

MEMO# 26313

July 19, 2012

CFTC Files Reply Brief in Lawsuit Challenging Amendments to Rule 4.5

[26313]

July 19, 2012

TO: BOARD OF GOVERNORS No. 9-12
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COMPLIANCE MEMBERS No. 13-12
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VARIABLE INSURANCE PRODUCTS ADVISORY COMMITTEE No. 9-12 RE: CFTC FILES REPLY
BRIEF IN LAWSUIT CHALLENGING AMENDMENTS TO RULE 4.5

As we previously informed you, ICI and the U.S. Chamber of Commerce (plaintiffs) 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. In June, the CFTC filed its initial response to the lawsuit, and in early July we filed a reply brief responding to the CFTC's motion. [\[*\]](#) On Monday, the CFTC filed its reply brief, which is attached, and is summarized briefly below.

Similar to arguments made in its prior brief, the CFTC defends its action to require advisers to registered investment companies that meet the definition of "commodity pool operator" under the CEA to register and file certain information as being justified "[i]n the wake of the financial crisis and Dodd-Frank" and as necessary to "eliminate a blind spot in markets for commodity derivatives including swaps." In its brief, the CFTC challenges arguments made by plaintiffs in their briefs and makes the following principal arguments:

- Amended Rule 4.5 is a "prudent exercise" of the CFTC's "undisputed authority;"
- Plaintiffs' descriptions of the rule releases proposing and adopting Rule 4.5 are false;
- The CFTC has articulated compelling reasons for its change in policy under Rule 4.5

since 2003;

- The CFTC’s justifications for amending Rule 4.5 are not only reasonable but compelling;
- The CFTC made reasonable judgments on all aspects of amended Rule 4.5;
- Plaintiffs’ challenge to “requirements that flow from” registration is not ripe for litigation;
- Plaintiffs failed to identify any flaw in the CFTC’s consideration of costs and benefits;
- Plaintiffs failed to show that Form CPO-PQR, which requires reporting by registered CPOs, requires information that is similar to information required by the SEC; and
- Plaintiffs received adequate notice of the factors that entered into the CFTC’s cost-benefit consideration, while notice was not required with respect to the seven marketing factors included in the release adopting amended Rule 4.5 because the factors were merely a “statement of agency policy” and not a “test.”

The briefing in the lawsuit is now complete. We have not yet been informed by the court regarding whether, or when, oral arguments will take place.

Sarah A. Bessin
Senior Counsel

[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), for a description of the CFTC’s initial response to the lawsuit, see ICI Memorandum No. [26246](#) (June 19, 2012), and for a description of our reply brief, see ICI Memorandum No. [26284](#) (July 3, 2012). More information relating to the lawsuit may be found on ICI’s website at http://www.ici.org/cftc_challenge.