

MEMO# 26172

May 21, 2012

ICI, U.S. Chamber File Motion for Summary Judgment in Lawsuit Challenging CFTC's Recent Amendments to Rule 4.5

[26172]

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TO: BOARD OF GOVERNORS No. 6-12
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DERIVATIVES MARKETS ADVISORY COMMITTEE No. 18-12
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SMALL FUNDS MEMBERS No. 13-12
UNIT INVESTMENT TRUST MEMBERS No. 3-12
VARIABLE INSURANCE PRODUCTS ADVISORY COMMITTEE No. 3-12 RE: ICI, U.S. CHAMBER
FILE MOTION FOR SUMMARY JUDGMENT IN LAWSUIT CHALLENGING CFTC'S RECENT
AMENDMENTS TO RULE 4.5

On May 18, 2012, ICI and the U.S. Chamber of Commerce filed a motion for summary judgment in U.S. federal district court in their lawsuit challenging the Commodity Futures Trading Commission's (CFTC) recent amendments to Rule 4.5 under the Commodity Exchange Act (CEA). [\[1\]](#) The motion, which is attached and summarized below, requests that the court vacate the CFTC's amendments to Rules 4.5 and 4.27 under the CEA (Rules) on the grounds that the amendments were arbitrary and capricious and failed to comply with the cost-benefit provisions of the CEA. [\[2\]](#)

The motion for summary judgment includes a statement of facts that discusses, among other things, the history of Rule 4.5 under the CEA, the CFTC's stated rationale for regulating investment companies and commenters' objections, the CFTC's analysis of costs and benefits under Rule 4.5, and Commissioner Sommers' dissent from the Rules. The motion makes the following principal arguments:

- By adopting the amendments to Rule 4.5 without considering their necessity, the CFTC violated both the Administrative Procedure Act and the cost-benefit provisions of the CEA.
- The CFTC arbitrarily reversed its 2003 rulemaking, which eliminated Rule 4.5's trading and marketing thresholds, with no meaningful justification.
- By adopting the amendments to Rule 4.5, the CFTC imposed significant and unnecessary costs while making it impossible to fully determine those costs as required by law.
- The CFTC failed to provide reasoned justification for significant aspects of its rulemaking, including the requirement that investment company advisers file Form CPO-PQR, the inclusion of swaps within the registration thresholds, the narrow definition of bona fide hedging, and the CFTC's decision to set the non-bona fide hedging threshold at five percent.
- The CFTC did not offer the public a meaningful opportunity to comment on the amendments to Rule 4.5.

We expect the CFTC will file a response and cross-motion for summary judgment in the lawsuit by the end of June.

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[Attachment](#)

endnotes

[\[1\]](#) For a description of the complaint in the lawsuit, see ICI [Memorandum](#) No. 26050 (April 17, 2012). More information relating to the lawsuit may be found on ICI's website at http://www.ici.org/cftc_challenge.

[\[2\]](#) Rule 4.27 would impose new quarterly reporting obligations on commodity pool operators through Form CPO-PQR.