The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE
Washington, DC // Brussels // London // www.ici.org

February 17, 2025

By Electronic Transmission

Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle, NE
Washington, DC 20544

Re: Request for Comments on Proposed Amendments to Federal Rule of Appellate Procedure 29

Dear Judge Bates:

The Investment Company Institute[1] is writing to object to the proposed amendments to Federal Rule of Appellate Procedure 29 (Brief of an Amicus Curiae)[2] that would: (i) make "redundant" briefs "disfavored;" (ii) eliminate the ability to file amicus briefs by consent of the litigants and instead require court permission; and (iii) require disclosure about the parties' contributions to total revenues of amici curiae in certain instances. Collectively, these changes would create new and unjustified obstacles for amici curiae to file briefs. Further, the proposal would compel speech in briefs, potentially chilling First Amendment speech and associational rights. Ultimately, these changes could lead to fewer amicus briefs and less informed judicial decisions.

ICI and Our Approach to Summitting Amicus Briefs

Founded in 1940, ICI is the leading association representing regulated funds globally, including mutual funds, ETFs, closed-end funds, and unit investment trusts in the United States. ICI also represents its members in their capacity as investment advisers to collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has a long history of seeking to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. ICI does this in part through advocacy directed at ensuring a sound

[1] The Investment Company Institute (ICI) is the leading association representing the asset management industry in service of individual investors. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage $38.2 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 120 million investors. Members manage an additional $9.6 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London.

[2] *Preliminary Draft, Proposed Amendments to the Federal Rules of Appellate and Bankruptcy Procedure, and the Federal Rules of Evidence*, Prepared by the Committee on Rules of Practice and Procedure Judicial Conference of the United States, August 2024 ("Preliminary Draft"), available at https://www.uscourts.gov/file/78921/download.

legal and regulatory framework, which includes extensive economic research, legal analysis, and reporting of trends and activities in the fund industry.[3]

Our advocacy and education efforts sometimes include submitting amicus briefs in litigation affecting funds, advisers, and investors. Factors that we consider in deciding whether to file a brief include the following:

- Whether a case has a point of law at issue of significant importance to a substantial portion of the asset management industry;
- Whether the industry has a common position on that point of law;
- Whether the matter is ripe for ICI involvement; and
- Whether ICI's participation would be unique and meaningful to the court (e.g., where ICI could provide data, practical or legal analysis, or industry information that would inform the court in a way sufficiently different from the parties or other amici).

Some of our briefs address litigation directly affecting funds and investors. For example, the Securities and Exchange Commission (SEC) adopted Rule 30e-3 under the Investment Company Act in 2018, which permitted regulated funds (e.g., mutual funds and ETFs) to meet their shareholder report delivery obligations by posting them online and mailing paper copies to shareholders upon request, rather than defaulting to mailing paper copies. ICI supported the rule's adoption, but representatives of the paper industry challenged it in court (*Twin Rivers Paper Company, LLC, et al., v. United States Securities and Exchange Commission*). Our amicus brief explained why the rule benefitted funds and shareholders and included data and information about: estimated cost savings; shareholder report page counts; ICI survey data on investor behavior with respect to shareholder reports (e.g., how likely they were to read printed materials); and approaches taken by other government agencies in delivering information.

Other ICI briefs address litigation indirectly—but significantly—affecting funds and investors. For example, the SEC issued orders meant to modernize and improve access to equity market trading data in 2020 and 2021. Those orders (i) required that the new plan (the CT Plan) governing the dissemination of equity transaction data be administered by an entity that does not sell its own data products that compete with securities information processor data, and (ii) directed changes to the governance of the CT Plan's operating committee, to include representatives of individual and institutional investors. The orders recognized that the governance structure for equity market data needed to address the exchanges' inherent conflicts of interest and to provide more representation to the market participants who provide and consume the data. ICI supported the orders, but NASDAQ and other stock exchanges challenged the CT Plan order (*The Nasdaq Stock Market LLC, et al., v. Securities and Exchange Commission*). Our amicus brief filed in support of the SEC's defense of the order emphasized that regulated funds have a significant interest in equity market data as contributors to, and consumers of, market data and explained why the orders meaningfully address conflicts of interest in the current governance system that harm the entire investment community.

[3] *See, e.g.*, the 2024 Investment Company Fact Book.

Cost also factors into our decisions to file briefs. We typically engage outside counsel to assist with these briefs and pay for these legal services from general ICI revenues, which focuses our resources on matters of high importance to our collective membership. It is not our practice to have parties to litigation, or their counsel, underwrite the costs in preparing and filing our briefs. In a case where we file an amicus brief in litigation involving an ICI member as a party, that member/party pays us nothing "extra," although its regular payment of membership dues would indirectly finance a small part of the brief's overall cost.

In sum, we are judicious in deciding when to file amicus briefs and do so only when we believe those briefs would benefit courts.

Our Objections to the Proposed Amendments to Rule 29

Because we believe our activity here is responsible and beneficial to courts, we are concerned that three of the proposed amendments could limit our ability to file briefs, leaving courts less informed about litigated matters and our industry generally.

First, the proposed amendments to Rule 29(a)(2) and (a)(3)(B) would "disfavor" an amicus brief that either does not "bring…to the court's attention relevant matter not already mentioned by the parties" or is "redundant with another amicus brief." As discussed above, we typically submit briefs only where they would be unique and meaningful to the court. At the same time, often there is at least *some* overlap in the substance of our briefs and those of other parties and amici. And if briefs are assessed and compared in a highly generalized way (e.g., "both briefs represent views of asset managers, and therefore we will allow only one"), then amicus briefs could be excluded even where they differ in important and nuanced ways with respect to their information, emphasis, and perspective. An overly broad reading and application of this "redundancy" requirement could lead to "races" among amici to file, excessive and costly coordination among amici, and potential amici eschewing the process altogether, depriving courts of information essential to their decision-making process.

Second, a proposed amendment to Rule 29(a)(2) would eliminate the ability of litigants to consent to amicus filings and require amici to obtain court permission to file briefs. The intent is to provide "a filter on the filing of unhelpful briefs."[4] But this change would unnecessarily burden amici and courts by requiring motions in cases where briefs are informative (and litigants would have consented). The current approach provides a useful and efficient screening mechanism (parties can withhold consent if they have substantive concerns, leaving it to courts to decide whether to permit the brief) that respects the interests of all entities.

Finally, proposed Rule 29(b)(4) would require an amicus brief to disclose whether a party, its counsel, or any combination thereof, has contributed or pledged to contribute 25% or more of the total revenue of the amicus for its prior fiscal year. Here, the rationale is "that—at some level—

[4] Preliminary Draft at 40.

contributions by a party to an amicus create… a sufficient risk of party influence that disclosure [is] warranted."[5]

We support reasonable measures to protect the integrity of amicus briefs, including (i) providing disclosure about amici and their history, experience, and interests, as the proposed amendments contemplate, and (ii) the current requirement that an amicus brief disclose whether a party or a party's counsel authored the brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief.

But we object to more intrusive disclosure measures, such as providing member-specific financial disclosure in amicus briefs (particularly as it relates to total revenue). It is at least conceivable that a provision like proposed Rule 29(b)(4) could require financial disclosure in an ICI amicus brief if the percentage threshold were set low enough and a large enough number of members were parties to the same litigation. If this compelled speech requirement were triggered, ICI would be forced to choose between (a) protecting the legitimate privacy and associational interests of ICI and its members and (b) advocating on behalf of investors, the markets, and ICI members.[6] And were ICI to file a brief with the required financial disclosure, some courts may discount unfairly the brief's value, under the erroneous belief that it represents only the narrow interests of the litigants. Such a requirement would be Constitutionally questionable, bad policy, and harmful to the judicial process.

No matter the intent, we believe that adopting these changes in their totality would disfavor and discourage the filing of amicus briefs, including, potentially, from ICI. We see no compelling policy reason for this shift and believe that it would increase burdens for all affected parties and deprive courts of useful information, to the detriment of all.

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If you have any questions, or if we can be of assistance in any way, please contact us at paul.cellupica@ici.org or matt.thornton@ici.org.

Sincerely,

/s/ Paul G. Cellupica
General Counsel

/s/ Matthew Thornton
Associate General Counsel

[5] *Id*. at 21.

[6] As discussed above, we file amicus briefs consistent with our mission that are broadly representative of our members' views, even where a party to the litigation is an ICI member.