See* 76 Fed. Reg. at 71661 n.245, 71654.

[28] Plaintiffs' concerns about state and foreign law violations lack merit. Pl. Opp. at 24. Plaintiffs never adequately explain how complying with the aggregation policy would result in a state or foreign law violation. Market participants have been subject to the aggregation policy for over forty years, and no commenters identified problems they had experienced with respect to state or foreign laws. If any conflict with a state or foreign law were to arise in the future, Plaintiffs' members would be free to bring such a conflict to the attention of the Commission or its staff and seek relief. 7 U.S.C. § 6a(a)(7); 17 C.F.R. § 140.99.

Plaintiffs contend that, because the owned non-financial exemption (ONF) and the independent account controller (IAC) exemptions cover some different activity, the Commission should not have tied its decision to retain the IAC exemption to the decision not to enact the proposed ONF exemption. Pl. Opp. at 23-24. But the Commission made a rational, legislative-type judgment in the interest of implementing Congress' mandate expeditiously, that it was not willing "at this time" to adopt an aggregation policy containing both of these exemptions (along with other exemptions the Commission decided to allow) on the concern that "expand[ing] further the scope of disaggregation" might be overly permissive and would not ensure a minimum number of independent market participants. *See* 76 Fed. Reg. at 71654, 71678-79. This is precisely the kind of agency line drawing entitled to deference. *Keating v. FERC,* 569 F.3d 427, 433 (D.C. Cir. 2009) (the court is "generally unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn ... are patently unreasonable, having no relationship to the underlying regulatory problem.") (quotation omitted, ellipsis in original).

F. Bona Fide Hedging – Plaintiffs suggest that the Commission eliminated any exemption for non-enumerated hedges, Pl. Opp. at 24-25, but in reality, it made only a modest change to the procedure for seeking such an exemption. Under the prior regime, a party seeking a non-enumerated hedge had to seek Commission permission for doing so pursuant to 17 C.F.R. § 1.47(a) (2011). The revised regime has a similar approval process: a party may seek approval from the Commission pursuant to section 6a(a)(7), or from the Commission's staff pursuant to 17 C.F.R. § 140.99. *See* 17 C.F.R. § 151.5(a)(5). Plaintiffs have failed to show how this change has prejudiced them.

G. International Regulatory Arbitrage – Plaintiffs offer no support for their contention that the Commission's efforts to mitigate the possibility of international regulatory arbitrage are insufficient; the charge thus provides no basis for reversal under the APA. *See* Pl. Opp. at 25. Plaintiffs' contention that the research on which the Commission relied is of "little relevance" similarly amounts to mere disagreement with the Commission's conclusion in an area in which it has technical expertise. *See Fox Television Stations*, 556 U.S. at 513. Moreover, Plaintiffs have no response to the point that Congress was aware that some transactions might migrate abroad as a result of the Rule but mandated it anyway. Congress chose to address this issue by instructing the Commission to study it further and report to Congress *after* the Rule takes effect. 15 U.S.C. § 8307(a). Neither Plaintiffs' studied disregard for the regime Congress established nor their unsupported concerns provide any basis for overturning the Rule.

CONCLUSION

For the reasons set forth above, and in the Commission's Memorandum in Support of Its Cross-Motion for Summary Judgment, this Court should grant the Commission's Cross-Motion, deny Plaintiffs' Motion for Summary Judgment, and dismiss Plaintiffs' complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2012, I filed Defendant's Reply in Further Support of Its Cross-Motion for Summary Judgment using this Court's CM/ECF electronic filing system. Also on April 30, I served the Reply on the following counsel using the CM/ECF system:

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