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ICI and U.S. Chamber of Commerce File Lawsuit Challenging CFTC Rule

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New rule imposes redundant regulation on registered investment companies without justifying costs or benefits

Washington, DC, April 17, 2012 - The Investment Company Institute and the U.S. Chamber of Commerce today filed a legal challenge to the Commodity Futures Trading Commission's (CFTC) final rule imposing redundant regulations on registered investment companies—such as mutual funds and exchange traded funds (ETFs)—without satisfying the agency's obligation to weigh the costs or benefits of the rule. Eugene Scalia and Daniel J. Davis of Gibson, Dunn, and Crutcher LLP will be counsel to ICI and the Chamber on this litigation.

"The rule layers the CFTC's regulatory regime atop that already applied to funds by the Securities and Exchange Commission under all the major federal securities laws. The CFTC in its rulemaking process did not remotely justify such regulatory excess," said ICI president and CEO Paul Schott Stevens. "The rule will impose significant compliance costs on mutual fund advisers and, ultimately, these costs will come out of shareholders' pockets. Additional cost for no benefit to investors – that's the wrong outcome."

"The Chamber strongly supports smarter regulation that reduces systemic risk. Unfortunately, the CFTC's new rule looks more like regulation for regulation's sake," said David Hirschmann, president and CEO of the U.S. Chamber's Center for Capital Markets Competitiveness. "The new rule creates confusion, not clarity, by subjecting mutual funds to redundant, overlapping, and unnecessary regulatory requirements. The CFTC completely ignored its statutory duty to evaluate the costs this unnecessary regulation will undoubtedly impose on the economy."

In a complaint filed with the U.S. District Court for the District of Columbia, ICI and the Chamber charge that the CFTC's Rule 4.5 amendment – which requires advisers to registered investment companies already regulated by the U.S. Securities and Exchange Commission (SEC) to be dually regulated by the CFTC as "commodity pool operators" – violates the Commodity Exchange Act (CEA) and the Administrative Procedure Act (APA) on multiple counts. The complaint states the rule is "arbitrary and capricious" and requests

injunctive relief to prevent the CFTC from implementing the Rule.

Excerpts from the complaint:

- “Investment companies and their advisers already are among the most highly regulated entities in the financial industry.”
- “Indeed, in clear disregard for the most basic requirements of reasoned agency action, the [CFTC] simply ignored and declined to mention key elements of the reasoning it had previously followed in lowering barriers to participation in the commodities markets by investment companies that it has now raised again.”
- “…[the CFTC] nowhere explained or determined in any manner that SEC regulation was proving to be insufficient…”
- “… at critical junctions in its decision-making leading to adoption of the Rule, the [CFTC] failed to perform the most basic tasks of an appropriate cost-benefit analysis.”

“The CFTC failed to satisfy its statutory obligation to weigh the costs and benefits of this new regulation,” said Eugene Scalia, partner at Gibson, Dunn & Crutcher, LLP, who is representing ICI and the Chamber. “The agency imposed burdensome new requirements without showing that they are necessary, or even that they will be helpful to investors. What’s more, just a few years ago the CFTC determined that similar requirements had adverse effects on the markets.”

For more information, please visit ICI’s Commodity Investments Resource Center that includes additional information about the case.
