

MEMO# 26818

January 3, 2013

ICI, U.S. Chamber File Motion for Expedited Consideration of Appeal in Lawsuit Challenging CFTC Amendments to Rule 4.5

[26818]

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TO: ACCOUNTING/TREASURERS COMMITTEE No. 1-13
BOARD OF GOVERNORS No. 1-13
CLOSED-END INVESTMENT COMPANY MEMBERS No. 2-13
COMPLIANCE MEMBERS No. 1-13
DERIVATIVES MARKETS ADVISORY COMMITTEE No. 3-13
ETF (EXCHANGE-TRADED FUNDS) COMMITTEE No. 1-13
ETF ADVISORY COMMITTEE No. 1-13
EQUITY MARKETS ADVISORY COMMITTEE No. 1-13
FIXED-INCOME ADVISORY COMMITTEE No. 1-13
INVESTMENT ADVISER MEMBERS No. 2-13
OPERATIONS COMMITTEE No. 1-13
SEC RULES MEMBERS No. 2-13
SMALL FUNDS MEMBERS No. 1-13
TRANSFER AGENT ADVISORY COMMITTEE No. 2-13
UNIT INVESTMENT TRUST MEMBERS No. 1-13
VARIABLE INSURANCE PRODUCTS ADVISORY COMMITTEE No. 1-13 RE: ICI, U.S. CHAMBER
FILE MOTION FOR EXPEDITED CONSIDERATION OF APPEAL IN LAWSUIT CHALLENGING CFTC
AMENDMENTS TO RULE 4.5

ICI and the U.S. Chamber of Commerce (Appellants) today filed a motion for expedited consideration of their appeal of the recent 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. [\[1\]](#) The brief was filed in the U.S. Court of Appeals for the District of Columbia Circuit. The brief, which is attached, requests that the court rule on the motion for expedited consideration by January 18, 2013, and proposes a schedule for expedited briefing in the case so that a decision in the case may be issued by Summer 2013. We expect that the CFTC will file a brief in response to the motion.

The brief argues that expedited consideration is appropriate in this case because: (i) the decision of the District Court “is subject to substantial challenge;” (ii) “delay will cause irreparable injury” to Appellants’ members; and (iii) the public has an “interest in prompt disposition” of the case. The brief states that Rule 4.5 resulted from a rulemaking process “that was flawed in multiple, significant respects.” For that reason, it asserts that the District Court’s decision upholding Rule 4.5 is subject to substantial challenge. In particular, the brief describes how the CFTC failed to explain, in amending Rule 4.5 to reinstate the trading and marketing conditions, why it was reversing the decision it had made to eliminate those conditions in its 2003 rulemaking.

The brief argues further that the CFTC failed to comply with its statutory obligation to perform a meaningful cost-benefit analysis. It also states that the District Court did not squarely address the similarities between this case and applicable decisions of the Court of Appeals, but instead attempted to minimize the significance of those decisions. The brief notes that “[t]he district court may disagree with those decisions, but they are the law of the Circuit and were required to be faithfully applied in this case.” Finally, the brief argues that the CFTC repeatedly invoked specific purported benefits of Rule 4.5 without determining that those benefits were not already provided by existing regulation.

The brief states that expedited consideration of the case is appropriate to avoid imposition of significant, unrecoverable costs on investment companies and their advisers. It explains that Appellants are seeking expedited consideration in order to increase the likelihood that the Court of Appeals is able to rule on the case before the effective date of the CFTC’s harmonization rule. The brief also explains that expedited consideration is in the public interest, as it would minimize the changes that occur to the status quo before the Court of Appeals rules, and may avoid significant costs for investors and the public, as well as unnecessary disruption of the markets.

Sarah A. Bessin
Senior Counsel

[Attachment](#)

endnotes

[1] More information relating to the lawsuit may be found on ICI’s website at http://www.ici.org/cftc_challenge.