ORAL ARGUMENT SCHEDULED FOR MAY 6, 2013

No. 12-5413

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INVESTMENT COMPANY INSTITUTE and
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Appellants,

v.

UNITED STATES COMMODITY FUTURES TRADING COMMISSION,

Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Appellee United States Commodity Futures Trading Commission ("CFTC" or "Commission") states as follows:

(A) Parties and Amici

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellants, except for additional amici Richard C. Breeden, Paul S. Atkins, Edward H. Fleischman, Joseph A. Grundfest, Allan S. Mostoff, Paul F. Roye, and Marianne K. Smythe.

(B) Rulings Under Review

The rulings under review are contained in the district court's opinion and order issued December 12, 2012, in *Investment Company Institute, et al. v. CFTC*, No. 12-cv-612 (D.D.C.) (Howell, J.), D.E.42 and D.E.41, respectively, as amended by an erratum dated December 21, 2012, D.E.46. The December 12, 2012 opinion can be found in the Joint Appendix at A-15-107, the final order at A-108, and the erratum at A-11. The district court opinion is to be published at *Investment Co. Institute, et al. v. U.S. Commodity Futures Trading Comm'n*, ___ F.Supp.2d ___, 2012 WL 6185735, Comm. Fut. L. Rep. (CCH) ¶ 32,471 (D.D.C. Dec. 12, 2012).[1]

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[1] Cites to "D.E._" are to district-court docket entries. Cites to "A-_" are to the Joint Appendix.

CERTIFICATE AS TO PARTIES, RULINGS, RELATED CASES (cont'd)

(C) Related Cases

Plaintiff-Appellants argue that *International Swaps and Derivatives Association v. CFTC*, _ F. Supp. 2d _, No. 11-cv-2146-RLW, 2012 WL 4466311 (D.D.C. Sept. 28, 2012), determined a dispositive issue in this case. (Br.24, 62.) The CFTC disagrees. *See infra* Part IV(C). That case is currently before this Court under Docket No. 12-5362. Appellant's opening brief is due March 21, 2013, and the case is not yet scheduled for oral argument.

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GLOSSARY

AIMA – Alternative Investment Management Association

APA – Administrative Procedure Act

CEA – Commodity Exchange Act

CFMA – Commodity Futures Modernization Act of 2000

CFTC or Commission – U.S. Commodity Futures Trading Commission

CPO – Commodity Pool Operator

CPO-PQR – CFTC Form CPO-PQR, a CFTC form for basic financial statistics proscribed by the Final Rule, which includes 3 subforms or "schedules", Schedules A-C. The reporting schedules for the Form can be found as appendices to the Final Rule, 77 FR 11252, and in the Joint Appendix at A-40-90.

CTA – Commodity Trading Advisor

D.E. – Docket Entry

Dodd-Frank – Dodd-Frank Wall Street Reform and Consumer Protection Act

EPA – Environmental Protection Agency

FCC – Federal Communications Commission

FDIC – Federal Deposit Insurance Corporation

FINRA – Financial Industry Regulatory Authority

ICA – Investment Company Act

ICI – Plaintiff the Investment Company Institute

IT – information technology

MFA – Managed Funds Association

GLOSSARY (cont'd)

MFDF – Mutual Fund Directors Forum

NFA – National Futures Association

OMB – Office of Management and Budget

PRA – Paperwork Reduction Act

RIC – Registered Investment Company

SEC – U.S. Securities and Exchange Commission

SIFMA – Securities Industry and Financial Markets Association

COUNTERSTATEMENT OF JURISDICTION

The district court correctly dismissed Plaintiffs' unripe challenge to the CFTC's non-final action proposing certain recordkeeping and disclosure rules. A-78-79.

STATEMENT OF ISSUES

1. Whether the district court correctly granted summary judgment denying Plaintiffs' challenges to final rules requiring advisors to SEC-registered investment companies that operate commodity pools to register with the CFTC and file financial data. These rules are concededly within the CFTC's authority.

2. Whether the district court correctly dismissed as unripe Plaintiffs' challenge to proposed "related provisions" for recordkeeping and disclosures by those commodity-pool operators, also concededly within the CFTC's authority.

STATEMENT OF THE CASE

On February 11, 2011, the CFTC published a proposal, 76 FR 7976 (Feb. 11, 2011), to amend CFTC Rule 4.5, 17 C.F.R. § 4.5, to narrow an exclusion from the definition of "commodity pool operator" ("CPO") for SEC-registered investment companies ("RICs") that operate commodity pools. The proposal would have required RIC/CPOs to register with the CFTC and adhere to "Compliance Rules," under Part 4 of the CFTC's regulations, for recordkeeping and disclosures to pool participants. *See id.* §§ 4.20-26. The Commission also

proposed amending Rule 4.27, *id*. § 4.27, to require all CPOs, including RIC/CPOs, to report financial data to the CFTC. On February 8, 2012, the CFTC approved a subset of the proposal, amending Rules 4.5 and 4.27 to require RIC/CPOs to register and (along with other CPOs) file financial data. 77 FR 11252 (Feb. 24, 2012), *publication errors corrected*, 77 FR 17328 (Mar. 26, 2012) ("Final Rule"). However, the Commission voted not to subject RIC/CPOs to existing Compliance Rules. 77 FR at 11252, 11259. Instead, the CFTC initiated a new rulemaking, proposing revised RIC/CPO Compliance Rules intended to harmonize the CFTC's and SEC's requirements. 77 FR 11345 (Feb. 24, 2012). The Final Rule also required certain previously exempt hedge funds to register as CPOs and comply with CFTC recordkeeping and disclosure rules. 77 FR at 11264-65 (rescinding Rule 4.13(a)(4)). Hedge funds and other non-RICs affected by the Final Rule have not sought judicial review.

Plaintiffs filed a Complaint seeking to enjoin "the amendments to Section 4.5, Section 4.27, and related provisions," A-226, which they identified as Compliance Rules, *inter alia*, "governing reporting and disclosure to investors" and "recordkeeping." A-237. The CFTC moved to dismiss Plaintiffs' Compliance-Rules challenge as unripe, and the parties cross-moved for summary judgment. A-4-5. The district court heard argument on October 5, 2012, whereupon Plaintiffs abandoned their facial challenge to Rule 4.27, seeking "to

have that vacated as applied." A-125. When the court asked about the complained-of "related provisions," counsel stated "I do not know of any other provisions." *Id.*

On December 12, 2012, the district court denied Plaintiffs' motion and granted the CFTC's motions. A-108. Plaintiffs filed a notice of appeal "from the [district court] Order" in its entirety, D.E.44; however, Plaintiffs' opening brief challenges only the "final rule amending Section 4.5…to require certain advisers to [RICs] to register." (Br.5.)

The registration deadline for RIC/CPOs passed on December 31, 2012. 77 FR at 11252.

STATEMENT OF FACTS

A. Derivatives Markets and the Commodity Exchange Act

The Commodity Exchange Act, 7 U.S.C. §§ 1 *et seq*. ("CEA"), vests the CFTC with "exclusive jurisdiction" in markets for commodity *futures*, *options*, and *swaps*. *Id.* § 2(a)(1)(A). A key purpose of this is "to separate the functions of the [CFTC] from those of the [SEC]." *Merrill Lynch v. Curran*, 456 U.S. 353, 386 (1982). Congress judged that the "different functions served by securities markets – capital formation and investment – and futures markets – risk-shifting and speculation – could best be overseen by separate regulator[s]." Brooksley Born, *Regulatory Responses to Risks in the OTC Derivatives Market* (remarks Nov. 13,

1998), http://www.cftc.gov/opa/speeches/opaborn-40.htm. It determined that "transactions subject to th[e] Act" require "oversight of the C[FTC]" to "deter and prevent…disruptions," "ensure…avoidance of systemic risk," and "protect all market participants." 7 U.S.C. § 5(a)-(b). Throughout its history, the CFTC has regulated futures and options; Dodd-Frank expanded the CFTC's jurisdiction to include swaps.[2]

Much of the "systemic risk" referenced in the CEA, *id.* § 5(b), results from the "leverage" that is characteristic of derivatives trading. For example, a futures trader does not post the full "notional value" (the theoretical total contract value), but a fraction called "margin" to cover adverse price movement. In volatile conditions, margin may be insufficient, and the trader may be liable for more. In a swap, the "notional value" is the hypothetical value upon which payment obligations are computed. In some cases, that full amount may come due: For

[2] Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010). A *derivative* is a financial instrument with a price "derived from" the value of "underlying" assets. A *future* is a contract to buy or sell a "commodity" at a future date. The term "commodity" encompasses "all services, rights, and interests…in which contracts for future delivery are presently or in the future dealt in," including physical commodities and financial commodities such as interest rates. 7 U.S.C. § 1a(5). A "*swap*," traditionally, was an agreement between parties to exchange sequences of cash flows based on the value of an underlying asset. R. Kolb & J. Overdahl, *Futures, Options, & Swaps* 5-6 (5th ed. 2007). Dodd-Frank established a broader definition. 7 U.S.C. § 1a(47).

example, in a "credit-default swap," where the "underlying" asset is the credit status of "reference entities," a party may be obligated to pay the notional value following a reference entity's bankruptcy. *Comment: Empty Creditors & Debt Exchanges*, 27 Yale J. on Reg. 159, 159-61 (2010). Each party to a swap may be exposed to "counterparty credit risk," or the possibility that the other may not pay. Due to leverage, the stability of a pooled investment vehicle can be threatened by a loss from even a small investment in derivatives. Significant losses at an entity that is interconnected within the derivative markets may threaten those markets' stability and, in very serious cases, the U.S. financial system.

1. The CFTC's Discretion to Modify the CPO Definition

One of the CFTC's core functions is regulation of CPOs, which the CEA defines as "any" person or entity operating a business that solicits or accepts value "for the purpose of trading in commodity interests, including any" future, option, or swap. 7 U.S.C. § 1a(11)(A). Because a CPO may also invest in securities, the CEA contemplates dual registration by some entities with the CFTC and SEC. Interp. Ltr. 75-17, 1975-77 Comm. Fut. L.Rep. (CCH) ¶20,112 (Nov. 4, 1975) (Congress was "cognizant of the…securities laws" but "did not see fit to exclude SEC-regulated entities"). However, the CFTC can exclude entities from the definition if it determines exclusion "will effectuate the [CEA's] purposes."

7 U.S.C. § 1a(11)(B). The CFTC has periodically expanded and contracted exclusions based on new information and policy views.

2. 1975-2003: RICs Not Excluded from the Definition

The CFTC initially handled exclusion requests case-by-case. 49 FR 4778, 4779 (proposed Feb. 8, 1984). In 1983, the Senate committee overseeing the CFTC rejected a proposed statutory exclusion for RICs, but asked the Commission to promulgate rules excluding RICs using no more than 5 percent of assets for commodity margins. *Id.* at 4779-80. In 1985, the CFTC promulgated Rule 4.5, establishing an exclusion for entities meeting the 5-percent test, using derivatives only for hedging risk, and not marketing their fund as a commodity investment. 50 FR 15868, 15883 (Apr. 23, 1985). In 1993, the CFTC expanded the exclusion to allow unregistered RICs to engage in unlimited hedging if they used no more than 5 percent of assets for other derivatives trading. 58 FR 6371, 6372 (Jan 28, 1993). This limited exclusion remained until 2003. Prior to 2003, RICs registered as CPOs were subject to CFTC compliance rules for recordkeeping and disclosures. 17 C.F.R. §§ 4.20-.23 (1993).

3. Swaps and the Commodity Futures Modernization Act

During the 1980s and 1990s, the *swap* became pervasive in off-exchange (“over-the-counter” or “OTC”) transactions, and debate arose whether to regulate them like other derivatives. Proponents of deregulation prevailed when, in 2000,

Congress passed the Commodity Futures Modernization Act, Pub. L. No. 106-554, 114 Stat. 2763 (2000) ("CFMA"), barring the CFTC and SEC from regulating most swaps, *id*. §§ 105, 302-303. Congress stated its intent "to streamline and eliminate unnecessary regulation," which it believed would "enhance the competitive position" of U.S. financial institutions and markets and "reduce systemic risk." *Id.* § 2, 124 Stat. at 2763A-366. The CFMA left markets for swaps and other OTC derivatives unregulated and unmonitored – effectively dark – in most respects.

4. The 2003 Deregulation

In 2003, the CFTC enacted rules to further "the purpose and intent of the CFMA" by excluding entities from CFTC regulation. 68 FR 47221, 47223 (Aug. 8, 2003). The rules eliminated the 5-percent threshold from Rule 4.5, establishing a blanket exclusion of RICs from CFTC oversight, no matter what their involvement in CFTC jurisdictional markets. *Id*. at 47222. The Commission explained that this was appropriate in "the current [2003] investment environment" to promote "flexibility" and "remov[e] barriers to participation." *Id*. at 47223, 47230. The CFTC predicted that eliminating oversight and regulation would have "no effect…on the financial integrity" of commodity-derivatives markets and would foster "risk management." *Id*. at 47230.

Since 2003, RICs have traded increasingly in derivatives, and they do so heavily today. 77 FR at 11255 n.35. However, due to the CFMA and 2003 deregulation, there is no complete, reliable information concerning that activity. *Id*. at 11275.

B. The Financial Crisis and Dodd-Frank

The 2007-2008 financial crisis has been attributed in significant part to the proliferation of dark, unregulated markets in OTC derivatives including swaps. *E.g.*, S. Rep. No. 111-176, at 29 (2010) (these were a "major contributor" to the crisis); 156 Cong. Rec. S3605 (May 12, 2010) (Sen. Shelby) ("[L]ack of transparency in the OTC derivatives market was a contributing factor to the financial debacle."); *Final Report of the Nat'l Comm'n on the Causes of the Fin. and Econ. Crisis in the U.S.* at xxv (Jan. 2011) (dark markets "added to uncertainty and escalated panic"). Congress responded by passing Dodd-Frank, which reversed key aspects of the CFMA and established additional protections. Of importance here, Congress:

1) Granted the CFTC "exclusive jurisdiction" over swaps, Dodd-Frank § 722(a);

2) Amended the definition of "CPO" to include entities that transact swaps, *id*. § 721(a)(6); and

3) Established the Financial Stability Oversight Council ("FSOC"), an interagency body including the CFTC Chair, to "collect information from member agencies," "identify risks to [U.S.] financial stability" and "respond to emerging threats," *id*. § 112(a)(1)-(2).

As a result of Dodd-Frank, the CPO definition from which RICs were excluded in 2003 no longer exists. Dodd-Frank left intact the CFTC's authority to set exclusions to "effectuate the [CEA's] purposes," 7 U.S.C. § 1a(11)(B), but that determination changed because, by adding swaps to the "transactions subject" to the CEA, Dodd-Frank broadened the statute's purposes to include law enforcement and systemic-risk prevention related to swaps, *id*. § 5(a)-(b).

1. "De Facto" Commodity Pools

In August 2010, NFA, the futures industry's main self-regulatory organization, petitioned the CFTC to withdraw the blanket RIC-exclusion and restore compliance obligations similar to those applicable before 2003. A-1432. NFA reported that RICs had established funds marketed as commodity-futures investments based on the funds' transactions in "futures and options contracts, forward contracts, swaps, and other [OTC] derivatives." A-1434. Under Rule 4.5, these RICs were operating without the "regulatory requirements and protections, and…oversight of the CFTC." A-1435. One fund touted "a 'lower cost structure than most retail managed futures funds.'" A-1434. NFA expressed "deep[] concern[]" that CPOs would, as a result, "migrat[e]" from CFTC oversight. A-1435.

NFA's August 2010 petition described "at least three entities" operating *de facto* unregistered commodity pools. A-1434. In April 2011, Plaintiff ICI

reported 29. A-982. In July 2011, ICI informed the CFTC of "approximately 70" IRS private letter-rulings approving favorable tax treatment of these pools. A-841. In December 2011, Senators Levin and Coburn shared findings identifying "at least 40" such funds with "assets in excess of $50 billion," A-832, a fivefold increase over 2008, A-837. The Senators stated that since 2006, the "IRS private letter rulings have opened the floodgates." A-832.

2. SEC Reports that "Complete Data" Is "Unavailable."

In September 2011, the SEC issued a release soliciting information "on a wide range of issues relevant to [RICs'] use of derivatives." 76 FR 55237 (Sept. 7, 2011) ("SEC Release"); *see* 77 FR at 11255 & nn.35-37 (discussing SEC Release). It described "dramatic growth in the volume and complexity of derivatives" and cited a report that RICs' derivatives trading "has soared." 76 FR at 55238 & n.7. The SEC stated, however, that "complete data concerning the nature of derivatives activities of [these] funds is unavailable." *Id.*

The SEC discussed an FDIC report of a particularly steep increase in RICs' use of credit-default swaps. *Id.* The release explained that RICs trade derivatives for "a variety of purposes," but, according to the FDIC report, "predominantly" use credit-default swaps "to increase a fund's exposure to credit risk." *Id.* The SEC stated that this "can raise risk management issues" concerning "leverage, illiquidity" and "counterparty risk." *Id.* It described how the SEC and its staff

have addressed some of these issues "on a case-by-case basis," but "certain swaps" have "not been addressed." *Id*. at 55239. As a result, "many funds" employ practices that "may fail to take into account future losses" and permit "excessive leveraging." *Id*. The SEC's then-Chairperson summarized that established securities-law controls may fail:

> The controls in place to address fund investments in traditional securities can lose their effectiveness when applied to derivatives[,]...because a relatively small investment in a derivative instrument can expose a fund to a potentially substantial gain or loss – or outsized exposure to an individual counterparty.

A-116; *see* 77 FR at 11255 n.37 (*quoting* Chairperson Schapiro).

C. Rulemaking

1. Proposal

On February 11, 2011, the CFTC and SEC published proposed rules as part of Dodd-Frank implementation. 76 FR 7976; 76 FR 8068 (Feb. 11, 2011). The CFTC explained that due to "recent economic turmoil" and "consistent with the tenor of the provisions of the Dodd-Frank Act," it "ha[d] reconsidered the level of regulation that it believes is appropriate" for entities participating in derivatives markets. 76 FR at 7977.

First, the CFTC proposed amending Rule 4.5 to restore both "registration and [all] compliance obligations" to RIC/CPOs. *Id*. at 7983-84, 7989. Second, the CFTC proposed eliminating two existing CPO-registration exemptions for hedge

funds. *Id*. at 7985-86. Third, the SEC and CFTC proposed "Form PF," a non-public filing to obtain "systemic risk information" concerning "private funds," including hedge funds required to register with both agencies. 76 FR at 8071. Fourth, the CFTC proposed amending Rule 4.27 to create "Form CPO-PQR" to obtain "information generally identical" to Form PF from all other CPOs, including RIC/CPOs. 76 FR at 7978.

2. Comments

The CFTC received 61 comments and held a public roundtable. 77 FR at 11254, 11257. Some parties expressed support, *e.g.*, A-836 (Sens. Feinstein & Levin); A-1030 (NFA); A-1127 (Sidley Austin), while others stated objections. Among the latter group, parties were generally open to registration and data reporting, but had concerns with Compliance Rules, which many viewed as burdensome and conflicting with SEC requirements.

Plaintiff ICI itself suggested that the CFTC require advisers to RICs "to register as CPOs" but not "otherwise be subject to the requirements applicable to CPOs under Part 4." A-988-89.[3] Franklin Templeton and the Investment Advisors Association stated "we are very willing and able to provide whatever regulatory reporting is necessary for you to monitor systemic risk" and "PQR…[is] something that we could certainly live with." A-1380; *see also, e.g.*, *id*. (MFA) ("[W]e would

[3] ICI objected to the 5-percent threshold. A-988.

echo that."); A-1360 (AIMA) ("We strongly support all the efforts to address potential systemic risk analysis and to [im]prove the transparency to regulators."). They explained, however, the common sentiment that their "concern [wa]s not seeing conflicting regulation on the CFTC side." A-1380; *see also, e.g.*, A-1229 (MFA) (requesting "relief" for "mutual funds" from Compliance Rules).

3. The Final Rule

In response to these public comments, a bipartisan 4-1 Commission approved a rule for RIC/CPOs requiring registration and data reporting only. 77 FR at 11343. The Commission explained that the Rule 4.5 registration amendments will enable it to more effectively enforce the CEA with respect to entities active in its jurisdictional markets and ensure their competency, while the CPO-PQR data-reporting requirement will eliminate blind spots in those markets that would otherwise hinder the CFTC's execution of its mandate under Dodd-Frank to manage systemic risk. 77 FR at 11254, 11275.

CPO-PQR is a three-schedule system that focuses on systemic risk through reports scaled to CPO size: Schedule A solicits basic information of all CPOs, while Schedules B and C, for mid- and large-sized CPOs, require more details with greater frequency. The information obtained will allow the CFTC to track how different trading strategies are affected by market stresses (A-337 (#1.d)); monitor trends across pools including how classes of pools perform and correlate under

different conditions (A-334 (#11), A-337-38 (#1), A-342-49 (#6)); follow the extent of CPO activities away from exchanges and clearing (A-341-42 (#4)); understand pools' risk metrics and sensitivities to market factors (A-356-61 (#4)); 76 FR at 7981; and analyze exposure to credit counterparties and leverage (A-361-64 (#5-6)); 76 FR at 7981. The CFTC explained that this tiered approach reflects that smaller operators are less likely to pose systemic risk and should have a lesser burden. 76 FR at 7978.

As to Compliance Rules, however, the CFTC acknowledged "concerns about the potential conflicts" and that entities "[un]able to comply with" both CFTC and SEC rules may "discontinue [their] activities involving commodity interests." 77 FR at 11259, 11272. Therefore, the Commission decided to "not require entities that must register due to the amendments to § 4.5 to comply with the Commission's compliance regime until adoption of final rules" on that subject. *Id*. at 11259. At the same time, the CFTC commenced a new "Harmonization" rulemaking, proposing less burdensome Compliance Rules for RIC/CPOs. 77 FR at 11345. No final Harmonization rule has been adopted.

Some commenters sought to exempt RICs from CPO-PQR as well, but the Commission declined, stating it is "important to collect data in form CPO-PQR from [RIC/CPOs] to assess the risk posed…in the derivatives markets and financial system generally." 77 FR at 11273. Citing Dodd-Frank's "robust mandate to

manage systemic risk," the CFTC stated that there "currently is no source of reliable information regarding the general use of derivatives by [RICs]." *Id.* at 11275. The Commission therefore finalized Rule 4.27, proposing no changes to that rule in the Harmonization rulemaking. 77 FR at 11345-48. To lessen the burden, however, it postponed the CPO-PQR deadline for RIC/CPOs until the conclusion of that rulemaking. 77 FR at 11252.

The CFTC also responded to concerns that a 5-percent margin threshold was too restrictive. It did so by adopting an alternative "net notional" test, *id.* at 11256, originally proposed by Barclays Global Investors, 67 FR 65743, 65744 & n.13 (Oct. 28, 2002), and adopted in 2003 as a trading threshold for certain entities, 68 FR at 12626. This test permits a RIC to claim exclusion regardless of margin amounts if the "net notional value" of its derivatives does not exceed 100 percent of its portfolio-liquidation value. 77 FR at 11257.

D. District Court Proceedings

With the RIC/CPO Compliance Rules still at the proposal stage, Plaintiffs (representing the only objecting entity class) filed a Complaint seeking an injunction to "set aside the amendments to Section 4.5, Section 4.27, and related provisions," which they identified as the Compliance Rules' "reporting and recordkeeping requirements, [and] disclosure obligations." A-224, 226. The Complaint focused on Compliance Rules. *E.g.*, A-237 ("reporting and disclosure

to investors, [and] recordkeeping"); A-241 ("'duplicative compliance obligations'"); A-242 ("inconsistent obligations" for "disclosure, reporting, and recordkeeping"); A-250 ("full panoply of CFTC regulation of CPOs"); A-258 ("full range of CPO regulations"). The CFTC moved to dismiss the Compliance-Rules challenge as unripe, and the parties cross-moved for summary judgment. A-4-5.

In a 93-page opinion, the district court granted the CFTC's motions. A-15-107. The court rejected as "false" Plaintiffs' major premise – that the CFTC had identified "'no evidence of a real problem'." A-54-55. "[I]n the face of a financial meltdown due in significant part to derivatives trading, lack of transparency, and the lack of regulatory oversight, all of which prompted enactment of Dodd-Frank," the court observed that Plaintiffs had been "carried away by their own rhetoric." A-61-62. The CFTC did not "'arbitrarily revers[e]' its 2003 position," which derived from 2003's "current investment environment" and "the CFMA's deregulatory policy, which was based on assumptions" now "called into serious question." A-64, 66. Congress's expansion of the CPO definition and the CFTC's jurisdiction to include swaps "constitutes a changed context at the core of the CFTC's stated justification." A-65. Thus, the court held, the Final Rule is "a reasonable response to 'changed circumstances'." A-66.

As for SEC regulation, the court found that the CFTC "*did* address this very

issue." A-67. The CFTC explained its exclusive responsibility "'to foster open, competitive, and financially sound commodity and derivatives markets'," and the court agreed that the agencies have different authority and purposes. A-68. The court identified in the releases "specific justifications for the amendments" that relate only to CFTC functions. A-56-57. Moreover, "[g]iven the SEC's own assessment of its effectiveness – or lack thereof – in regulating entities involved in derivatives markets, [Plaintiffs'] complaint about redundant regulation appears based on a false premise." A-67-68.

The court also upheld the rule's particulars. As to registration thresholds, it found "nothing" in the record "contradict[ing] the CFTC's reasoning that five percent remained" reasonable, while the net-notional test is "a reasoned alternative" further "demonstrat[ing] the CFTC's consideration of the implications of its rulemaking." A-90, 91. The court held that excluding swaps from these thresholds "would have ignored a significant purpose of Dodd-Frank and defied Congress." A-86. Plaintiffs also "offered no reason…to disturb the CFTC's decision" to exclude only certain *bona fide* hedging transactions. A-88. Similarly, the court found the CFTC "justified in seeking information from RICs" on Form CPO-PQR that will "be helpful in bringing light" to "blind spots" in financial markets, and concluded that Plaintiffs had not identified "any reason to disturb" that judgment. A-85.

The court also found "nothing arbitrary and capricious" about the agency's decision to proceed with Compliance Rules incrementally. A-72. Plaintiffs' challenge to those rules was "hypothetical" and unripe because "it is unclear at this stage" what "if any" such rules would be applied. A-78.

Finally, the court found "plainly distinguishable the SEC line of cases" underlying Plaintiffs' cost-benefit challenge. A-103. While "the agency in those cases did not consider responsibly the costs," the CFTC "by contrast did." A-106. The court held that "long standing" precedent on cost-benefit, including the SEC cases, applies an arbitrary-and-capricious standard, under which the court must ensure that the agency considers relevant factors but not substitute its own judgment. A-93-95, 105-06. The court conducted a detailed review and found the standard met. A-92-98. "Set against the considerations outlined in the Final rule" concerning "the financial crisis, the congressional intent and mandate in Dodd-Frank, and the evidence that [RICs] were engaging in potentially risky and non-transparent practices," that registration and data reporting "are *burdens*…is not reason to find that the agency…was arbitrary and capricious." A-81.

Plaintiffs appealed, but now challenge only the Rule 4.5 amendments (Br.5), denying that they made unripe challenges to "related regulations" (Br.55) and referencing Rule 4.27 only in a footnote as another amendment "[i]n the same rulemaking" (Br.14 n.3). Those claims are, therefore, abandoned. *See Terry v.*

Reno, 101 F.3d 1412, 1415 (D.C. Cir. 1996).

STANDARD OF REVIEW

In an APA case, this Court reviews summary judgment *de novo*. *Sherley v. Sebelius*, 689 F.3d 776, 780 (D.C. Cir. 2012). The Court's "duty is to undertake the same examination as did the district court." *Id.* Dismissal of unripe claims is also reviewed *de novo*. *Nat'l Ass'n of Home Builders v. Army Corps of Eng'rs*, 440 F.3d 459, 461 (D.C. Cir. 2006) ("*NAHB*").

Arbitrary-and-capricious review "is narrow and a court is not to substitute its judgment" for the agency's. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). Agency action is presumed valid, *WorldCom Inc. v. FCC*, 238 F.3d 449, 457-58 (D.C. Cir. 2001), and must be upheld so long as there is a "rational connection between the facts found and the choice made," *State Farm*, 463 U.S. at 43. The APA makes "no distinction" between "initial agency action and subsequent" action "undoing or revising that action." *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009). A "change in policy is not subject to a heightened standard." *Anna Jaques Hosp. v. Sebelius*, 583 F.3d 1, 6 (D.C. Cir. 2009).[4]

[4] Plaintiffs seek vacatur, but even if any of their arguments had merit, "an injunction must be narrowly tailored to remedy the harm shown." *Gulf Oil Corp. v. Brock*, 778 F.2d 834, 842 (D.C. Cir. 1985) These rule provisions are severable,
---footnote continued on next page---

SUMMARY OF ARGUMENT

1a. As the district court concluded, the Final Rule is a reasonable response to significant events and legislation as part of the CFTC's overall effort to restore oversight in opaque markets. The releases comprehensively explain the Commission's judgment that registration and data-reporting by RIC/CPOs are needed to accomplish specific regulatory purposes not pursued by the SEC. These determinations are entitled to deference.

Plaintiffs contend that the CFTC had to separately "explain why it no longer found the facts and circumstances underlying th[e 2003] rulemaking to be compelling." (Br.1.) But the Supreme Court in *Fox Television* held that there is "no basis" in the APA for such scrutiny. 556 U.S. at 514. In any event, the CFTC clearly explained the changed circumstances and, as the district court concluded, "amply satisfied" *Fox Television* and the APA. A-61.

1b. The Final Rule's requirement that RIC/CPOs file CPO-PQR is also justified. In the district court, Plaintiffs asserted that the CFTC had "impos[ed]"

(cont'd)

and the Court may enjoin no more of the CFTC's actions than Plaintiffs carry the burden of showing are "duplicative and unnecessary." (Br.66.) If the Court identifies a "failure to consider" issue, it should allow the rule "to remain in effect for a reasonable period during which the Commission c[an] consider the remanded issues." *North Carolina v. FERC*, 730 F.2d 790, 795 (D.C. Cir. 1984); *see Chamber*, 412 F.3d at 145 (remanding). In light of the national interest in "improving accountability and transparency in the financial system," 77 FR at 11252, this Court, even if it finds error, should take a measured approach.

CPO-PQR with insufficient consideration of benefits. A-259-60. The claim had no basis, and the court rejected it. A-85. Abandoning that claim, Plaintiffs now argue the *opposite* – that it was *error* for the CFTC and district court to consider those *same benefits* because RICs' CPO-PQR filing deadline is not yet established. This argument is waived, because it was not raised below, and it is also wrong – the CEA required the CFTC to consider the costs and benefits of the Rule 4.27 amendments when promulgated in the Final Rule. The Commission did so rationally, and the district court correctly upheld them.

2. Plaintiffs' arguments rest on further legal error in their unsupported assertion that the CFTC "cannot use a multi-step approach" to issue registration and data-reporting rules before considering what, if any, Compliance Rules to adopt. (Br.56.) That is not the law: The APA permits an agency to issue rules in phases, and the CEA cost-benefit provisions do not supersede the APA in that respect. Rather, they require the CFTC to consider its "action" in "promulgating" a rule, consistent with the APA's limit of judicial review to "final agency action." The Commission met this requirement as to its final action here, and the district court correctly treated Plaintiffs' challenges to "related provisions" as unripe claims regarding what Plaintiffs admit is a "separate rulemaking." (Br.3.)

3. For the items that *were* contained in the Final Rule, the district court correctly held that the CFTC "properly considered and evaluated the benefits and

costs." A-104. It summarized how the CFTC considered the costs, quantified where reasonably feasible, A-74-75, and gave cogent explanations of systemic benefits that by nature cannot meaningfully be quantified, A-59. Unable to show any flaw in the CFTC's consideration, Plaintiffs accuse the district court of seeking "to minimize the[] significance" of this Court's decisions in *American Equity Investment Life Insurance Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010), and *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011). (Br.46.) In fact, the district court spent more than seven pages analyzing that line of cases and held that they are "clearly distinguishable." A-68-69, A-98-104, A-106-07.

4. The 2-prong registration threshold test is also reasonable, and the district court properly refused to second-guess the CFTC's policy judgments. A-84-92. Establishment of a percentage threshold is an area of heightened deference, and the CFTC provided an alternative test for additional flexibility. While Plaintiffs protest the inclusion of swaps in those thresholds, the CFTC explained that its regulatory interests necessitated that it consider swaps in determining whether to exercise oversight. In light of the financial crisis and Dodd-Frank, to exclude them would have been anomalous. The CFTC also offered an exclusion for bona-fide hedging, and the line that it drew, based on inherent risk and to avoid difficulties in administration, was clearly reasonable.

5. Finally, the district court correctly held that Plaintiffs received sufficient

opportunity to comment. A-104-05. Plaintiffs had ample opportunity with respect to the proposal's costs and benefits. And the "marketing factors" Plaintiffs challenge are not a rule requiring notice and comment, but a statement of policy that Plaintiff ICI and others specifically requested. They were, in any event, a logical outgrowth of the proposal.

ARGUMENT

I. The Final Rule Is a Reasonable Response to Market Events and Legislation.

A. The CFTC Reasonably Changed Policy.

1. The APA presumes that a regulator will reconsider "the wisdom of its policy on a continuing basis." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). The "agency's view of what is in the public interest may change, either with or without a change in circumstances." *State Farm*, 463 U.S. at 57. Here, in Plaintiff Chamber's words, to say that circumstances changed following the financial crisis and Dodd-Frank would be a "gross understatement." A-857.

Addressing those changed circumstances, the CFTC explained specific regulatory purposes for amending Rules 4.5 and 4.27, including:

i. To eliminate "blind spots" in derivatives markets. 77 FR at 11275; *see also id*. at 11278 n.224, 11279, 11280, 11281; 76 FR at 7988.

ii. To enable its execution of the Dodd-Frank/CEA mandate "to manage systemic risk and ensure safe trading practices" in derivatives markets. 77 FR at 11275; *see also id*. at 11277, 11279, 11283; 76 FR at 7976-78.

iii. To "better understand who is operating in" those markets and the "interconnectedness of" market participants. 77 FR at 11280; *see also id.* at 11281; 76 FR at 7980, 7988.

iv. To enable the CFTC Chair to perform his duties on FSOC. 77 FR at 11252-53; *id*. at 11281; 76 FR at 7977-78.

v. To accord with Congress's amendment of the "CPO" definition to include swap-trading entities. 77 FR at 11258; *id*. at 11260.

vi. To address new information indicating extensive derivatives trading by RICs, including as *de facto* unregistered CPOs. 77 FR at 11254-55 & nn.35-37, 11259; 76 FR at 7983.

vii. To ensure the competency of those operating entities active in derivatives markets. 77 FR at 11254, 11277.

As the district court observed, Plaintiffs "simply ignore or make light" of these purposes. A-55. While Plaintiffs disparage the CFTC's judgment as a shift in "'philosophy' supposedly ushered in by recent events" (Br.3), a change in "philosophy" alone would have been sufficient, *NAHB*, 682 F.3d at 1043. Yet the Commission did not rely on "generalized invocations" as Plaintiffs claim. (Br.3.) Rather, it articulated these specific objectives, each of which is rationally connected to Rule 4.5, 4.27, or both.

2. Plaintiffs attempt to dismiss much of this as "background" and accuse the CFTC of "*post hoc* reliance" (Br.15, 37), but the district court accurately observed that these purposes "are all plainly in the Final Rule and cited as justifications,"

A-57. Indeed, commenters including ICI recognized these justifications and responded in their letters. A-964, 969 (ICI); A-1063 n.21 (Dechert); A-1017 (Vanguard). Then as now, ICI asserted unpersuasively that these amendments are "not mandated by…Dodd-Frank." A-969. But Plaintiffs admit that Dodd-Frank preserved the CFTC's exclusion authority. (Br.35.) To upend the rules because they are "not mandated" would frustrate Congress's delegation of that judgment to the CFTC.

3. Plaintiffs' objection that the CFTC "changed course" without "explain[ing] why it no longer finds the [2003] rationale persuasive" (Br.30-31), is foreclosed by *Fox Television*, which held that an agency need not explain "why the original reasons for adopting the displaced rule or policy are no longer dispositive," 556 U.S. at 514 (alterations omitted). There, the Supreme Court examined the FCC's reversal of a policy prohibiting on-air expletives only where repeated rather than fleeting. *Id*. at 509-13. The FCC had stated that the old policy would "advance the government's interest in protecting children" but "not go further" than necessary to do so. *In re Infinity Broadcasting Corp.*, 1987 WL 345514, at **4 (FCC Dec. 29, 1987). When the agency reversed itself, the Second Circuit struck down the new policy, stating that the FCC provided "no reasonable explanation for why it ha[d] changed its perception" that fleeting expletives were not "harmful." *Fox Television Stations v. FCC*, 489 F.3d 444, 458 (2d Cir. 2007).

But the Supreme Court reversed, finding "no basis" in the APA to scrutinize an agency's judgment in that way. 556 U.S. at 514. It sufficed that the FCC "forthrightly acknowledged" the change and that its reasoning for the new policy was "rational." *Id*. at 517.

An agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." *Id*. at 515. The Court held that a policy change must be upheld regardless of the agency's former views so long as it (1) acts within its authority, (2) "display[s] awareness that it *is* changing position," and (3) "provide[s] a reasoned explanation" for the *new* policy. *Id*. The district court correctly found these requirements "amply satisfied" here. A-60-61.[5] Indeed, the CFTC went further and explained why non-oversight is no longer appropriate after the crisis and Dodd-Frank. *E.g.*, 77 FR at 11252-56, 11275; 76 FR at 7976-84.

If anything, the case for policy change here is more compelling than in *Fox Television* because the Final Rule reflects substantially changed facts (the financial crisis and RICs' "soar[ing]" derivatives use) and landmark legislation. 77 FR at

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[5] The statement in *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319 (D.C. Cir. 2006), that an agency may not be "mute" concerning policy change is inapposite, because there the agency "fail[ed] to satisfy th[e] core requirement" that it "display awareness that it is changing position." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 & n.3 (D.C. Cir. 2012).

11275 ("Changed circumstances warrant[ed] revisions to these rules."). Plaintiff Chamber's own comment letter acknowledges that Dodd-Frank's amendment of the CPO definition to include swaps was, by itself, "a major change" that "necessitates a complete overhaul" of applicable rules. A-944.

4. Plaintiffs' argument that the CFTC had to reconcile the Final Rule to the 2003 policy of promoting "liquidity" (Br.1) fails under *Fox Television*, and also because the Commission did not, as Plaintiffs assert, leave the issue "unaddressed" (Br.31). It stated that one reason *for* the amendments is to "aid the Commission in examining large CPOs' roles as a source of liquidity in different asset classes." 76 FR at 7981. The Commission explained that it "currently only has information on the positions held by…entities already registered as CPOs, as opposed to those excluded…under § 4.5." 77 FR at 11278 n.229. It stated that "data limitations are one reason why the Commission is pursuing additional data collection initiatives under these final rules." *Id*. This satisfies the APA. *Fox Television*, 556 U.S. at 519 (a court may not require "empirical data" that is "unobtainable").

Where the CFTC did have information, it addressed the facts rationally. "Liquidity," as used by Plaintiffs, simply means higher levels of investment activity. (Br.31 (equating "liquidity" with RICs "increasingly participat[ing] in the commodity markets")); A-143 ("bringing more people to the commodities markets"). The Commission discussed RICs' "increased trading activity in the

derivatives area" and explained that the Final Rule addressed RICs "because" of that activity taking place in "blind spots." 77 FR at 11255, 11275. Given the role of swaps in the financial crisis and Dodd-Frank's reversal of the policies underlying the CFMA, the CFTC reasonably no longer accepts market opacity as the price of high trading volume. *Id*. at 11275.

5. The CFTC also responded to comments raising concerns about RICs' access to these markets.[6] Plaintiffs rely solely on comments that the Compliance Rules would reduce RICs' derivatives-market participation. A-941-42, 946-47 (Chamber) (citing "overlapping and possibly conflicting regulatory requirements"); A-973 (ICI) (objecting to "directly conflicting, or fundamentally inconsistent, requirements"); A-1067 (Dechert) ("inconsistent and often conflicting SEC and CFTC regulations"). The CFTC was *persuaded* and excised them from the Final Rule. 77 FR at 11259. Citing those same concerns that conflicting requirements may cause RICs to "discontinue their activities involving commodity interests," the Commission proposed revised rules. 77 FR at 11345, 11348. The district court, therefore, correctly found that the CFTC "explicitly recognized" these concerns and responded by "adopt[ing] a measured approach." A-70-72.

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[6] The agency need not catalogue responses to every comment. *Nat'l Mining Ass'n v. MSHA*, 116 F.3d 520, 549 (D.C. Cir. 1997).

No commenter suggested that registration and CPO-PQR *alone* would drive RICs out of markets, and Plaintiffs do not make that claim even now. (Br.18 ("reversing the 2003 regulation" – which freed RICs from Compliance Rules – would affect liquidity)); *see also* A-988 (ICI) (recommending that RICs "be, at most, required to register as CPOs, but not otherwise be subject to" CPO regulations). Plaintiffs' Complaint links liquidity to the Compliance Rules, not registration or CPO-PQR. A-224 (alleging RICs avoided derivatives due to "redundant and potentially conflicting regulation"). The same is true of the article they cite. 112 Banking L.J. 757, 761 (1995) (stating that RICs limited trading because "activities of [CPOs] are strictly regulated").

6. Unable to prevail under the usual APA standard, Plaintiffs urge the Court to apply a heightened standard apposite only where the agency's "new policy rests on factual findings that contradict" those underlying the old policy. *Fox Television*, 556 U.S. at 515; (Br.29-30). But there are no such findings or contradictions here. Instead, Plaintiffs rely on 2003 statements that the CFTC "intended" and "expected" increased liquidity. 68 FR at 12625, 12634. However, statements of intent or prediction are not findings of fact. *Public Citizen, Inc. v. FAA*, 988 F.2d 186, 196 (D.C. Cir. 1993); *Amoco Oil Co. v. EPA*, 501 F.2d 722, 740 (D.C. Cir. 1974). In *Fox Television*, the Court imposed no heightened scrutiny on the FCC's changed prediction that its policy would protect children. 556 U.S.

at 519. Here, the CFTC did not contradict the prediction that lean oversight may attract money into a market. Instead, it concluded that resulting "blind spots" should not be tolerated. 77 FR at 11275.

7. Plaintiffs argue that the Final Rule is arbitrary because it applies to RICs but not "insurance companies, banks, trust companies, and pension plans." (Br.18-19.) But their assertion that the CFTC offered "no justification" (Br.19) is untrue: The CFTC stated that it "is unaware of other classes of [pooled investment] entities that are excluded" under Rule 4.5 "engaging in significant derivatives trading," but that if it should become aware, it would consider action. 77 FR at 11255-56. This satisfies the APA. *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007) (agencies generally do not resolve problems in "one fell regulatory swoop"); *Nat'l Mining Ass'n*, 116 F.3d at 549 (agency need not address all potential problems at once).[7]

8. Given the rational connection between the financial crisis and Dodd-Frank and the CFTC's restoration of oversight, Plaintiffs' assertion that the CFTC has not blamed RICs for the events of 2007-2008 is a *non sequitur*. (Br.33.) This Court rejected materially the same argument in *Chamber of Commerce v. SEC*, 412 F.3d 133, 140-41 (D.C. Cir. 2005), holding that a regulator aware of "particular

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[7] As between RIC/CPOs and other CPOs (Br.18), the Commission stated that it aimed to equalize their treatment "regardless of their status with respect to other regulators." 77 FR at 11254.

abuses" may reasonably conclude there is a "more general problem" and enact "prophylactic measure[s]." As the district court explained, the Final Rule is not "punishment for past conduct," but "is intended, going forward, to ensure that the Commission can adequately oversee" and manage risk in its jurisdictional markets. A-58 (quotation marks omitted). The amendments will enable the CFTC to "more efficiently deploy its regulatory resources and to more expeditiously take necessary action to ensure the stability" of markets. 76 FR at 7978. The CFTC addressed RIC/CPOs specifically because it is "aware of increased trading" by those entities "that may not be appropriately addressed" in existing regulations, 77 FR at 11255 (citing SEC Release), and "there currently is no source of reliable information" regarding their derivatives activities, *id*. at 11275. This was rational, and the APA requires no more. *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) ("An agency need not suffer the flood before building the levee.").

Congress followed similar logic in requiring certain hedge-fund advisers to register and report financial data. In the Form PF release, the CFTC and SEC cited Congress's reasoning that "hedge funds are generally not thought to have caused" the crisis, but "information regarding their size, strategies, and positions could be crucial in regulatory attempts to deal with a future crisis." 76 FR 71128, 71164 (Nov. 16, 2011) (*quoting* S. Rep. No. 111-176, at 38). Here, the CFTC explained that "sources of risk delineated in" Dodd-Frank regarding hedge funds "are also

presented by commodity pools." 77 FR at 11253. These include "leverage, counterparty credit risk," *id*., "connectivity and" potential for "contagion," 76 FR at 71165 (quotation marks omitted). The district court correctly found nothing arbitrary in "a prophylactic rule to prevent problems before they arise in the agency's blind spots." A-58.

9. Lacking any serious response, Plaintiffs assail the district judge for a *proofreading* error, subsequently corrected. (Br.34.) The court quoted legislative history that, in its view, contradicted "plaintiffs' arguments that the financial crisis" was not tied to investment companies, but inadvertently used the phrase "investment banks." A-63. In their zeal to attack the district judge, however, Plaintiffs mistakenly assert that the source refers only to "investment banks," (Br.33-34), when in fact, it refers to banks "'and other types of nonbank financial firms'," A-63, a category that includes RICs, *see* Financial Stability Oversight Council, *Authority to Require Supervision & Regulation of Certain Nonbank Financial Companies*, 77 FR 21637, 21644, 21652 (Apr. 11, 2012). The court had no "misunderstanding" of the issues (Br.34), and Plaintiffs' attacks are irrelevant and misleading.

B. The Registration Requirement Is Justified.

To the extent Plaintiffs have recast their case as a narrower attack on registration *simpliciter*, they fail in any event because registration is reasonable, as

ICI impliedly acknowledged when it *proposed* requiring RIC/CPOs to register, with exemption from other CFTC rules. A-988. The CFTC explained that registration has two important justifications independent of CPO-PQR and Compliance Rules, both of which are reasonable: First, it "allows the Commission to ensure" that CPOs "meet minimum standards of fitness and competency." 77 FR at 11254. Second, it provides "a clear means of addressing wrongful conduct" including "violations of the CEA or [CFTC] regulations." *Id*.

1. With respect to competency, the CFTC cited, *inter alia*, a House report discussing proficiency examinations and explaining that "registration of associated persons of" CPOs "is necessary to ensure that such persons are qualified." *Id*.; H.R. Rep. No. 97-565, at 48. To pursue a Congressional objective is rational, not arbitrary. *Charter Communications v. FCC*, 460 F.3d 31, 42 (D.C. Cir. 2006). Plaintiffs provide no support for their assertion that "competency" *in commodity-derivatives* trading is "already addressed by existing SEC and FINRA regulation." (Br.48.) Nor could they, as the SEC and FINRA require competency *with respect to securities transactions*.[8] The required commodity-derivatives exam covers "future contracts, hedging and speculating, the operation of various [derivative] investment strategies, technical analysis and spread trading, calculation of gain and

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[8] *See* Registration & Examination Requirements, http://www.finra.org/Industry/Compliance/Registration/QualificationsExams/Qualifications/P011051.

loss, and other matters such as floor procedures and reporting rules," topics Plaintiffs' Amicus MFDF concedes are "far beyond" the knowledge typical of RICs' directors. A-1107-08.[9]

Plaintiffs assert that CFTC regulations "recognize the value" of securities testing in an exemption for FINRA-registered *salespeople* (Br.49-50), but that exemption is unavailable to *operators* of commodity pools, *see* 17 C.F.R. § 3.12(h)(1)(ii) (such salespersons may "not engage in any other activity subject to" CFTC regulation). Before changing views here, ICI admitted that these are "different role[s]." A-1278-79. This limitation supports the CFTC's determination to assure *operator* competency through registration.

2. With respect to CEA enforcement, the same cited House report confirms that registration is intended to permit the CFTC to "proceed more effectively against individuals associated with registered entities who violate the [CEA]." H.R. Rep. No. 97-565, at 48. "Registration is the kingpin of the statutory machinery, giving the Commission the information about participants in commodity trading which it…requires to carry out its other statutory functions." *CFTC v. British Am. Commodity Options Corp.*, 560 F.2d 135, 139-40 (2d Cir.

[9] MFDF submitted a brief joined by former SEC commissioners and staff, who were unwilling to stand behind all the brief's content and most of whom acknowledge financial and professional ties to RICs. (Amic.2-4 ("not all amici necessarily endorse" each point).)

1977). Through registration, the CFTC obtains information on the identity, organizational form, location of offices and records, and officers of the CPO. 7 U.S.C. §§ 6m-6n(1)(A)-(F). This allows it to track market developments, make inquiries, and intervene quickly when there is evidence of CEA violations or economic risks. Failure to register may be grounds to shut down a CPO where definitive proof of fraud is not yet available. *Id*. § 6m.

Once registered, the CEA requires CPOs to "maintain books and records" that must be "open to inspection" by the Commission." *Id.* § 6n(3)(A). A registrant is also subject to NFA examinations, which NFA schedules based on its risk assessments. 77 FR at 11277. The CFTC explained that information gained from registration "allows [it] to better understand the participants in the derivatives markets" and their "interconnectedness" and, thus, "to better assess potential threats." *Id.* at 11280. Before again reversing itself here, ICI agreed that this access is "very valuable for a regulator to make sure that things are operating in the way that the funds are representing." A-1337.

3. Plaintiffs' assertion that these functions "are already provided by the SEC" (Br.51) is wrong. As ICI's president testified to Congress, "each agency is called upon to maintain the integrity of the markets within its jurisdiction." 111th Cong. 1, S.Hrg. 111-58, at 98 (Mar. 10, 2009). The SEC does not enforce the CEA or CFTC regulations or monitor or protect commodity markets. The differences in

the agencies' functions and expertise are well-recognized. *See, e.g.*, *Leist v. Simplot*, 638 F.2d 283, 314 (2d Cir. 1980) (Friendly, J.) (Congress determined "to separate the functions of the new CFTC from those of the SEC"); A-838 (Sens. Feinstein & Levin) (Nov. 30, 2011) (urging CFTC to rescind the blanket RIC/CPO exclusion because "[t]he SEC does not have the equivalent expertise or experience"). Congress created "'*one* federal agency with the expertise to regulate the commodities industry'." *Board of Trade v. SEC*, 677 F.2d 1137, 1152 (7th Cir.) (emphasis added), *vacated as moot*, 459 U.S. 1026 (1982). The fact that the SEC regulates RICs "as investment vehicles" (Br.44) does not mean that the SEC has expertise in commodity derivatives, enforces the CEA, performs the CFTC's market-wide surveillance functions, or has the capacity to keep FSOC apprised of derivatives-market issues.

Plaintiffs cite the 2011 SEC Release as evidence that the SEC is "engaged" in "addressing the leverage-related risk of derivatives," and refer to a report contending that the SEC's "basic framework" on derivatives "has worked very well." (Br.45.) But ICI took the contrary position in its response to the SEC Release, criticizing the SEC's framework as "a patchwork of interpretations that is neither practical nor sustainable." Ltr. from ICI to SEC (Nov. 7, 2011) ("ICI SEC

Ltr.") at 9.[10] And while Plaintiffs now assert that such SEC guidance "[h]as long applied" to swaps (Br.8), ICI told the SEC that "no written SEC or staff guidance exists…for swaps." *Id.* at 10.

The SEC Release describes the lack of available information and limitations of SEC guidance in this area, 76 FR at 55238-44, and the CFTC relied on those and similar statements in formulating the Final Rule, 77 FR at 11255 & nn.35-37. The CFTC does not *criticize* the SEC for its efforts – swaps and other commodity derivatives are within the *CFTC's* exclusive jurisdiction, and it was the CFTC's regulations that required change.

C. The Requirement of Data Reporting Is Reasonable.

Registration is also the legal predicate for data-reporting on CPO-PQR. 7 U.S.C. § 6n(3)(A) (requiring "registered" CPOs to file CFTC-prescribed reports); 17 C.F.R. § 4.27(b)(1) (applicable to CPOs "registered or required to be registered"); 77 FR at 11283. Plaintiffs argue that the CFTC failed to consider, as an alternative to registration, relying on "information" obtained in other ways, including compulsion of *unregistered* RICs to file CPO-PQR or from "publicly available disclosures *already* made to the SEC." (Br.35.) However, the CFTC considered and rejected those alternatives, and an agency's determination of what

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[10] Available at http://www.sec.gov/comments/s7-33-11/s73311-46.pdf.

technical data it needs to carry out its mission is entitled to deference. *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 9 (D.C. Cir. 2006).

1. First, Plaintiffs cite no authority by which the CFTC could require RICs that are not CPOs to file CPO-PQR. *See* 7 U.S.C. § 6n(3)(A). Moreover, as explained (Part I(B)), the Commission gave independent justifications for registration – the "two significant benefits" Plaintiffs quote *fourteen times* in their brief. In context, the accusation that the CFTC "failed even to consider" (Br.35-36) whether to require RICs to register is frivolous.

2. With respect to Plaintiffs' suggestion that the CFTC simply glean the necessary data from SEC filings and other sources, the CFTC explained that there are no such sources of data that would enable it to execute its systemic-risk mitigation mandate under Dodd-Frank. 77 FR at 11275.

First, the information on CPO-PQR is "generally identical" to that on the SEC and CFTC's Form PF, but RICs do not file PF because they are not "Private Funds." 76 FR at 7978 & n.22. The CFTC explained its need for this information from CPOs, including RIC/CPOs, 76 FR at 7980-81, and Plaintiffs have never asserted error in that reasoning.[11]

[11] Plaintiffs quote the CFTC Chairman saying that the CFTC is "more than happy to use the forms that you use over at the SEC" (Br.16 n.4), but in the linked video he is referring to "forms called Form PFs," which RICs do not file.

Commenters asserted that SEC Form N-SAR collected relevant information, but ICI admitted that it was not comparable. *E.g.*, A-1009 (N-SAR "generally does not require [RICs] to report investment and exposure information" similar to Schedule C). Although ICI made generalized assertions of similarity between SEC disclosures and CPO-PQR Schedule B, it failed to identify specific overlap. A-1008-09. At the roundtable, CFTC staff asked participants "line item by line item" in CPO-PQR "what you don't like or what you think is inconsistent with the SEC's [regime]." A-1398. No participant identified problems or suggested an alternative source for the systemic-risk data in Schedules B or C. As to the general data on Schedule A, ICI agreed that it is reasonable for the CFTC to collect such "basic information." A-1251.

Plaintiffs state in a footnote that comparable data might be found on SEC Form N-1A or reports under 17 C.F.R. § 210 (Br.36 n.6), but they never suggested this during the rulemaking, and it is not true. N-1A is filed once in a fund's lifetime, requires disclosure only of the *types* of instruments it may transact, and is not required of all RICs. Form N-1A at 1, 21. Plaintiffs are mistaken in their claim that 17 C.F.R. § 210.12-13 requires "a list of all open derivatives positions on a contract-by-contract basis" (Br.36 n.6): Other than securities, a filer need only state "each major category of investments by descriptive title." 17 C.F.R. § 210.12-13 n.1. These reports also are required only of some RICs.

ICI acknowledged during the rulemaking that differences between CPO-PQR and SEC filings "generally reflect the fact that Form CPO-PQR is intended to obtain information relating to systemic risk." A-1007-08. This is underscored by the fact that SEC filings are public, while the data on Schedules B and C are not. Before litigation, ICI agreed that these different purposes, investor information versus regulatory, may support different judgments as to what information is required. A-1336-37. The CFTC's judgment here is entitled to deference.

Second, Plaintiffs' and Amici's suggestions that the CFTC rely on information collected through special calls, swap-data reporting, or large-trader reports (Br.35-36; Amic.25), were reasonably rejected by the Commission. The Commission explained that a special call is "reactive in nature" and occurs only after the CFTC "bec[omes] aware of an issue." 77 FR at 11261. Large-trader reporting does not provide information "regarding the relationship between a large position" and "the rest of the pool's other derivatives positions," nor does it address "trends across funds that are not large enough to trigger" that reporting obligation "but that may nevertheless impact the market." *Id.* at 11261, 11268. Swap-data reporting will collect information only on individual transactions. CPO-PQR, however, will supply "detail regarding the activities of [these] entities" and "better enable [the CFTC] to assess the risk posed by a pool or CPO as a whole." *Id.* at 11268. The Commission reasonably concluded that CPO-PQR

addresses the absence of "reliable information regarding the general use of derivatives by RICs," and that this information is "necessary" to "fulfill the Commission's systemic-risk mitigation mandate." *Id.* at 11273, 11275. That determination is entitled to deference.

II. The District Court Correctly Dismissed Plaintiffs' Unripe Challenge to Compliance Rules.

Plaintiffs criticize the district court for "reliance on considerations of ripeness" to dismiss their challenge to Compliance Rules because, now, "Appellants are not challenging the compliance obligations themselves." (Br.55.) But their Complaint says that they are (*e.g.*, A-226, 268), and they continue to assert objections to specific Compliance Rules they fear, but cannot show, will be imposed in the future (*e.g.*, Br.10). Those issues remain hypothetical, and the district court correctly dismissed those claims as unripe challenges to non-final action. *Marcum v. Salazar*, 694 F.3d 123, 128-29 (D.C. Cir. 2012); 5 U.S.C. § 704; A-77-79.

III. The CFTC Thoroughly Considered the Costs and Benefits.

The CEA requires the CFTC, "[b]efore promulgating a regulation," to "consider the costs and benefits of the action." 7 U.S.C. § 19(a). Like other aspects of agency decisionmaking, cost-benefit consideration is subject to the arbitrary-and-capricious standard, *American Equity*, 613 F.3d at 177, and "a court is not to substitute its judgment for that of the agency," *Consumer Elecs. Ass'n v.*

FCC, 347 F.3d 291, 303 (D.C. Cir. 2003) (Roberts, J.). The CFTC must "evaluate" the "action" according to five specified "public interest" factors. 7 U.S.C. § 19(a)(2). As the district court concluded, the CFTC fulfilled its duties. A-107.[12]

1. As a threshold matter, Plaintiffs err as a matter of law to base objections to Rule 4.5 on hypothetical costs of future Compliance Rules that remain at the proposal stage.[13] The CEA states that the CFTC must consider the costs and benefits "of the action" in "promulgating" a regulation. 7 U.S.C. § 19(a). A regulation is "promulgated" when its terms become known. *United Techs. Corp. v. OSHA*, 836 F.2d 52, 53-54 (2d Cir. 1987). The CFTC considered the costs of the registration and reporting rules it promulgated, while Compliance Rules for RICs were not promulgated in the Final Rule and, thus, the CEA did not require consideration of their hypothetical costs.

Plaintiffs "do not deny" that the APA permits rulemaking in stages. (Br.56.) Nor could they, as "[n]othing prohibits federal agencies from moving in an incremental manner." *Fox Television*, 556 U.S. at 522; *see also Am. Portland*

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[12] Instead of the APA standard, MFDF mistakenly relies on Executive Orders that impose no requirements on independent agencies, and on a CFTC staff memorandum from outside the administrative record, containing guidance that Commission staff followed here as a matter of prudence.

[13] MFDF repeats this error. (Amic.16-17, 20-21.)

Cement Alliance v. EPA, 101 F.3d 772, 776 (D.C. Cir. 1996); *Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984). Plaintiffs' contention that the CFTC "cannot use a multi-step approach" because it is "impossible to meaningfully assess" future rules is unsupported by any citation to law (Br.26, 56), and has no basis in either the APA or CEA. This is a pervasive legal error that distinguishes Plaintiffs' case entirely from the SEC cases upon which they rely. *See Business Roundtable*, 647 F.3d at 1149 (SEC must quantify the "certain" costs).

2. Compounding that error, Plaintiffs rely overwhelmingly on their own opinion that dual regulation is too "costly" and they should not have multiple "regulatory masters." (Br.39-40.) But ICI failed to persuade Congress of that, urging in the Dodd-Frank process that the CFTC and SEC be combined. S.Hrg. 111-58, at 96. Congress not only refused, but established an *expanded* CPO definition that includes *more* SEC registrants – those who trade swaps. "Clearly," the district court observed, "Congress thought that additional regulation from the CFTC was necessary for swaps in particular." A-69. In "an age of overlapping and concurring regulatory jurisdiction," *FTC v. Ken Roberts Co.*, 276 F.3d 583, 593 (D.C. Cir. 2001), many entities with business before the CFTC answer to regulators in securities, banking, energy, and agriculture. The Commission has no view of whether RICs are "among the most regulated" (Br.1), and it is not for the

CFTC, each time it crafts a rule, to justify the existence of a multi-regulator system. Rather, it must consider how best to enforce the CEA, while considering the costs and benefits of its actions. The CFTC did so here in a prudent effort to reassert a fraction of its undisputed statutory authority.

3. The Commission identified benefits including ensuring derivatives-trading competency; addressing wrongful conduct including CEA violations; the elimination of blind spots; facilitating performance of systemic-risk prevention duties under the CEA and with FSOC; and bringing *de facto* CPOs into oversight. 77 FR at 11254, 11275, 11277, 11280-81. The CFTC reasonably determined that those benefits are unquantifiable but substantial, particularly because the Commission may be able to use these tools "to prevent further future shocks to the U.S. financial system." *Id.* at 11277, 11281. The CFTC "cannot protect against risks of which it is not aware," *id.* at 11281, and RICs active in derivatives markets are a sensible focus of attention, given derivatives' centrality in the last crisis and the CFTC's exclusive jurisdiction over those markets, 76 FR at 7976-77 (discussing the CFTC's jurisdictional expansion "[f]ollowing the recent economic turmoil" "[t]o promote the financial stability of the United States"). The administrative record confirms RICs' extensive use of these instruments, SEC Release, 76 FR at 55238 n.7; A-982 (ICI); A-1220 (Chamber) ("the entire mutual fund industry"), and the CFTC's conclusion that complete, reliable information is

not otherwise available. *E.g.*, SEC Release, 76 FR at 55238 n.7; 77 FR at 11275. Plaintiffs state no basis to second-guess the Commission's judgment.

4. The CFTC also considered the costs. For registration, the Commission noted that CPOs will expend specified registration and testing fees, dues, and estimated time submitting forms. 77 FR at 11273-74. The CFTC also considered the burdens associated with NFA on-site examinations, but explained that these vary by individual entity. *Id*. at 11277. The CFTC also considered that registration may result in additional legal, compliance, and IT costs, and cited one commenter's estimate that for new registrants these costs would be in the "range of $150,000 to $250,000 per year." *Id*. However, that estimate included hedge funds previously subject to lighter regulation than RICs, which is a factor the commenter explained would cause costs to "vary significantly." *Id.* Despite repeated requests, *e.g.*, 76 FR at 7988-89, no RIC or association of RICs submitted data on this subject.

With respect to CPO-PQR, the Commission provided estimates of expected burdens of completing each schedule.[14] *Id*. at 11275. The CFTC published an initial version of these estimates at the proposal stage, 76 FR at 7987-88, and no

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[14] Because the requirements of Rule 4.27 constitute the "collection of information" within the meaning of the Paperwork Reduction Act ("PRA"), 44 U.S.C. §§ 3501 *et seq.*, the CFTC made use of "burden" estimates required by the PRA to evaluate the cost of Rule 4.27. 77 FR at 11281.

commenter disputed the figures or submitted quantitative data. Accordingly, the district court found "nothing arbitrary or capricious" about the CFTC's cost-benefit consideration. A-94.

Contrary to Plaintiffs' assertions, the CFTC also estimated the relevant Paperwork Reduction Act burdens for the rules being finalized. 77 FR at 11272-75.[15] OMB accepted the filing, which is not subject to judicial review. 44 U.S.C. § 3507(d)(6). The CFTC made no final PRA estimates concerning hypothetical future Compliance Rules, and it was not required to do so.[16]

5. The Commission also took "steps to minimize industry costs." *Charter Communications*, 460 F.3d at 42 (weighting this factor against claim of "arbitrary" cost-benefit consideration). For example, the alternative-net-notional test was adopted to afford RICs "additional flexibility." 77 FR at 11279. The 3-schedule system in CPO-PQR minimizes burdens on "smaller operators" that are "less likely to present significant risk." 76 FR at 7978. In the Final Rule, the Commission:

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[15] MFDF incorrectly asserts (Amic.18 n.6) that the CFTC, like the SEC in *Chamber of Commerce*, 412 F.3d at 143-44, failed to estimate per-entity impact. *See* 77 FR at 11277 (identifying per entity costs of registration).

[16] The PRA section refers to the "compliance regime" as "provisions of § 4.5" rather than §§ 4.20, *et seq*., but it is clear in context that where the Commission states it "will not be requiring compliance with the provisions of § 4.5," it meant the Compliance Rules; Rule 4.5 is a definitional exclusion that does not itself contain compliance obligations, and the release is clear that registration itself would be required. *See* 77 FR at 11252.

(1) increased reporting thresholds from the proposal, reducing the number of CPOs required to file Schedule C, 77 FR at 11267; (2) reduced the frequency of reporting, *id.* at 11269, 11274; and (3) altered several proposed CPO-PQR provisions, *id.* at 11270 (less detailed geographical breakdown of investments); *id.* (eliminating questions); *id.* at 11270-71 (amending form so "CPOs without existing quantitative models will not be required to build or acquire them"); *id.* at 11271 (revising question so that CPOs can "utilize their existing practices"). These and other cost-mitigating actions demonstrate that the Commission responsibly considered the costs.

6. Plaintiffs accuse the CFTC of counting hypothetical Compliance Rules "among the 'benefits' of" the Final Rule. (Br.3.) However, they incorrectly rely on a statement from the cost-benefit section concerning "periodic account statements, disclosure of risk, [and] audited financial statements" that refers to requirements for hedge funds, not RICs. 77 FR at 11280. The Final Rule adds registration requirements for both classes of entity, but hedge funds, unlike RICs, are not excused from the Compliance Rules. The passage Plaintiffs cite discusses benefits of registration for all types of entities and mentions several, some of which apply to RIC/CPOs and others that do not. *Id.* In determining to expand registration of hedge funds, the CFTC relied on benefits from its entire "compliance regime," *id.* at 11262, including risk disclosures, account statements,

and audited financials, *id*. at 11265-66, 11276 & n.215. With respect to RIC/CPOs, the Commission specified "two significant benefits" related more narrowly to operator competency and CEA-administration, neither of which includes the investor-disclosure benefits cited by Plaintiffs, *id.* at 11254, as well as the informational benefits of CPO-PQR, *id*. at 11281. Thus, the reference to "periodic account statements, disclosure of risk, [and] audited financial statements" was not an attempt to rely on benefits of hypothetical RIC/CPO Compliance Rules.

7. After arguing that the CFTC ought to have considered the burdens of those hypothetical Compliance Rules, Plaintiffs take the inconsistent position that it was impermissible for the Commission (and the district court) to consider the benefits and burdens of CPO-PQR, because the due date for the form has not been established. (Br.35.) In the district court, however, Plaintiffs argued the opposite: that the CFTC "imposed new [CPO-PQR] filing obligations on [RICs] without considering whether those obligations were necessary." D.E.8 at 39. It was no error for the district court to reach an issue *they* raised, and after "affirmatively represent[ing] the opposite position below," the argument is waived. *Blickenstaff v. R.R. Donnelley & Sons Co.*, 378 F.3d 669, 677 n.5 (7th Cir. 2004).

Plaintiffs also have it backwards: While the Compliance Rules remain in "flux" and therefore not promulgated, *Am. Portland Cement*, 101 F.3d at 777, the Rule 4.27 amendments were finalized, including as to RICs, 77 FR at 11273. The

only open question was the date of compliance, which does not render the Rule 4.27 amendments non-final. *NRDC v. EPA*, 683 F.2d 752, 759 n.16 (3d Cir. 1982) (rejecting argument that "rules are not final until after they have become effective"). This is clear in the Final Rule itself, 77 FR at 11267-68, 11273 (rejecting suggestions to further harmonize CPO-PQR with SEC rules or exclude RICs from the requirement), and because the Harmonization release proposes no changes regarding CPO-PQR, 77 FR at 11345-48. Because the CEA requires cost-benefit consideration for a rule that has been "promulgated," as Rule 4.27 was, the Commission correctly considered the costs and benefits of 4.27, the contours of which are not subject to change. Even if it were not required, Plaintiffs could show no prejudice in the CFTC's considering those costs and benefits at an early juncture.

8. Plaintiffs are further mistaken in asserting that the CFTC "failed to assess existing regulation" by the SEC. (Br.39.) In finalizing the registration and data-reporting rules, the CFTC explained that the SEC does not enforce the CEA or perform oversight in derivatives markets, and there exists no current source for the information to be collected on CPO-PQR. 77 FR at 11254-55, 11275, 11278. The CFTC also noted the SEC's acknowledgement that "'it had not developed a comprehensive and systematic approach to derivatives related issues' and that SEC controls 'lose their effectiveness'" in this context. A-67. The district court

correctly observed that, "[g]iven the SEC's own assessment," Plaintiffs' objection "about redundant regulation appears based on a false premise about the SEC's capacity and interest." A-67-68.

Plaintiffs' assertion that "portions" of the release "discussing Section 4.5 *do not even cite a single SEC regulation*" (Br.40) is a carefully worded adjunct to their hypothesis that the CFTC "cannot use a multi-step approach." Indeed, the CFTC cited the securities laws that may be relevant in its release re-proposing Compliance Rules, where that information was necessary to the analysis. 77 FR at 11346 nn.20-21, 11347 nn.28, 31-32, 34, 11348 n.36.

9. The CFTC's reasoning contrasts with the SEC's in *American Equity*, where that agency argued that state laws "'no matter how strong' could not 'substitute for federal securities law protections.'" 613 F.3d at 178. The SEC imposed "the full panoply of requirements set forth by the [Securities] Act" without assessing whether the same protections already existed. *Id*. at 167, 177-79. Here, the CFTC enacted only those requirements needed to perform its unique statutory functions: to enforce the CEA, and to bring transparency, prevent disruptions, and inform the FSOC concerning events in derivatives markets. 77 FR at 11275-76, 11281. The CFTC correctly concluded that the SEC cannot and does not perform those functions, *id*. at 11275-76, which the district court observed was "in sharp contrast to the SEC's purposeful ignoring as 'not relevant' concurrent

state regulation in *American Equity*," A-102.

Similarly, in *Business Roundtable*, the SEC failed to address whether ICA requirements "reduce the need for, and hence the benefit to be had from" the rule at issue. 647 F.3d at 1154. The district court correctly found the CFTC's reasoning "plainly distinguishable" because "the CFTC *did* consider other regulations in place governing RICs, and still concluded that the CFTC's regulations were necessary." A-103. Rather than relying on its "authority to regulate derivatives" to "evade" assessing the baseline (Br.43), the CFTC correctly determined that the SEC does not monitor commodity markets or enforce the CEA, and does not collect the information the CFTC needs to carry out its responsibilities. 77 FR at 11275, 11278.

10. Twice since *Business Roundtable*, this Court has explained that the decision rested on the SEC's failure to consider specific adverse data submitted by commenters. *Am. Petroleum Inst. v. EPA*, 684 F.3d 1342, 1351 (D.C. Cir. 2012); *Ass'n of Private Sector Colleges & Univs. v. Duncan*, 681 F.3d 427, 447-48 (D.C. Cir. 2012). Here, Plaintiffs point to no data the CFTC failed to consider and in fact resort to data they did not submit to the CFTC until two months after adoption of the Final Rule. (Br.23, 55 n.13; *see* A-701 (ICI Letter dated Apr. 24, 2012).) That Plaintiffs must do so underscores that *Business Roundtable* is satisfied, and the

district court correctly held that the SEC cases are "clearly distinguishable." A-106.[17]

Because the *Business Roundtable* analogy fails, Plaintiffs suggest that the CEA uses the word "evaluate" in addition to "consider" to impose an "obligation on the CFTC [that] is even more stringent" than the SEC's. (Br.38 n.7.) But they make no attempt to explain what such a requirement would be, or how it would exceed the SEC's obligation to "quantify the certain costs" or explain why those costs cannot be quantified. 647 F.3d at 1149. Here, the CFTC considered and evaluated all relevant information, and the district court correctly found "nothing arbitrary or capricious about the CFTC's compliance with its responsibilities." A-94.[18]

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[17] Plaintiffs misleadingly state that the district court "remarkably" cited "academic commentary critical of *this* Court's cost-benefit jurisprudence." (Br.46.) The district court expressly was disagreeing with that commentary. A-106.

[18] The requirement to "evaluate" *is* inconsistent with MFDF's suggestion that the CFTC must "hazard a guess" where it lacks access to information within industry's control. (Amic.18 n.6. (citing *Chamber*, 412 F.3d at 143).) The Court in *Chamber* quoted language indicating that where there are "'competing estimates,'" the agency should use "'expertise to…hazard a guess as to which is correct.'" 412 F.3d at 143. No competing estimates are at issue here, and this Court has never implied that an agency must manufacture data. *See id.* at 142 (stating that an agency need not conduct a study before it acts). Where data do not exist, the agency need only "so state, and go on to identify the considerations it found persuasive," *Jifry v. FAA*, 370 F.3d 1174, 1180 (D.C. Cir. 2004), as the CFTC did here. Similarly, the CFTC was not obliged to speculate on whether and to what

---footnote continued on next page---

IV. The Final Rule Is Rational in Its Particulars.

A. The 5 Percent/100 Percent Test Is Rational.

The district court also correctly upheld the two-prong test for registration. A-89-91. When an agency sets a rule "in which percentage terms play a central role," it has discretion to "make a rational legislative-type judgment." *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1242 (D.C. Cir. 2007). It "may not pluck a number out of thin air," but "a line has to be drawn" and will be upheld unless "patently unreasonable" or "a dictate of unbridled whim." *Id.*

The CFTC established the 5-percent threshold in consultation with Congress, based on experience with case-by-case exclusion requests. 50 FR at 15875. In 1985, the CFTC illustrated how even at 5 percent, leverage could lead to exposure in multiples of the pool's assets. *Id.* at 15878 & n.64. The CFTC here noted that it continued to use the 5-percent threshold for hedge funds after 2003, 77 FR at 11255, and that "[f]ive percent remains the average required for futures margins," *id.* at 11256. It explained that trading exceeding 5 percent "evidences a significant exposure," while a pool may be "sizeable enough" that a 5-percent investment could make it "a major participant" in a market. *Id.* at 11278 & n.221.

(cont'd)
extent RICs may pass costs to their shareholders (Amic.19 n.7) – data MFDF or other industry members may have but chose not to share. *Fox Television*, 556 U.S. at 519 (a court may not "insist upon obtaining the unobtainable").

Some commenters argued that 5-percent was too strict, but "no data was provided." *Id*. at 11256.

It is no answer that the CFTC found 5 percent "too low" in 2003. (Br.64.) The CFTC's intent then was to *reduce* oversight, "consistent with the purposes and intent of the CFMA." 68 FR at 47223. The purpose in 2012 was to *increase* oversight "to provide the Commission with adequate information…to effectively oversee [RICs'] derivatives" activity and "assess the risk posed." 77 FR at 11255, 11266. The CFTC also indicated willingness to reconsider thresholds after collecting data through Form CPO-PQR. *Id*. at 11263.

Nevertheless, the CFTC heeded concerns that some products have higher margins by adding the test's second prong, which considers net notional value rather than margin amounts. *Id*. at 11256-57. RICs whose commodity trading exceeds the 5-percent threshold need not register unless the aggregate net notional value of their derivatives positions exceeds the liquidation value of their portfolios. Plaintiffs' objection that 5 percent is "too low" (Br.63) ignores this alternative, as does their criticism that the CFTC established this 2-prong test during the pendency of proceedings concerning margin levels for certain swaps. (Br.57.) The alternative test was directly responsive to concerns that "the levels for swaps

margining may" be higher. 77 FR at 11256.[19]

Unable to find fault with the alternative test, Plaintiffs attack the CFTC's *lawyers* for making a correction following oral argument. (Br.30.) Counsel's correction explained that derivatives with notional value exceeding the fund's liquidation value may "place the entire value of the portfolio at risk," but "not necessarily…in all cases." A-119. Counsel confirmed that the alternative test does not consider margin amounts and, accordingly, is "'less restrictive' for some entities" and "provides additional flexibility." A-119-20. The district court, therefore, correctly found that the 2-prong test rationally furthers the objective of restoring oversight of RICs who trade significantly in derivatives markets. A-90-91.

B. The CFTC Rationally Included Swaps in the Thresholds.

Plaintiffs next grasp at straws to assert that the CFTC included swaps in the trading thresholds because it "did not know how to write the regulation any other way." (Br.27.) Enhancing oversight of swaps markets was a core purpose of the Final Rule, and, before changing positions here (Br.61), ICI acknowledged that the Commission proposed the rule in part because "the CFTC obtained jurisdiction over swaps as a result of the Dodd-Frank Act," A-972. The Commission explained

[19] Plaintiffs misstate that the alternative test was adopted "without opportunity for public comment." (Br.13-14 n.2.) ICI submitted a further comment letter after the test was discussed at the roundtable. A-840, 1236-40.

that Dodd-Frank "amended the statutory definition" of CPO specifically "to include those entities that trade swaps." 77 FR at 11258. Under the statute, "one swap contract would be enough to trigger" registration, but the CFTC determined to "permit some de minimis level of swaps activity by [RICs] without registration," because low-level activity "does not implicate the Commission's regulatory concerns." *Id*. The CFTC discussed those concerns throughout the release, explaining, for example, that information to be obtained "from CPOs transacting in swaps" will "help bring transparency to th[ose] markets, as well as to the interaction of swaps and futures markets, protecting the participants in both." *Id*. at 11283. Given the Commission's justified and repeatedly expressed concern with swaps, the district court correctly held that it was rational to include them in the trading thresholds. A-87; *see Am. Trucking Ass'ns v. U.S. Dep't of Transp*., 166 F.3d 374, 384 (D.C. Cir. 1999) (crediting purpose that "may reasonably be discerned" even if of "less than ideal clarity").

The CFTC did not, as Plaintiffs contend, adopt the Final Rule without knowing the definition of "swap" or whether proposed refinements might "significantly affect the number of firms required to register." (Br.27, 57.) Dodd-Frank itself defines "swap." 7 U.S.C. § 1a(47). Before issuing the Final Rule, the CFTC concluded that this statutory definition is "comprehensive" and "extensive 'further definition'…by rule is not necessary." 76 FR 29818, 29819-20 (proposed

May 23, 2011). Thus, it proposed to refine the definition with limited *narrowing* clarifications, to provide interpretive guidance and exclude instruments "such as insurance products and certain consumer and commercial contracts," which Plaintiffs have never stated concern RICs. *Id.* at 29821. The CFTC therefore concluded that the definition of "swap" was "sufficiently clear" to decide the appropriate CPO policy. *Id.* at 11276. The district court correctly held that this was reasonable. A-80.

Plaintiffs criticize the district court for *citing* the later-finalized "swap" rulemaking (Br.58), but the APA requires that "due account…be taken of the rule of prejudicial error." 5 U.S.C. § 706. Plaintiffs cannot show such error because the final swap rule is consistent with the proposal and has doubtful impact on RICs.

C. The CFTC Rationally Excluded Only Specified Bona Fide Hedging.

The Final Rule permits RICs, without registration, to engage in unlimited derivatives trading for specified "'bona fide hedging' purposes." 77 FR at 11256. This includes hedges of any commodity so long as the entity has equivalent offsetting cash-market holdings. *Id.* Plaintiffs prefer a broader allowance for "risk management," but the CFTC explained the "important distinction" that excluded "bona fide hedging transactions are unlikely to present the same level of market risk as they are offset by exposure in the physical markets." *Id.* The Commission

explained that the concept of "risk management" is excessively subjective, "difficult in this context to properly limit the scope," and "onerous to enforce." *Id.* "[M]any, if not most, positions in a portfolio" could be characterized as risk-management hedges, resulting "in an overly broad exclusion." *Id.* at 11343 (Chairman Gensler). This is underscored by the lack of consensus among commenters concerning the definition of "risk management." *Id*. at 11256; *compare* A-891 (Federated) *with* A-985 (ICI). Plaintiffs argue that other hedges may "also offset" and that a "risk mitigation position is, by definition, a position that 'offsets.'" (Br.62.) But hedges that do not involve a direct offset in the cash market may not offset as intended. *See* ICI SEC Ltr. at 14 (stating that "determination of which transactions actually offset others" is "very complicated" and subject to "no clear guidance"). The CFTC's explanation is reasonable.[20]

The *bona fide* hedging exception also did not "assume the validity" of the position limits rule vacated in *ISDA v. CFTC*, No. 11-cv-2146, __ F.Supp.2d. ___, 2012 WL 4466311 (D.D.C. Sept. 28, 2012), and, in any event, the only court to address the "validity" of the exception language *upheld* it – the district court here. In the Final Rule, the CFTC cross-referenced the "meaning and intent" of language

[20] Plaintiffs question why the CFTC did not import hedging definitions it has used in other contexts (Br.62), but other rules reflect different policy considerations, and none draw into question the conclusion that the excluded hedging transactions are unlikely to present the same risks.

establishing *bona fide* hedging exceptions to the position-limits rule, 77 FR at 11283, though it could just as easily have reproduced the same words within Rule 4.5. The *ISDA* court had no occasion to address the exceptions' validity in the position-limits context (much less in the CPO-registration context), because it vacated the position limits altogether. Plaintiffs ask this Court to vacate this rule, even if not arbitrary or capricious, because of a lower-court decision, itself currently on appeal, that did not reach the question presented here. There is no precedent for such action, nor any basis in the APA.

In the interrelated cases Plaintiffs cite, *Solite Corp. v. EPA*, 952 F.2d 473 (D.C. Cir. 1991), and *Mobile Oil Corp. v. EPA*, 35 F.3d 579 (D.C. Cir. 1994), the EPA promulgated one rule that was procedurally defective, and then "extend[ed]" it into a related context, spreading the flaw, *Solite*, 952 F.2d at 493. This Court "remanded" so the agency could consider if it "may wish to justify the [second] rule on independent grounds." *Id*. Here, no court has found flaw in the *bona fide* hedging exception in any context, the CFTC has already independently justified the exception from CPO-registration thresholds, and the district court correctly upheld it as rational. Agency action is presumed valid, *WorldCom*, 238 F.3d at 457-58, and the district court correctly declined to vacate a *sound* rule simply

because language was cross-referenced rather than reproduced.[21] A-89.

V. Plaintiffs' Notice Arguments Lack Merit.

The district court also correctly rejected Plaintiffs' argument that the CFTC gave inadequate notice. A-104. The CFTC's proposal met the APA's requirement for notice of the "legal authority" and "either the terms or substance of the proposed rule or a description of the subjects and issues," 5 U.S.C. § 553(b), and went further, explaining the CFTC's market-oversight purposes, concern with systemic risk, the issue of *de facto* CPOs, and the reasons for the information solicited on each Schedule of CPO-PQR. 76 FR at 7977-81, 7984. The notice's cost-benefit section was relatively brief, since the record was not yet developed, but gave notice of the Commission's approach and invited commenters to submit data and other information. *Id.* at 7988-89. That section was supplemented with estimates of paperwork burdens, which comprised a substantial portion of total costs. *Id.* at 7987-88. Based on those descriptions, Plaintiffs could have submitted cost data on registration and reporting, to which they had ready access, A-701-824, but chose not to.[22]

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[21] The CFTC interpretive letter Plaintiffs cite therefore correctly interpreted that traders may continue to exclude hedges set forth in the amended definitions, which are more generous than the older definitions because they enumerate more hedges. D.E.36-1.

[22] *Chamber of Commerce v. SEC*, 443 F.3d 890, 901-05 (D.C. Cir. 2006), cited by
---footnote continued on next page---

Notice-and-comment was not required, however, for the marketing factors, because they are not a new rule or "test" (Br.27), but a policy statement reflecting how the Commission will consider compliance with the Rule 4.5 marketing restriction. 77 FR at 11258-59; *see* 5 U.S.C. § 553(b)(3)(A). ICI asked for "guidance" on "what the relevant factors" would be. A-989. The CFTC obliged – not with a "test" (Br.27), but with factors that "should be instructive," in "a case by case…examination of the relevant facts," 77 FR at 11259. Moreover, even if the factors were a rule, they were a permissible logical outgrowth of the proposal, which expressly asked for comments on the definition of "marketing." 76 FR at 7984; *see CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009).

Finally, Plaintiffs have made no attempt to show prejudice, as they were required to do. *Am. Coke & Coal Chems. Inst. v. EPA*, 452 F.3d 930, 939 (D.C. Cir. 2006). They could not do so, among other reasons, because the Final Rule is significantly narrower than the proposal, underscoring the CFTC's careful and measured approach to this rulemaking.

(cont'd)

Plaintiffs (Br.65), rested on the SEC's failure to allow public comment on specific record materials following a remand. Plaintiffs cite no such materials here, and this case is not in that procedural posture.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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ADDENDUM

Except for the following, all applicable statutes and regulations are contained in the Addendum to the Brief for Appellants.

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7 U.S.C. § 1a(9)

Section 1a. Definitions
As used in this chapter: ***

(9) Commodity

The term "commodity" means wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions (as provided by section 13-1 of this title) and motion picture box office receipts (or any index, measure, value, or data related to such receipts), and all services, rights, and interests (except motion picture box office receipts, or any index, measure, value or data related to such receipts) in which contracts for future delivery are presently or in the future dealt in.

7 U.S.C. § 1a(47)

Section 1a. Definitions
As used in this chapter: ***

(47) Swap

(A) In general
Except as provided in subparagraph (B), the term "swap" means any agreement, contract, or transaction--

(i) that is a put, call, cap, floor, collar, or similar option of any kind that is for the purchase or sale, or based on the value, of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind;

(ii) that provides for any purchase, sale, payment, or delivery (other than a dividend on an equity security) that is dependent on the occurrence,

nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence;

(iii) that provides on an executory basis for the exchange, on a fixed or contingent basis, of 1 or more payments based on the value or level of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind, or any interest therein or based on the value thereof, and that transfers, as between the parties to the transaction, in whole or in part, the financial risk associated with a future change in any such value or level without also conveying a current or future direct or indirect ownership interest in an asset (including any enterprise or investment pool) or liability that incorporates the financial risk so transferred, including any agreement, contract, or transaction commonly known as--

(I) an interest rate swap;
(II) a rate floor;
(III) a rate cap;
(IV) a rate collar;
(V) a cross-currency rate swap;
(VI) a basis swap;
(VII) a currency swap;
(VIII) a foreign exchange swap;
(IX) a total return swap;
(X) an equity index swap;
(XI) an equity swap;
(XII) a debt index swap;
(XIII) a debt swap;
(XIV) a credit spread;
(XV) a credit default swap;
(XVI) a credit swap;
(XVII) a weather swap;
(XVIII) an energy swap;
(XIX) a metal swap;
(XX) an agricultural swap;
(XXI) an emissions swap; and
(XXII) a commodity swap;

(iv) that is an agreement, contract, or transaction that is, or in the future becomes, commonly known to the trade as a swap;

(v) including any security-based swap agreement which meets the definition of "swap agreement" as defined in section 206A of the Gramm-Leach-Bliley Act (15 U.S.C. 78c note) of which a material term is based on the price, yield, value, or volatility of any security or any group or index of securities, or any interest therein; or

(vi) that is any combination or permutation of, or option on, any agreement, contract, or transaction described in any of clauses (i) through (v).

(B) Exclusions
The term "swap" does not include--

(i) any contract of sale of a commodity for future delivery (or option on such a contract), leverage contract authorized under section 23 of this title, security futures product, or agreement, contract, or transaction described in section 2(c)(2)(C)(i) or 2(c)(2)(D)(i) of this title;

(ii) any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled;

(iii) any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities, including any interest therein or based on the value thereof, that is subject to--
(I) the Securities Act of 1933 (15 U.S.C. 77a et seq.); and
(II) the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.);

(iv) any put, call, straddle, option, or privilege relating to a foreign currency entered into on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a));

(v) any agreement, contract, or transaction providing for the purchase or sale of 1 or more securities on a fixed basis that is subject to--

(I) the Securities Act of 1933 (15 U.S.C. 77a et seq.); and
(II) the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.);

(vi) any agreement, contract, or transaction providing for the purchase or sale of 1 or more securities on a contingent basis that is subject to the Securities Act of 1933 (15 U.S.C. 77a et seq.) and the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), unless the agreement, contract, or transaction predicates the purchase or sale on the occurrence of a bona fide

contingency that might reasonably be expected to affect or be affected by the creditworthiness of a party other than a party to the agreement, contract, or transaction;

(vii) any note, bond, or evidence of indebtedness that is a security, as defined in section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1));

(viii) any agreement, contract, or transaction that is--

(I) based on a security; and

(II) entered into directly or through an underwriter (as defined in section 2(a)(11) of the Securities Act of 1933 (15 U.S.C. 77b(a)(11)) by the issuer of such security for the purposes of raising capital, unless the agreement, contract, or transaction is entered into to manage a risk associated with capital raising;

(ix) any agreement, contract, or transaction a counterparty of which is a Federal Reserve bank, the Federal Government, or a Federal agency that is expressly backed by the full faith and credit of the United States; and

(x) any security-based swap, other than a security-based swap as described in subparagraph (D).

(C) Rule of construction regarding master agreements

(i) In general

Except as provided in clause (ii), the term "swap" includes a master agreement that provides for an agreement, contract, or transaction that is a swap under subparagraph (A), together with each supplement to any master agreement, without regard to whether the master agreement contains an agreement, contract, or transaction that is not a swap pursuant to subparagraph (A).

(ii) Exception

For purposes of clause (i), the master agreement shall be considered to be a swap only with respect to each agreement, contract, or transaction covered by the master agreement that is a swap pursuant to subparagraph (A).

(D) Mixed swap

The term "security-based swap" includes any agreement, contract, or transaction that is as described in section 3(a)(68) (A) of the Securities Exchange Act of 1934

(15 U.S.C. 78c(a)(68)(A)) and also is based on the value of 1 or more interest or other rates, currencies, commodities, instruments of indebtedness, indices, quantitative measures, other financial or economic interest or property of any kind (other than a single security or a narrow-based security index), or the occurrence, non-occurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence (other than an event described in subparagraph (A)(iii)).

(E) Treatment of foreign exchange swaps and forwards

(i) In general
Foreign exchange swaps and foreign exchange forwards shall be considered swaps under this paragraph unless the Secretary makes a written determination under section 1b of this title that either foreign exchange swaps or foreign exchange forwards or both--

(I) should be not be regulated as swaps under this chapter; and

(II) are not structured to evade the Dodd-Frank Wall Street Reform and Consumer Protection Act in violation of any rule promulgated by the Commission pursuant to section 8321(b) of this title.

(ii) Congressional notice; effectiveness
The Secretary shall submit any written determination under clause (i) to the appropriate committees of Congress, including the Committee on Agriculture, Nutrition, and Forestry of the Senate and the Committee on Agriculture of the House of Representatives. Any such written determination by the Secretary shall not be effective until it is submitted to the appropriate committees of Congress.

(iii) Reporting
Notwithstanding a written determination by the Secretary under clause (i), all foreign exchange swaps and foreign exchange forwards shall be reported to either a swap data repository, or, if there is no swap data repository that would accept such swaps or forwards, to the Commission pursuant to section 6r of this title within such time period as the Commission may by rule or regulation prescribe.

(iv) Business standards
Notwithstanding a written determination by the Secretary pursuant to clause (i), any party to a foreign exchange swap or forward that is a swap dealer or major swap participant shall conform to the business conduct standards contained in section 6s(h) of this title.

(v) Secretary
For purposes of this subparagraph, the term "Secretary" means the Secretary of the Treasury.

(F) Exception for certain foreign exchange swaps and forwards

(i) Registered entities
Any foreign exchange swap and any foreign exchange forward that is listed and traded on or subject to the rules of a designated contract market or a swap execution facility, or that is cleared by a derivatives clearing organization, shall not be exempt from any provision of this chapter or amendments made by the Wall Street Transparency and Accountability Act of 2010 prohibiting fraud or manipulation.

(ii) Retail transactions
Nothing in subparagraph (E) shall affect, or be construed to affect, the applicability of this chapter or the jurisdiction of the Commission with respect to agreements, contracts, or transactions in foreign currency pursuant to section 2(c)(2) of this title.

7 U.S.C. § 2(a)(1)(A)

(a) Jurisdiction of Commission; Commodity Futures Trading Commission
(1) Jurisdiction of Commission
(A) In general
The Commission shall have exclusive jurisdiction, except to the extent otherwise provided in the Wall Street Transparency and Accountability Act of 2010 (including an amendment made by that Act) and subparagraphs (C), (D), and (I) of this paragraph and subsections (c) and (f) of this section, with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving swaps or contracts of sale of a commodity for future delivery (including significant price discovery contracts), traded or executed on a contract market designated pursuant to section 7 of this title or a swap execution facility pursuant to section 7b-3 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title. Except as hereinabove provided, nothing contained in this section shall (I)

supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (II) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State.

7 U.S.C. § 5

Section 5. Findings and purpose

(a) Findings
The transactions subject to this chapter are entered into regularly in interstate and international commerce and are affected with a national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities.

(b) Purpose
It is the purpose of this chapter to serve the public interests described in subsection (a) of this section through a system of effective self-regulation of trading facilities, clearing systems, market participants and market professionals under the oversight of the Commission. To foster these public interests, it is further the purpose of this chapter to deter and prevent price manipulation or any other disruptions to market integrity; to ensure the financial integrity of all transactions subject to this chapter and the avoidance of systemic risk; to protect all market participants from fraudulent or other abusive sales practices and misuses of customer assets; and to promote responsible innovation and fair competition among boards of trade, other markets and market participants.

7 U.S.C. § 6m

6m. Use of mails or other means or instrumentalities of interstate commerce by commodity trading advisors and commodity pool operators; relation to other law

(1) It shall be unlawful for any commodity trading advisor or commodity pool operator, unless registered under this chapter, to make use of the mails or any

means or instrumentality of interstate commerce in connection with his business as such commodity trading advisor or commodity pool operator: Provided, That the provisions of this section shall not apply to any commodity trading advisor who, during the course of the preceding twelve months, has not furnished commodity trading advice to more than fifteen persons and who does not hold himself out generally to the public as a commodity trading advisor. The provisions of this section shall not apply to any commodity trading advisor who is a (1) dealer, processor, broker, or seller in cash market transactions of any commodity specifically set forth in section 2(a) of this title prior to October 23, 1974, (or products thereof) or (2) nonprofit, voluntary membership, general farm organization, who provides advice on the sale or purchase of any commodity specifically set forth in section 2(a) of this title prior to October 23, 1974; if the advice by the person described in clause (1) or (2) of this sentence as a commodity trading advisor is solely incidental to the conduct of that person's business: Provided, That such person shall be subject to proceedings under section 18 of this title.

(2) Nothing in this chapter shall relieve any person of any obligation or duty, or affect the availability of any right or remedy available to the Securities and Exchange Commission or any private party arising under the Securities Act of 1933 [15 U.S.C.A. § 77a et seq.] or the Securities Exchange Act of 1934 [15 U.S.C.A. § 78a et seq.] governing the issuance, offer, purchase, or sale of securities of a commodity pool, or of persons engaged in transactions with respect to such securities, or reporting by a commodity pool.

(3) Exception

(A) In general
Paragraph (1) shall not apply to any commodity trading advisor that is registered with the Securities and Exchange Commission as an investment adviser whose business does not consist primarily of acting as a commodity trading advisor, as defined in section 1a of this title, and that does not act as a commodity trading advisor to any commodity pool that is engaged primarily in trading commodity interests.

(B) Engaged primarily
For purposes of subparagraph (A), a commodity trading advisor or a commodity pool shall be considered to be "engaged primarily" in the business of being a commodity trading advisor or commodity pool if it is or holds itself out to the public as being engaged primarily, or proposes to engage primarily, in the business of advising on commodity interests or

investing, reinvesting, owning, holding, or trading in commodity interests, respectively.

(C) Commodity interests
For purposes of this paragraph, commodity interests shall include contracts of sale of a commodity for future delivery, options on such contracts, security futures, swaps, leverage contracts, foreign exchange, spot and forward contracts on physical commodities, and any monies held in an account used for trading commodity interests.

7 U.S.C. § 6n

6n. Registration of commodity trading advisors and commodity pool operators; application; expiration and renewal; record keeping and reports; disclosure; statements of account

(1) Any commodity trading advisor or commodity pool operator, or any person who contemplates becoming a commodity trading advisor or commodity pool operator, may register under this chapter by filing an application with the Commission. Such application shall contain such information, in such form and detail, as the Commission may, by rules and regulations, prescribe as necessary or appropriate in the public interest, including the following:

(A) the name and form of organization, including capital structure, under which the applicant engages or intends to engage in business; the name of the State under the laws of which he is organized; the location of his principal business office and branch offices, if any; the names and addresses of all partners, officers, directors, and persons performing similar functions or, if the applicant be an individual, of such individual; and the number of employees;

(B) the education, the business affiliations for the past ten years, and the present business affiliations of the applicant and of his partners, officers, directors, and persons performing similar functions and of any controlling person thereof;

(C) the nature of the business of the applicant, including the manner of giving advice and rendering of analyses or reports;

(D) the nature and scope of the authority of the applicant with respect to clients' funds and accounts;

(E) the basis upon which the applicant is or will be compensated; and

(F) such other information as the Commission may require to determine whether the applicant is qualified for registration.

(2) Each registration under this section shall expire on the 30th day of June of each year, or at such other time, not less than one year from the effective date thereof, as the Commission may by rule, regulation, or order prescribe, and shall be renewed upon application therefor subject to the same requirements as in the case of an original application.

(3)

(A) Every commodity trading advisor and commodity pool operator registered under this chapter shall maintain books and records and file such reports in such form and manner as may be prescribed by the Commission. All such books and records shall be kept for a period of at least three years, or longer if the Commission so directs, and shall be open to inspection by any representative of the Commission or the Department of Justice. Upon the request of the Commission, a registered commodity trading advisor or commodity pool operator shall furnish the name and address of each client, subscriber, or participant, and submit samples or copies of all reports, letters, circulars, memorandums, publications, writings, or other literature or advice distributed to clients, subscribers, or participants, or prospective clients, subscribers, or participants.

(B) Unless otherwise authorized by the Commission by rule or regulation, all commodity trading advisors and commodity pool operators shall make a full and complete disclosure to their subscribers, clients, or participants of all futures market positions taken or held by the individual principals of their organization.

(4) Every commodity pool operator shall regularly furnish statements of account to each participant in his operations. Such statements shall be in such form and manner as may be prescribed by the Commission and shall include complete information as to the current status of all trading accounts in which such participant has an interest.

Dodd-Frank, § 112(a)(1)-(2)

SEC. 112. COUNCIL AUTHORITY.

(a) PURPOSES AND DUTIES OF THE COUNCIL.—

(1) IN GENERAL.—The purposes of the Council are—

(A) to identify risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large, interconnected bank holding companies or nonbank financial companies, or that could arise outside the financial services marketplace;
(B) to promote market discipline, by eliminating expectations on the part of shareholders, creditors, and shield them from losses in the event of failure; and
(C) to respond to emerging threats to the stability of the United States financial system.

(2) DUTIES.—The Council shall, in accordance with this title—

(A) collect information from member agencies, other Federal and State financial regulatory agencies, the Federal Insurance Office and, if necessary to assess risks to the United States financial system, direct the Office of Financial Research to collect information from bank holding companies and nonbank financial companies;
(B) provide direction to, and request data and analyses from, the Office of Financial Research to support the work of the Council;
(C) monitor the financial services marketplace in order to identify potential threats to the financial stability of the United States;
(D) to monitor domestic and international financial regulatory proposals and developments, including insurance and accounting issues, and to advise Congress and make recommendations in such areas that will enhance the integrity, efficiency, competitiveness, and stability of the U.S. financial markets;
(E) facilitate information sharing and coordination among the member agencies and other Federal and State agencies regarding domestic financial services policy development, rulemaking, examinations, reporting requirements, and enforcement actions;
(F) recommend to the member agencies general supervisory priorities and principles reflecting the outcome of discussions among the member agencies;

(G) identify gaps in regulation that could pose risks to the financial stability of the United States;
(H) require supervision by the Board of Governors
for nonbank financial companies that may pose risks to the financial stability of the United States in the event of their material financial distress or failure, or because of their activities pursuant to section 113;
(I) make recommendations to the Board of Governors concerning the establishment of heightened prudential standards for risk-based capital, leverage, liquidity, contingent capital, resolution plans and credit exposure reports, concentration limits, enhanced public disclosures, and overall risk management for nonbank financial companies and large, interconnected bank holding companies supervised by the Board of Governors;
(J) identify systemically important financial market utilities and payment, clearing, and settlement activities (as that term is defined in title VIII);
(K) make recommendations to primary financial regulatory agencies to apply new or heightened standards and safeguards for financial activities or practices that could create or increase risks of significant liquidity, credit, or other problems spreading among bank holding companies, nonbank financial companies, and United States financial markets; the Commission and any standard-setting body with respect to an existing or proposed accounting principle, standard, or procedure;
(M) provide a forum for—

(i) discussion and analysis of emerging market developments and financial regulatory issues; and
(ii) resolution of jurisdictional disputes among the members of the Council; and

(N) annually report to and testify before Congress on—

(i) the activities of the Council;
(ii) significant financial market and regulatory developments, including insurance and accounting regulations and standards, along with an assessment of those developments on the stability of the financial system;
(iii) potential emerging threats to the financial stability of the United States;
(iv) all determinations made under section 113 or title VIII, and the basis for such determinations;
(v) all recommendations made under section 119 and the result of such recommendations; and
(vi) recommendations—

(I) to enhance the integrity, efficiency,

competitiveness, and stability of United States
financial markets;
(II) to promote market discipline; and
(III) to maintain investor confidence.

Dodd-Frank, § 721(a)(6)

SEC. 721. DEFINITIONS.
(a) IN GENERAL.—Section 1a of the Commodity Exchange Act (7 U.S.C. 1a) is amended—

(6) by striking paragraph (11) (as redesignated by paragraph (1)) and inserting the following:

''(11) COMMODITY POOL OPERATOR.—

''(A) IN GENERAL.—The term 'commodity pool operator' means any person—
''(i) engaged in a business that is of the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in commodity interests, including any—
''(I) commodity for future delivery, security futures product, or swap;
''(II) agreement, contract, or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i);
''(III) commodity option authorized under section 4c; or
''(IV) leverage transaction authorized under section 19; or
''(ii) who is registered with the Commission as a commodity pool operator.

''(B) FURTHER DEFINITION.—The Commission, by rule or regulation, may include within, or exclude from, the term 'commodity pool operator' any person engaged in a business that is of the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise if the Commission

determines that the rule or regulation will effectuate the purposes of this Act.'';

Dodd-Frank, § 722(a)

SEC. 722. JURISDICTION.

(a) EXCLUSIVE JURISDICTION.—Section 2(a)(1) of the Commodity Exchange Act (7 U.S.C. 2(a)(1)) is amended—

(1) in subparagraph (A), in the first sentence—

(A) by inserting ''the Wall Street Transparency and Accountability Act of 2010 (including an amendment made by that Act) and'' after ''otherwise provided in'';
(B) by striking ''(C) and (D)'' and inserting ''(C), (D), and (I)'';
(C) by striking ''(c) through (i) of this section'' and inserting ''(c) and (f)'';
(D) by striking ''contracts of sale'' and inserting ''swaps or contracts of sale''; and
(E) by striking ''or derivatives transaction execution facility registered pursuant to section 5 or 5a'' and inserting ''pursuant to section 5 or a swap execution facility pursuant to section 5h''; and

(2) by adding at the end the following:

''(G)(i) Nothing in this paragraph shall limit the jurisdiction conferred on the Securities and Exchange Commission by the Wall Street Transparency and Accountability Act of 2010 with regard to security-based swap agreements as defined pursuant to section 3(a)(78) of the Securities Exchange Act of 1934, and security-based swaps.
''(ii) In addition to the authority of the Securities and Exchange Commission described in clause (i), nothing in this subparagraph shall limit or affect any statutory authority of the Commission with respect to an agreement, contract, or transaction described in clause (i).

''(H) Notwithstanding any other provision of law, the Wall Street Transparency and Accountability Act of 2010 shall not apply to, and the Commodity Futures Trading Commission shall have no jurisdiction under such Act (or any amendments to the Commodity Exchange Act made by such Act) with respect to, any security other than a security-based swap.''.

Pertinent regulations

17 C.F.R. §§ 4.20-4.26

§ 4.20 Prohibited activities.

(a)(1) Except as provided in paragraph (a)(2) of this section, a commodity pool operator must operate its pool as an entity cognizable as a legal entity separate from that of the pool operator.

(2) The Commission may exempt a corporation from the requirements of paragraph (a)(1) of this section if;

(i) The corporation represents in writing to the Commission that each participant in its pool will be issued stock or other evidences of ownership in the corporation for all funds, securities or other property that the participant contributes for the purchase of an ownership interest in the pool;

(ii) The corporation demonstrates to the satisfaction of the Commission that it has established procedures adequate to assure compliance with paragraphs (b) and (c) of this section; and

(iii) The Commission finds that the exemption is not contrary to the public interest and to the purposes of the provision from which the exemption is sought.

(b) All funds, securities or other property received by a commodity pool operator from an existing or prospective pool participant for the purchase of an interest or as an assessment (whether voluntary or involuntary) on an interest in a pool that it operates or that it intends to operate must be received in the pool's name.

(c) No commodity pool operator may commingle the property of any pool that it operates or that it intends to operate with the property of any other person.

§ 4.21 Required delivery of pool Disclosure Document.

(a)(1) Subject to the provisions of paragraph (a)(2) of this section, each commodity pool operator registered or required to be registered under the Act must deliver or cause to be delivered to a prospective participant in a pool that it operates or intends to operate a Disclosure Document for the pool prepared in accordance with

§§ 4.24 and 4.25 by no later than the time it delivers to the prospective participant a subscription agreement for the pool; Provided, That any information distributed in advance of the delivery of the Disclosure Document to a prospective participant is consistent with or amended by the information contained in the Disclosure Document and with the obligations of the commodity pool operator under the Act, the Commission's regulations issued thereunder, and the laws of any other applicable federal or state authority; Provided, further, That in the event such previously distributed information is amended by the Disclosure Document in any material respect, the prospective participant must be in receipt of the Disclosure Document at least 48 hours prior to its subscription being accepted by the pool operator.
(2) For the purpose of the Disclosure Document delivery requirement, including any offering memorandum delivered pursuant to § 4.7(b)(1) or 4.12(b)(2)(i), the term “prospective pool participant” does not include a commodity pool operated by a pool operator that is the same as, or that controls, is controlled by, or is under common control with, the pool operator of the offered pool.

(b) The commodity pool operator may not accept or receive funds, securities or other property from a prospective participant unless the pool operator first receives from the prospective participant an acknowledgment signed and dated by the prospective participant stating that the prospective participant received a Disclosure Document for the pool. Where a Disclosure Document is delivered to a prospective pool participant by electronic means, in lieu of a manually signed and dated acknowledgment, the pool operator may establish receipt by electronic means that use a unique identifier to confirm the identity of the recipient of such Disclosure Document, Provided, however, That the requirement of § 4.23(a)(3) to retain the acknowledgment specified in this paragraph (b) applies equally to such substitute evidence of receipt, which must be retained either in hard copy form or in another form approved by the Commission.

§ 4.22 Reporting to pool participants.

(a) Except as provided in paragraph (a)(4) or (a)(6) of this section, each commodity pool operator registered or required to be registered under the Act must periodically distribute to each participant in each pool that it operates, within 30 calendar days after the last date of the reporting period prescribed in paragraph (b) of this section, an Account Statement, which shall be presented in the form of a Statement of Operations and a Statement of Changes in Net Assets, for the prescribed period. These financial statements must be presented and computed in accordance with generally accepted accounting principles consistently applied.

The Account Statement must be signed in accordance with paragraph (h) of this section.

***

§ 4.23 Recordkeeping.

Each commodity pool operator registered or required to be registered under the Act must make and keep the following books and records in an accurate, current and orderly manner at its main business office and in accordance with § 1.31. All books and records required by this section except those required by paragraphs (a)(3), (a)(4), (b)(1), (b)(2) and (b)(3) must be made available to participants for inspection and copying during normal business hours at the main business office of the pool operator. Upon request, copies must be sent by mail to any participant within five business days if reasonable reproduction and distribution costs are paid by the pool participant. If the commodity pool operator's main business office is outside of the United States, its territories or possessions, then upon the request of a Commission representative, the pool operator must provide such books and records as requested at the place in the United States, its territories or possessions designated by the representative within 72 hours after the pool operator receives the request.

(a) Concerning the commodity pool:

(1) An itemized daily record of each commodity interest transaction of the pool, showing the transaction date, quantity, commodity interest, and, as applicable, price or premium, delivery month or expiration date, whether a put or a call, strike price, underlying contract for future delivery or underlying commodity, swap type and counterparty, the futures commission merchant and/or retail foreign exchange dealer carrying the account and the introducing broker, if any, whether the commodity interest was purchased, sold (including, in the case of a retail forex transaction, offset), exercised, expired (including, in the case of a retail forex transaction, whether it was rolled forward), and the gain or loss realized.

(2) A journal of original entry or other equivalent record showing all receipts and disbursements of money, securities and other property.

(3) The acknowledgement specified by § 4.21(b) for each participant in the pool.

(4) A subsidiary ledger or other equivalent record for each participant in the pool showing the participant's name and address and all funds, securities and other property that the pool received from or distributed to the participant.

(5) Adjusting entries and any other records of original entry or their equivalent forming the basis of entries in any ledger.

(6) A general ledger or other equivalent record containing details of all asset, liability, capital, income and expense accounts.
(7) Copies of each confirmation or acknowledgment of a commodity interest transaction of the pool, and each purchase and sale statement and each monthly statement for the pool received from a futures commission merchant, retail foreign exchange dealer or swap dealer.
(8) Cancelled checks, bank statements, journals, ledgers, invoices, computer generated records, and all other records, data and memoranda prepared or received in connection with the operation of the pool.
(9) The original or a copy of each report, letter, circular, memorandum, publication, writing, advertisement or other literature or advice (including the texts of standardized oral presentations and of radio, television, seminar or similar mass media presentations) distributed or caused to be distributed by the commodity pool operator to any existing or prospective pool participant or received by the pool operator from any commodity trading advisor of the pool, showing the first date of distribution or receipt if not otherwise shown on the document.
(10) A Statement of Financial Condition as of the close of (i) each regular monthly period if the pool had net assets of $500,000 or more at the beginning of the pool's fiscal year, or (ii) each regular quarterly period for all other pools. The Statement must be completed within 30 days after the end of that period.
(11) A Statement of Income (Loss) for the period between (i) the later of: (A) the date of the most recent Statement of Financial Condition furnished to the Commission pursuant to § 4.22(c), (B) April 1, 1979 or (C) the formation of the pool, and (ii) the date of the Statement of Financial Condition required by paragraph (a)(10) of this section. The Statement must be completed within 30 days after the end of that period.
(12) A manually signed copy of each Account Statement and Annual Report provided pursuant to § 4.22, 4.7(b) or 4.12(b), and records of the key financial balances submitted to the National Futures Association for each commodity pool Annual Report, which records must clearly demonstrate how the key financial balances were compiled from the Annual Report.

(b) Concerning the commodity pool operator:
(1) An itemized daily record of each commodity interest transaction of the commodity pool operator and each principal thereof, showing the transaction date, quantity, commodity interest, and, as applicable, price or premium, delivery month or expiration date, whether a put or a call, strike price, underlying contract for future delivery or underlying commodity, swap type and counterparty, the futures commission merchant or retail

foreign exchange dealer carrying the account and the introducing broker, if any, whether the commodity interest was purchased, sold, exercised, or expired, and the gain or loss realized; Provided, however, that if the pool operator is a counterparty to a swap, it must comply with the swap data recordkeeping and reporting requirements of Part 45 of this chapter, as applicable.

(2) Each confirmation of a commodity interest transaction, each purchase and sale statement and each monthly statement furnished by a futures commission merchant or retail foreign exchange dealer to:

(i) The commodity pool operator relating to a personal account of the pool operator; and

(ii) Each principal of the pool operator relating to a personal account of such principal.

(3) Books and records of all other transactions in all other activities in which the pool operator engages. Those books and records must include cancelled checks, bank statements, journals, ledgers, invoices, computer generated records and all other records, data and memoranda which have been prepared in the course of engaging in those activities.

§ 4.24 General disclosures required.

Except as otherwise provided herein, a Disclosure Document must include the following information.

(a) Cautionary Statement. The following Cautionary Statement must be prominently displayed on the cover page of the Disclosure Document.

THE COMMODITY FUTURES TRADING COMMISSION HAS NOT PASSED UPON THE MERITS OF PARTICIPATING IN THIS POOL NOR HAS THE COMMISSION PASSED ON THE ADEQUACY OR ACCURACY OF THIS DISCLOSURE DOCUMENT.

(b) Risk Disclosure Statement.

(1) The following Risk Disclosure Statement must be prominently displayed immediately following any disclosures required to appear on the cover page of the Disclosure Document as provided by the Commission, by any applicable federal or state securities laws and regulations or by any applicable laws of non–United States jurisdictions.

* * *

§ 4.25 Performance disclosures.

(a) General principles-- * * *
(b) Performance disclosure when the offered pool has at least a three-year operating history. The commodity pool operator must disclose the performance of the offered pool, in accordance with paragraphs (a)(1)(i)(A) through (H) and (a)(2) of this § 4.25, where: * * *
(c) Performance disclosure when the offered pool has less than a three-year operating history-- * * *

§ 4.26 Use, amendment and filing of Disclosure Document.

(a)(1) Subject to paragraph (c) of this section, all information contained in the Disclosure Document and, where used, profile document, must be current as of the date of the Document; Provided, however, that performance information may be current as of a date not more than three months prior to the date of the Document.
(2) No commodity pool operator may use a Disclosure Document or profile document dated more than nine months prior to the date of its use.

(b) The commodity pool operator must attach to the Disclosure Document the most current Account Statement and Annual Report for the pool required to be distributed in accordance with § 4.22; provided, however, that in lieu of the most current Account Statement the commodity pool operator may provide performance information for the pool current as of a date not more than sixty days prior to the date on which the Disclosure Document is distributed and covering the period since the most recent performance information contained in the Disclosure Document.

(c)(1) If the commodity pool operator knows or should know that the Disclosure Document or profile document is materially inaccurate or incomplete in any respect, it must correct that defect and must distribute the correction to:
(i) All existing pool participants within 21 calendar days of the date upon which the pool operator first knows or has reason to know of the defect; and
(ii) Each previously solicited prospective pool participant prior to accepting or receiving funds, securities or other property from any such prospective participant.
(2) The pool operator may furnish the correction by any of the following means:
(i) An amended Disclosure Document or profile document;
(ii) With respect to a hard copy of the Disclosure Document, a sticker affixed to the Disclosure Document; or
(iii) Other similar means.
(3) The pool operator may not use the Disclosure Document or profile document until such correction has been made.

(d) Except as provided by § 4.8:
(1) The commodity pool operator must electronically file with the National Futures Association, pursuant to the electronic filing procedures of the National Futures Association, the Disclosure Document and, where used, profile document for each pool that it operates or that it intends to operate not less than 21 calendar days prior to the date the pool operator first intends to deliver such Document or documents to a prospective participant in the pool; and
(2) The commodity pool operator must electronically file with the National Futures Association, pursuant to the electronic filing procedures of the National Futures Association, the subsequent amendments to the Disclosure Document and, where used, profile document for each pool that it operates or that it intends to operate within 21 calendar days of the date upon which the pool operator first knows or has reason to know of the defect requiring the amendment.

17 C.F.R. § 4.27 (as amended)
§ 4.27 Additional reporting by advisors of certain large commodity pools.

(a) General definitions. For the purposes of this section:
(1) Commodity pool operator or CPO has the same meaning as commodity pool operator defined in section 1a(11) of the Commodity Exchange Act;
(2) Commodity trading advisor or CTA has the same meaning as defined in section 1a(12);
(3) Direct has the same meaning as defined in section 4.10(f);
(4) Net asset value or NAV has the same meaning as net asset value as defined in section 4.10(b);
(5) Pool has the same meaning as defined in section 1(a)(10) of the Commodity Exchange Act;
(6) Reporting period means the reporting period as defined in the forms promulgated hereunder;

(b) Persons required to report. A reporting person is:
(1) Any commodity pool operator that is registered or required to be registered under the Commodity Exchange Act and the Commission's regulations thereunder; or
(2) Any commodity trading advisor that is registered or required to be registered under the Commodity Exchange Act and the Commission's regulations thereunder.

(c) Reporting.
(1) Except as provided in paragraph (c)(2) of this section, each reporting person shall file with the National Futures Association, a report with respect to the

directed assets of each pool under the advisement of the commodity pool operator consistent with appendix A to this part or commodity trading advisor consistent with appendix C to this part.
(2) All financial information shall be reported in accordance with generally accepted accounting principles consistently applied.

(d) Investment advisers to private funds. Except as otherwise expressly provided in this section, CPOs and CTAs that are dually registered with the Securities and Exchange Commission and are required to file Form PF pursuant to the rules promulgated under the Investment Advisers Act of 1940, shall file Form PF with the Securities and Exchange Commission in lieu of filing such other reports with respect to private funds as may be required under this section. In addition, except as otherwise expressly provided in this section, CPOs and CTAs that are dually registered with the Securities and Exchange Commission and are required to file Form PF pursuant to the rules promulgated under the Investment Advisers Act of 1940, may file Form PF with the Securities and Exchange Commission in lieu of filing such other reports with respect to commodity pools that are not private funds as may be required under this section. Dually registered CPOs and CTAs that file Form PF with the Securities and Exchange Commission will be deemed to have filed Form PF with the Commission for purposes of any enforcement action regarding any false or misleading statement of a material fact in Form PF.

(e) Filing requirements. Each report required to be filed with the National Futures Association under this section shall:
(1)(i) Contain an oath and affirmation that, to the best of the knowledge and belief of the individual making the oath and affirmation, the information contained in the document is accurate and complete; Provided, however, That it shall be unlawful for the individual to make such oath or affirmation if the individual knows or should know that any of the information in the document is not accurate and complete and
(ii) Each oath or affirmation must be made by a representative duly authorized to bind the CPO or CTA.
(2) Be submitted consistent with the National Futures Association's electronic filing procedures.

(f) Termination of reporting requirement. All reporting persons shall continue to file such reports as are required under this section until the effective date of a Form 7W filed in accordance with the Commission's regulations.

(g) Public records. Reports filed pursuant to this section shall not be considered Public Records as defined in § 145.0 of this chapter.

[Appendices to rule excluded]

17 C.F.R. § 4.5 (as amended)

§ 4.5 Exclusion for certain otherwise regulated persons from the definition of the term "commodity pool operator."

(a) Subject to compliance with the provisions of this section, the following persons, and any principal or employee thereof, shall be excluded from the definition of the term "commodity pool operator" with respect to the operation of a qualifying entity specified in paragraph (b) of this section:

(1) An investment company registered as such under the Investment Company Act of 1940;
(2) An insurance company subject to regulation by any State;
(3) A bank, trust company or any other such financial depository institution subject to regulation by any State or the United States; and
(4) A trustee of, a named fiduciary of (or a person designated or acting as a fiduciary pursuant to a written delegation from or other written agreement with the named fiduciary) or an employer maintaining a pension plan that is subject to title I of the Employee Retirement Income Security Act of 1974; Provided, however, That for purposes of this § 4.5 the following employee benefit plans shall not be construed to be pools:

(i) A noncontributory plan, whether defined benefit or defined contribution, covered under title I of the Employee Retirement Income Security Act of 1974;
(ii) A contributory defined benefit plan covered under Title IV of the Employee Retirement Income Security Act of 1974; Provided, however, That with respect to any such plan to which an employee may voluntarily contribute, no portion of an employee's contribution is committed as margin or premiums for futures or options contracts;
(iii) A plan defined as a governmental plan in Section 3(32) of Title I of the Employee Retirement Income Security Act of 1974;
(iv) Any employee welfare benefit plan that is subject to the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974; and

(v) A plan defined as a church plan in Section 3(33) of title I of the Employee Retirement Income Security Act of 1974 with respect to which no election has been made under 26 U.S.C. 410(d).

(b) For the purposes of this section, the term "qualifying entity" means:
(1) With respect to any person specified in paragraph (a)(1) of this section, an investment company registered as such under the Investment Company Act of 1940;
(2) With respect to any person specified in paragraph (a)(2) of this section, a separate account established and maintained or offered by an insurance company pursuant to the laws of any State or territory of the United States, under which income gains and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account, without regard to other income, gains, or losses of the insurance company;
(3) With respect to any person specified in paragraph (a)(3) of this section, the assets of any trust, custodial account or other separate unit of investment for which it is acting as a fiduciary and for which it is vested with investment authority; and
(4) With respect to any person specified in paragraph (a)(4) of this section, and subject to the proviso thereof, a pension plan that is subject to title I of the Employee Retirement Income Security Act of 1974; Provided, however, That such entity will be operated in the manner specified in paragraph (c)(2) of this section.

(c) Any person who desires to claim the exclusion provided by this section shall file electronically a notice of eligibility with the National Futures Association through its electronic exemption filing system; Provided, however, That a plan fiduciary who is not a named fiduciary as described in paragraph (a)(4) of this section may claim the exclusion through the notice filed by the named fiduciary.
(1) The notice of eligibility must contain the following information:
(i) The name of such person;
(ii) The applicable subparagraph of paragraph (a) of this section pursuant to which such person is claiming exclusion;
(iii) The name of the qualifying entity which such person intends to operate pursuant to the exclusion; and
(iv) The applicable subparagraph of paragraph (b) of this section pursuant to which such entity is a qualifying entity.
(2) The notice of eligibility must contain representations that such person will operate the qualifying entity specified therein in a manner such that the qualifying entity:
(i) Will disclose in writing to each participant, whether existing or prospective, that the qualifying entity is operated by a person who has

claimed an exclusion from the definition of the term "commodity pool operator" under the Act and, therefore, who is not subject to registration or regulation as a pool operator under the Act; Provided, that such disclosure is made in accordance with the requirements of any other federal or state regulatory authority to which the qualifying entity is subject. The qualifying entity may make such disclosure by including the information in any document that its other Federal or State regulator requires to be furnished routinely to participants or, if no such document is furnished routinely, the information may be disclosed in any instrument establishing the entity's investment policies and objectives that the other regulator requires to be made available to the entity's participants; and

(ii) Will submit to such special calls as the Commission may make to require the qualifying entity to demonstrate compliance with the provisions of this § 4.5(c);

Provided, however, That the making of such representations shall not be deemed a substitute for compliance with any criteria applicable to commodity futures or commodity options trading established by any regulator to which such person or qualifying entity is subject.

(iii) Furthermore, if the person claiming the exclusion is an investment company registered as such under the Investment Company Act of 1940, then the notice of eligibility must also contain representations that such person will operate the qualifying entity as described in Rule 4.5(b)(1) in a manner such that the qualifying entity:

> (A) Will use commodity futures or commodity options contracts, or swaps solely for bona fide hedging purposes within the meaning and intent of Rules 1.3(z)(1) and 151.5 (17 CFR 1.3(z)(1) and 151.5); Provided however, That in addition, with respect to positions in commodity futures or commodity option contracts, or swaps which do not come within the meaning and intent of Rules 1.3(z)(1) and 151.5, a qualifying entity may represent that the aggregate initial margin and premiums required to establish such positions will not exceed five percent of the liquidation value of the qualifying entity's portfolio, after taking into account unrealized profits and unrealized losses on any such contracts it has entered into; and, Provided further, That in the case of an option that is in-the-money at the time of purchase, the in-the-money amount as defined in Rule 190.01(x) (17 CFR 190.01(x)) may be excluded in computing such five percent; or
>
> (B) The aggregate net notional value of commodity futures, commodity options contracts, or swaps positions not used solely for bona fide hedging purposes within the meaning and intent of Rules 1.3(z)(1) and 151.5 (17 CFR 1.3(z)(1) and 151.5), determined at the

time the most recent position was established, does not exceed 100 percent of the liquidation value of the pool's portfolio, after taking into account unrealized profits and unrealized losses on any such positions it has entered into. For the purpose of this paragraph:

(1) The term "notional value" shall be calculated for each futures position by multiplying the number of contracts by the size of the contract, in contract units (taking into account any multiplier specified in the contract), by the current market price per unit, for each such option position by multiplying the number of contracts by the size of the contract, adjusted by its delta, in contract units (taking into account any multiplier specified in the contract), by the strike price per unit, for each such retail forex transaction, by calculating the value in U.S. Dollars for such transaction, at the time the transaction was established, excluding for this purpose the value in U.S. Dollars of offsetting long and short transactions, if any, and for any cleared swap by the value as determined consistent with the terms of 17 CFR part 45; and

(2) The person may net futures contracts with the same underlying commodity across designated contract markets and foreign boards of trade; and swaps cleared on the same designated clearing organization where appropriate; and

(C) Will not be, and has not been, marketing participations to the public as or in a commodity pool or otherwise as or in a vehicle for trading in the commodity futures, commodity options, or swaps markets.

(3) The notice of eligibility must be filed with the National Futures Association prior to the date upon which such person intends to operate the qualifying entity pursuant to the exclusion provided by this section.

(4) The notice of eligibility shall be effective upon filing.

(5) Annual notice. Each person who has filed a notice of exclusion under this section must affirm on an annual basis the notice of exemption from registration, withdraw such exemption due to the cessation of activities requiring registration or exemption therefrom, or withdraw such exemption and apply for registration within 60 days of the calendar year end through National Futures Association's electronic exemption filing system.

(d)

(1) Each person who has claimed an exclusion hereunder must, in the event that any of the information contained or representations made in the notice of eligibility becomes inaccurate or incomplete, amend the notice electronically

through National Futures Association's electronic exemption filing system as may be necessary to render the notice of eligibility accurate and complete.
(2) This amendment required by paragraph (d)(1) of this section shall be filed within fifteen business days after the occurrence of such event.

(e) An exclusion claimed hereunder shall cease to be effective upon any change which would render:
(1) A person as to whom such exclusion has been claimed ineligible under paragraph (a) of this section;
(2) The entity for which such exclusion has been claimed ineligible under paragraph (b) of this section; or
(3) Either the representations made pursuant to paragraph (c)(2) of this section inaccurate or the continuation of such representations false or misleading.

(f) Any notice required to be filed hereunder must be filed by a representative duly authorized to bind the person specified in paragraph (a) of this section.

(g) The filing of a notice of eligibility or the application of "non-pool status" under this section will not affect the ability of a person to qualify for an exemption from registration as a commodity pool operator under § 4.13 in connection with the operation of another trading vehicle that is not covered under this § 4.5.

17 C.F.R. § 210.12-13

Title 17. Commodity and Securities Exchanges
Chapter II. Securities and Exchange Commission
Part 210. Form and Content of and Requirements for Financial Statements,

§ 210.12–13 Investments; other than securities.

[For management investment companies only]

Col. A	Col. B	Col. C
Description[FN1]	Balance held at close of period–quantity[FN2], [FN3], [FN5]	Value of each item at close of period[FN4], [FN6], [FN7]

[FN1] List each major category of investments by descriptive title.

[FN2] If practicable, indicate the quantity or measure in appropriate units.

[FN3] Indicate by an appropriate symbol each investment which is non-income producing.

[FN4] Indicate by an appropriate symbol each investment not readily marketable. The term "investment not readily marketable" shall include investments for which there is no independent publicly quoted market and investments which cannot be sold because of restrictions or conditions applicable to the investment or the company.

[FN5] Indicate by an appropriate symbol each investment subject to option. State in a footnote: (a) The quantity subject to option, (b) nature of option contract, (c) option price, and (d) dates within which options may be exercised.

[FN6] Column C shall be totaled and shall agree with the correlative amount shown on the related balance sheet.

[FN7] State in a footnote the following amounts based on cost for Federal income tax purposes: (a) Aggregate gross unrealized appreciation for all investments in which there is an excess of value over tax cost, (b) the aggregate gross unrealized depreciation for all investments in which there is an excess of tax cost over value, (c) the net unrealized appreciation or depreciation, and (d) the aggregate cost of investments for Federal income tax purposes.

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), I hereby certify that on this 8th day of March, 2013, the foregoing Brief for Appellee CFTC was electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia using the CM/ECF system. I also certify that I caused 8 paper copies to be delivered to the Clerk's Office.

Service was accomplished on the following by the CM/ECF system, with 2 paper copies also dispatched by overnight service to the following parties:

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