

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

CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA,

Petitioner,

v.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR REVIEW

No. 04-1300

PETITIONER'S PRELIMINARY STATEMENT OF ISSUES TO BE RAISED

Pursuant to this Court's Order of September 15, 2004, Petitioner Chamber of Commerce of the United States of America files this preliminary Statement Of Issues To Be Raised:

1. Whether the Commission, which has no general authority to regulate mutual fund governance, exceeded its statutory authority in promulgating provisions of a mutual fund "governance rule" (i) to require that 75 percent of funds' directors be independent of the fund adviser, and (ii) to require that the chair of the fund board be independent of the adviser.
2. Whether the Commission's adoption of the independent chair and 75 percent independent director requirements exceeded the Commission's authority under the Investment Company Act of 1940 ("Act"), in light of Congress's considered decision to provide in the text of the Act that no more than 40 percent of directors must be independent of the fund adviser, except in narrow statutorily-identified circumstances.
3. Whether the Commission engaged in agency action that was arbitrary and capricious, an abuse of discretion, and otherwise unlawful within the meaning of the Administrative Procedure Act ("APA") when it imposed the independent chair and 75 percent

independent director requirements by amending ten separate and distinct rules without discussing the rules' existing terms; mutual funds' activities in connection with the existing rules; or the rationale for amending each individual rule in light of the rule's current terms, related fund activities, and the statutory provision that each rule addresses.

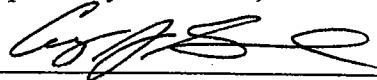
4. Whether the Commission, by repeatedly failing to address empirical data and other rulemaking evidence regarding the costs for funds and fund shareholders of the independent chair and 75 percent independence requirements, violated the Act and the APA by failing to discharge its statutory obligation to consider whether the new requirements would "promote efficiency, competition, and capital formation."

5. Whether the Commission's adoption of the independent chair and 75 percent independent director requirements was arbitrary and capricious, an abuse of discretion, and otherwise unlawful within the meaning of the APA, given the Commission's failure to adequately consider and address rulemaking comments, empirical evidence in the record, and alternatives to each requirement.

Dated: October 15, 2004

Of Counsel:
Stephen A. Bokat
Robin S. Conrad
National Chamber Litigation Center, Inc.
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Telephone: (202) 463-5337

Respectfully submitted,



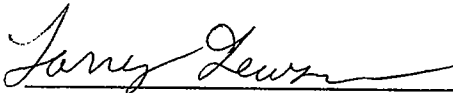
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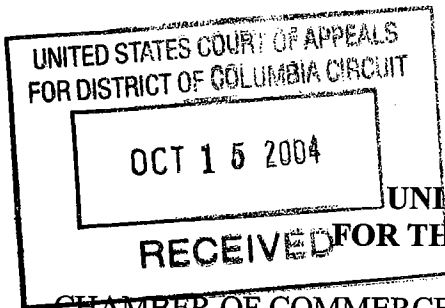
CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a true and correct copy of Petitioner's Preliminary Statement Of Issues To Be Raised via hand delivery this 15th day of October, 2004, upon the following:

Giovanni P. Prezioso, General Counsel
Meyer Eisenberg, Deputy General Counsel
Jacob H. Stillman, Solicitor
John W. Avery, Special Counsel
United States Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549



Larry S. Newsom



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PETITIONER'S CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1) and this Court's order dated September 15, 2004, Petitioner Chamber of Commerce of the United States of America states as follows:

(A) Parties and Amici:

The parties in this case are the Chamber of Commerce of the United States of America (Petitioner) and the United States Securities and Exchange Commission (Respondent). There are no intervenors or amici.

The Chamber of Commerce is the nation's largest federation of business companies and associations. With substantial membership in each of the fifty states, the Chamber has an underlying membership of more than three million businesses and professional organizations of every size and in every industry sector. One of the Chamber's associational purposes is to protect its members from costly and unlawful federal regulation. Chamber members and their subsidiaries include mutual fund advisers that will be injured by the Commission's challenged rule. Moreover, the Chamber invests in mutual funds, and thus will itself be injured by the Commission's challenged rule.

The Chamber is a non-stock corporation and thus has no parent organization, and no publicly-held corporation holds a 10 percent or greater stake in the Chamber.

(B) Rulings Under Review:

Under review in this case are the independent chair and 75 percent independent director provisions of the Commission's final mutual fund "governance" rule, Investment Company Governance; Final Rule; 69 Fed. Reg. 46,378 (Aug. 2, 2004), a copy of which was attached to the Petition for Review.

(C) Related Cases:

This case was not previously before this Court or any other court. However, because there is uncertainty whether jurisdiction lies in this Court or in federal district court, the Chamber of Commerce has concurrently challenged the independent chair and 75 percent independent director requirements in the United States District Court for the District of Columbia (Sept. 2, 2004, No. 1: 04CV01522). *See Investment Co. Inst. v. Board of Governors of Fed. Reserve*, 551 F.2d 1270, 1280 (D.C. Cir. 1977) (indicating that when there is uncertainty whether the district court or court of appeals has jurisdiction to review agency action, filing in both courts is appropriate). On September 20, 2004, the Chamber filed in this Court a *Motion for Stay, or, Alternatively, for Expedited Briefing* that, as a threshold matter, identified the jurisdictional issue for the Court's consideration. Currently pending in the District Court is a motion by the Commission to transfer that proceeding to this Court.

Dated: October 15, 2004

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Respectfully submitted,




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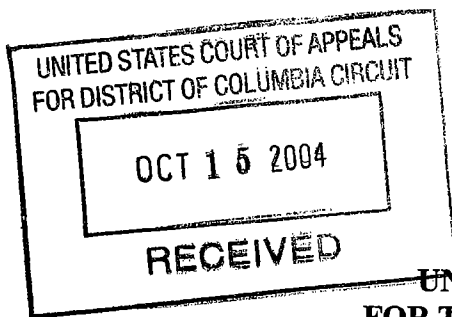
CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a true and correct copy of Petitioner's Certificate as to Parties, Rulings and Related Cases via hand delivery this 15th day of October, 2004, upon the following:

Giovanni P. Prezioso, General Counsel
Meyer Eisenberg, Deputy General Counsel
Jacob H. Stillman, Solicitor
John W. Avery, Special Counsel
United States Securities and Exchange Commission
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**PETITIONER'S STATEMENT REGARDING USE OF DEFERRED APPENDIX
UNDER F.R.A.P. 30(C)**

Pursuant to this Court's Order dated September 15, 2004, Petitioner Chamber of Commerce of the United States of America states that it does intend to utilize a deferred appendix under F.R.A.P. 30(c).

Dated: October 15, 2004

Of Counsel:
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Respectfully submitted,

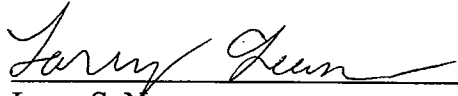

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*Counsel for Petitioner Chamber of Commerce
of the United States of America*

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a true and correct copy of Petitioner's Statement Regarding Use of Deferred Appendix Under F.R.A.P. 30(c) via hand delivery this 15th day of October, 2004, upon the following:

Giovanni P. Prezioso, General Counsel
Meyer Eisenberg, Deputy General Counsel
Jacob H. Stillman, Solicitor
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