BETTER MARKETS
TRANSPARENCY · ACCOUNTABILITY · OVERSIGHT

July 22, 2013

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Reopening of Comment Periods for Certain Proposed Rulemaking Releases and Policy Statements Applicable to Security-Based Swaps (May 1, 2013) (Release No. 34-69491; File Number S7-27-10; File Number S7-34-10; File Number S7-53-10; File Number S7-43-10; File Number S7-06-11; File Number S7-08-11; File Number S7-25-11; RIN 3235-AL05; RIN 3235-AL12) ("Release")

Dear Ms. Murphy:

Better Markets, Inc.[1] appreciates the opportunity to submit further comment on the Commission's proposed rules concerning security-based swaps ("SBS") and security-based swap market participants ("Proposed Rules"), which were issued pursuant to Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").

In the Release, the Commission explains that it has reopened the comment periods on the Proposed Rules to allow interested persons additional time to offer input in light of three developments:

1. the Commission's proposal of substantially all of the rules required to be adopted under Title VII;

2. the Commission's proposal of rules governing the cross-border application of the Title VII provisions regarding SBS; and

3. the adoption by the Commodity Future Trading Commission ("CFTC") of substantially all of the rules regarding swaps.[2]

Although the ability to review "substantially all" of the regulatory framework governing swaps and SBS may stimulate some helpful additional commentary from

1 Better Markets, Inc. is a nonprofit organization that promotes the public interest in the capital and commodity markets, including in particular the rulemaking process associated with the Dodd-Frank Act.

2 Release at 30,801.

interested persons, the reopening of the comment period for the Proposed Rules also poses a significant danger: Opponents of reform will seize this opportunity to refine, embellish, and fortify their criticisms of the Commission's proposals in a renewed push to weaken the regulatory framework governing the SBS market.

The Commission must guard against this threat. It must resist further calls to dilute the Proposed Rules, and as argued below, it must enhance and strengthen them in numerous respects. In short, all of the substantive rule provisions proposed so far must remain as strong as possible, irrespective of the Commission's approach to its very limited jurisdiction over cross-border transactions or the CFTC's approach to the implementation of Title VII.

SUMMARY OF COMMENTS

- **The comment letters previously submitted by Better Markets on the Proposed Rules remain critically important and the changes advocated in those letters must be incorporated into the Proposed Rules as they are finalized.** The enhancements advocated by Better Markets will help ensure that the Proposed Rules are stronger, broader, and more prescriptive; that they contain very limited exemptions and minimal reliance on industry discretion; and that they maximize transparency, accountability, and oversight in the SBS markets.

- **The Commission's proposal for the cross-border regulation of SBS transactions provides no basis for weakening any of the substantive provisions in the Proposed Rules.** The Commission's cross-border authority is strictly limited to preventing evasion of its SBS regulatory framework. Therefore, the Commission may enlist its cross-border jurisdiction only for the purpose of protecting the Proposed Rules against evasion, not for the purpose of diluting or weakening the Proposed Rules to accommodate concerns about international regulation of the SBS markets.

- **As it finalizes all of its Proposed Rules, the Commission should adhere to a number of core principles governing the economic analysis actually required under the securities laws.**

    - Under the securities laws, the Commission has no statutory duty to conduct cost-benefit analysis; its far more narrow obligation is to consider the Congressionally enumerated factors.

    - The Commission must be guided first and foremost by the public interest and the protection of investors as it considers the economic impact of its rules, not by concerns over the costs of regulation imposed on industry.

    - For any rule promulgated in accordance with and in furtherance of the Dodd-Frank Act, the ultimate public interest and investor protection consideration is implementing the reforms that Congress passed to provide for a safer and sounder financial system and to prevent another financial crisis.

- The Commission must ensure that its economic analysis is limited to its narrow duty under Sections 3(f) and 23(a)(2) and that it does not undertake an onerous cost-benefit analysis.

- Finally, wherever applicable, the Commission should explicitly set forth the fact that the rule is being proposed or adopted as part of a comprehensive, integrated framework aimed at preventing another financial crisis.

COMMENTS

I. The recommendations in the comments previously submitted by Better Markets remain critically important and they must be incorporated into the Proposed Rules as they are finalized.

Better Markets reiterates and incorporates herein by reference all of the comment letters it has filed on the Proposed Rules.[3] Those letters support many aspects of the Proposed Rules as sound and effective, but they also identify a wide range of weaknesses relating to the antifraud provisions, data reporting requirements, corporate governance measures, business conduct standards, trading platforms, capital requirements, and clearing agency standards.

[3] *See* Better Markets comment letters, "Prohibition Against Fraud, Manipulation, and Deception in Connection with Security-Based Swaps" (Dec. 23, 2010) *available at* http://www.sec.gov/comments/s7-32-10/s73210-13.pdf; "Reporting and Dissemination of Security-Based Swap Information" (Jan. 18, 2011) *available at* http://www.sec.gov/comments/s7-34-10/s73410-19.pdf; "Proposed Rules Governing Security-Based Swap Repository, Registration, Duties, and Core Principles" (Jan. 24, 2011) *available at* http://www.sec.gov/comments/s7-35-10/s73510-9.pdf; "Proposed Rules Governing the End-User Exception to Mandatory Clearing of Security-Based Swaps" (Feb. 4, 2011) *available at* http://www.sec.gov/comments/s7-43-10/s74310-10.pdf; "Registration and Regulation of Security-Based Swap Execution Facilities" (Mar. 30, 2012) *available at* http://www.sec.gov/comments/s7-06-11/s70611-117.pdf; "Clearing Agency Standards for Operation and Governance" (Apr. 29, 2011) *available at* http://www.sec.gov/comments/s7-08-11/s70811-19.pdf; "Business Conduct Standards for Securities-Based Swap Dealers and Major Securities-Based Swap Participants" (Aug. 29, 2011) *available at* http://www.sec.gov/comments/s7-25-11/s72511-11.pdf; "Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants" (Dec. 19, 2011) *available at* http://www.sec.gov/comments/s7-40-11/s74011-5.pdf; and Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participatns and Capital Requirements for Broker-Dealers" (Jan. 22, 2013) *available at* http://www.sec.gov/comments/s7-08-12/s70812-34.pdf.

In those letters, Better Markets urges the Commission to adopt stronger, broader, and more prescriptive rules, containing very limited exemptions and minimal reliance on industry discretion, all to maximize transparency, accountability, and oversight in the SBS markets. Our core recommendations include the following points:

- Antifraud – Expand the antifraud provisions to fully encompass fraud in connection with SBS transactions, including fraud that affects the value of any right or the performance of any obligation under an SBS over time;

- SBS data repositories – Require that market participants have equal and fair access to data on SBS transactions; that reported data is subject to uniform aggregation, formatting, and dissemination requirements; that data is reported on the components of complex SBS transactions; that hedge equivalents are included; that meaningful corporate governance requirements apply to SBS data repositories, including independent boards and ownership and voting restrictions; and establish a meaningful role for Chief Compliance Officers;

- SBS execution facilities ("SEFs") – Require that the SEF trading platform be a limit order book or at least an RFQ to all participants to achieve maximum transparency; that "available to trade" is interpreted according to its plain meaning and not encumbered by additional trade volume thresholds; that no SEF is allowed to provide preferential data access; that revenue sharing, volume discounts, rebates, and other unfair practices by SEFs are prohibited; that abusive trading practices, including those favored by high frequency traders, are prohibited; and that SEF Chief Compliance Officers have the power and autonomy to play a meaningful role;

- Business conduct standards for SBS dealers and major SBS participants ("SBS entities") – Require that SBS entity disclosures regarding SBS transactions are complete, timely, and in writing; expand application of the best interest standard to dealings with all participants, not only special entities; and enhance protections for Chief Compliance Officers;

- Capital requirements for SBS entities – Apply the same capital requirements for SBS activities, regardless of whether the entity is a broker-dealer or SBS dealer; prohibit the use of proprietary risk weighting models in favor of a standardized approach; jettison risk weighting strategies and replace them with simpler, lower leverage ratios; prohibit netting of derivatives exposures when calculating potential losses; and eliminate VaR-based modes for calculating capital charges;

- Data reporting – Require the dissemination of aggregated data about SBS transactions in a uniform and useful format for the benefit of market participants as well as regulators; shorten the delay for the release of data on block trades and ensure that size thresholds are determined by the

Commission, not individual SDRs with conflicting business interests; increase the amount of reportable information to include data on disaggregated customized SBS as well as collateral arrangements for SBS; and shorten the time limit for reporting data to SDRs;

- <u>End-user exception</u> – Require reporting of more information about how an end-user will meet its obligations under non-cleared SBS, including information about the terms of forbearance arrangements, how margin will be paid if credit triggers are activated, the role of any guarantors, the nature of any posted collateral, and limits on re-hypothecation; and require reporting of additional information to ensure that reliance on the end-user exception is bona fide, including information about the specific risks being hedged and how the SBS will hedge those risks;

- <u>Clearing agencies</u> – Provide more detailed standards for calculating margin, including standards that reflect liquidity and the minimum amount of historical data that must be considered in defining normal market conditions for a given derivative; require intra-day calculations of credit risk exposure when circumstances warrant; define "extreme but plausible market conditions" for purposes of calculating the financial resources that clearing agencies must maintain, and make clear that the definition must be framed in terms of unprecedented periods of illiquidity and volatility, rather than statistical analysis of historical price moves; apply the conflict of interest safeguards to all types of clearing agencies; establish an aggregate ownership limit of 25 percent for members and certain market participants; require clearing agency boards to have a majority of independent directors; and enhance measures to protect Chief Compliance Officers from improper interference and influence.

- <u>Registration of SBS entities</u> – Strengthen the registration regime so that it relies far less on industry assurances; provide for the Commission to independently investigate each SBS entity to determine fitness for registration; at a minimum, require an external audit of each SBS entity as part of the registration process; define the "operational, financial, and compliance capabilities" that each entity must certify as a condition of registration; and establish a mandatory licensing regime for the associated persons of SBS entities.

All of these recommendations continue to be relevant and important, just as they were prior to issuance of the Commission's cross-border proposal or the CFTC's final rules implementing Title VII, and they should be adopted and incorporated as the Proposed Rules are finalized.

II. The Commission's proposal for the cross-border regulation of SBS transactions provides no basis for weakening any of the substantive provisions in the Proposed Rules.

As noted above, the Release cites the Commission's recent proposal of rules governing the cross-border application of the Title VII as one justification for reopening the comment period for all of the Proposed Rules.[4] Better Markets will comment on the Commission's cross-border release in detail in a separate letter, but at this stage, at least one fundamental point is clear: nothing in the cross-border proposal can justify weakening any of the Proposed Rules.

The Commission's cross-border proposal is predicated on one and only one jurisdictional foundation: anti-evasion authority. Section 772(b) of the Dodd-Frank Act amended Section 30(c) of the Exchange Act,[5] which now provides:

> (c) Rule of construction. No provision of this title [15 USCS §§ 78a et seq,] that was added by the Wall Street Transparency and Accountability Act of 2010, or any rule or regulation thereunder, shall apply to any person insofar as such person transacts a business in security-based swaps without the jurisdiction of the United States, <u>unless such person transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of any provision of this title</u> [15 USCS §§ 78a et seq,] that was added by the Wall Street Transparency and Accountability Act of 2010.

Thus, the Commission's statutory authority in connection with cross-border SBS activity is solely and simply to adopt rules that prevent **evasion** of the regulatory framework applicable within the jurisdictional boundaries of the United States. In other words, under Section 772(b), the Commission's rules governing the domestic SBS marketplace are taken as a given, and the cross-border proposal can only be written and invoked to ensure that the Proposed Rules are not circumvented through international SBS transactions. Clearly, there is no basis in this statutory authority for arguing that the Commission's implementation of Title VII must be weakened or diluted to accommodate cross-border considerations.

To the contrary, the statute's singular focus on preventing evasion of the Commission's SBS regulations reflects Congress's commitment to strong and effective SBS regulation. If anything, the Commission's limited anti-evasion authority indicates that the Proposed Rules themselves should be **strengthened** in whatever way is necessary to help prevent their evasion through cross-border SBS transactions.[6]

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4 Release at 30,801.

5 15 U.S.C. 78dd(c).

6 Nor is Section 752(a) of the Dodd-Frank Act a justification for diluting the Proposed Rules. First, that section simply requires the Commission to "consult and coordinate" with foreign regulatory

III. As it finalizes all of its rules, the Commission should adhere to a number of core principles governing the economic analysis actually required under the securities laws.

A critically important aspect of the Commission's rulemaking process is the way in which it approaches economic analysis. The Release reflects this fact, since economic analysis is one of the few specific issues on which the Commission requested further comment. As stated in the Release, the Commission "specifically seeks comment on the . . . economic consequences and effects, including costs and benefits, of the Proposed Rules, either individually or as a whole."[7] This issue is also fundamentally important because the Commission's approach to economic analysis affects **all** of the Proposed Rules, regardless of their specific substantive focus.

In reality, and as discussed in detail below, the Commission's statutory duty is narrow: it need not conduct a cost-benefit analysis for any of its rules, and its first priority in the rulemaking process is to protect investors and serve the public interest, not compromise the strength of its regulations to accommodate industry's cost concerns.

Nevertheless, even when the Commission has clearly fulfilled its limited statutory duty to consider the economic impact of its rules, representatives from industry have challenged proposed rules claiming—without merit—that the Commission failed to appropriately conduct what the industry calls "cost-benefit analysis." These attacks rest on a series of fundamentally flawed claims. For example, in challenging rules promulgated by the Commission, the industry has:

(1) greatly exaggerated the actual duty imposed on the Commission by its governing statutes, Sections 3(f) and 23(a)(2) of the Exchange Act, in effect seeking to transform that limited duty into what they call "cost-benefit analysis," but which is in really an "industry cost-only analysis;"

(2) entirely disregarded the paramount statutorily required role of the public interest in the rulemaking process; and

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authorities on the establishment of consistent international standards regarding SBS. It does not require any specific outcome, substantive rule provision, or other action by the Commission with respect to its SBS rules or its cross-border release, and it certainly does not justify any dilution of the Proposed Rules. Second, Section 752(a) is irrelevant to the three factors that induced the Commission to reopen the comment period for the Proposed Rules. Those factors were, in essence, the substantial completion of proposed or final rules by the CFTC and the Commission on the implementation of Title VII. Section 752(a) addresses a separate issue and in fact is not mentioned in the Release that reopened comment on the Proposed Rules. Finally, Section 752(a) can and should be read as an attempt to raise international regulatory standards so that they harmonize with U.S. standards, rather than an effort to lower U.S. standards in the interest of harmony.

7 Release at 30,802.

(3) indefensibly ignored the enormous cost of the financial crisis and the larger collective benefit of all rules designed to help prevent a recurrence of that crisis or something far worse.[8]

Accordingly, as the Commission finalizes all of the Proposed Rules, it is imperative that it adhere to a series of core principles governing the actual contours of its duty to consider the economic impact of its rules.

1. *Under the securities laws, the Commission has no statutory duty to conduct cost-benefit analysis; its far more narrow obligation is simply to consider certain enumerated factors.*

Sections 3(f) and 23(a)(2) of the Exchange Act set forth the Commission's statutory requirement to "consider" a rule's impact on several specifically listed economic factors.[9] Specifically, Section 3(f) requires the Commission, after considering "the public interest" and the "protection of investors," "to consider . . . whether the action will promote efficiency, competition, and capital formation." Section 23(a)(2) requires the Commission 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]."[10] The Exchange Act contains no language requiring a cost-benefit analysis and there is no basis for imposing any such requirement.

When Congress intends cost-benefit analysis to apply, it explicitly refers to "costs" and "benefits" and specifies the nature of the analysis.[11] And, when Congress wants agencies to be free from those constraints, it imposes a less burdensome requirement, thus giving overriding importance to particular statutory objectives.[12]

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8 *See* 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.pdf, incorporated here as if fully set forth herein.; *see also* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, FINANCIAL REGULATORY REFORM: FINANCIAL CRISIS LOSSES AND POTENTIAL IMPACTS OF THE DODD-FRANK ACT, GAO-13-180, at 17 (Jan. 2013), *available at* http://gao.gov/assets/660/651322.pdf.

9 15 U.S.C. §§ 78c(f), 78w(a)(2).

10 Better Markets has set forth a comprehensive analysis regarding the scope of the Commission's duties under the securities laws in BETTER MARKETS, SETTING THE RECORD STRAIGHT ON COST-BENEFIT ANALYSIS AND FINANCIAL REFORM AT THE SEC, at 39-44 (July 30, 2012), *available at* http://bettermarkets.com/sites/default/files/CBA%20Report.pdf. In addition, Better Markets has recently filed an *amicus curiae* brief in support of the Commission on the agency's statutory duties in *American Petroleum Inst. v. Commission*, No. 12-1398 (D.C. Cir. Oct. 10, 2012). Both the report and *amicus* brief are incorporated by reference as if fully set forth herein.

11 *See American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-512 & n. 30 (1981) (stating that "Congress uses specific language when intending that an agency engage in cost-benefit analysis" and citing numerous statutory examples).

12 *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. 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

Recently, the Court of Appeals for the District of Columbia confirmed these principles.[13] The Court addressed the CFTC's economic analysis duty under Section 15(a) of the Commodity Exchange Act ("CEA"), which is similarly framed in terms of a duty to "consider" certain factors. Even though the CEA actually references "costs" and "benefits," the Court made clear that the duty simply to "consider" such factors is a limited one and does not require a cost-benefit analysis:

> The appellants further complain that CFTC failed to put a precise number on the benefit of data collection in preventing future financial crises. But the law does not require agencies to measure the immeasurable. CFTC's discussion of unquantifiable benefits fulfills its statutory obligation to consider and evaluate potential costs and benefits . . . . Where Congress has required "rigorous, quantitative economic analysis," it has made that requirement clear in the agency's statute, but it imposed no such requirement here.[14]

Like the CFTC's obligation under the CEA, the Commission's duty under the securities laws stands in sharp contrast to the statutory provisions in which Congress explicitly mandates a netting or specific balancing of costs and benefits, let alone mentions "costs" and "benefits."

Moreover, Congress's careful choice of words in Sections 3(f) and 23(a)(2) and the case law construing similar provisions, make clear that the Commission has broad discretion in discharging its duty. The Supreme Court has long recognized that when statutorily mandated **considerations** are not "mechanical or self-defining standards," they "imply wide areas of judgment and therefore of discretion" as an agency fulfills its statutory duty.[15]

The plain fact is that the Commission has no statutory or other obligation[16] to quantify costs or benefits,[17] weigh them against each other,[18] or find that a rule will

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(9th Cir. 1993) (language in 42 U.S.C. § 7491(g)(1) requiring "consideration" does not require a cost-benefit analysis).

13 *Inv. Co. Inst. v. CFTC*, No. 1:12-cv-00612 (D.C. Cir. June 25, 2013)

14 *Id.* at 14-15 (cited authorities omitted).

15 *Sec'y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 611 (1950).

16 Indeed, there is no other law which would subject the Commission 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 Commission 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).

17 *Cf.* 42 U.S.C. § 300g-1(b)(3) (imposing a duty on the Environmental Protection Agency to use analysis of specific factors including the "[q]uantifiable and nonquantifiable health risk reduction benefits," the "[q]uantifiable and nonquantifiable costs," and "[t]he incremental costs and benefits associated with each alternative."). Courts have repeatedly held that an agency need not quantify the costs and benefits of a rule when a statute does not require it. *See, e.g., FMC Corp. v. Train*, 539 F.2d 973, 978-979 (4th Cir. 1976) (finding that 33 U.S.C. §§ 1314(b)(1)(B), (b)(2)(B) and § 1316 do not require quantification of the benefits in monetary terms). In fact, the D.C. Circuit has explicitly recognized that even in a cost-benefit analysis an agency's "predictions or conclusions" do not necessarily need to be

confer a net benefit before promulgating it. The rationale for this flexible obligation in the law is clear: Requiring the Commission to conduct a resource intensive, time consuming, and inevitably imprecise cost-benefit analysis as a precondition to rulemaking would significantly impair the agency's ability to implement Congress's regulatory objectives. The industry's desire to have its costs prioritized over all other costs (what they falsely refer to as "cost-benefit analysis") does not change the law, the rationale for the law, or the underlying policy.

2. *The Commission must be guided first and foremost by the public interest and the protection of investors as it considers the economic impact of its rules, not by concerns over the costs of regulation imposed on industry.*

The Commission's preeminent duty when promulgating rules is to protect investors and the public interest. The agency was established for the purpose of implementing the securities laws, and therefore its primary duty is to achieve the legislative objectives of those laws, which are first and foremost to protect investors and the public interest from fraud, abuse, and manipulation in the securities markets. As is evident from the securities laws themselves, their legislative history, and the specific delegations of rulemaking authority, the public interest and protection of investors is a key consideration in the Commission's rulemaking process. Indeed, Section 3(f) of the Exchange Act explicitly refers to "the protection of investors" and "the public interest," but does not mention any industry-focused concerns, such as compliance costs or the feasibility of conforming to rule requirements.[19]

The Commission's duty to protect investors and the public interest has renewed importance in light of the 2008 financial crisis. The financial crisis is a powerful reminder of the need to remain focused on the core purposes of securities regulation and the Commission's overriding duty to protect the public, investors, and the integrity of the markets. The Supreme Court's admonition about the importance of raising standards of conduct to the highest possible level following the Great Depression applies with equal force today:

> It requires but little appreciation . . . of what happened in this country during the 1920's and 1930's to realize how essential it is

"based on a rigorous, quantitative economic analysis." *Am. Fin. Services Ass'n. v. FTC*, 767 F.2d 957, 986 (D.C. Cir. 1985); *see also Pennsylvania Funeral Directors Ass'n v. FTC*, 41 F.3d 81, 91 (3d Cir. 1994) (recognizing that "much of a cost-benefit analysis requires predictions and speculation, in any context," and holding that the "absence of quantitative data is not fatal").

18 Even when a statute refers to "costs" and "benefits," Courts 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).

19 *Cf.* 42 U.S.C. § 300g-1(b)(3)(C) (requiring analysis of certain costs of safe drinking water regulations including costs that "are likely to occur solely as a result of compliance with the maximum contaminant level, including monitoring, treatment, and other costs"); 42 U.S.C. § 6295(d) (1976 ed., Supp. II) (requiring a weighing of the economic impact on manufacturers and the savings in operating costs as "compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered products which are likely to result").

> that the highest ethical standards prevail' in every facet of the securities industry.[20]

If these goals are subordinated to industry concerns over the costs of regulation in the rulemaking process, then the reforms embodied in the Dodd-Frank Act will have little chance of protecting our markets and our economy from the ravages of another financial crisis. Thus, in promulgating rules under the Dodd-Frank Act, the Commission must be guided by the preeminent concerns of the public interest and the protection of investors, not the burdens of regulation on industry.

3. *For any rule promulgated in accordance with and in furtherance of the Dodd-Frank Act, the ultimate public interest and investor protection consideration is implementing the reforms that Congress passed to provide for a safer and sounder financial system and to prevent another financial crisis.*

The statutory authority for the Proposed Rules is the Dodd-Frank Act. The Commission must therefore consider and give proper weight to the overriding goal that Congress intended to achieve when it passed that comprehensive, interrelated law, and in terms of the enormous benefit that the rules collectively will provide to the public. That goal is to prevent another financial collapse and economic crisis, and that benefit is to avoid the economic costs, hardships, and human suffering that would inevitably accompany such disastrous events.

The dollar cost alone of the financial collapse and still-unfolding economic crisis is conservatively estimated to be in the trillions. A study by Better Markets estimates that those costs will exceed $12.8 trillion.[21] In addition, the Government Accountability Office has recently issued the results of a study on the costs of the crisis, observing that "the present value of cumulative output losses [from the crisis] **could exceed $13 trillion**."[22] Therefore, as the Commission considers the public interest and the protection of investors under Sections 3(f) and 23(a)(2), it must continue to consider, above all, the benefits of the entire collection of reforms embodied in the Dodd-Frank Act, of which any specific rule is but a single, integral part.

Congress passed the Dodd-Frank Act knowing full well that it would impose significant costs on industry, yet it determined those costs were not only justified but necessary to stabilize our financial system and avoid another financial crisis. Those costs include the elimination of extremely profitable lines of business as well as significant and ongoing compliance costs. A leading example is the establishment of the

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20 *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186-87 (1963) (quoted authorities omitted).

21 *See* 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.

22 U.S. GOVERNMENT ACCOUNTABILITY OFFICE, FINANCIAL REGULATORY REFORM: FINANCIAL CRISIS LOSSES AND POTENTIAL IMPACTS OF THE DODD-FRANK ACT, GAO-13-180, at 17 (Jan. 2013) (released Feb. 14, 2013), *available at* http://gao.gov/assets/660/651322.pdf (emphasis added).

new, comprehensive regulatory regime for swaps and SBS. It will require the financial industry to incur significant costs arising from new personnel and technology, ongoing compliance, margin and collateral, and reduced revenues and profits.

However, the financial reform law and the rules implementing it do not, in fact, add any incremental costs (or, if they do, those costs are *de minimis*). Rather, they reallocate costs so that industry bears them in a regulated environment that **prevents** financial failure and bailouts. As a result, the public and society are spared the massive costs of responding to economic crises after the fact.[23]

Congress fully understood this. It knew that re-regulation would impose costs on the industry, in some cases totaling billions of dollars. The Dodd-Frank Act reflects Congress's unflinching determination to shift the costs of de-regulation and non-regulation of the financial industry back to the industry from a society that has paid and continues to pay the bill for industry's unregulated excesses. In substance, Congress conducted its own cost-benefit analysis and concluded that the enormous collective benefits of the law far exceeded the costs and lost profits that industry would have to absorb.[24]

Indeed, had Congress wanted the financial regulatory agencies to conduct cost-benefit analysis prior to promulgating the rules under the Dodd-Frank Act, it would have clearly said so. Congress passed the Dodd-Frank Act fully aware of the specific economic analysis provisions in the federal agencies' governing statutes—like Sections 3(f) and 23(a)(2) of the Exchange Act—and fully aware of how to impose a cost-benefit analysis requirement. Yet, it made no changes to those provisions, thereby affirming congressional intent that those specific provisions should control as they were originally written and intended.

Against the backdrop of the worst financial and economic crises since the Great Depression, it is inconceivable that Congress would enact sweeping reforms and then allow the implementation of those reforms to hinge on the outcome of a biased, one-sided cost-benefit analysis that ignored the overriding purpose of the new regulatory framework—and that gave controlling weight to cost concerns from the very industry that precipitated the crisis and inflicted trillions of dollars in financial damage and human suffering across the country.

In short, the following analytical framework must guide any consideration of the economic impact of rules implementing the Dodd-Frank Act, or any rules that are promulgated within the broader Dodd-Frank Act context:

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[23] *See* BETTER MARKETS, SETTING THE RECORD STRAIGHT ON COST-BENEFIT ANALYSIS AND FINANCIAL REFORM AT THE SEC, at 39-44 (July 30, 2012), *available at* http://bettermarkets.com/sites/default/files/CBA%20Report.pdf.

[24] *Id.* at 43.

- Congress's ultimate objective in the Dodd-Frank Act was to prevent another crisis and the massive costs it would inflict on our financial system, taxpayers, investors, economy, and country;

- The Proposed Rules are an integral component of the overall body of reforms that Congress envisaged to achieve this objective; and

- The costs of compliance and reduced profits that industry may have to absorb by virtue of the Proposed Rules, as well as the entire Dodd-Frank Act, were considered by Congress in passing the law and determined to pale in comparison with the benefits of preventing another crisis—a benefit that can be valued at over $12.8 trillion.

4. *The Commission must ensure that its economic analysis is limited to its narrow duty under Sections 3(f) and 23(a)(2), and that it does not undertake a cost-benefit analysis.*

With respect to each of the Proposed Rules, the Commission must simply identify the statutory provisions applicable to its economic considerations and explain how various aspects of the Rules would affect the specifically enumerated factors in those provisions. This is what the Exchange Act requires, and by considering the specified factors, the Commission will fulfill its duty with respect to economic analysis.

Conversely, the Commission should carefully avoid undertaking a cost-benefit analysis, or any similar approach in which agencies determine and quantify costs and benefits, net them against one another, and adopt the least costly rule. This type of analysis is not required by Sections 3(f) and 23(a)(2), it poses a threat to the implementation of Congress's policy goals, and it wastes agencies' resources without producing accurate or useful results. In fact, consideration of costs and benefits beyond those specifically tied to the Exchange Act provisions misleads the public and the Commission by presenting an inevitably incomplete and inaccurate portrayal of a rule's impact, and by overemphasizing easily quantifiable costs to the detriment of vastly more important, albeit unquantifiable, benefits.

At a minimum, the Commission should, in explaining its statutory duty under Sections 3(f) and 23(a)(2), explicitly assert that it is not required to perform a cost-benefit analysis, quantify or compare costs and benefits, or perform any analysis that exceeds the Sections 3(f) and 23(a)(2)'s requirements. And, assuming that particular costs and benefits are at all relevant to the Commission's required economic analysis, the agency should more clearly set forth how those costs and benefits are directly related to protecting investors or the public or to efficiency, competition, or capital formation.

> 5. *Finally, wherever applicable, the Commission should explicitly set forth the fact that the rule is being proposed or adopted as part of a comprehensive, integrated framework aimed at preventing another financial crisis.*

The context in which each of the Proposed Rules is being promulgated, concurrently with the comprehensive overhaul of the entire SBS market under the Dodd-Frank Act, is extremely important and should be fully explained in connection with the consideration of the application of Sections 3(f) and 23(a)(2). The Commission should acknowledge the Dodd-Frank Act authority for each Proposed Rule, and should explain that the rule is part of a comprehensive set of reforms that collectively will help avoid another devastating financial crisis.

This level of explanation is appropriate to illustrate the larger interests at stake: not only promoting a specific interest—such as transparency through data reporting—but also increasing the overall stability and integrity of the entire SBS marketplace, and ultimately reducing the likelihood of a future financial collapse and economic crisis.

<u>CONCLUSION</u>

We hope these comments are helpful as the Commission finalizes all of the Proposed Rules.

Sincerely,

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