



SIFMA, ISDA and IIB File Lawsuit Challenging Commodity Futures Trading Commission's Cross-Border Rule

NEW YORK AND WASHINGTON, D.C., December 4, 2013—The Securities Industry and Financial Markets Association (SIFMA), the International Swaps and Derivatives Association, Inc. (ISDA), and the Institute of International Bankers (IIB) today filed a legal challenge to the Commodity Futures Trading Commission's (CFTC) Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations ("Cross-Border Rule"), and to the cross-border aspects of related rules. The Cross-Border Rule was published by the CFTC in July 2013.

The Associations have filed suit in federal court in the District of Columbia, stating that the CFTC:

- Unlawfully circumvented the requirements of the Administrative Procedure Act and the Commodity Exchange Act by characterizing its regulations as "guidance";
- Failed to conduct any cost-benefit analysis, as required by law;
- Conducted a flawed rulemaking process; and
- Imposed a series of rules that are contrary to the spirit and the letter of international cooperation and may harm global markets.

The lawsuit alleges that the CFTC failed to follow key requirements mandated by law with regard to development and issuance of the Cross-Border Rule. The Associations believe that the Cross-Border Rule violates existing agreements between global policymakers, and works against the G20 Commitment to "implement global standards consistently in a way that ensures a level playing field and avoids fragmentation of markets." The Cross-Border Rule further creates significant financial, legal and administrative burdens on market participants that could harm liquidity and the ability of end-users to manage their risks.

The complaint makes clear that the Associations' members support proper regulation of the derivatives markets designed to improve transparency and mitigate systemic risk, and have attempted in good faith to comply with the CFTC's improperly-adopted regulations. However, the Associations are compelled to bring this action now to stop what is proving to be an unceasing effort by the Commission to regulate the global swaps markets through unpredictable "guidance" documents, advisories, and directives, and to force the CFTC instead to abide by the requirements for rulemaking laid down by Congress.

The Cross-Border Rule could undermine the global commitment to coordination and lead to such conflicts in several ways. For example, a firm could be required to execute the same trade on two different platforms and to clear the same transaction on two different clearinghouses.

Transactions could be required to be reported in two jurisdictions. The Cross-Border Rule could further create significant administrative, legal and financial costs for market participants with no apparent benefits. Conversely, the Securities and Exchange Commission (SEC) has appropriately acknowledged the importance of coordination in its substituted compliance approach to cross-border swaps rulemaking for securities-based swaps. CFTC relief provided thus far is inadequate in scope and/or time limited, leaving critical uncertainties pending.

As a result of the confusing process around the development of the Cross-Border Rule and the CFTC's lack of coordination with the SEC or foreign regulatory bodies, non-U.S. counterparties have become increasingly reluctant to transact with U.S. based dealers, U.S. based corporations and other U.S. based derivatives end-users, or even with non-U.S. dealers that have U.S. personnel involved in the transaction.

Policymakers have expressed concerns about the CFTC's actions, including the November 14th [Cross-Border](#) and November 15th [SEF](#) advisories. The European Commission has stated it was "very surprised by the latest CFTC rules which seem to us to go against both the letter and spirit of the path forward agreement," and that the rules "are another step away from the kind of interoperable global system that we want to build."

"SIFMA and our members support responsible regulatory reform that will bring transparency and accountability to the derivatives markets. We are committed to constructive engagement with regulators following fair and open procedures. It is vital that the costs and benefits of any new rules are properly analyzed to ensure they won't disrupt the markets," said former Senator Judd Gregg, SIFMA CEO. "The CFTC's arbitrary and unilateral approach to cross-border regulation is backdoor rulemaking which has led to widespread market confusion and is creating significant impediments to the orderly functioning of financial markets worldwide."

Stephen O'Connor, ISDA's chairman, stated: "ISDA supports safe, efficient markets and works constructively with regulators around the world toward that end. The CFTC's Cross-Border Rule, however, harm our mutual efforts to develop a robust, consistent and global framework for OTC derivatives regulation that reduces systemic risk. It harms financial markets and market participants and adversely impacts the ability of end-users to hedge their business and financial risks."

IIB CEO Sally Miller stated: "The IIB supports vigilant regulation of the derivatives markets to eliminate systemic risk. Our members have attempted in good faith to comply with the CFTC's improperly-adopted regulations. However, we have become increasingly alarmed by what is proving to be an unceasing effort by the Commission to regulate the global swaps markets through unpredictable "guidance" documents, advisories, and directives. While we support bringing transparency to the markets, transparency has been lacking in the rulemaking process, coming at the expense of international coordination, the global markets and market participants."

For more detail, please read the joint Association Backgrounder on the Rule:

http://www.sifma.org/uploadedfiles/issues/regulatory_reform/otc_derivatives/CFTC-cross-border-derivatives-markets-Backgrounder.pdf

A copy of the Complaint can be found here:

<http://www.sifma.org/issues/item.aspx?id=8589946488>

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About SIFMA

The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

About ISDA

Since 1985, ISDA has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 60 countries. These members include a broad range of OTC derivatives market participants: corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure including exchanges, clearinghouses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

About IIB

The Institute of International Bankers is the only national association devoted exclusively to representing and advancing the interests of the international banking community in the United States. Its membership is comprised of internationally headquartered banking and financial institutions from over 35 countries around the world doing business in the United States. The IIB's mission is to help resolve the many special legislative, regulatory, tax and compliance issues confronting internationally headquartered institutions that engage in banking, securities and other financial activities in the United States. Through its advocacy efforts the IIB seeks results that are consistent with the U.S. policy of national treatment and appropriately limit the extraterritorial application of U.S. laws to the global operations of its member institutions. For more information about the IIB, visit our website at www.iib.org.