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Position Limits Rule Fact Sheet

- On Friday, December 2, ISDA and SIFMA jointly filed lawsuits in US District Court and US Court of Appeals for the District of Columbia challenging the Commodity Futures Trading Commission's (CFTC) Position Limits Rule. The lawsuits ask the courts to vacate the Rule or direct the CFTC to conduct the analysis required to determine that position limits are necessary.

- The Rule, which establishes limits on the positions that investors can hold in certain futures and options contracts and swaps, was adopted on October 18 by the CFTC in 3-2 vote.

- The industry has, from the beginning, supported reasonable and responsible reform measures. While we continue to support regulations that increase the safety and soundness of our financial markets, the trade groups have been forced to take legal action against the CFTC for two reasons.

    - First, the substance of the rule is flawed.
    - Second, the CFTC did not follow the law in drafting the Position Limits Rule. The CFTC erred in its conclusions regarding its statutory authority, did not present a reasoned analysis or consider all evidence, and did not conduct an adequate cost-benefit analysis as required by law.

- The majority of the Commissioners actually oppose the substance of the rule. In addition to the two dissenters, Commissioner Scott O'Malia and Commissioner Jill Sommers, one Commissioner at that time -- Michael Dunn -- publicly stated: "position limits, at best a cure for a disease that does not exist…may harm the very markets we're trying to protect." Commissioner O'Malia essentially laid out the case for a judicial challenge to the Rule.

- Most market participants and others agree with these criticisms of position limits. A substantial academic consensus exists that position limits are unnecessary. (The accompanying backgrounder provides additional information on this issue.)

- The lawsuit argues that the Position Limits Rule should be invalidated for three primary reasons:

    1) The CFTC erred in concluding that the Dodd-Frank Act required it to establish position limits without first determining whether they were even necessary;

    2) The CFTC did not present a reasoned analysis or consider all evidence in setting position limits;

3) The CFTC did not conduct an adequate cost-benefit analysis as required by law.

- Regarding point 1), the misunderstanding of statutory authority:

    - The CFTC promulgated the Position Limits Rule on the theory that Dodd-Frank Act compelled it to establish position limits. As a result, it ignored information demonstrating that position limits not only are not necessary, but would harm commodity markets. The CFTC acknowledged this evidence but found it irrelevant in light of its "mandate." In fact, as noted above, a majority of the CFTC's Commissioners did not believe position limits were effective or necessary.

- Regarding point 2), failure to not present a reasoned analysis or consider all evidence in setting position limits:

    - The Administrative Procedure Act requires federal agencies to exercise their rulemaking discretion in a reasonable way, to provide the public with an adequate explanation of the choices they make, and to base their decision-making on evidence subject to public scrutiny. Additionally, in this case, the Commission was obliged to take into consideration specific policy concerns that Congress enumerated in the statute.
    - The Rule, however, presented virtually no quantitative analysis or empirical evidence to support its conclusions. Its rationale for the Rule repeatedly invoked—without explanation—the Commission's "beliefs" based on unidentified "experience." The CFTC also ignored a substantial academic consensus that position limits are unnecessary.

- Regarding point 3), an adequate cost-benefit analysis was not conducted, as required by law

    - Federal law requires the CFTC to evaluate the costs and benefits of a rule before promulgating it. The CFTC, however, concluded instead that it was only required to consider the costs and benefits in a general sense. This limited analysis is contrary to the CFTC's independent statutory obligation, and is similar to an error made repeatedly by the SEC in rules that were invalidated by the federal court.

- The industry and the financial services trade associations have, from the start, supported reform measures that will increase consumer confidence in the markets, ensure market liquidity and proper functioning of the markets to ensure strong capital formation, economic growth, and job creation.

- We continue to be a productive participant in the implementation process. We provide information and analysis to help regulators craft new rules that meet the intent of the Dodd-

Frank legislation while not creating unintended consequences, impeding market function, increasing systemic risk, or causing negative economic impact on the economy and jobs.

- The lawsuit in no way reflects any lack of support by market participants, or the organizations that represent them, for those provisions of the Dodd-Frank Act designed to reduce systemic risk. These include initiatives intended to reduce counterparty credit risk and increase transparency. The support of market participants for this important goal is evidenced by the ongoing process made:
    - Over 50% of the interest rate swaps market is centrally cleared
    - Almost $175 trillion of OTC derivatives have been eliminated through portfolio compression (or trade tear-ups)
    - Trade repositories have been formed that significantly improve regulatory visibility into trading activity and risk exposures