

MEMO# 26619

October 26, 2012

CFTC Files Reply Brief in Lawsuit Challenging Amendments to Rule 4.5; Agrees with ICI on Compliance Date for Form CPO-PQR

[26619]

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TO: ACCOUNTING/TREASURERS MEMBERS No. 16-12
BOARD OF GOVERNORS No. 13-12
CLOSED-END INVESTMENT COMPANY MEMBERS No. 70-12
COMPLIANCE MEMBERS No. 18-12
DERIVATIVES MARKETS ADVISORY COMMITTEE No. 60-12
ETF (EXCHANGE-TRADED FUNDS) COMMITTEE No. 39-12
ETF ADVISORY COMMITTEE No. 42-12
FIXED-INCOME ADVISORY COMMITTEE No. 26-12
INVESTMENT ADVISER MEMBERS No. 40-12
SEC RULES MEMBERS No. 99-12
SMALL FUNDS MEMBERS No. 35-12
UNIT INVESTMENT TRUST MEMBERS No. 11-12
VARIABLE INSURANCE PRODUCTS ADVISORY COMMITTEE No. 16-12 RE: CFTC FILES REPLY
BRIEF IN LAWSUIT CHALLENGING AMENDMENTS TO RULE 4.5; AGREES WITH ICI ON
COMPLIANCE DATE FOR FORM CPO-PQR

Yesterday, the Commodity Futures Trading Commission (CFTC) filed a brief replying to the supplemental brief recently filed by ICI and the U.S. Chamber of Commerce in their lawsuit against the CFTC. [\[1\]](#) The CFTC brief, which has been accepted by the court, is attached to this memorandum. The brief addresses the compliance date for Form CPO-PQR and plaintiffs' arguments regarding the implications of the recent D.C. District Court decision vacating the CFTC's position limits rule (ISDA decision) [\[2\]](#) for CFTC Rule 4.5.

With regard to Form CPO-PQR, the brief states that the position taken by CFTC counsel at the October 5 oral argument was mistaken, and that plaintiffs are correct regarding the date by which advisers to registered investment companies that must register as commodity pool operators must comply with the obligation to report on Form CPO-PQR under CFTC Rule 4.27. The brief states:

Upon further review of the quoted Federal Register language concerning compliance dates, Plaintiffs are correct that the Final Rule release suspends compliance with Rule 4.27 for registered investment companies, pending a final harmonization rule. Because the language is clear, the position taken by Commission counsel at the October 5, 2012 hearing was mistaken, and investment companies required to register with the Commission pursuant to the amendments to Rule 4.5 need not comply with Rule 4.27 until after the harmonization rule becomes effective.

With regard to the ISDA decision, the brief disagrees with certain assertions made in plaintiffs' supplemental brief. Specifically, the CFTC argues that:

- It did not, as plaintiffs assert, "assume the validity" of the position limits rules in Rule 4.5; it merely incorporated the bona fide hedging language by reference;
- Plaintiffs' contention that the ISDA decision reached the merits of the bona fide hedging provisions is wrong, and the ISDA decision speaks for itself;
- Plaintiffs' professed "confusion" concerning how to determine the definition of bona fide hedging "is not credible;" and
- Plaintiffs' supplemental brief includes impermissible attempts to raise new arguments concerning the CFTC's consideration of costs and benefits.

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[Attachment](#)

endnotes

[1] See ICI Memorandum No. 26599 (October 23, 2012), available at http://www.ici.org/my_ici/memorandum/memo26599.

[2] International Swaps and Derivatives Association, et al. v. United States Commodity Futures Trading Commission, Case No. 11-cv-2146 (D.D.C. September 28, 2012).