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April 24, 2012

VIA ELECTRONIC MAIL

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

Commission Regulation 4.5 Harmonization

Dear Mr. Stawick:

We are submitting this letter in response to the request by the Commodity Futures Trading Commission ("Commission" or "CFTC") for comments regarding proposed amendments to the Commission's regulations ("Harmonization Proposal")[1] regarding requirements applicable to investment companies registered under the Investment Company Act of 1940 ("1940 Act") whose advisors will be required to register as commodity pool operators ("CPOs") under recently adopted changes to Rule 4.5 of the Commission's regulations ("Amended 4.5").[2] We appreciate the opportunity to comment on the Harmonization Proposal, and support the Commission's efforts to lessen the compliance burdens imposed by Part 4 of the Commission's regulations ("Part 4") on registered investment companies ("Registered Funds") and their advisors because, under Amended 4.5, such funds will no longer qualify for exclusion from the definition of "commodity pool."

We have divided this letter into three Sections. Section I summarizes the salient differences between the structure and operation of pooled vehicles operated by CPOs and that of Registered Funds. In Section II, we urge the Commission to re-evaluate its position contained in the Harmonization Proposal that certain provisions of Part 4 should be applicable to all Registered Funds that hold futures, options on futures and swaps ("Instruments") in excess of the thresholds established in Amended 4.5. Given that Registered Funds are subject to the 1940 Act

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1 *Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operator*, 77 FR 11345.

2 *Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations,* 77 FR 11252.

and other federal securities laws, as well as to comprehensive regulation by the Securities and Exchange Commission ("SEC"), we believe that requiring such funds to additionally comply with certain provisions of Part 4 would not further the purposes and goals of the Commodity Exchange Act ("CEA"). Indeed, we believe that the investor confusion resulting from such partial compliance with Part 4 may be harmful to the achievement of such purposes and goals and, of equal importance, that such compliance would cause Registered Funds to experience significant costs that would ultimately reduce returns to their shareholders without providing offsetting investor protections. Section III of this letter comments on specific provisions of Part 4 which we believe would require duplicative or inconsistent disclosure by Registered Funds if the Harmonization Proposal were to be adopted as written.

SECTION I — DIFFERENCES BETWEEN CONVENTIONAL COMMODITY POOLS AND TYPICAL REGISTERED FUNDS

Given the broad usage of both U.S. commodity pools and Registered Funds by many types of financial market participants and the vast size of the commodity pool and Registered Fund industries, it is virtually impossible to describe and characterize them without over-generalizing their attributes. We acknowledge that this letter in some instances contains overly broad descriptions or statements about commodity pools and Registered Funds in order to make meaningful comparisons between them.

Conventional commodity pools operated by CPOs are usually organized as limited partnerships, trusts or limited liability companies. The CPO of a commodity pool, and certain others, such as its commodity trading advisor ("CTA") are subject to the CEA as well as to the regulations of the Commission and the National Futures Association ("NFA") (collectively, "CEA Regime"), but the commodity pool itself is not regulated. The majority of commodity pools are not publicly offered and therefore provide only limited updated information to investors. In addition, commodity pools are not required to provide daily redemptions to investors. For this reason, CPOs are required to include in their pools' disclosure documents the following legend as part of the required risk disclosure statements: "IN ADDITION, RESTRICTIONS ON REDEMPTIONS MAY AFFECT YOUR ABILITY TO WITHDRAW YOUR PARTICIPATION IN THE POOL."[3]

In contrast, Registered Funds are independent entities, usually organized as corporations, business trusts or statutory trusts, and are directly subject to the provisions of the 1940 Act and the regulations adopted thereunder by the SEC (collectively, "1940 Act Regime"), which substantively regulates virtually all aspects of their organizational, governance, operational and investment activities. For example, Registered Funds' capital structure,[4] minimum number of

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[3] CFTC Rule 4.24(b).

[4] 1940 Act, Section 18.

independent directors,[5] investments in certain types of industries[6] and other investment companies,[7] and transactions with affiliates[8] are regulated. Section 18 of the 1940 Act and the SEC regulations adopted thereunder place significant limitations both on the amount of leverage and the risks that may be borne by Registered Funds from speculative activity, Section 35 and Rule 35d-1 circumscribe the content and use of Registered Funds' names and Section 17(e) and the rules adopted thereunder set forth requirements for the custody of Registered Funds' portfolio assets. Indeed, the scope, breadth and degree of specificity of the provisions of the 1940 Act alone has caused it to be called the "most intrusive financial legislation known to man or beast."[9] In addition, advisors to Registered Funds are subject to regulation pursuant to the Investment Advisers Act of 1940 ("Advisers Act") and the SEC regulations adopted thereunder. For example, the anti-fraud provisions of Section 206 of the Advisers Act prohibits advisors, among other things, from making misstatements or misleading omissions of fact.[10]

Unlike most commodity pools, Registered Funds usually are publicly offered and provide liquidity to their shareholders either by offering redeemable securities (open-end investment companies or "mutual funds") or listing their shares for daily trading on a securities exchange ("closed-end funds"). Mutual funds, because they offer redeemable securities, are required by the 1940 Act Regime to compute their net asset value as of the end of each business day and to stand ready to redeem their shares at such daily net asset value. Many closed-end funds also compute and make available their net asset value on a daily basis in order to comply with the rules of the exchange on which their shares are listed. In addition, exchange-traded registered investment companies, known as "ETFs," have hybrid structures that combine certain characteristics of mutual funds and closed-end funds and therefore compute and make available their daily net asset value. All publicly offered Registered Funds must provide disclosure documents, such as summary prospectuses, statutory prospectuses, Statements of Additional Information ("SAIs"), shareholder reports and other supplemental information, which are publicly available on such funds' websites and/or from their advisors/distributors.

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5 1940 Act, Section 10(a).

6 1940 Act, Section 12(d)(3).

7 1940 Act, Section 12(d)(1).

8 1940 Act, Section 17.

9 Jerry W. Markham, *A Financial History of Modern U. S. corporate scandals: from Enron to reform,* 2006. at 423 quoting Clifford E. Kirsch, ed., *The Financial* Services *Revolution: Understanding the Changing Role of Banks, Mutual Funds and Insurance Companies*, 1997 at 382.

10 Also, compensation that may be received by an advisor to a Registered Fund is subject to Section 205 of the Advisers Act and the rules thereunder.

Most Registered Funds have the authority to transact in Instruments and other derivatives, subject to the limits established under the 1940 Act Regime. Today, Registered Funds, including those holding Instruments in their portfolios, rely upon exemptions provided in current CFTC Rule 4.5 and, therefore, are not required to be managed by a CPO and are not subject to the CEA Regime. Registered Funds transact in Instruments for a variety of purposes, such as hedging, providing efficient portfolio management, gaining exposure to investments that the funds are otherwise unable to obtain directly, or for temporary "defensive" purposes to generate income on what otherwise would be idle cash held when attractive investment opportunities are not available. Consequently, portfolio holdings of Instruments by Registered Funds are fluid and may change frequently. A Registered Fund may hold no Instruments today but in the future might hold the maximum amount permitted under the 1940 Act Regime.

In light of these differences, we believe, as discussed below, that there is a basic incompatibility between the CEA Regime and the 1940 Act Regime. While Part 4 was designed for conventional commodity pools, it was not designed to cover Registered Funds already subject to comprehensive regulation under the 1940 Act Regime and other federal securities laws which provide significant investor protections.

SECTION II — THE HARMONIZATION PROPOSAL SHOULD EXEMPT MOST REGISTERED FUNDS FROM THE APPLICATION OF PART 4.

The Commission has stated several grounds for the adoption of Amended 4.5. The Commission concluded that "significant exposure to the derivatives markets . . . should subject an entity to the Commission's oversight,"[11] especially

> [i]n order to ensure that the Commission can adequately oversee the commodities and derivatives markets and assess market risk associated with pooled investment vehicles under its jurisdiction . . . .[12]

The Commission has also articulated its position that "entities that are offering services substantially identical to those of a registered CPO should be subject to substantially identical regulatory obligations."[13] In furtherance of this position, the Commission has (i) adopted a specific marketing restriction and (ii) provided useful guidance as to the factors that it believes demonstrates a Registered Fund's intent to engage in "regulatory arbitrage" between the Commission and the SEC. The factors cited by the Commission, among others, include

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11 Amended 4.5, p. 11256.

12 Amended 4.5, p. 11254.

13 Amended 4.5, p. 11255.

> whether the fund's primary investment objective is tied to a commodity index, . . . [and] whether the futures/options/swaps transactions engaged in by the fund will directly or indirectly be its primary source of potential gains and losses [("Factors")].[14]

Although we generally agree with both statements of the Commission's positions, we believe that the concerns giving rise to these positions are different and therefore should be addressed separately rather than dealt with in a combined fashion. In other words, policy concerns about market oversight and risk assessment should not be addressed by the application of Part 4 to Registered Funds where such application ignores the policy concerns of the 1940 Act Regime.

The 1940 Act Regime provides sufficient grounds for such an exemption.

The stated purpose of the CEA is "to protect all market participants from fraudulent or other abusive sales practices and misuses of customer assets."[15] The Commission has constructed a regulatory regime to further such purpose. The federal securities laws were enacted to achieve a similar purpose, and the SEC, as primary regulator of Registered Funds, has adopted a comprehensive regulatory, disclosure, bookkeeping and reporting regime which incorporates stringent anti-fraud provisions and robust disclosure requirements that we believe are comparable to the CEA Regime. We believe, therefore, that the substantive and broad-reaching 1940 Act Regime affords the Commission sufficient grounds upon which to wholly exempt advisors that manage and advise Registered Funds from Part 4 with respect to such funds. The advisors of such Registered Funds would continue to be subject to the anti-fraud and liability provisions of the CEA.[16] Therefore, we urge the Commission to reconsider its decision and to exempt managers of Registered Funds, except Primary Activity Funds (as defined below), from the application of Part 4 in its entirety.

Part 4 should be applicable only to "Primary Activity Funds."

If, however, Registered Funds remain subject to the requirements of Part 4, we urge the Commission to recognize that Registered Funds are not monolithic in their use of Instruments but hold them for a wide variety of purposes and in varying amounts. In light of these differences between individual Registered Funds, we believe that the degree to which the advisor of any particular Registered Fund ought to be subjected to the CEA Regime should be directly

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14 Amended 4.5, p. 11259.

15 CEA, Section 3(b).

16 CEA, Section 6(c).

related to such fund's actual use of Instruments, its primary investment objectives and the tenor of its marketing materials. Accordingly, we respectfully propose that the Commission focus on those advisors that operate and market Registered Funds that seek to achieve speculative returns from Instruments. In such cases, we agree with the Commission's view that it should require such additional information as, together with the Registered Fund's public regulatory filings with the SEC, will enable the Commission to achieve its statutory mission. We believe that the Commission's regulatory concerns about Registered Funds transacting in Instruments is adequately addressed by the scope and extent of SEC disclosure requirements and the 1940 Act Regime, with the exception of the small number of Registered Funds discussed below that have a primary objective of achieving speculative returns ("Primary Activity Funds").[17]

While we agree with the Commission that the advisors of Primary Activity Funds ought to be subject to the CEA Regime as it is imposed on CPOs, advisors of typical Registered Funds using Instruments as part, but not a primary part, of their investment strategy, should not be treated in the same manner. As discussed in Section I above, many Registered Funds utilize some Instruments in their portfolios from time to time, but usually in different ways and for different purposes than commodity pools. Most of the Registered Funds currently holding Instruments do so to further their overall goal of running a well-managed and diversified portfolio and we believe that their managers should be permitted to continue to do so for legitimate investment purposes in addition to bona fide hedging, such as achieving non-speculative exposure to uncorrelated financial assets. Treating conventional Registered Funds otherwise would subject them to unnecessary, costly and potentially confusing additional regulation.

The Commission should adopt a separate test to identify Primary Activity Funds.

We believe that only Primary Activity Funds' use of Investments should trigger the Commission's legitimate concern of preventing "regulatory arbitrage." In such cases, the Commission's statutory purposes warrant the imposition of the CEA Regime on the advisors of such funds who should be required to provide their investors with the full array of materials required to be provided by traditional commodity pools (subject to harmonization with such funds' summary prospectuses, statutory prospectuses and SAIs prepared pursuant to the 1940 Act Regime, as discussed below in Section III of this letter). The Commission should adopt a marketing and/or investment test separate and apart from its Amended 4.5 regulatory threshold to identify Primary Activity Funds; only the managers of such funds should be required to make available the full array of disclosures provided by CPOs of traditional commodity pools in accordance with the provisions of the CEA Regime. In order that Primary Activity Funds be

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[17] Examples of Primary Activity Funds include managed futures mutual funds as well as leveraged mutual funds and leveraged ETFs.

properly classified in a consistent, clear and even-handed manner, we propose that the Commission use the Factors it has identified as the basis for identifying such funds.[18]

The Commission has not adequately considered the costs and delays that are likely to result from the implementation of the Harmonization Proposal.

Therefore, we urge the Commission to revise Harmonization Proposal in light of the differences in usage of Instruments by conventional Registered Funds and typical commodity pools as well as the likely investor confusion that will result from the inclusion of disclosures that are not relevant to the actual investment in shares of most Registered Funds made by investors. We believe that the Commission has not taken into account the potential costs to Registered Funds and their investors that are likely to result from regulatory review delays of newly required disclosures by such funds. These delays will be added to other delays likely to occur, such as those stemming from obtaining individual SEC staff no-action relief to permit a Registered Fund to make changes to current disclosures as would now be required under the CEA Regime, such as the inclusion of past related performance of affiliated funds.[19] All of these delays may have a serious, negative effect on Registered Funds engaged in various offerings by causing an hiatus in the effectiveness of their registration statements with the SEC and the Commission.

We have concerns that the immediate and practical effect of implementing the Harmonization Proposal will be a serious detriment caused solely by such regulatory action. These negative effects may differ, in part, depending upon whether or not an existing Registered Fund currently holds Instruments in excess of the "de minimis" threshold in Amended 4.5. Compliance with Amended 4.5 may have the unintended consequence of forcing existing Registered Funds currently holding Instruments in excess of the "de minimis" threshold to reduce or eliminate their positions in such Instruments within the 60-day compliance effectiveness period of the Harmonization Proposal ("60-Day Grace Period").[20] Given the

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18 In other words, the Factors would be used to establish that a fund is a Primary Activity Fund because it has, or promotes, a "primary investment objective" and "primary source" of investment returns from Commission-regulated Instruments.

19 In footnote 26 of the Harmonization Proposal, the Commission indicated that it has had "preliminary discussions with SEC staff on this issue" and that "[t]he SEC staff stated that it would consider requests for no-action relief regarding the performance presentations, if necessary and appropriate." 77 FR 11345, at 11347. In our experience, the formality of the SEC no-action letter process frequently involves lengthy time periods until the requested relief is granted.

20 For the purpose of registration only, Part 4 compliance with Amended 4.5 must occur on the later of either December 31, 2012 or within 60 days following the adoption of the final definition of the term "swap". However, fund compliance with the balance of Part 4 must occur no later than the end of the 60-Day Grace Period. Amended 4.5, 77 FR 11252.

number of existing Registered Funds, the dollar amount of their Instrument holdings, and the very short time period in which to effect such sale, termination or unwinding activities, unforeseen and/or adverse effects on the commodities markets may take place as a simple imbalance of supply and demand for such Instruments results.

Advisors of existing Registered Funds may decide to eliminate all Instruments holdings due to worries that they may not comply with all of the requirements of the CEA Regime (other than CPO registration) the within 60-Day Grace Period. We view the 60-Day Grace Period as inadequate. As a practical matter, revising existing Registered Fund practices to meet all Commission recordkeeping, reporting, disclosure and compliance requirements cannot be accomplished in such a brief time period. For example, crafting and adopting a new commodities compliance manual that will appropriately mesh with a Registered Fund's existing securities compliance manual can be expected to take longer than two months, as will setting up new records and investor reporting systems. Devising a Registered Fund's amended registration statement that will be deemed satisfactory by NFA, Commission and SEC staffs will certainly exceed two months, in part because the review staffs will likely be overwhelmed by the sheer number of Registered Fund filings made within the 60-Day Grace Period. Indeed, finalizing an acceptable registration statement will take considerably longer, if, for example, the grant of individual SEC no-action relief is required for a Registered Fund to include Commission-mandated past related performance disclosures.

Although discussed neither in Amended 4.5 nor the Harmonization Proposal, existing Registered Funds that currently hold no Instruments, or hold Instruments in an amount below the "de minimis" threshold, also face the issues discussed above, only in reverse. Operating under current Rule 4.5, advisors of these Registered Funds now are free to transact in Instruments (within the limits of the 1940 Act Regime) solely on the basis of their investment objectives and strategies, without regard to other regulatory requirements or timing concerns. However, in order to comply with the Harmonization Proposal as written, these Registered Funds will be forced to revise many of their existing operations and practices to meet Commission recordkeeping, reporting, disclosure and compliance requirements prior to transacting in Instruments in excess of the "de minimis" threshold amount. The advisor of an existing Registered Fund, therefore, either will be precluded entirely from transacting in Instruments in excess of the "de minimis" threshold, no matter how appropriate, or will be forced to wait months[21] following the decision to acquire Instruments before it can fully implement its fund's investment objectives and strategies. Existing Registered Funds may also be required to amend their registration statements in order to discuss these issues, with significant out of-pocket, competitive and opportunity costs to its shareholders, before undertaking the required Commission regulatory revisions.

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[21] As discussed above, this delay will occur due to the need to achieve compliance with Part 4 and obtain individual SEC no-action letter relief.

If the Commission does not exempt advisors from Part 4, it should provide Registered Funds with a compliance grace period of at least 12 months.

If the Commission does not exempt advisors of Registered Funds from Part 4 in its entirety or revise the Harmonization Proposal in the manner discussed above, we urge the Commission to provide all existing Registered Funds and their advisors with a Part 4 compliance grace period of at least 12 months after they first exceed the "de minimis" threshold of Amended 4.5. Such a grace period would mitigate the immediate and practical negative impacts that the Harmonization Proposal could cause. A grace period longer than the 60-Day Grace Period would enable the advisor of any existing Registered Fund to comply with all required elements of the CEA Regime in a thoughtful, planned manner and to avoid precipitous investment decisions made solely on the basis of arbitrary time constraints. A longer compliance grace period would permit all of the Commission's stated goals to be accomplished without causing the serious negative effects discussed above. We therefore urge the Commission to provide, at a minimum, for a compliance grace period of at least 12 months for Registered Funds.

SECTION III — THERE ARE SPECIFIC REDUNDANCIES OR CONFLICTS BETWEEN CERTAIN PROVISIONS OF THE CEA REGIME AND THOSE OF THE 1940 ACT REGIME WHICH MUST BE ADDRESSED PRIOR TO IMPLEMENTATION OF AMENDED 4.5 AND THE HARMONIZATION PROPOSAL

As discussed above in Section II, we believe that the Commission should re-evaluate its decision to impose its disclosure requirements on all Registered Funds holding Instruments above the "de minimis" threshold (with the exception of Primary Activity Funds) because significant protections meeting both the CEA requirements and public policy rationale are provided by the disclosure requirements of the 1940 Act Regime. If, however, the Commission does not exempt all Registered Funds other than Primary Activity Funds from the requirements of the CEA Regime, we have highlighted in this section certain important redundancies or incompatibilities between it and the 1940 Act Regime. In some cases, we have proposed solutions different from those put forth by the Commission in the Harmonization Proposal.

Disclosure document delivery requirements should be modified.

We propose that the Commission amend CFTC Rule 4.12(c) to allow a Registered Fund to comply with the disclosure document delivery requirements of CFTC Rule 4.21 by permitting such fund to post the required information in readily available form on its public website. Also, given that Registered Funds are publicly, not privately offered, we suggest that the Commission broadly exempt Registered Funds from the requirement of receiving an executed participant acknowledgement prior to accepting funds, securities or other property from an investor.

Account statement requirements are duplicative.

The Commission has proposed to amend CFTC Rule 4.12(c) so that a Registered Fund could meet the requirements under CFTC Rules 4.22(a) and (b) to distribute monthly or quarterly Account Statements to investors by making such documents available on its public website. Nevertheless, we believe that such information is largely duplicative of the information currently provided to Registered Fund shareholders, and therefore would provide no new, but possibly confusing, material that will increase costs to such shareholders. Therefore, we suggest instead that the Commission revise the Harmonization Proposal to permit a Registered Fund to satisfy the requirements under CFTC Rules 4.22(a) and (b) by posting on its public website all reports to shareholders fully compliant with, and required by, SEC rules.

NFA review of a registered fund's disclosure documents is duplicative.

We note that the registration statements and amendments thereto, including the prospectuses contained therein submitted to the SEC by Registered Funds, are actively reviewed by the SEC's staff. In addition to the disclosures applicable to Registered Funds as required by the 1940 Act Regime, such funds are required to adhere to the disclosure standard of the Securities Act of 1933 (*i.e.*, their registration statements and amendments must not contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading).[22] If a Registered Fund amends or supplements its prospectus and/or SAI, such amendments and supplements also must be filed with the SEC and are equally subject to monitoring and/or review by the SEC. Given that the CEA Regime and the 1940 Act Regime have similar public policy objectives with respect to investor disclosures, we believe that NFA review of Registered Fund disclosure documents is duplicative and therefore should not be required.

Brokerage commission disclosure should not be required.

We observe that the brokerage commission information required by CFTC Rule 4.22 is the only disclosure item not currently included in the financial statements required to be provided by Registered Funds. Although disclosure of brokerage commission information may be appropriate for commodity pools, we believe that disclosure of a Registered Fund's relevant trading costs usually is more complicated. A typical Registered Fund incurs several types of trading costs that are frequently much more important than brokerage costs (*e.g.*, market impact costs and spreads for fixed income, over-the-counter derivatives and foreign currency transactions), none of which are disclosed separately. Those transaction costs are, however, included in a Registered Fund's calculation of its returns as required by the SEC. We believe that disclosing brokerage commissions in Registered Fund reports would be likely to confuse,

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22 See Section 11(a) and Section 12(a)(2) of the Securities Act of 1933.

and, more importantly, mislead, investors and therefore we propose that advisors to Registered Funds be exempt from providing such information.

Registered Funds, at their election, should be permitted to file either individual prospectuses or combined prospectuses in compliance with Part 4.

As mentioned above, Registered Funds are organized in a variety of ways, and their prospectuses often reflect these arrangements. So, for example, some Registered Funds are established under state law as individual "stand-alone" corporations or trusts, while others are organized as series trusts ("Series Trust"). Each series of a Series Trust is separate from all others and typically enjoys inter-series limited liability from all other series and the Series Trust itself.[23] Many mutual funds and ETFs that offer multiple Registered Funds, whether organized as stand-alone funds or separate series of a Series Trust, prepare a combined prospectus for some or all of such funds if they share sufficiently similar important characteristics. This practice yields a variety of benefits, including comparability among funds and substantial cost savings to shareholders. Registered Funds choose the prospectus format (e.g., multiple fund series in a combined prospectus or a prospectus for each fund series) that they believe best fits the nature of the Registered Funds to be disclosed.

The applicability of Part 4 to the prospectus formats used by Registered Funds will impose unwarranted costs and unwieldy disclosure documents that ultimately will harm investors, especially where a Series Trust has dozens of series. CFTC Rule 4.10(d)(1) defines the term "pool" as "any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests." Further, Rule 4.20(a)(1) mandates that "a commodity pool operator . . . operate its pool as an entity cognizable as a legal entity separate from that of the pool operator." Series of Series Trust, under this definition, are not separate legal entities. Therefore, conflicts will occur if the Commission requires that a Series Trust file a combined disclosure document for all pool series, even if the Registered Funds intend that separate prospectuses for individual pool series be prepared and filed separately.[24]

Conversely, the Commission's requirement that the disclosure document for all series of a commodity pool must be combined will likely result in other conflicts with respect to the 1940 Act Regime applicable to prospectus disclosure. For example, some Registered Funds, organized as series of a Series Trust, may become subject to the CEA Regime with respect to

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23 See, for example, 12 Del. Code §3801 *et seq.* (2011).

24 The Commission had recognized this Series Trust structure in CFTC Rules 4.22(a)(5) and 4.22(c)(6) where it has acknowledged that when pools are organized as a series fund structure with limitation of liability among the different series, the account statement and financial statements are not required to include consolidated information for all series.

disclosures, while other Registered Funds organized under the same Series Trust may not. Given that compliance with the CEA Regime would require that all series of such a Series Trust be combined in a joint prospectus, inconsistent disclosures will appear in such a prospectus. We believe that investors' comparisons between and among such Registered Funds would be made both difficult and confusing. In addition, we are concerned that stand-alone Registered Funds that currently use a combined prospectus may decide to alter such existing prospectus format in order to meet the CEA Regime. This re-formatting would necessarily incur unwarranted operational, compliance, marketing, legal and printing costs to sever a combined prospectus into many single prospectuses.

We believe that the disparate disclosure requirements of the CEA Regime as applied to Registered Funds organized as stand-alone funds and series Registered Funds are merely technical in nature, without providing any significant new benefits to investors of such Registered Funds. Given the costs that will be incurred by Registered Funds if they must re-assemble their current prospectuses into different configurations of single and combined disclosure documents, we urge the Commission to permit Registered Funds to format their prospectuses according to their current methodologies.

Compliance with the CEA Regime's Recordkeeping Rules should be modified.

We believe that compliance with the SEC's comprehensive recordkeeping rules should be deemed to satisfy the recordkeeping requirements under the CEA Regime, including those imposed by CFTC Rule 4.23(a)(4) which requires a CPO to maintain ledgers or other equivalent records for each participant in any pool it manages to record each participant's "name and address and all funds, securities and other property that the pool received from or distributed to the participant."[25] In contrast to participants of typical commodity pools, Registered Fund investors often hold their shares in omnibus accounts maintained by financial intermediaries. Transfer agents for Registered Funds frequently do not know the identities of beneficial owners of Registered Fund shares held in such omnibus accounts; this is especially true of closed-end funds and ETFs. The benefits to Registered Funds' investors provided by compliance with CFTC Rule 4.23(a)(4) are likely to be negligible, at best, and will be negatively offset by the substantial operational changes and costs that will result. Therefore, we propose that the Commission should either (1) exempt managers of Registered Funds from the recordkeeping requirements under CFTC Rule 4.23(a)(4) or (2) clarify that a Registered Fund's transfer agent's maintenance of records of financial intermediaries holding omnibus accounts will satisfy the information requirements regarding pool participants under such Rule.

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[25] CFTC Rule 4.23(a)(4).

Providing trading records to shareholders upon request should not be required.

We are also concerned that the implementation of provisions of CFTC Rule 4.23 requiring that advisors of Registered Funds retain and, upon request, make available to shareholders records of transactions in Investments, will directly conflict with the policies adopted by most Registered Funds with respect to sharing information with their investors about portfolio positions and Investment transactions. Most Registered Funds have adopted policies that generally prohibit selective disclosure of trading and position information to their shareholders, so as to reduce the risks of front running and unfair competition. For example, many Registered Funds publish certain information about their portfolio positions on a delayed basis in order to provide information on a non-selective basis at a time when front running is not an issue. The provisions of CFTC Rule 4.23, therefore, is contrary to Registered Funds' policies adopted with respect to selective disclosure. Compliance with CFTC Rule 4.23 could compel advisors of Registered Funds to disclose publicly information about current portfolio holdings following any shareholder request to review such records[26] in violation of their SEC-mandated policies. Although the SEC may require less comprehensive disclosure about trading information than that required by the CEA Regime, we believe that the information required pursuant to the SEC's rules is sufficient to satisfy the Commission's concerns about investor protection. Therefore, we believe that advisors of Registered Funds should be exempt from the obligation under CFTC Rule 4.23 to make records of trading and investment transactions available to investors. Accordingly, we urge the Commission to exempt advisors of Registered Funds entirely from compliance with its position disclosure requirements in view of the SEC's requirements. Otherwise, the requirements of CFTC Rule 4.23 will directly conflict with the certain fundamental elements of Registered Funds' operations that have been deliberately tailored to meet certain securities law requirements.

Disclosure of past related performance information should be only required of Primary Activity Funds.

We have concerns about the conflicts that exist between the Commission's past related performance reporting requirements and the permissible extent of such disclosure under the 1940 Act Regime. The Commission's rules require CPOs to disclose certain past related performance information in the disclosure documents of their commodity pools.[27] CFTC Rule 4.25(c) requires a commodity pool with less than a three-year operating history to disclose the performance of other pools and accounts operated and traded by its CPO.[28] In addition, the

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[26] See Regulation FD 17 C.F.R. Part 243.

[27] CFTC Rules 4.24(n) and 4.25(c).

[28] CFTC Rule 4.25(c). Additionally, "if the pool operator, or if applicable, the trading manager, has not operated for at least three years any commodity pool in which seventy-five percent or more of the contributions to the

Commission requires CPOs of commodity pools to describe material differences among the pools for which past related performance is disclosed, including, without limitation, differences in leverage and use of different trading programs.[29] In contrast, Registered Fund past related performance disclosure, when permitted by the SEC, is far narrower than the disclosure required by the Commission. The SEC allows (but does not require) a Registered Fund to include certain limited information about past performance of accounts and funds other than the fund offered in its prospectus. However, the SEC permits only the inclusion of past performance of those other funds and accounts that have substantially similar investment objectives and strategies,[30] which is subject to conditions designed to ensure that such past related performance disclosure does not mislead investors into thinking that such past performance is indicative of the future performance of the Registered Fund. Thus, compliance with the CEA Regime will give rise to situations where the advisor of a Registered Fund will be required to disclose past related performance information while it is simultaneously prohibited from doing so under the 1940 Act Regime. We also note that today many Registered Funds choose not to include even permitted past related performance information because the SEC's staff often delays approval of such registration statements due to intensive review of such related fund or account performance disclosures.

The Commission's proposal to permit advisors of Registered Funds to present past related performance information in their SAIs rather in their prospectuses does not resolve this fundamental conflict between Commission and SEC regulations. The limitations imposed by the SEC staff on past related performance disclosure are principles-based and designed to ensure a consistent and comparable quality of disclosure among Registered Funds. They are also imposed to ensure that investors are not misled. We believe that requiring advisors of Registered Funds to conform their disclosures in accordance with the Commission's past related performance rule in their registration statements would create inconsistent reporting standards among registered

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pool were made by persons unaffiliated with the commodity pool operator, the trading manager, the pool's commodity trading advisors or their respective principals, the pool operator must also disclose the performance of each other pool operated by and account traded by the trading principals of the pool operator (and of the trading manager, as applicable) unless such performance does not differ in any material respect from the performance of the offered pool and the pool operator (and trading manager, if any) disclosed in the Disclosure Document."

29 CFTC Rule 4.25(a)(3)(iv).

30 See, SEC No-Action Letter, Nicholas-Applegate Mutual Funds (pub. Avail. Aug. 6, 1996) which states that a registered investment company may include in its prospectus the performance of its investment advisor's similarly managed private accounts if "(1) the performance was for all of the advisor's private accounts that were managed with investment objectives, policies and strategies substantially similar to those used in managing the fund; (2) the relative sizes of the fund and the private accounts were sufficiently comparable to ensure that the private account performance would be relevant to a potential investor in the fund; and (3) the prospectus clearly disclosed that the performance information related to the advisor's management of private accounts and that such information should not be interpreted as indicative of the fund's future performance."

investment companies, and would force Registered Funds to include information that such Funds and the SEC (and potentially plaintiffs) may view as misleading. Even if Commission and SEC positions with respect to past related performance disclosure were truly harmonized, such a requirement would also generally result in delays in the SEC registration statement review process, which would operate to the competitive disadvantage of Registered Funds subject to the requirement. For these reasons, we urge the Commission to exempt all Registered Funds, except Primary Activity Funds, from the Commission's requirement to disclose past related performance information.

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We believe that the concerns and conflicts described above demonstrate that the Commission's Harmonization Proposal does not adequately address certain important issues that will make compliance by Registered Funds extremely difficult as well as very costly for their shareholders. We respectfully propose that the Commission delay the implementation of the revisions to the Part 4 compliance requirements for advisors of Registered Funds until all of the outstanding issues raised in this letter have been fully addressed and resolved to the full satisfaction of both the Commission and the SEC.

We would be pleased to meet and to discuss with you or your staff any of the issues referred to in this letter or in the Harmonization Proposal. Please contact Kathleen H. Moriarty (kathleen.moriarty@kattenlaw.com) or Peter J. Shea (peter.shea@kattenlaw.com) if you wish to discuss our comments further.

Very truly yours,

Kathleen H. Moriarty

Peter J. Shea