

MEMO# 27101

March 12, 2013

CFTC Files Brief in Appeal of District Court Decision Upholding CFTC Amendments to Rule 4.5

[27101]

March 12, 2013

TO: ACCOUNTING/TREASURERS COMMITTEE No. 11-13
BOARD OF GOVERNORS No. 6-13
CLOSED-END INVESTMENT COMPANY MEMBERS No. 24-13
COMPLIANCE MEMBERS No. 17-13
DERIVATIVES MARKETS ADVISORY COMMITTEE No. 25-13
ETF (EXCHANGE-TRADED FUNDS) COMMITTEE No. 15-13
ETF ADVISORY COMMITTEE No. 14-13
FIXED-INCOME ADVISORY COMMITTEE No. 7-13
INVESTMENT ADVISER MEMBERS No. 21-13
INVESTMENT COMPANY DIRECTORS No. 5-13
OPERATIONS MEMBERS No. 7-13
SEC RULES MEMBERS No. 30-13
TRANSFER AGENT ADVISORY COMMITTEE No. 23-13
UNIT INVESTMENT TRUST MEMBERS No. 9-13
VARIABLE INSURANCE PRODUCTS ADVISORY COMMITTEE No. 7-13 RE: CFTC FILES 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 (District Court) upholding the Commodity Futures Trading Commission's (CFTC) amendments to Rule 4.5 under the Commodity Exchange Act. [*] On March 8, the CFTC 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. Amended Rule 4.5 is a reasonable response to market events and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The brief argues that the financial crisis and the Dodd-Frank Act justify the CFTC's amendments to Rules 4.5 and 4.27.
2. The District Court correctly dismissed Appellants' unripe challenges to the harmonization rules, as those issues remain hypothetical.

3. The CFTC thoroughly considered the costs and benefits of amended Rule 4.5.
4. Amended Rule 4.5 is rational in its particulars, including (a) the 5% and 100% trading thresholds; (b) the CFTC's decision to include swaps in the trading thresholds; and (c) the CFTC's determination to exclude only specified bona fide hedging.
5. Appellants' notice arguments lack merit. The brief argues that the CFTC's rulemaking proposal for amended Rule 4.5 met the requirements of the Administrative Procedure Act, and that while the proposal's cost-benefit section was "relatively brief," it "gave notice of the [CFTC's] approach . . ."

Under the schedule for expedited briefing that was established by the Circuit Court, an amicus brief in support of the CFTC may be filed by March 15, and Appellants must file a reply brief by March 25. The Circuit Court has scheduled oral argument in the case for May 6, 2013, and has assigned a three-judge panel to the case, consisting of Judges Garland, Brown, and Sentelle.

Sarah A. Bessin
Senior Counsel

Rachel H. Graham
Senior Associate Counsel

[Attachment](#)

endnotes

[*] 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. On January 30, Appellants filed their opening brief in the lawsuit. See ICI Memorandum No. 26955 (Jan. 31, 2013), available at 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.