

INITIAL BRIEF

NO. 05-1240

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

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

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

**OPENING BRIEF OF PETITIONER
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA**

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**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

(A) Parties and Amici:

The parties in this case are the Chamber of Commerce of the United States of America (Petitioner) and the Securities and Exchange Commission (Respondent). The Consumer Federation of America and Fund Democracy, Inc. have moved to participate jointly as amici in support of the Commission.

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 re-adopted by the Commission on June 29, 2005. Investment Company Governance; Final Rule, 70 Fed. Reg. 39,390 (July 7, 2005). The provisions were first adopted in 2004, but were declared unlawful by this Court on June 21, 2005. *Chamber of Commerce of the United States v. SEC*, No. 04-1300, 412 F.3d 133 (D.C. Cir. 2005). The Commission re-adopted the provisions unchanged eight days later.

(C) Related Cases:

The regulatory provisions under challenge in this case were previously challenged in No. 04-1300. On June 21, 2005, a panel of this Court unanimously 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." *Id.* at 145. On July 28, 2005, the Chamber filed a Petition for Panel Rehearing in that case. The Petition was denied on September 9, but as of the date of this brief a mandate had not yet issued in that case.

Because at the time of the earlier case there was a question whether this Court or a federal district court had jurisdiction of the Chamber's challenge, the Chamber concurrently filed suit in this Court 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 once a mandate issues in No. 04-1300, the initial proceeding before this Court.

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GLOSSARY

Adopting Release	Investment Company Governance; Final Rule, 70 Fed. Reg. 39,390 (July 7, 2005)
Commission	Securities and Exchange Commission
ICA or the Act	Investment Company Act of 1940, 15 U.S.C. § 80a, <i>et seq.</i>
SBREFA	Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. § 601, <i>et seq.</i>

JURISDICTIONAL STATEMENT

This case is before the Court on a petition to review two provisions of a final Commission rule under the Investment Company Act of 1940 (“ICA” or “Act”), 15 U.S.C. § 80a, *et seq.* The Court already has determined that direct review of those provisions is available in this Court. *Chamber of Commerce of the United States v. SEC*, 412 F.3d 133, 138 (D.C. Cir. 2005); *see also* 15 U.S.C. § 80a-42(a) (jurisdiction in the United States Court of Appeals for the District of Columbia). The Chamber’s petition for review was timely filed within sixty days of the re-adopted provisions’ publication, on July 7, 2005.

The Chamber has standing in its capacity as an investor in mutual funds. It also has associational standing.

1. This Court already has held that the Chamber has standing in its capacity as an investor to petition for review of the challenged provisions. *Chamber of Commerce*, 412 F.3d at 138. The Chamber is invested in funds that, as a consequence of the rule, will be compelled to select a new chair and to have 75 percent independent directors. Decl. of Stan M. Harrell, Addendum hereto. The Chamber currently intends to continue to invest in mutual funds, and wishes to have the ability to invest in management-chaired funds and in funds with fewer than 75 percent independent directors. The loss of this ability, this Court has stated, is “injury in fact and, because a favorable ruling would redress that injury,

[the Chamber] has standing to sue the Commission.” *Chamber of Commerce*, 412 F.3d at 138 (citing *Consumer Fed’n of Am. v. FCC*, 348 F.3d 1009, 1011-12 (D.C. Cir. 2003); *Competitive Enter. Inst. v. Nat’l Highway Traffic Safety Admin.*, 901 F.2d 107, 112-13 (D.C. Cir. 1990)). The Chamber will be injured for the additional reason that the provisions will increase the costs and diminish the value of the funds in which it is invested.

2. The Chamber also has associational standing. Chamber members and their subsidiaries include fund advisers that will be harmed by the challenged provisions because they manage funds that both have management chairs and fewer than 75 percent independent directors, and rely—and wish to continue to rely—on at least one of the ten rules being amended. Decl. of Aaron Stover, Addendum hereto; *see also Warth v. Seldin*, 422 U.S. 490, 511 (1975) (one affected member is sufficient). Under the provisions, those members must accept a less influential role over the funds they established and manage if they wish to receive the competitive benefits associated with the rules being amended. Further, those Chamber members and their subsidiaries will in the future be prevented from establishing mutual funds over which they may exercise a significantly influential role on the board of directors unless they forgo the competitive benefits associated with the rules being amended. Simply, the rule is intended to reduce advisers’ influence over the funds they establish, manage, and on which their income

depends; indeed, the Commission has said it intends to reduce advisers' income. *See* Investment Company Governance; Final Rule, 69 Fed. Reg. 46,378, 46,380-46,381 (Aug. 2, 2004). The other prerequisites to associational standing are also met: the suit is germane to the Chamber's associational purpose of protecting members from costly and unlawful federal regulation, and participation by any individual member is not necessary for this Court to provide meaningful relief. *National Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1435 (D.C. Cir. 1995).

STATEMENT OF ISSUES

1. In a unanimous decision, 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 ICA. Eight days later—before the mandate had issued—the Commission re-adopted the two challenged provisions. Did the Commission have the authority to act prior to the issuance of this Court's mandate?

2. On remand, an agency has the same obligation to comply with the APA and other laws governing rulemaking that it had during the initial rulemaking. In this case, the Commission majority 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 instructions in its earlier decision?

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 said it had "no reliable basis" in the existing record to make these "difficult" cost estimates, in "reconsidering" the provisions the Commission declined to receive additional, current information on the provisions' costs and instead purported to estimate the costs on the basis of extra-record "evidence," dated material from prior rulemakings, and the unspecified experience of unidentified 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 this violate the APA, ICA, and this Court's instructions in its earlier decision?

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 smaller funds, new entrants to the marketplace, or on competition in the market for mutual funds as a whole, nor did it perform a revised

