

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:04-CV-1522 (RMC)
)	
UNITED STATES SECURITIES AND EXCHANGE COMMISSION,)	
)	
Defendant.)	
)	

DEFENDANT’S REPLY IN SUPPORT OF MOTION TO TRANSFER

The United States Securities and Exchange Commission (“SEC”) has moved, pursuant to 28 U.S.C. 1631, to transfer this action to the United States Court of Appeals for the District of Columbia Circuit. The D.C. Circuit already has before it a petition by the plaintiff Chamber of Commerce (“Chamber”) raising challenges to certain provisions of the SEC’s recently-promulgated Investment Company Governance Rule that are identical to those the Chamber has made in this action. In response, the Chamber contends that there is “uncertainty” as to which court has jurisdiction over its claims, and suggests that this Court should “defer” consideration of the SEC Motion until the D.C. Circuit rules on whether it has jurisdiction. Plaintiff’s Statement in Response to Defendant’s Motion to Transfer at 1, 2 (Sept. 9, 2004) (“Plaintiff’s Statement”). As discussed below, the Chamber’s claims of jurisdictional “uncertainty” are ill-founded, and deferring consideration of the SEC’s motion is neither warranted nor advisable.

DISCUSSION

There is no uncertainty – challenges to SEC final rules promulgated under the Investment Company Act of 1940 are to be brought in the courts of appeals. The SEC has shown that when a governing statute (such as the ICA here) provides for appellate-court jurisdiction over appeals of agency “orders,” the courts of appeals possess exclusive jurisdiction over challenges to “any agency action capable of review on the basis of the administrative record.” See SEC Motion at 3-4 & n.2 (citing *Investment Co. Inst. v. Board of Governors, Fed. Reserve Sys.*, 551 F.2d 1270, 1278 (D.C. Cir. 1977)) (other citations omitted). The SEC has further demonstrated that when (as the Chamber implicitly concedes is the case here) review of an agency action can be done on the administrative record, allowing for district-court jurisdiction would foster wasteful duplication of effort. SEC Motion at 4 (citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744-45 (1985)). Indeed, the Chamber’s actions in the D.C. Circuit have highlighted this risk. In the D.C. Circuit, the Chamber has filed an “emergency” motion to stay the SEC’s Investment Company Governance Rule, accompanied by a “voluminous Appendix.” Plaintiff’s Statement at 2.¹ As the Chamber is already fully litigating its claims against the SEC in the D.C. Circuit, transferring this action would certainly “avoid the waste attendant upon [any] duplication of effort.” *Lorion*, 470 U.S. at 744.

As for the Chamber’s suggestion that this Court defer consideration of the SEC’s transfer motion, that is neither advisable nor necessary. It is inadvisable because deferring consideration may not prevent duplication of effort. While the Chamber in its stay motion asked the D.C. Circuit to rule on jurisdiction by October 18, 2004, Plaintiff’s Statement at 2, there is no guarantee that the

¹ In addition, the D.C. Circuit has already issued a detailed scheduling order regarding the Chamber’s petition to that court. See Exh. 1.

D.C. Circuit will do so. The D.C. Circuit might well deny the stay motion on a ground other than jurisdiction, such as the lack of any irreparable harm. *See* D.C. Cir. Rule 18(a)(1) (party moving for stay of agency action must show, *inter alia*, “the prospect of irreparable injury . . . if relief is withheld”). In that situation, the SEC and the Chamber would have to continue the duplicative litigation of this action, which at the least would include a response by the SEC to the Chamber’s Complaint and presumably (if the Complaint is not dismissed out right) cross-motions for summary judgment. It is precisely to avoid this duplication of effort that on-the-record review of agency actions is ordinarily, as here, committed to the courts of appeals. Deferring consideration of the SEC’s transfer motion will not prevent such duplication.

Moreover, a deferral is completely unnecessary. Transferring this case to the D.C. Circuit will not prejudice the Chamber in any way. The D.C. Circuit is hearing the same issues that the Chamber raised in this action. Moreover, in the unlikely event that the D.C. Circuit decides (contrary to the parties’ contentions) that Section 43 of the Investment Company Act of 1940, 15 U.S.C. 80a-42, vests jurisdiction in the district courts rather than the courts of appeals, the D.C. Circuit can simply transfer the Chamber’s petition for review to this Court, with no loss of rights to the Chamber.²

For these reasons, the SEC respectfully submits that consideration of its motion should not be deferred, and that pursuant to 28 U.S.C. 1631, this action should be transferred to the D.C. Circuit. If, however, the Court is inclined not to dispose of this case until the D.C. Circuit issues a definitive ruling on its jurisdiction over the Chamber’s petition, the SEC submits that, rather than

² *See* 28 U.S.C. 1631 (noting that when a case is transferred pursuant to this statute, it “shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred”).

defer consideration of the SEC's motion, the Court should stay this case altogether until the D.C. Circuit issues a definitive ruling on its jurisdiction.

CONCLUSION

For the foregoing reasons, the Commission requests that this Court grant its motion to transfer this case to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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Dated: September 27, 2004

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

No. 04-1300

September Term, 2003

Chamber of Commerce of the United States of America, Petitioner
v.
Securities and Exchange Commission, Respondent

O R D E R

This case was filed and docketed on 9/2/04. The case was filed as a petition for review and was assigned the above number.

It is **ORDERED** that petitioner(s) shall submit the following document(s) (original and one copy required, unless otherwise noted) by the indicated date(s) :

- 10/15/04 Statement of issues to be raised.
- 10/15/04 Certificate of Counsel (Cir. R. 28(a) (1)).
- 10/15/04 Statement as to whether or not a deferred appendix under F.R.A.P. 30(c) will be utilized. (A motion will not be necessary.)
- 10/15/04 Original and four copies of procedural motions which would affect the calendaring of this case.
- 11/1/04 Dispositive motions, if any. See Cir. R. 27(g).
(Original and four copies.)

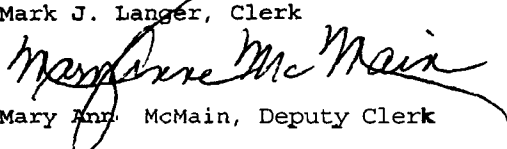
It is **FURTHER ORDERED** that respondent(s) shall submit the following document(s) (original and one copy required, unless otherwise noted) by the indicated date(s) :

- 11/1/04 Entry of Appearance form.
- 11/1/04 Certified Index to Record.
- 10/15/04 Original and four copies of procedural motions which would affect the calendaring of this case.
- 11/1/04 Dispositive motions, if any. See Cir. R. 27(g).
(Original and four copies.)

It is **FURTHER ORDERED** that briefing in this case is deferred pending further order of the Court.

The Clerk is directed to certify and transmit a copy of this order, along with the petition for review, to respondent(s).

FOR THE COURT:
Mark J. Langer, Clerk

BY: 
Mary Ann McMain, Deputy Clerk

