

**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. 05-1240

PETITIONER'S PRELIMINARY STATEMENT OF ISSUES TO BE RAISED

Pursuant to this Court's Order of July 26, 2005, petitioner Chamber of Commerce of the United States of America files this Preliminary Statement Of Issues To Be Raised:

1. In a unanimous decision dated June 21, 2005, this Court ruled that the independent chair and 75 percent independent director provisions of the Commission's mutual fund "governance" rule had been adopted in violation of the Administrative Procedure Act ("APA") and the Investment Company Act of 1940 ("ICA"). *Chamber of Commerce of the United States v. Securities Exch. Comm'n*, No. 04-1300 (D.C. Cir. June 21, 2005). At an Open Meeting eight days later—before the mandate had issued—the Commission majority re-adopted the two challenged provisions. The mandate still has not issued, and a Petition for Panel Rehearing is currently pending in that earlier proceeding. Did the Commission have the authority to act prior to issuance of this Court's mandate in No. 04-1300?

2. On remand, an agency has the same obligation to comply with the APA and other laws governing rulemaking as it had during the initial rulemaking. In this case, the Commission on remand precluded public comment, repeatedly relied on extra-record materials, and gave

Commissioners insufficient time to review and comment on the data and analysis underlying the agency's action. Did this violate the APA, ICA, and this Court's remand?

3. The APA, ICA, and this Court's earlier decision required the Commission to consider the costs of the independent chair and 75 percent independent director requirements. Although it previously had stated that it had "no reliable basis" in the existing record to make "difficult" cost estimates required by law, on remand the Commission declined to receive current information on the provisions' actual costs and instead purported to estimate the costs without public comment and on the basis of dated materials from prior rulemakings, extra-record "evidence," and the unspecified experience of unknown Commission personnel. The Commission also failed to consider whether these costs were warranted with respect to each of the specific rules being amended and each of the ten types of activities being regulated. Did the Commission's action violate the APA, ICA, and this Court's remand?

4. Section 2(c) of the ICA and this Court's earlier decision required the Commission to consider the effects of the independent chair and 75 percent independent director requirements on efficiency, competition, and capital formation. In re-adopting the provisions, the Commission majority did not address the provisions' effects on new entrants in the marketplace, on smaller funds, or on the return on mutual fund investments relative to other investment alternatives. Did this violate the APA, ICA, and this Court's remand?

5. The APA requires an agency to consider significant alternatives to a proposed regulatory requirement. This Court previously ruled that the Commission had not adequately considered a disclosure alternative to the independent chair provision, and remanded for the agency to do so. The Commission majority—without soliciting the views of the two dissenting Commissioners—rejected the disclosure alternative on remand without assessing it in light of the

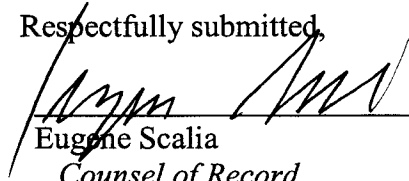
separate protections attributed to the 75 percent independence requirement, the additional protections already provided by the exemptive rules, the public's interest in investing in management-chaired funds, the specific rules being amended, and the ten types of activities being regulated. Did this violate the APA, ICA, and this Court's remand?

6. An agency's regulatory powers may be used only to those ends authorized by statute. The Commission on remand used its authority to issue exemptive rules regarding certain transactions for the purpose of regulating activities outside the exemptive rules. Did this violate the APA, ICA, and this Court's remand?

Dated: August 25, 2005

Of Counsel:
Stephen A. Bokat
Robin S. Conrad
Amar D. Sarwal
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
Telephone: (202) 463-5337

Respectfully submitted,



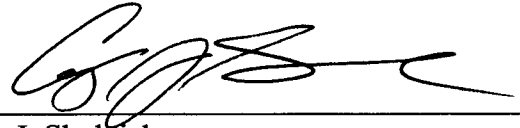
Eugene Scalia
Counsel of Record
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*Counsel for Petitioner Chamber of Commerce
of the United States of America*

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a true and correct copy of Petitioner's Preliminary Statement Of Issues To Be Raised via hand delivery this 25th day of August, 2005, upon the following:

John W. Avery, Special Counsel
Jacob H. Stillman, Solicitor
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549



Cory J. Skolnick

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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 July 26, 2005, 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 currently 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, chambers of commerce, and business 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 action. Moreover, the Chamber invests in mutual funds, and thus will itself be injured by the Commission's action.

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 that were adopted by the Commission at an Open Meeting on June 29, 2005, and which were published in the Federal Register on July 7, 2005. Investment Company Governance; Final Rule, 70 Fed. Reg. 39,390 (July 7, 2005). On June 21, 2005, the same provisions had been judged “deficient” by this Court and remanded to the Commission.

Chamber of Commerce of the United States v. Securities Exch. Comm’n, No. 04-1300 (D.C. Cir. June 21, 2005) (reviewing Investment Company Governance; Final Rule, 69 Fed. Reg. 46,378 (Aug. 2, 2004)).

(C) Related Cases:

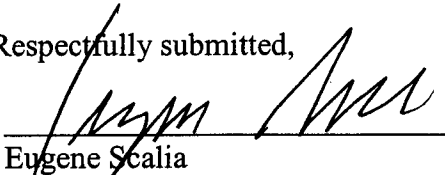
The regulatory provisions under challenge in this case were previously challenged before this Court in No. 04-1300. On June 21, 2005, a panel of this Court granted in part the Chamber’s Petition for Review, holding: “This matter is remanded to the Commission to address the deficiencies with the 75% independent director condition and the independent chairman condition.” Slip op. at 19. On July 28, 2005, the Chamber filed a Petition for Panel Rehearing in that case. A mandate has not yet issued.

Because there was some question whether this Court or a federal district court had jurisdiction of the Chamber of Commerce’s initial challenge to the Commission’s rulemaking, the Chamber had concurrently filed suit in this Court (No. 04-1300) and the U.S. District Court for the District of Columbia (Sept. 2, 2004, No. 1: 04CV01522 (RMC) (D. Ct., D.E. 1)). In light of this Court’s October 18, 2004 Order in No. 04-1300, the District Court stayed the district

court action on October 25, 2004. The Chamber of Commerce intends to dismiss its Complaint in that case once a mandate issues in No. 04-1300, the initial proceeding before this Court.

Dated: August 25, 2005

Of Counsel:
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Robin S. Conrad
Amar D. Sarwal
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Respectfully submitted,


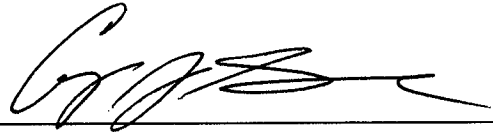
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Facsimile: (202) 467-0539

*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 Certificate As To Parties, Rulings And Related Cases via hand delivery this 25th day of August, 2005, upon the following:

John W. Avery, Special Counsel
Jacob H. Stillman, Solicitor
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549



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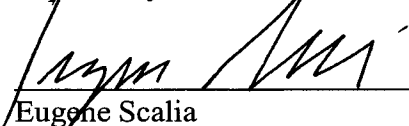
**PETITIONER'S STATEMENT REGARDING USE OF DEFERRED APPENDIX
PURSUANT TO F.R.A.P. 30(C)**

Pursuant to this Court's Order dated July 26, 2005, petitioner Chamber of Commerce of the United States of America states that it does intend to file a deferred appendix in accordance with F.R.A.P. 30(c). In an Order dated August 10, 2005, this Court issued a briefing schedule that requires the filing of the deferred appendix by November 7, 2005.

Dated: August 25, 2005

Of Counsel:
Stephen A. Bokat
Robin S. Conrad
Amar D. Sarwal
National Chamber Litigation Center, Inc.
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Washington, D.C. 20062
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Respectfully submitted,



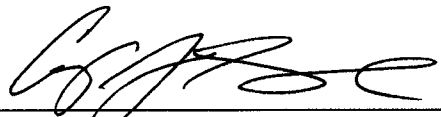
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Facsimile: (202) 467-0539

*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 Pursuant To F.R.A.P. 30(c) via hand delivery this 25th day of August, 2005, upon the following:

John W. Avery, Special Counsel
Jacob H. Stillman, Solicitor
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549



Cory J. Skolnick

United States Court of Appeals

District of Columbia Circuit

DOCKETING STATEMENT

*Administrative Agency Review Proceedings
(To be completed by appellant/petitioner)*

1. CASE NO. 05-1240 2. DATE DOCKETED July 7, 2005

3. CASE NAME Chamber Of Commerce Of the
(lead parties only) United States Of America v. United States Securities And Exchange Commission

4. TYPE OF CASE: Review Appeal Enforcement Complaint Tax Court

5. IS THIS CASE REQUIRED BY STATUTE TO BE EXPEDITED? YES _____ NO

If YES, cite statute: _____

6. CASE INFORMATION:

a. Identify agency whose order is to be reviewed: United States Securities And Exchange Commission

b. Give agency docket or order number(s): Release No. IC-26985; File No. S7-03-04; 70 Fed. Reg. 39,390 (July 7, 2005)

c. Give date(s) of order(s): July 7, 2005

d. Has a request for rehearing or reconsideration been filed at the agency? YES _____ NO

If so, when was it filed? _____ By whom? _____

Has the agency acted? YES _____ NO _____ If so, when? _____

e. Are any other cases involving the same underlying agency order pending in this Court or in any other Court?
YES _____ NO If YES, identify case name(s), docket number(s), and court(s): _____

f. Are any other cases, to counsel's knowledge, pending before the agency, this Court, another Circuit Court, or the Supreme Court which involve *substantially the same issues* as the instant case presents?

YES NO _____ If YES, give case name(s) and number(s) of these cases and identify court/agency:
Chamber v. SEC, No. 04-1300 (DC Cir.) (mandate not yet issued); Chamber v. SEC, No. 1: 04CV01522 (D.D.C.) (stayed)

g. Have the parties attempted to resolve the issues in this case through arbitration, mediation, or any other alternative for dispute resolution? YES _____ NO If so, provide the name of the program and the dates of participation. _____

Signature  Date 7 25 05

Name of Party (Print) Chamber Of Commerce Of The United States Of America

Name of Counsel for Appellant/Petitioner (Print) Eugene Scalia Firm Gibson, Dunn & Crutcher LLP

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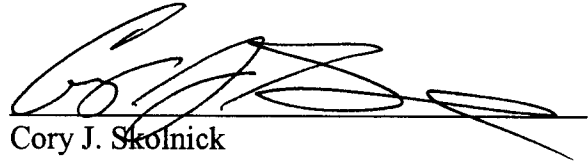
ATTACH A CERTIFICATE OF SERVICE

Note: If counsel for any other party believes that the information submitted is inaccurate or incomplete, counsel may so advise the Clerk within 10 days by letter, with copies to all other parties, specifically referring to the challenged statement. An original and three copies of such letter should be submitted.

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a true and correct copy of Petitioner's
Docketing Statement via hand delivery this 25th day of August, 2005, upon the following:

John W. Avery, Special Counsel
Jacob H. Stillman, Solicitor
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549


Cory J. Skolnick