No. 12-1398
Oral Argument Not Yet Scheduled

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PETROLEUM INSTITUTE, et al.,

Petitioners,

V.

U.S. SECURITIES AND EXCHANGE COMMISSION,

Respondent.

OXFAM AMERICA, INC.,

Intervenor.

On Petition for Review of Final Rule of the
United States Securities and Exchange Commission

BRIEF OF BETTER MARKETS, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT U.S. SECURITIES AND EXCHANGE COMMISSION

Dennis M. Kelleher
Stephen W. Hall
Katelynn O. Bradley
Better Markets, Inc.
1825 K Street N.W., Suite 1080
Washington, D.C. 20006
dkelleher@bettermarkets.com
(202) 618-6464

Counsel for Amicus Curiae

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rules 26.1 and 28(a)(1), Better Markets states as follows:

(A) Parties, Intervenors, and *Amici*

Except for the following, all parties, intervenors, and *amici* appearing in this Court are listed in the Brief for Petitioners and the Brief for Respondent: Sen. Carl Levin, Rep. Edward J. Markey, Rep. Maxine Waters, Rep. Eliot L. Engel, Rep. Jim McDermott, Rep. Gregory W. Meeks, Rep. Betty McCollum, Rep. Jim Moran, Rep. Earl Blumenauer, Rep. André Carson, Rep. Sam Farr, Rep. Peter Welch, and Rep. Barbara J. Lee.

Better Markets is a non-profit organization founded to promote the public interest in the financial markets. It advocates for greater transparency, accountability, and oversight in the financial system through a variety of activities, including comment on rules proposed by the financial regulators, public advocacy, litigation, congressional testimony, and independent research.

Better Markets has no parent corporation and there is no publicly held corporation that owns 10% or more of the stock of Better Markets.

(B) Rulings Under Review

References to the rule at issue appear in the Brief for Petitioners.

(C) Related Cases

Petitioners have also filed suit in the U.S. District Court for the District of Columbia relating to the same claims. *See Am. Petroleum Inst. v. SEC*, No. 12-1668 (D.D.C. filed Oct. 10, 2012).

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OTHER AUTHORITIES

GLOSSARY

APA	Administrative Procedure Act, 5 U.S.C. § 551 *et seq*.
Exchange Act	Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq*.
Petitioners	Petitioners American Petroleum Institute, Chamber of Commerce of the United States of America, Independent Petroleum Association of America, and National Foreign Trade Council
Pet. Br.	Brief for Petitioners page citation
Respondent	U.S. Securities and Exchange Commission
Res. Br.	Brief for Respondent page citation
Rule	Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365 (Sept. 12, 2012)
SEC	Securities and Exchange Commission

STATUTES AND REGULATIONS

All pertinent statutes and regulations are contained in the Brief for Petitioners.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Better Markets is a non-profit organization that promotes the public interest in the financial markets through a variety of activities.[1] One way it furthers its mission is by defending rules against interested parties seeking to overwhelm the financial regulators with burdensome "cost-benefit" claims that have no statutory basis and that threaten to cripple the agencies' ability to implement Congress's policy goals.[2]

Better Markets has an interest in this case because Petitioners claim that the SEC failed to conduct an adequate "cost-benefit analysis" when it promulgated the Rule. This argument seeks to greatly expand the SEC's very limited duty under the securities laws far beyond what Congress intended. It threatens not only the Rule at issue, but also a more far-reaching harm: Unless rejected, Petitioners' onerous standard will severely undermine the SEC's ability to promulgate and

[1] Better Markets states that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person—other than Better Markets, its members, or its counsel—contributed money that was intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(c)(5).

[2] *See* Brief of Better Markets, Inc. as *Amicus Curiae* in Support of Defendant CFTC at 15-18, Inv. Co. Inst. v. CFTC, No. 12-cv-00612 (D.D.C. 2013) (discussing the crippling effect on an agency's rulemaking and statutory mission of imposing a cost-benefit duty not required by statute).

defend rules that protect the public, our financial markets, and ultimately our economy from another financial crisis.[3]

SUMMARY OF ARGUMENT

The securities laws do **not** require the SEC to conduct cost-benefit analysis when promulgating rules. Its statutory obligation is simply "to consider" a rule's impact on several specifically listed economic factors. The Supreme Court has interpreted "consider" as giving agencies wide discretion.

In addition, legislative history shows that Congress intended the SEC to place the protection of investors and the public interest above economic considerations. Congress explicitly requires agencies to conduct cost-benefit analysis, thus its decision **not** to do so in the securities laws was a deliberate policy choice. The SEC fulfilled its limited duty, and the imposition of any heavier burden is unjustifiable.

Petitioners' reliance on several recent decisions from this Court is misplaced. In none of those cases did the parties present or the Court substantively analyze the legal authorities and arguments defining the limited scope of the SEC's statutory duty, and, on that issue, they lack precedential weight.

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[3] BETTER MARKETS, THE COST OF THE WALL STREET-CAUSED FINANCIAL COLLAPSE AND ONGOING ECONOMIC CRISIS IS MORE THAN $12.8 TRILLION (Sept. 15, 2012), *available at* http://bettermarkets.com/sites/default/files/Cost%20Of%20The%20Crisis_0.pdf.

Finally, although the SEC voluntarily discussed a number of costs and benefits of the Rule, it did not thereby assume a cost-benefit analysis duty. Furthermore, it expressly differentiated its actual statutory mandate to consider the listed factors from its discretionary consideration of certain costs and benefits.

ARGUMENT

I. The SEC's narrow statutory duty is only to "consider" certain listed factors, not to conduct cost-benefit analysis.

A. The securities laws do not contain cost-benefit requirements.

The applicable provisions of the Exchange Act do not contain any language requiring the SEC to conduct cost-benefit analysis, nor do they even mention costs and benefits. Therefore, Petitioners' claim that the SEC "deployed a flawed cost-benefit analysis," Pet. Br. at 25, cannot be valid, since the SEC has no duty to conduct such an analysis.

Exchange Act Section 3(f) merely requires the SEC, after considering "the public interest" and the "protection of investors," "to consider. . . whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. § 78c(f). Section 23(a)(2) only requires the SEC to "consider among other matters the impact any such rule or regulation would have on competition," and to refrain from adopting the rule if it "would impose a burden on competition not necessary or appropriate in furtherance of the purposes of [the statute]." 15 U.S.C. § 78w(a)(2).

B. The Supreme Court has held that the obligation to "consider" factors gives an agency wide discretion.

In 1950, well before Congress added these statutory provisions in 1975 and 1996, the Supreme Court held that when statutorily mandated "considerations" are not "mechanical or self-defining standards," they "in turn imply wide areas of judgment and therefore of discretion." *Sec'y of Agriculture v. Cent. Roig Refining Co.*, 338 U.S. 604, 611-12 (1950) ("Congress did not think it was feasible to bind the Secretary as to the part his 'consideration' of these three factors should play in his final judgment—what weight each should be given, or whether in a particular situation all three factors must play a quantitative share in his computation").

Following this approach, this Court has explained that where "Congress did not assign the specific weight the [agency] should accord each of these factors, [it] is free to exercise [its] discretion in this area." *New York v. Reilly*, 969 F.2d 1147, 1150 (D.C. Cir. 1992); *see also Brady v. FERC*, 416 F.3d 1, 6 (D.C. Cir. 2005). Indeed, when Congress requires an agency to "consider" certain factors in its rulemaking, a reviewing court's role is limited. Courts are not to find a rule arbitrary and capricious under the APA, 5 U.S.C. § 706(2)(A), unless the agency has "wholly failed" to comply with a statutory requirement, or if there is a "complete absence of any discussion of a statutorily mandated factor." *Pub.*

Citizen v. Fed. Motor Carrier Safety Admin., 374 F.3d 1209, 1216 (D.C. Cir. 2004).[4]

Thus, Congress chose wording that, on its face and as interpreted by the courts, imposed a limited obligation on the SEC and left the agency with broad discretion in how to discharge that obligation.

C. Congress intended the public interest to take precedence over economic analysis.

The legislative history of the securities laws reinforces the discretionary nature of the SEC's duty and shows that Congress did not intend any economic analysis to supersede the SEC's paramount duty to protect investors and the public. The Securities Acts Amendments of 1975, which added Section 23(a)(2), were not passed to curb "costly" rules, but to eliminate anticompetitive **industry** practices **that were harming investors** who could not be assured of efficient and fair execution prices. *See* S. REP. No. 94-75, at 1 (1975); H.R. REP. No. 94-229, at 94 (1975).

In Section 23(a)(2), Congress required the SEC to consider the anticompetitive effects of its rules, but it intended this consideration to be flexible

[4] The Court in *Public Citizen*, 374 F.3d at 1221, suggested that the agency had to "weigh" costs and benefits even though the statute simply required the agency to "consider" them. However, that suggestion was pure dicta, and it arose in part from detailed and prescriptive language in a separate provision of the applicable statute. *Id.* at 1216.

and entitled to deference. For example, Congress did **not** require "the Commission to justify that such actions be the least anti-competitive manner of achieving a regulatory objective." S. REP. No. 94-75, at 13 (1975). Moreover, "[c]ompetition was simply not to 'become paramount to the great purposes of the Act.'" *Bradford Nat'l Clearing Corp. v. SEC*, 590 F.2d 1085, 1105 (D.C. Cir. 1978) (citing S. REP. No. 94-75, at 14).

Similarly, the National Securities Markets Improvement Act of 1996, which added Section 3(f) to require the SEC to "consider" "efficiency, competition, and capital formation," did not require rigid analysis nor did it subordinate the SEC's primary duty to protect investors. The purpose of the amendments was to eliminate the dual system of state and federal regulation "while also advancing the historic commitment of the securities laws to promoting the protection of investors." H.R. REP. No. 104-864, at 39-40 (1996). In passing Section 3(f), Congress again chose to frame the SEC's duty in terms of a consideration.

Congress actually rejected a much more prescriptive obligation, which would have required:

> (a) an analysis of the likely costs of the regulation on the U.S. economy, particularly the securities markets and the participants in those markets; and (b) the estimated impact of the rule on economic and market behavior, including any impact on market liquidity, the costs of investment, and the financial risks of investment.

S. REP. No. 104-293, at 28-29 (1996). Congress declined to impose this "mechanical or self-describing" process on the SEC.[5]

D. Congress's deliberate decision not to burden the SEC with cost-benefit analysis is evident from many other laws.

The Supreme Court has declared that an agency's duty to conduct cost-benefit analysis is not to be inferred lightly or without a clear indication from Congress. *See American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-512 & n. 39 (1981) (stating that "Congress uses specific language when intending that an agency engage in cost-benefit analysis" and citing numerous statutory examples). Therefore, when Congress intends cost-benefit analysis to apply, it explicitly refers to "costs" and "benefits" and specifies the nature of the analysis.

When Congress wants agencies to be free from those constraints, it imposes a less burdensome requirement, thus giving overriding importance to particular statutory objectives. *See Whitman v. American Trucking Ass'ns., Inc.*, 531 U.S. 457, 471 (2001) (holding that a statute "unambiguously bars cost considerations"); *see also Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1039 (D.C. Cir.

[5] Nor is there any other law subjecting the SEC to a cost-benefit duty. The APA does not require such an analysis, *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 670-671 (D.C. Cir. 2011), and the Executive Orders on cost-benefit analysis exclude the SEC and other independent agencies. Executive Order 13,579, 76 Fed. Reg. 41,587 (July 14, 2011); Executive Order No. 13,563, 76 Fed. Reg. 3,821, § 7 (Jan. 21, 2011); Executive Order 12,866, 58 Fed. Reg. 51,735, § 3(b) (Oct. 4, 1993); *see also* Brief of Better Markets, *supra* note 2, at 13-14 n.6.

2012) (statutes in which agencies must "consider" the "economic" impact or "costs" do not require cost-benefit analysis); *Cent. Ariz. Water Conservation Dist. v. EPA*, 990 F.2d 1531, 1542 n.10 (9th Cir. 1993) (language in 42 U.S.C. § 7491(g)(1) requiring "consideration" does not require a cost-benefit analysis).[6]

Congress's decision not to include cost-benefit requirements in the securities laws while expressly including them in other statutes reflects Congress's long-standing judgment that the benefits of protecting investors must not be subordinated to concerns about the costs of regulation.[7]

II. The SEC reasonably considered the factors in accordance with Exchange Act Sections 3(f) and 23(a)(2).

The SEC considered the impact of the Rule on the protection of investors and the public as well as on efficiency, competition, and capital formation. It also found that any burden on competition was necessary or appropriate in furtherance of the purposes of the statute. Thus, far from a "complete absence of any

[6] Courts respect these congressional policy choices and even when a statute refers to "costs" and "benefits," they refuse to impose a duty to conduct cost-benefit analysis absent language of comparison in the statute. *See Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1045 (D.C. Cir. 1978); *see also Am. Petroleum Inst. v. EPA*, 858 F.2d 261, 265 & n.5 (5th Cir. 1988); *Reynolds Metal Co. v. EPA*, 760 F.2d 549, 565 (4th Cir. 1985).

[7] The bills proposed in Congress seeking to impose a cost-benefit analysis duty on the SEC confirm this view. *See, e.g.*, SEC Regulatory Accountability Act, S. 2373, 112th Cong. (introduced Apr. 26, 2012). Courts have found that such proposals support a finding that an agency's statute does not already mandate a cost-benefit analysis. *See Am. Textile Mfrs. Inst*, 452 U.S. 490, 512 n.30.

discussion of a statutorily mandated factor," *Pub. Citizen*, 374 F.3d at 1216, the SEC reasonably considered all required factors. Applying the high degree of deference due to the SEC under APA jurisprudence, this consideration should be upheld. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[T]he scope of review . . . is narrow and a court is not to substitute its judgment for that of the agency."); *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981) ("standard of review is a highly deferential one").

First, the agency considered the Rule's impact on **investors and the public**. For example, it observed that "investors and other market participants, as well as civil society in countries that are resource-rich, may benefit from any increased economic and political stability and improved investment climate that transparency promotes." 77 Fed. Reg. 56,397/3. Thus, the SEC recognized that the Rule "may result in social benefits." *Id*. at 56,398/2. It also recognized the beneficial impact of providing the required disclosures to investors, which can ''materially and substantially improve investment decision making.'' *Id*. at 56,398/2; *see also id.* at 56,398/3-99/1 (recognizing informational benefits of project-level reporting); *id.* at 56,407/1 (recognizing benefits of investors' ability to seek redress).

Second, the SEC appropriately considered the Rule's impact on **informational efficiency** and **capital formation**. Citing commentators' views that

the disclosures "would help investors assess the risks faced by resource extraction issuers operating in resource-rich countries," the agency stated that "[t]o the extent that the required disclosure will help investors in pricing the securities of the issuers subject to the [mandatory reporting], the [Rule] could improve informational efficiency." *Id*. at 56,399/1. And "[t]o the extent that investors want information about payments to assess these risks, the [Rule] may result in increased investment by those investors and thus may increase capital formation." *Id*. at 56,398/2-3.

Moreover, the SEC considered the potential loss in **allocative efficiency** resulting from compliance costs, which could "potentially divert[] capital away from other productive opportunities." *Id*. at 56,403/2. However, the agency, citing several studies, reasonably concluded that this effect "may be partially offset if increased transparency of resource extraction payments reduces rent-seeking behavior by governments of resource-rich countries and leads to improved economic development and higher economic growth." *Id*. at 56,403/2, & n. 586.

Lastly, the SEC adequately considered the impact of the Rule on **competition**, and it reasonably concluded that "the competitive burdens arising from the need to make the required disclosures . . . are necessary by the terms of, and in furtherance of the purposes of, Section 13(q)." *See id*. at 56,413/1. Recognizing other potentially less competitively burdensome alternatives, the

agency, as permitted in its discretion, rejected these alternatives as "inconsistent with Section 13(q)" and congressional intent "to promote international transparency efforts." *Id*. at 56,413/1; *see also id*. at 56,406/2-3; 56,391/2. Indeed, the SEC reasonably considered all of the alternatives advocated by Petitioners and rejected the cloak of obscurity they sought to place over the Rule. *See* Res. Br. at 39-53.

For example, the SEC refused to grant an exemption when disclosures are prohibited by foreign governments. The SEC recognized companies' competitive positions could be impacted, but noted that this impact may be mitigated by a number of factors. 77 Fed. Reg. 56,412/1-413/1. Further, it reasonably concluded that burdens were necessary in furtherance of the statute and its purpose. *Id*. at 56,403/1; *see also id.* at 56,403/1-2 (discussing transparency and informational benefits); *id.* at 56,372/3-73/1 (noting that the exemption "could undermine the statute"). By reasonably considering the competitive impact of the Rule and explaining why certain burdens were necessary to fulfill the purpose of the statute, the SEC complied with its statutory duty. Although there may have been less anti-competitive means of promulgating the Rule, "the Commission's decision falls within the boundaries of its broad authority." *Bradford Nat'l Clearing Corp.*, 590 F.2d at 1107; S. Rep. No. 94-75, at 13 (least anti-competitive approach not required).

III. Petitioners' reliance on *Business Roundtable* and *Chamber I* is mistaken.

Petitioners cite *Business Roundtable v. SEC*, 647 F.3d 1144, 1149 (D.C. Cir. 2011) and *Chamber of Commerce v. SEC*, 412 F.3d 133, 144 (D.C. Cir 2005) [*Chamber I*] for the proposition that the SEC has a duty to "determine" a rule's costs and benefits. Pet. Br. 37-38, 41. They go further—relying on law review articles—and suggest that the SEC was required to engage in an analysis in which "the benefits justify the costs" and the rule "maximizes net benefits." *Id.* at 37-38.

As a threshold matter, in the cases where the SEC's consideration of the economic impact of its rules was at issue, this Court never expressly held that the SEC had a duty to conduct "cost-benefit analysis." *See, e.g., Business Roundtable*, 647 F.3d 1144; *American Equity Investment Life Insurance Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010); *Chamber I*, 412 F.3d 133. But to the extent those decisions can be read as requiring such a duty, or any duty more onerous than what Congress actually imposed, that interpretation would not be entitled to precedential weight.

The Supreme Court has held that "questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511(1925); *Honeywell Int'l, Inc. v. EPA*, 374 F.3d 1363, 1374 (D.C. Cir. 2004). Thus, any overly burdensome interpretation of the SEC's obligation ascribed to this Court in *Chamber I* and its progeny should not be considered

controlling because in **none of those cases** did the parties argue or the Court address:

- The plain meaning of the applicable statutes and the absence of cost-benefit references in those provisions;
- The Supreme Court's interpretation of "consider;" which affords agencies wide discretion;
- Legislative history, which reaffirms that the SEC's duty is limited, entitled to deference, and subject to the public interest;
- Other statutes, which demonstrate that Congress knows precisely how to impose a cost-benefit obligation; and
- The harmful impact on investor protection arising from the imposition of burdensome non-statutory obligations on the SEC.

Because these issues and authorities were neither argued nor addressed, those cases did not resolve or define, with any precedential weight, the SEC's statutory duty to consider the economic factors listed in the Exchange Act.

IV. Although the SEC chose to consider some costs and benefits in its rulemaking, it did not thereby assume a duty to perform cost-benefit analysis.

In *American Equity*, 613 F.3d at 177, this Court found that the SEC had "conducted a § 2(b) analysis . . . with no assertion that it was not required to do so." It therefore held that the SEC's rule would be judged on what the SEC had

undertaken, whether or not Section 2(b) actually applied. *Id.*; *see also Nat'l Ass'n of Home Builders*, 682 F.3d at 1039-1041 (agency had no duty to conduct cost-benefit analysis but undertook one).

This case is distinguishable from *American Equity* on two grounds. First, although the SEC "discussed" some of the costs and benefits relating to the Rule, 77 Fed. Reg. 56,398, it clearly did not undertake a cost-benefit analysis. Second, the SEC drew an explicit distinction between its statutory duty to consider certain factors on the one hand, and its "sensitiv[ity] to the costs and benefits" of the Rule on the other. *Id.* at 56,397/3. Therefore, the Court may not hold the agency to an entire analytical approach that the statute never required and the SEC never attempted—especially where the SEC properly identified and satisfied the only statutory obligation to which it **was** subject.[8]

In any case, the SEC's discretionary consideration of certain costs and benefits was reasonable. The agency qualitatively considered the potential benefits to society and investors. *See* 77 Fed. Reg. 56,398/2-99/2; 56,407/1; *see also* Res. Br. at 27-30; *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir.

[8] Imposing a cost-benefit duty on the SEC would also conflict with the Supreme Court's prohibition against imposing procedural requirements on agencies beyond those in the APA. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978). The Supreme Court's respect for agency expertise, *id.* at 524-525, applies with even greater force to an agency's economic analysis than it does to an agency's procedures. *See also AFL-CIO v. Marshall*, 617 F.2d 636, 665 n.167 (D.C. Cir. 1979).

2009) ("The APA imposes no general obligation on agencies to produce empirical evidence."). And, "to assess industry commentators' claims about the potential industry-wide costs," the SEC considered some of the Rule's costs, quantifying them where possible and using "the limited data that commentators provided, supplemented by data from issuers' public filings and a commonly used publicly available database." Res. Br. at 31; *see also* 77 Fed. Reg. 56,399/2 (estimate of compliance costs given "in response to comments").[9] The agency also adequately explained any limitations on these estimates. *See, e.g.*, 77 Fed. Reg. 56,411, n. 628; *id.* at 56,412. Thus, the SEC's consideration of costs and benefits, although not required, was reasonable under the APA.

[9] Here, judging the Rule against a cost-benefit standard would have the perverse effect of discouraging the SEC from addressing commenters' concerns about costs and benefits.

CONCLUSION

For the foregoing reasons, the Court should uphold the Rule.

Dated: January 16, 2013

Respectfully Submitted,

/s/ Dennis M. Kelleher

Dennis M. Kelleher
dkelleher@bettermarkets.com

Stephen W. Hall
shall@bettermarkets.com

Katelynn O. Bradley
kbradley@bettermarkets.com

Better Markets, Inc.
1825 K Street, NW, Suite 1080
Washington, DC 20006
Tel: (202)-618-6464
Fax: (202)-618-6465

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPESTYLE REQUIREMENTS

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d), because this brief contains 3,486 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Dennis M. Kelleher
Dennis M. Kelleher
Better Markets, Inc.
1825 K Street N.W., Suite 1080
Washington, D.C. 20006
dkelleher@bettermarkets.com
(202) 618-6464

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2013, I caused the foregoing "Brief of Better Markets, Inc. as *Amicus Curiae* in Support of Respondent U.S. Securities and Exchange Commission" to be electronically filed using the Court's CM/ECF system, which serves a copy of the document on all counsel of record in the case.

/s/ Dennis M. Kelleher
Dennis M. Kelleher