

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?

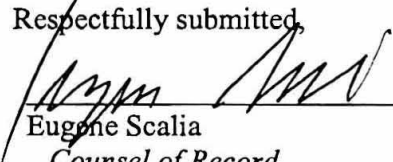
6. An agency's regulatory powers may be used only to those ends authorized by statute. The Commission on remand used its authority to issue exemptive rules regarding certain transactions for the purpose of regulating activities outside the exemptive rules. Did this violate the APA, ICA, and this Court's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

Dated: August 25, 2005

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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 25th day of August, 2005, upon the following:

John W. Avery, Special Counsel
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A handwritten signature in black ink, appearing to read 'Cory J. Skolnick', is written over a horizontal line.

Cory J. Skolnick