

MEMO# 26284

July 3, 2012

ICI, Chamber File Reply Brief in Lawsuit Challenging Amendments to Rule 4.5

[26284]

July 3, 2012

TO: BOARD OF GOVERNORS No. 8-12
CLOSED-END INVESTMENT COMPANY MEMBERS No. 38-12
COMPLIANCE MEMBERS No. 11-12
DERIVATIVES MARKETS ADVISORY COMMITTEE No. 27-12
ETF (EXCHANGE-TRADED FUNDS) COMMITTEE No. 23-12
ETF ADVISORY COMMITTEE No. 22-12
FIXED-INCOME ADVISORY COMMITTEE No. 14-12
INVESTMENT ADVISER MEMBERS No. 17-12
SEC RULES MEMBERS No. 57-12
SMALL FUNDS MEMBERS No. 22-12
UNIT INVESTMENT TRUST MEMBERS No. 5-12
VARIABLE INSURANCE PRODUCTS ADVISORY COMMITTEE No. 6-12 RE: ICI, CHAMBER FILE
REPLY BRIEF IN LAWSUIT CHALLENGING AMENDMENTS TO RULE 4.5

As we previously informed you, ICI and the U.S. Chamber of Commerce filed suit in April challenging the Commodity Futures Trading Commission's (CFTC) amendments to Rules 4.5 and 4.27 under the Commodity Exchange Act (CEA). In May, we asked the court to grant summary judgment, and in June, the CFTC filed its initial response to the lawsuit. [*](#) Yesterday, we filed a reply brief responding to the CFTC's motion. Our brief is attached, and is summarized below.

Our brief argues that the CFTC's motion is to a large degree an attempt to avoid the analysis that the Administrative Procedure Act (APA) and the CEA require. It asserts that, rather than engaging in pointed, specific discussion of the reasons it gave for amending Rule 4.5 and why they are supposedly correct, the CFTC's motion instead discusses at length the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)—which required hundreds of new financial regulations, but not the rules at issue—and the financial crisis of 2008, which the CFTC concedes had nothing to do with registered investment companies. The brief argues that the CFTC's motion similarly avoids any meaningful discussion of the regulatory protections provided by the Investment Company Act of 1940 and the Securities and Exchange Commission. The brief emphasizes that the CFTC, by law, may not rely on evidence and arguments to defend its rulemaking that were not put forward in the rulemaking itself.

The brief makes the following principal arguments:

- The Dodd-Frank Act neither requires the amendments to Rule 4.5, nor suspends the CFTC's obligations under the APA and the cost-benefit provision of the CEA.
- The CFTC's reliance, in its motion, on the Dodd-Frank Act and the financial crisis is a profound and impermissible shift from its original justification for amending Rule 4.5.
- The CFTC's new contentions cannot salvage amended Rule 4.5 from the critical flaws in the rulemaking analysis.
- The portions of the rule release cherry-picked in the CFTC's motion do not support the amendments to Rule 4.5.
- The CFTC offers no explanation for its failure to address its prior 2003 rulemaking which eliminated the trading and marketing thresholds under Rule 4.5.
- The CFTC cannot justify its failure to properly determine the costs and benefits of amended Rule 4.5.
- The CFTC's belated attempts to justify specific aspects of amended Rule 4.5 are untimely and insufficient.
- The CFTC did not provide an adequate opportunity for notice and comment on amended Rule 4.5.

The CFTC is required to file a response with the court on July 12.

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[Attachment](#)

endnotes

[*] For a description of the complaint in the lawsuit, see ICI Memorandum No. [26050](#) (April 17, 2012), for a description of our motion for summary judgment, see ICI Memorandum No. [26172](#) (May 21, 2012), and for a description of the CFTC's initial response to the lawsuit, see ICI Memorandum No. [26246](#) (June 19, 2012). More information relating to the lawsuit may be found on ICI's website at http://www.ici.org/cftc_challenge.