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## Suit against CFTC draws on commission's own commentary

By Joel Poelhuis

Industry groups are hoping a [legal challenge](#) to new CFTC [position limits](#) on commodity futures and economically equivalent swaps will take strength from an earlier court decision on an SEC rule as well as comments made by three CFTC commissioners.

The International Swaps and Derivatives Association and the Securities Industry and Financial Markets Association filed suit against the CFTC on Dec. 2, alleging that the commission implemented the rule improperly, without conducting an adequate cost-benefit analysis or determining if the limits were necessary or appropriate. Observers say the industry could have a strong case, especially because of disagreement within the CFTC about the legal framework for the rule; ISDA and SIFMA cite three commissioners in the initial court filing.

Statements by Scott O'Malia and Jill Sommers as well as recently retired Michael Dunn pepper the document. Dunn, who joined Gary Gensler and Bart Chilton in the 3-2 vote that approved the rule, nevertheless opined that "no one has presented this agency any reliable economic analysis to support either the contention that excessive speculation is affecting the market we regulate or that position limits will prevent the excessive speculation." Dunn based his support of the rule on his belief that language in the law forced the CFTC to take action by imposing position limits, a point vigorously debated in O'Malia's [dissent](#), which argues that the law gives the commission broad discretion in the manner and timing of establishing the limits. The industry lawsuit repeatedly cites O'Malia's views, including the statement that the rule "fails to provide a legally sound, comprehensible rationale based on empirical evidence."

Isaac Boltansky, a policy analyst and vice president for [Compass Point Research & Trading LLC](#), said the rule represents a weak link in the Dodd-Frank legislation because the language in the law is ambiguous in regard to the requirements for the rulemaking, while it does delineate specific goals. The lawsuit asserts that the commission has no evidence to prove that the newly established position limits are appropriate to the goals of the legislation, which include preventing excessive speculation, ensuring market liquidity, protecting price discovery and preventing market manipulation.

If the court finds that the CFTC did not conduct an adequate cost-benefit analysis, the rule could be on thin ice. The U.S. Court of Appeals for the District of Columbia Circuit, where the suit was filed, in July [struck down](#) a proxy access rule written by the SEC after finding the agency's economic analysis of the issue inadequate. Boltansky said the position limits rules could be similarly vulnerable.

"The opponents of Dodd-Frank have noted, rightfully so, that it does fly in the face of the Administrative Procedure Act," he said, referring to the 1946 law that governs rulemaking by federal agencies. "There just haven't been any government findings that directly show that speculation is affecting the market negatively," he said.

Some observers disagree. Michael Greenberger, a law professor at the University of Maryland cited by the CFTC several times in the final rule release, told SNL that while the agency's cost-benefit approach was adequate, the court's earlier stance in the SEC litigation took an extreme view of the considerations required of regulators in rulemaking and gave challengers hope for another victory.

"If what the D.C. circuit did in the SEC case is applied across the board, it's going to mean essentially that Dodd-Frank is going to be vetoed by the judiciary on a highly technical premise," he said.

While a Government Accountability Office [report](#) confirmed that the CFTC had performed a cost-benefit analysis, the report said that in many instances the agency "determined that it is not feasible to estimate or quantify the costs with reliable precision" and "does not have the resources or information to determine how market participants may adjust their trading strategies in response to the rules."

New position limits had been a controversial issue from the beginning, with the CFTC receiving more than 15,000 comment letters on the topic. While ISDA and SIFMA are named as plaintiffs in the suit, it appears the Futures Industry Association, which represents some of the largest U.S. futures commission merchants, has not taken legal action despite raising some of the same concerns in its comment letter. Aite Group analyst Howard Tai suggested that the organization may be preoccupied with managing the fallout surrounding [MF Global Holdings Ltd.](#) unit [MF Global Inc.](#)

Boltansky said a ruling in favor of the ISDA and SIFMA would likely lead to more challenges of future rules on similar grounds. But Greenberger said it may not matter whether the industry's argument about position limits is upheld by the court for more lawsuits to be filed against Dodd-Frank rulemaking.

"Whatever happens, there's going to be litigation," he said. "The stakes are too high. There's too much money involved."