IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INVESTMENT COMPANY INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, Plaintiffs, v. UNITED STATES COMMODITY FUTURES TRADING COMMISSION, Defendant.	Civil Action No. 12-cv-00612 (BAH) Judge Beryl A. Howell

DEFENDANT COMMODITY FUTURES TRADING COMMISSION'S
REPLY TO PLAINTIFFS' SUPPLEMENTAL RESPONSE

The U.S. Commodity Futures Trading Commission replies to Plaintiffs' October 22, 2012 Supplemental Response (ECF Doc. No. 38) as follows:

1. With respect to the district court's decision in *IDSA v. CFTC*, _ F. Supp. 2d. _, 2012 WL 4466311 (D.D.C. Sept. 28, 2012), Plaintiffs' discussion is meritless and non-responsive to the Commission's supplemental filing. As the Commission explained, the cross-reference in Rule 4.5 to the "meaning and intent of" Rules 1.3(z)(1) and 151.5 was for convenience only. The Commission could have reproduced, word for word, the text of those rules within the text of Rule 4.5, and the effect would have been the same. The Commission did not, as Plaintiffs assert, "assume the validity" of the position limits rules; it merely incorporated the bona fide hedging language by reference. Agencies can and frequently do incorporate language by reference, and Plaintiffs present no authority to the contrary.

2. Plaintiffs' contention that the *ISDA* decision reached the merits of the bona fide hedging provisions is wrong, and the *IDSA* court's opinion speaks for itself. Moreover, even if

the *ISDA* court had reached the merits of the position limits bona fide hedging exclusion, which it plainly did not, the *ISDA* court did not have before it, much less did it purport to rule on, the proper scope of the bona fide hedging exclusion from the Rule 4.5 thresholds.

3. Plaintiffs' professed "confusion" concerning how to determine the definition of bona fide hedging is not credible. The rules and cross references were published in the Federal Register, and, to remove any possible doubt, DSIO's interpretive and no-action release (ECF Doc. No. 36-1) provided clarification, setting forth the applicable terms within the body of the letter itself. While it is true that an interpretive and no-action letter does not formally bind the Commission, the release does clarify the legal status quo. Plaintiffs and their members are well aware that no-action letters are a common regulatory tool; indeed, Plaintiffs have relied on one in this very case as an example of SEC regulation of investment companies. *See* ICI Reply at 14 (ECF Doc. No. 26 at 20 of 53) (citing Dreyfus Strategic Investing & Dreyfus Strategic Asset Management, L.P., SEC No-Action Letter (pub. avail. July 2, 1996)).[1]

4. Plaintiffs' supplemental filing also includes impermissible attempts to raise new arguments concerning, *inter alia*, the Commission's consideration of costs and benefits. (*E.g.*, ECF Doc. No. 38 at 4 of 8.) These contentions are waived because they were not raised in

[1] Plaintiffs appear to be arguing, entirely hypothetically, that the CFTC's October 12 letter is a "yes-action" because there could be an entity that could benefit from *ISDA*'s vacatur, but would not qualify for exemption from the trading thresholds under the bona fide hedging definition the Commission adopted in Rule 4.5. There is no cognizable notice-and-comment problem with respect to such an entity. Such an entity would not have a legitimate expectation to benefit from *ISDA* because *ISDA* is not a ruling on the merits of the definition of bona fide hedging, let alone a ruling on the definition as it is used in this rulemaking. Thus, this hypothetical entity would have no right to rely on the definition of bona fide hedging in the prior version of Rule 1.3(z)(1), a definition that the Commission did not adopt in Rule 4.5.

Plaintiffs' summary judgment briefs. *Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99, 108 n.4 (D.C. Cir. 2003).

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

Respectfully submitted,

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Dated: October 25. 2012

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2012, I caused the foregoing document to be served on all counsel via this Court's CM/ECF electronic filing system.

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