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April 24, 2012

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

**Re: Comments on the Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators**

Dear Mr. Stawick:

Fidelity Investments ("Fidelity")[1] appreciates the opportunity to comment on the proposed rules for Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators, published by the Commodity Futures Trading Commission ("CFTC") in the Federal Register on February 24, 2012 (the "Proposed Rules").[2] Fidelity acts as an investment manager to certain registered investment companies ("mutual funds")[3] that from time to time utilize futures, options, or swaps subject to the CFTC's jurisdiction.

Pursuant to the CFTC's final rule amendments to CFTC Rule 4.5, certain mutual funds will no longer qualify for exclusion from the definition of a "commodity pool" and, accordingly, their advisers will be required to register as commodity pool operators ("CPOs").[4] Registered CPOs will be subject to the CFTC's recordkeeping, reporting, and disclosure requirements pursuant to part 4 of the CFTC's regulations (as would be modified by the Proposed Rules, the

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[1] Fidelity is one of the world's largest providers of financial services, with assets under administration of $3.7 trillion, including managed assets of $1.6 trillion. Fidelity provides investment management, retirement planning, portfolio guidance, brokerage, benefits outsourcing and many other financial products and services to more than 20 million individuals and institutions, as well as through 5,000 financial intermediary firms.

[2] Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators, 77 Fed. Reg. 11345 (Feb. 24, 2012) [hereinafter Proposed Rules], *available at* http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-3388a.pdf.

[3] For purposes of this letter, the term "mutual funds" includes exchange-traded funds.

[4] Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed. Reg. 11252 (Feb. 24, 2012), *available at* http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-3390a.pdf; correction notice published at 77 Fed. Reg. 17328 (Mar. 26, 2012).

"part 4 rules"). Fidelity still has significant concerns with this recent CFTC decision, and believes that the CFTC rulemaking in this area failed to consider fully the costs of CPO registration for mutual funds. However, if mutual funds are subject to CPO registration, Fidelity strongly supports harmonizing the compliance obligations for mutual funds and their advisers who must register as CPOs under the amended rules. Unfortunately, we believe that the Proposed Rules do not adequately address the additional costs and administrative burdens that would far outweigh any perceived benefits to investors or the marketplace.[5]

We cite with favor the letters submitted by the Investment Company Institute and the Securities Industry and Financial Markets Association's Asset Management Group ("AMG"), which provide further data and costs associated with compliance with the part 4 rules and address in more detail the industry's concerns with complying with the disclosure, reporting, and recordkeeping requirements. In addition, we support the AMG's recommendation that the CFTC exempt from certain of the part 4 rules those private funds that relied on the recently rescinded Rule 4.13(a)(4) and that have an investment adviser registered with the Securities and Exchange Commission ("SEC").

Among the concerns that we share with the industry are the following: (i) general issues with the required disclosures in disclosure documents; (ii) lack of clarity surrounding the disclosure document review and comment process; (iii) frequency and timing of reporting requirements; (iv) holdings disclosure obligations; and (v) general recordkeeping and maintenance requirements.

The foregoing list provides just a sample of the many concerns we have with the part 4 rules as they apply to mutual funds. This letter focuses on certain of the disclosure issues as a means to illustrate the overall need to revisit the Proposed Rules. If the CFTC proceeds with the changes as proposed, we believe that some mutual funds will cease or limit their use of certain investment strategies, thereby restricting the options available to investors and potentially

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[5] Fidelity previously submitted comment letters to the CFTC detailing our concerns with, and recommendations to, proposed amendments to the CPO registration requirements for mutual funds. *See* Letter from Scott C. Goebel, Senior Vice President, Fidelity Investments, to David Stawick, Sec'y, CFTC (Oct. 18, 2010), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26305&SearchText=, and Letter from Scott C. Goebel, Senior Vice President, Fidelity Investments, to David Stawick, Sec'y, CFTC (Apr. 12, 2011), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=42179&SearchText=goebel. We also support previous letters and remarks submitted by industry trade groups. *See, e.g.,* Letter from Karrie McMillan, General Counsel, Investment Company Institute, to David A. Stawick, Sec'y, CFTC (Apr. 12, 2011), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=42191&SearchText=, Written Statement from Karrie McMillan for July 6, 2011 Roundtable on CFTC Proposal to Amend Rule 4.5 and Rescind Rules 4.13(a)(3) and 4.13(a)(4), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=46732&SearchText=, and Remarks from the Asset Management Group of SIFMA for July 6, 2011 Roundtable on CFTC Proposal to Amend Rule 4.5 and Rescind Rules 4.13(a)(3) and 4.13(a)(4), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=46741&SearchText=.

adversely impacting the trading markets.[6] In order to prevent these undesirable results, we recommend that the CFTC consider the following concepts:

- Mutual funds and their advisers should not be subject to the added costs and burdens of additional compliance obligations imposed by the CFTC in connection with CPO registration because they already are subject to an extensive regulatory framework imposed by the SEC.

- Many of the compliance obligations under the Proposed Rules conflict with existing rules and guidance from the SEC, which will leave registrants in the position of having to choose which regulatory regime they will violate. We urge the CFTC to rescind the Proposed Rules and instead work directly with the SEC to propose joint rulemaking that will avoid duplicative and conflicting requirements imposed by these agencies.

## I. Mutual Funds Are Subject Already to Extensive Regulatory Oversight

Mutual funds are subject to extensive oversight and regulation. The primary statute governing mutual funds, the Investment Company Act of 1940 (the "1940 Act"), together with the rules promulgated thereunder, provides a comprehensive set of regulation that encompasses investor protections, extensive disclosure requirements,[7] and comprehensive financial reporting and recordkeeping requirements.[8] In addition, mutual fund investors are afforded protections

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[6] Commodity-based mutual funds, together with their wholly owned subsidiaries, generally are considered long-term liquidity providers to the commodity options, futures, and swaps markets. If mutual funds (or their wholly owned subsidiaries) cease to employ these instruments in the face of CPO registration or the compliance requirements under the part 4 rules, they could impair liquidity in the commodity futures, options, and swaps markets and could potentially have a destabilizing effect on commodity prices and commodities markets. Decreased liquidity could leave commodity producers and commercial end users with unmatched demand, higher costs of hedging and increased risks, as mutual funds and their subsidiaries often take the long side of hedging transactions with these commodity producers and end users. The net result of these adverse effects on trading markets could be higher commodity prices.

[7] Form N-1A requires mutual funds to make a vast array of disclosures that provide protection to investors that is substantively equivalent to that provided by the CFTC's disclosure regime. Among other required disclosures, a fund must disclose its principal investment strategies and principal investment risks in its prospectus. Form N-1A also requires disclosure of certain performance data. *See* Items 2, 4, 9, and 16 of Form N-1A, *available at* http://www.sec.gov/about/forms/formn-1a.pdf.

[8] Mutual funds are required to produce audited financial statements, make periodic reports to the SEC and to fund shareholders and follow exhaustive recordkeeping requirements. *See* Investment Company Act of 1940, 15 U.S.C. §§80a-30 – 80a-31.

under state law and other federal statutes, such as the Investment Advisers Act of 1940,[9] the Securities Act of 1933 and the Securities Exchange Act of 1934.

Given these ample protections afforded to mutual fund investors under statutes and regulations that the SEC administers, imposing CFTC regulations that address the same general topics is not only unnecessary, it is counterproductive due to the inevitable shareholder confusion that will result from the conflicting approaches to disclosure. Neither the CFTC nor the National Futures Association has produced any evidence that investors in mutual funds are being harmed by a lack of CFTC oversight or compliance with the CFTC's part 4 rules. We remain concerned about the potential costs to funds and fund shareholders associated with such obligations and fail to see any significant benefits or additional protection to investors that would result from requiring additional compliance obligations for certain mutual funds.

For Fidelity, we anticipate that currently only a handful of the more than 400 mutual funds that we manage would trigger a requirement that their investment advisers register as CPOs and that will, therefore, be subject to the part 4 rules. Today we can only state with relative certainty that three of our funds will be required to have a registered CPO under revised Rule 4.5.[10] None of these funds is offered to the general public – two are offered only to other mutual funds managed by Fidelity Management & Research Company or an affiliate and the third is only available through a discretionary managed account program that Fidelity offers. We are disappointed that the CFTC rules on the scope of the application of Rule 4.5 do not recognize or accommodate fund structures that do not involve direct sales and interaction with individual shareholders. We therefore urge the CFTC to consider the additional costs associated with complying with the part 4 rules for just a handful of mutual funds, all of which already are subject to SEC oversight and an extensive regulatory framework. These costs likely will be passed on to fund shareholders, with little, if any, benefit in return. Many of the substantial costs and burdens of compliance apply equally whether a CPO offers one, ten, or one hundred mutual funds subject to the part 4 rules.

## II. The Part 4 Rules Conflict with Existing SEC Disclosure Rules and Guidance

Many of the disclosure requirements set forth in the part 4 rules overlap with current SEC rules that are intended to address the same concerns, while others are flatly contradictory. In

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[9] Advisers to mutual funds are required to register with the SEC under the Investment Advisers Act of 1940 [hereinafter Advisers Act]. The Advisers Act also imposes exhaustive recordkeeping requirements on investment advisers. *See* Investment Advisers Act of 1940, 15 U.S.C. §80(b)-4(a).

[10] We are currently uncertain about the exact number of mutual funds that revised Rule 4.5 will affect because many of the rules necessary for this analysis have not been finalized, including the CFTC's definition of the term "swap" and required margin levels for uncleared swaps, as well as the Department of Treasury's final determination regarding the status of foreign exchange forwards. In addition, the mutual fund industry is awaiting answers to a number of written questions posed to the CFTC that seek guidance regarding application of revised Rule 4.5, including guidance on the how the revised rule will apply to funds-of-funds. Until all of this is accomplished, it is not possible for the industry to assess fully the impact of Rule 4.5 and the Proposed Rules.

order for a mutual fund to comply with the disclosure requirements under the part 4 rules, it would be compelled to violate certain SEC rules and published guidance. At the very least, Fidelity believes that the CFTC, working with the SEC, should propose rules that complement existing regulatory requirements imposed on mutual funds, as opposed to rules that conflict with these requirements.

We believe that layering CFTC-required disclosures on top of current fund disclosures will confuse shareholders and frustrate existing SEC oversight by obfuscating SEC-required disclosures, thereby impeding understanding of the information that the SEC currently requires mutual funds to include in their disclosure documents.[11] The SEC's recent efforts to address derivatives disclosure demonstrates that the agency is aware of the importance of communicating the risks and characteristics of these instruments to shareholders. By requiring a separate set of conflicting or duplicative disclosure requirements, the CFTC will leave mutual funds and their advisers perplexed in the face of inconsistent regulations from two regulators and, therefore, unable to resolve differing comments from the agencies on this disclosure.

The part 4 rules require mutual funds to add disclosures to their prospectuses that are boilerplate, technical, and in many cases unduly prominent. For example, Rule 4.24 requires funds to include lengthy risk disclosure, all in capital letters.[12] Such disclosure is inconsistent with the SEC's continued efforts to ensure that mutual funds use "plain English" and include disclosures in a standardized format to facilitate comparisons among funds – to say nothing of the fact that the substance of the required disclosures includes references to redemption

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[11] *See* Letter from SEC to Investment Company Institute on Derivatives-Related Disclosures by Investment Companies (July 30, 2010), *available at* http://www.sec.gov/divisions/investment/guidance/ici073010.pdf [hereinafter SEC-ICI Letter]. The SEC has recently undertaken to reinforce with the industry the SEC's expectations regarding derivatives-related disclosures by investment companies, as summarized in its 2010 letter to the Investment Company Institute, which stated in relevant part: "We will continue to review fund registration statements and shareholder reports to evaluate fund disclosures related to derivatives. Among other things, we will continue to review fund registration statements to assess whether a fund's principal investment strategies and risks are presented in plain English, and discuss the relevance of derivative transactions to the fund's investment operations. Where appropriate, we will query whether the strategies listed are, in fact, principal investment strategies and whether the risk disclosure is tailored to those strategies. We also will continue to compare a fund's investment objectives, strategies and risks in its registration statement to its shareholder reports to assess whether the disclosures regarding the fund's operations appear to be consistent with its registration statement disclosures. Similarly, we will continue to review financial statement disclosures, including assessing whether derivatives-related disclosures in financial statements appears to be consistent with the M[anagement's] D[iscussion of] F[und] P[erformance]." *Id.* at 6-7.

[12] Rule 4.24(b)(1) requires the following risk disclosure statement: "YOU SHOULD CAREFULLY CONSIDER WHETHER YOUR FINANCIAL CONDITION PERMITS YOU TO PARTICIPATE IN A COMMODITY POOL. IN SO DOING, YOU SHOULD BE AWARE THAT COMMODITY INTEREST TRADING CAN QUICKLY LEAD TO LARGE LOSSES AS WELL AS GAINS. SUCH TRADING LOSSES CAN SHARPLY REDUCE THE NET ASSET VALUE OF THE POOL AND CONSEQUENTLY THE VALUE OF YOUR INTEREST IN THE POOL. IN ADDITION, RESTRICTIONS ON REDEMPTIONS MAY AFFECT YOUR ABILITY TO WITHDRAW YOUR PARTICIPATION IN THE POOL." This disclosure appears inconsistent with the 1940 Act, which generally does not allow a mutual fund to suspend the right of redemption other than in narrowly specified circumstances that are disclosed to investors in a prospectus. *See* 15 U.S.C. §80a-22(e).

restrictions that seem unsuited to the way mutual funds operate.[13] SEC guidance has also required that prospectus disclosure avoid "a disproportionate emphasis on possible investments or activities of the fund that are not a significant part of the fund's investment operations."[14] In its release adopting amended Form N-1A, the registration form for mutual funds, the SEC also emphasized that prospectus disclosure should be limited to "information that is necessary for an average or typical investor to make an investment decision" and that the prospectus should not include "lengthy disclosure that discourages investors from reading the prospectus or obscures essential information about an investment in a fund."[15] The general instructions to Form N-1A also incorporate these guidelines.[16]

With respect to derivatives-related disclosure specifically, the SEC recently provided guidance that "all funds that use or intend to use derivative instruments should assess the accuracy and completeness of their disclosure, including whether the disclosure is presented in an understandable manner using plain English."[17] This guidance further describes the SEC's observation "that some funds provide generic disclosures about derivatives that . . . may be of limited usefulness for investors in evaluating the anticipated investment operations of the fund, including how the fund's investment adviser actually intends to manage the fund's portfolio and the consequent risks."[18]

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[13] *See* Registration Form Used by Open-End Management Investment Companies, Release Nos. 33-7512 and 34-39748, at 5 (Mar. 13, 1998) [hereinafter N-1A Adopting Release], *available at* http://www.sec.gov/rules/final/33-7512r.htm. *See also* Enhanced Disclosure And New Prospectus Delivery Option For Registered Open-End Management Investment Companies, 77 Fed. Reg. 4546 (Jan. 26, 2009) (SEC summary prospectus rules that simplify mutual fund disclosures and require disclosing certain key information in plain English and in a standardized order), *available at* http://www.sec.gov/rules/final/2009/33-8998fr.pdf, and Interactive Data for Mutual Fund Risk/Return Summary, 74 Fed. Reg. 7748 (Feb. 19, 2009) (SEC rule amendments requiring mutual funds to provide risk/return summary information in a form that is intended to improve its usefulness to investors in the prospectus and on Websites using an interactive data format), *available at* http://www.sec.gov/rules/final/2009/33-9006fr.pdf.

[14] N-1A Adopting Release, *supra* note 13, at 7.

[15] *Id.*

[16] *See* N-1A General Instruction C.1(a), (b) and (c). General Instruction C.1(c) to Form N-1A provides as follows: "Responses to the Items in Form N-1A should be as simple and direct as reasonably possible and should include only as much information as is necessary to enable an average or typical investor to understand the particular characteristics of the Fund. The prospectus should avoid: including lengthy legal and technical discussions; simply restating legal or regulatory requirements to which Funds generally are subject; and disproportionately emphasizing possible investments or activities of the Fund that are not a significant part of the Fund's investment operations. Brevity is especially important in describing the practices or aspects of the Fund's operations that do not differ materially from those of other investment companies. Avoid excessive detail, technical or legal terminology, and complex language. Also avoid lengthy sentences and paragraphs that may make the prospectus difficult for many investors to understand and detract from its usefulness."

[17] SEC-ICI Letter, *supra* note 11, at 4.

[18] *Id.* at 2.

The part 4 rules require multiple disclosures that we believe clearly violate the plain English principles the SEC has undertaken for so many years to enforce. While the CFTC's disclosures cover many of the same topics as the SEC-required disclosures, the disclosure requirements differ from Form N-1A to at least some extent in most cases,[19] resulting in highly duplicative and potentially inconsistent and confusing disclosure. We believe these disclosures run counter to the SEC's guidance and in many cases are inconsistent with the requirements of Form N-1A.[20]

The part 4 rules also require affected mutual funds with less than a three-year operating history to disclose prior performance of other managed pools and accounts in the statement of additional information, including pools and accounts that are not of the same class as the offered pool or account. The SEC allows, but does not require, mutual funds to disclose past performance of other accounts, *but only when* the accounts are sufficiently comparable and subject to certain conditions. In fact, a condition in the SEC Staff's series of no-action letters allowing a mutual fund to include historical performance of other accounts is that "the performance was for all of the adviser's private accounts that were managed with investment objectives, policies and strategies *substantially similar* to those used in managing the fund" (emphasis added).[21]

In recognition of this conflict, the CFTC includes footnote 26 in its release stating that it has had conversations with SEC Staff on this issue who have indicated that the SEC "would consider requests for no-action relief regarding the performance presentations, if necessary and appropriate."[22] Fidelity believes that it is impractical for a regulator to impose requirements on a regulated entity that would require that entity to seek an exemption from the entity's primary regulator to comply with these requirements. We are extremely concerned that the CFTC fundamentally appears to misunderstand the process for receiving SEC no-action relief, the extent of the relief afforded under the no-action letter process, and the ability of mutual funds to rely upon such relief. Although we understand that the CFTC and SEC Staffs have discussed this issue, we find it inconceivable that the entire mutual fund industry would be expected to seek relief from the SEC based on these conversations. Even were such relief forthcoming, no-action relief is not equivalent to law or agency rulemaking. It is important correspondence from agency staff members that they would not recommend enforcement against a mutual fund or firm, but this recommendation is not legally binding.

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[19] Because the requirements differ, it is uncertain to what extent they would be interpreted as requiring the same disclosures. Or, for that matter, how differing interpretations could be resolved.

[20] For example, compare N-1A General Instruction C.3(a): ("[D]isclose the information required by Items 2 through 8 in numerical order at the front of the prospectus. Do not precede these Items with any other Item except the Cover Page (Item 1) or a table of contents. . .") to CFTC Rule 4.24(b) ("The following Risk Disclosure Statement must be prominently displayed immediately following any disclosures required to appear on the cover page of the Disclosure Document . . .") (emphasis added).

[21] Nicholas-Applegate Mutual Funds, SEC No-Action Letter (Aug. 6, 1996). *See also* Bramwell Growth Fund, SEC No-Action Letter (Aug. 7, 1996) and GE Funds, SEC No-Action Letter (Feb. 7, 1997).

[22] Proposed Rules, *supra* note 2, at 11347.

Further, in granting no-action relief to one mutual fund, the SEC does not grant blanket relief to all mutual funds. The relief is based on the facts and representations made in a particular request and does not provide flexibility for different scenarios across an entire industry. Accordingly, because such relief is granted on an applicant-by-applicant basis, this likely would result in more than 400 requests at the mutual fund complex level or more than 1,700 requests if required on a fund-by-fund basis.[23] In addition, while waiting for the SEC to provide this relief, which typically takes several months, a mutual fund would be prohibited from including the prior performance disclosure mandated by the part 4 rules and, therefore, would be in violation of the CFTC's requirements. In addition to the costs and burdens associated with seeking no-action relief, the inevitable staggered timing in receiving such relief will result in disparate disclosures across similar mutual funds and in investor confusion. Furthermore, even if all applicable mutual funds include such prior performance disclosure, investors likely will be confused nonetheless because of the difference in performance information provided for funds not subject to these requirements. We do not believe that this disclosure will inform a shareholder's decision to invest in a fund (and, in fact, could make that decision harder).

Our goal in this letter is not to treat exhaustively the conflicts and tensions between the SEC and CFTC regulatory regimes – such a task is likely beyond the capacity of even the most well resourced of commentators. Instead, our letter represents an attempt to illustrate some of the practical difficulties of complying with the rules of these two separate and conflicting regimes. Fidelity urges that the most appropriate course of action is for the CFTC to hold a comprehensive set of discussions with the SEC to work through the intricacies of the two regulatory regimes, followed by a new joint proposed rulemaking from the two agencies.

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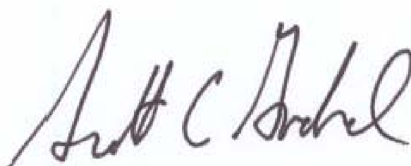
We appreciate the opportunity to comment on the Proposed Rules. Fidelity would be pleased to provide any further information or respond to any questions that the Staff may have.

Sincerely,



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[23] Proposed Rules at 18-19 (estimating that 1,750 registered investment companies would trigger registration for approximately 416 sponsors).

cc: Honorable Gary Gensler, Chairman
Honorable Jill E. Sommers, Commissioner
Honorable Bart Chilton, Commissioner
Honorable Scott D. O'Malia, Commissioner
Honorable Mark P. Wetjen, Commissioner

Honorable Mary L. Schapiro, SEC Chairman
Honorable Elise B. Walter, SEC Commissioner
Honorable Luis A. Aguilar, SEC Commissioner
Honorable Troy A. Paredes, SEC Commissioner
Honorable Daniel M. Gallagher, SEC Commissioner

Ms. Eileen Rominger, Director, SEC Division of Investment Management