

MEMO# 26955

January 31, 2013

ICI, Chamber File Brief in Appeal of District Court Decision Upholding CFTC Amendments to Rule 4.5

[26955]

January 31, 2013

TO: ACCOUNTING/TREASURERS COMMITTEE No. 6-13
BOARD OF GOVERNORS No. 4-13
CLOSED-END INVESTMENT COMPANY MEMBERS No. 13-13
COMPLIANCE MEMBERS No. 7-13
DERIVATIVES MARKETS ADVISORY COMMITTEE No. 13-13
ETF (EXCHANGE-TRADED FUNDS) COMMITTEE No. 7-13
ETF ADVISORY COMMITTEE No. 7-13
FIXED-INCOME ADVISORY COMMITTEE No. 4-13
INVESTMENT ADVISER MEMBERS No. 10-13
INVESTMENT COMPANY DIRECTORS No. 3-13
OPERATIONS MEMBERS No. 4-13
SEC RULES MEMBERS No. 14-13
TRANSFER AGENT ADVISORY COMMITTEE No. 16-13
UNIT INVESTMENT TRUST MEMBERS No. 5-13
VARIABLE INSURANCE PRODUCTS ADVISORY COMMITTEE No. 4-13 RE: ICI, CHAMBER FILE
BRIEF IN APPEAL OF DISTRICT COURT DECISION UPHOLDING CFTC AMENDMENTS TO RULE
4.5

As we previously informed you, ICI and the U.S. Chamber of Commerce (Appellants) have appealed the ruling by the U.S. District Court for the District of Columbia upholding the Commodity Futures Trading Commission's (CFTC) amendments to Rule 4.5 under the Commodity Exchange Act (CEA). [\[1\]](#) Yesterday, Appellants filed the attached brief with the U.S. Court of Appeals for the District of Columbia Circuit (Circuit Court).

The brief makes the following principal arguments:

1. The CFTC arbitrarily and capriciously failed to address the facts and circumstances that underlay its 2003 rulemaking, including its prior finding that eliminating the trading and marketing thresholds in Rule 4.5 would provide increased market liquidity.
2. The CFTC acted arbitrarily and capriciously, and in violation of the cost-benefit provision of the CEA, when it failed to assess the baseline of protection afforded by

existing regulation and promulgated its rule in a manner that made it impossible to meaningfully determine the rule's costs and benefits, and when it repeatedly failed to address significant comments and alternatives presented by commenters.

3. The CFTC acted arbitrarily and capriciously when it declined to exclude swap transactions from the registration threshold on the ground that it did not know how to write such a rule, adopted a restrictive definition of bona fide hedging without explaining why it was rejecting proposed alternatives, and failed to provide a reasoned justification for setting the trading threshold at five percent.
4. The CFTC provided an inadequate opportunity for notice and comment.
5. Numerous deficiencies in the rulemaking process warrant vacatur of the CFTC's rule.

Under the schedule for expedited briefing that was established by the Circuit Court, an amicus brief in support of Appellants may be filed by February 6, and the CFTC must file its brief by March 8.

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[Attachment](#)

endnotes

[1] See ICI Memoranda Nos. 26806 (Dec. 27, 2012), available at http://www.ici.org/my_ici/memorandum/memo26806

and 26883 (Jan. 15, 2013), available at http://www.ici.org/my_ici/memorandum/memo26883. More information relating to the lawsuit may be found on ICI's website at http://www.ici.org/cftc_challenge.