

Court Dismisses Chamber of Commerce and ICI Lawsuit Over Amendments to CFTC Rule 4.5

December 14, 2012

On Wednesday, December 12, the United States District Court for the District of Columbia dismissed a joint U.S. Chamber of Commerce (the Chamber) and Investment Company Institute (ICI) lawsuit against the Commodity Futures Trading Commission (CFTC) alleging that the CFTC violated the Administrative Procedure Act (APA) in adopting amendments to CFTC Rule 4.5 earlier this year. In the court's [opinion](#), the CFTC acted well within its discretion and "there was nothing arbitrary or capricious about the CFTC's actions in promulgating" the amendments to the rule.

CFTC Rule 4.5 excludes advisers of investment companies, that are registered as such with the Securities and Exchange Commission under the Investment Company Act of 1940 (RICs), from commodity pool operator (CPO) status. Previously, CFTC Rule 4.5 afforded a blanket exclusion to RIC advisers. However, last February, the CFTC adopted final rules to, among other things, amend CFTC Rule 4.5 to include *de minimis* commodity interest (*i.e.*, futures, options and swaps) trading thresholds. Pursuant to the final rules, the relevant RIC's commodity interest trading must fall below the specified thresholds for the adviser to the RIC to qualify for the CFTC Rule 4.5 exclusion from the definition of CPO. Advisers to RICs that cannot satisfy the *de minimis* thresholds must register as CPOs as of December 31, 2012, unless they are eligible for alternative relief.¹

The Chamber and the ICI challenged the CFTC's amendments to CFTC Rule 4.5 arguing that, among other things, (1) such amendments were "arbitrary and capricious" because the CFTC failed to consider their necessity, and (2) the CFTC failed to perform an adequate cost-benefit analysis with respect to the amendments, as required by the APA. However, the court was unpersuaded by these arguments and determined not to disturb the amendments to CFTC Rule 4.5. The Chamber and the ICI are currently reviewing the court's opinion and considering their options with respect to the lawsuit.

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If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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¹ For more information, please see Sutherland's [February 29, 2012](#) and [August 16, 2012](#) Legal Alerts.

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