MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

April 24, 2012

Via Electronic Mail: http://comments.cftc.gov

David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Regulation 4.5 Harmonization

Dear Mr. Stawick:

Managed Funds Association[1] ("MFA") appreciates the opportunity to provide comments to the Commodity Futures Trading Commission (the "Commission" or "CFTC") on its notice of proposed rulemaking to harmonize compliance obligations for the operators of registered investment companies ("RICs") required to register as commodity pool operators ("CPOs") (the "Harmonization Proposal").[2] MFA generally supports the Commission's Harmonization Proposal and believes that harmonization between the Commission and the Securities and Exchange Commission's ("SEC") (together the "Commissions") regulations are necessary given the Commission's final rulemaking regarding §§ 4.5 and 4.13.[3] We believe, however, that the Harmonization Proposal should also harmonize regulations for operators of privately-offered funds as many such funds with investment advisers registered with the SEC will likely have to register with the Commission as a result of the rescission of § 4.13(a)(4) and other changes in law and regulation. We provide a few comments and recommendations in this respect.

[1] The Managed Funds Association (MFA) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry's contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, North and South America, and all other regions where MFA members are market participants.

[2] 77 *FR* 11345 (Feb. 24, 2012), hereinafter, the "Harmonization Proposal."

[3] *See* letter from Stuart J. Kaswell, Executive Vice President and Managing Director, MFA, to David A. Stawick, Secretary, CFTC, dated April 12, 2011, RIN 3038-AD30, *available at:* http://www.managedfunds.org/wp-content/uploads/2011/06/4.12.11-MFA-CTA_CPO-Amendments-final.4.12.11.pdf; *see also* letter from Stuart J. Kaswell, Executive Vice President and Managing Director, MFA, to David A. Stawick, Secretary, CFTC, dated October 18, 2010, NFA Petition to Amend Rule 4.5, *available at:* https://www.managedfunds.org/wp-content/uploads/2010/10/MFA-Ltr-on-NFA-petition.final_.10.18.10.pdf.

I. The Harmonization Proposal

The Harmonization Proposal provides relief from, amendments to, and clarifications on the Commission's Part 4 regulations. Specifically, the Harmonization proposal provides:

- relief from the disclosure document/prospectus delivery and acknowledgement requirements under § 4.21, Required delivery of pool Disclosure Document;
- relief from certain periodic financial reporting obligations under § 4.22, Reporting to pool participants;
- clarification on the disclosure of fees;
- amendments to the disclosure document update requirements under § 4.26, Use, amendment and filing of Disclosure Document;
- clarification on mandatory SEC and CFTC certification language; and
- relief from the requirement that books and records be maintained only at the main business office.[4]

II. Comments

A. Delivery of Disclosure Documents and Periodic Reports

§ 4.21 requires a CPO, prior to accepting any funds, securities or other property from a prospective investor, to receive a signed and dated acknowledgement from a prospective investor that he received a copy of the pool's disclosure document.[5] § 4.22 requires a CPO to deliver periodic reports to participants (together with § 4.21, the "Disclosure Document and Account Statement Delivery Requirements").[6] The Commission recently adopted relief from the Disclosure Document and Account Statement Delivery Requirements for exchange-traded funds ("ETFs") by allowing ETFs to comply with the requirements by making such documents available on their web sites.[7] The Harmonization Proposal extends this relief, in addition to RICs, to publicly offered commodity pools, recognizing that "there is no useful distinction between publicly offered pools whose units are listed for trading on a national securities exchange, and those which are not."[8]

We strongly believe that allowing CPOs to comply with the Disclosure Document and Account Statement Delivery Requirements by making such documents available on their web sites will ultimately promote greater transparency and accessibility of disclosure documents and will afford more meaningful protections to purchasers. As investors increasingly rely on digital information (including searching for information through the internet) and communication, many of the methods that investors and funds previously used to communicate and disseminate information are no longer as relevant. Accordingly, we believe that, substantively, the relief provided by the Harmonization Proposal is the correct policy. Moreover, we would further suggest two additional circumstances that warrant such relief.

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[4] *Id.*

[5] 17 CFR 4.21.

[6] 17 CFR 4.22.

[7] 76 FR 28641 (May 18, 2011).

[8] Harmonization Proposal at 11346.

First, for the reasons stated above, we believe that such relief should similarly be made available to the CPOs of privately-offered pools; whose pools generally have investors that are even more sophisticated than public pools. In fact, given the nature of the investors, the case for relief for CPOs of privately-offered pools may be even stronger than for CPOs of public pools. Traditional channels of communication are, in many instances, less efficient for both investors and pool operators. Allowing CPOs to communicate with investors and prospective investors through their website, whether the website is password protected or available to the public, will allow all investors and prospective investors to access similar information on a more timely basis.[9]

Second, we believe the same exemption from the Commission's Disclosure Document and Account Statement Delivery Requirements should be available to the operator of a pool that is listed or admitted to trading on a foreign exchange in a jurisdiction that the Commission recognizes as adhering to international disclosure standards, such as those adopted by the International Organization of Securities Commissions. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2009 amended the definition of "commodity interest" to include swaps and the definition of "commodity pool" to include an investment vehicle trading in swaps. As a result of the amendments, a foreign-listed investment fund that trades swaps and is also offered to U.S. investors will fall within the definition of "commodity pool" once the term swap is further defined and effective through rulemaking.[10] In addition, based on Commission precedents, even a foreign-listed fund that is not offered to U.S. investors could be considered a "commodity pool" subject to the Commission's rules if U.S. investors are able to purchase fund interests in the secondary market. Because the sponsor of a listed fund cannot prevent such secondary market purchases, the sponsor must assume that interests in the fund will be purchased by U.S. investors.

This "commodity pool" status may be particularly problematic in the context of foreign-listed funds that are primarily invested in the securities markets. As is the case with respect to U.S. registered and listed funds, it would be very difficult, or impossible, for the CPO of a foreign-listed fund to receive a signed and dated acknowledgement from a prospective participant that it received a disclosure document prior to investing in the product, and, therefore, to comply with the Commission's Disclosure Document and Account Statement Delivery Requirements. Accordingly, the CPO of such foreign-listed fund should be permitted to operate under the same type of relief afforded to exchange-traded funds, and other publicly offered funds, pursuant to the Commission's proposed § 4.12(c).

B. Concerns with Prospectus and Disclosure Documents

The Harmonization Proposal addresses some of the discrepancies between the Part 4 regulations and the regulations under the Company Act. For example, the Harmonization Proposal allows pool operators to make the break-even point disclosure required by § 4.24(d)(5) in the section immediately following all disclosures required by SEC Form N-1A or Form N-2; and allows the past performance of other pools and accounts required to be disclosed by §§ 4.25(c)(2)-(5) to be presented in a RIC's statement of additional information ("SAI"). Nevertheless, we are concerned that by merely bundling the

[9] The Jumpstart Our Business Startups Act (the "JOBS Act"), recently signed into law by President Obama, removes the general solicitation and advertising prohibition for certain private offerings exempt from registration under Section 4(2) of the Securities Act of 1933. Accordingly, we respectfully suggest that the Commission also should consider harmonizing its regulations pertaining to private pools, *i.e.,* §§ 4.7(b) and 4.13(a)(3).

[10] These pools may not be registered under the Securities Act of 1933 or the Investment Company Act of 1940 (the "Company Act"), and, thus, may not qualify for the relief from the Disclosure Document and Account Statement Delivery Requirement contemplated in the Harmonization Proposal.

Commissions' disclosure requirements together into one prospectus, the end result will be a very long and confusing disclosure document for investors. While such a prospectus could explain the differences between the SEC and the Commission's fee tables, the document is likely to be even lengthier than just combining a public pool prospectus with a mutual fund prospectus if it has to explain the different regulatory requirements. We do not believe that such a combined document, which may be several hundred pages long, will necessarily serve the best interest of investors or promote investor protection. We believe registrants should have the option of providing a combined document or maintaining separate SEC and CFTC required documents on their website.

C. Harmonization of Filing Deadline for Audited Financial Statements; and Quarterly Account Statements

As a result of the Commission's rescission of § 4.13(a)(4), many private investment funds will have to have both an investment adviser registered with the SEC and a CPO registered with the CFTC. Under the Investment Advisers Act of 1940 (the "Advisers Act"), an adviser with "custody" of a fund's assets generally must comply with the SEC's custody rule, Rule 206(4)-2, by distributing to fund investors audited financial statements prepared in accordance with generally accepted accounting principles within 120 days of the fund's fiscal year end (180 days for a fund-of-funds). A CPO of a fund that relies on § 4.7 must file with the NFA, and distribute to pool investors, certain audited financial statements within 90 days of the pool's fiscal year end. Under § 4.22(f)(2), a CPO that operates a § 4.7 pool that is a fund-of-funds may claim a 90-day automatic extension, subject to the compliance with certain conditions, for the annual report for that pool. We believe the Commission should harmonize with the Advisers Act the date by which a CPO must file with NFA and distribute to investors its Annual Report, including audited financial statements. Accordingly, we recommend that the Commission amend § 4.7 by changing the date that a CPO must file with NFA and distribute to investors certain audited financial statements from within 90 days to within 120 days of the pool's fiscal year end.

§ 4.7(b) provides qualifying operators with relief from the § 4.22 requirement to provide participants with monthly account statements, provided that operators prepare and distribute to participants quarterly account statements within 30 calendar days after the end of the reporting period.[11] Privately-offered funds do not have a periodic reporting requirement under the securities regulations. In practice, however, most privately-offered funds provide their investors with quarterly statements. We are concerned that 30 days may not allow sufficient time for operators of privately-offered funds to prepare and distribute quarterly statements. It is not uncommon for private investment funds to have investments in hard-to-value or illiquid assets. In these situations, funds typically engage third party service providers for valuation services. Certain products are only valued at the end of the month, and oftentimes fund managers spend a considerable amount of time reconciling their positions/valuations with those of service providers. Accordingly, we recommend that the Commission amend § 4.7(b) by changing the number of days by which a CPO must prepare and distribute quarterly statements to pool participants from 30 days to 45 days.

D. Location of Books and Records

Finally, we believe, for the same reasons discussed in the Investment Adviser Association's letter on the Harmonization Proposal, that the Commission should grant all CPOs and CTAs relief from the §

[11] 17 CFR 4.7(b).

4.23 requirement that books and records be maintained at the CPO's main business office.[12] The Harmonization Proposal extends relief currently available to operators of ETFs to operators of public commodity pools and RICs and allows them to maintain books and records with certain third parties, provided that the operators meet certain requirements, including providing NFA with information with respect to its books and records.[13] We believe this relief should be extended to all CPOs and CTAs, including those of privately-offered pools.

Currently, the SEC allows registered investment advisers to maintain their required records at a wider range of third-parties than does current § 4.12(c) for operators of commodity ETFs. For example, investment advisers registered with the SEC may keep records with, but not limited to, administrators, distributors, custodians, sub-advisers, banks, broker-dealers and/or futures commission merchants. Such advisers are required to identify the locations of their books and records in Form ADV, Part 1A, which is publicly available on the SEC's web site. We believe the Commission also should consider harmonizing its requirement on the location of books and records with the SEC. Investors of privately-offered investment funds are increasingly expecting and demanding that third party service providers perform services, such as creating accounting records, and receiving and reviewing subscriptions. Moreover, prevailing technology allows operators to easily and readily access the records of their pools when necessary. Thus, we recommend that the Commission provide relief to all CPOs and CTAs, including those of privately-offered pools, by harmonizing its requirement on the location of books and records with the SEC and allowing CPOs and CTAs to maintain books and records with third parties, provided that registrants disclose the location of such books and records to NFA.

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[12] *See* letter from Karen L. Barr, General Counsel, Investment Adviser Association, to David A. Stawick, Secretary, CFTC, dated April 24, 2012, Regulation 4.5 Harmonization.

[13] *See* 17 CFR 4.12.

We commend the Commission for its efforts to harmonize the regulatory requirements for commodity pools. We appreciate the opportunity to offer further suggestions to achieve that same objective. We would be happy to discuss our comments or any other issues raised in the Harmonization Proposal at greater length with the Commission or its staff. If the staff has any questions, please do not hesitate to call Jennifer Han or the undersigned at (202) 730-2600.

Respectfully submitted,

/s/ Stuart J. Kaswell

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General Counsel

Cc:

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