

**MEMO# 27152**

April 4, 2013

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

[27152]

April 4, 2013

TO: ACCOUNTING/TREASURERS COMMITTEE No. 12-13  
BOARD OF GOVERNORS No. 7-13  
CLOSED-END INVESTMENT COMPANY MEMBERS No. 30-13  
COMPLIANCE MEMBERS No. 19-13  
DERIVATIVES MARKETS ADVISORY COMMITTEE No. 27-13  
ETF (EXCHANGE-TRADED FUNDS) COMMITTEE No. 20-13  
ETF ADVISORY COMMITTEE No. 19-13  
FIXED-INCOME ADVISORY COMMITTEE No. 8-13  
INVESTMENT ADVISER MEMBERS No. 23-13  
INVESTMENT COMPANY DIRECTORS No. 7-13  
OPERATIONS MEMBERS No. 9-13  
SEC RULES MEMBERS No. 34-13  
TRANSFER AGENT ADVISORY COMMITTEE No. 25-13  
UNIT INVESTMENT TRUST MEMBERS No. 10-13  
VARIABLE INSURANCE PRODUCTS ADVISORY COMMITTEE No. 8-13 RE: ICI, CHAMBER FILE  
REPLY BRIEF IN APPEAL OF DISTRICT COURT DECISION UPHOLDING CFTC AMENDMENTS TO  
RULE 4.5

As we previously informed you, on January 30, ICI and the U.S. Chamber of Commerce (Appellants) filed their opening brief with the U.S. Court of Appeals for the District of Columbia Circuit (Circuit Court) in their appeal of the ruling by the U.S. District Court for the District of Columbia upholding the Commodity Futures Trading Commission's (CFTC) amendments to CFTC Rule 4.5. [\[1\]](#) On March 8, the CFTC filed its brief with the Circuit Court. [\[2\]](#) On April 3, Appellants filed the attached reply brief with the Circuit Court.

The brief makes the following principal arguments:

1. The CFTC arbitrarily, and without adequate explanation, reversed its 2003 rulemaking, which exempted investment companies from registration as commodity pool operators (CPOs). While it identified increased liquidity as the central reason for the 2003 exemption, it failed to consider the effects on liquidity of amending Rule 4.5.

2. The CFTC did not meaningfully assess the costs and benefits of amended Rule 4.5.
  - a. It failed to evaluate the “baseline” provided by existing regulation of investment companies.
  - b. It also relied on benefits that are already provided by regulation of the Securities and Exchange Commission and the Financial Industry Regulatory Authority, Inc.
  - c. The CFTC’s registration requirement cannot now be justified as an information-gathering provision when, among other things, the CFTC did not adequately consider other alternatives to obtain information or the information already available.
  - d. The CFTC relied on uncertain benefits even as it improperly obscured the costs of amended Rule 4.5 because it took into account the potential benefits of the CFTC’s yet to be finalized harmonization rulemaking without considering the potential costs of those rules.
3. Amended Rule 4.5 suffers from other serious deficiencies, including the inclusion of swaps within the registration thresholds, the narrow definition of bona fide hedging, and the adoption of the five percent trading threshold.
4. The CFTC provided inadequate opportunity for notice and comment, including on the seven-factor marketing test that is included in the CFTC’s release adopting amended Rule 4.5.

Under the schedule for expedited briefing that was established by the Circuit Court, Appellants’ brief concludes the briefing in the appeal. Oral argument is scheduled for May 6, 2013.

Sarah A. Bessin  
Senior Counsel

#### [Attachment](#)

#### **endnotes**

[1] See ICI Memorandum No. 26955 (Jan. 31, 2013), available at [http://www.ici.org/my\\_ici/memorandum/memo26955](http://www.ici.org/my_ici/memorandum/memo26955). More information relating to the lawsuit may be found on ICI’s website at [http://www.ici.org/cftc\\_challenge](http://www.ici.org/cftc_challenge).

[2] See ICI Memorandum No. 27101 (March 12, 2013), available at [http://www.ici.org/my\\_ici/memorandum/memo27101](http://www.ici.org/my_ici/memorandum/memo27101).