April 24, 2012

Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre, 1155 21st Street, N.W.
Washington, D.C. 20581

Re: **Harmonization of Compliance Obligations for Registered Investment Companies Required To Register as Commodity Pool Operators**

Dear Mr. Stawick,

The Association of Institutional INVESTORS (the "Association")[1] appreciates the opportunity to provide comments related to proposed rules on harmonization of compliance obligations for registered investment companies ("RICs") required to register as commodity pool operators ("CPOs"). The Association continues to support the Commodity Futures Trading Commission's ("CFTC" or "Commission") efforts to effectively regulate the derivatives market and to implement the transparency and oversight goals at the core of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[2]

On February 24, 2012, the CFTC published the proposed rule on "Harmonization of Compliance Obligations for RICs Required to Register as Commodity Pool Operators" (the "Proposed Harmonization Rule").[3] The Proposed Harmonization Rule further amends recently finalized rules titled, "Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations,"[4] and "Reporting by Investment Advisers to Private Funds and Certain Commodity

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[1] The Association of Institutional INVESTORS is an association of some of the oldest, largest, and most trusted investment advisers in the United States. Our clients are primarily institutional investment entities that serve the interests of individual investors through public and private pension plans, foundations, and registered investment companies. Collectively, our member firms manage ERISA pension, 401(k), mutual fund, and personal investments on behalf of more than 100 million American workers and retirees. Our clients rely on us to prudently manage participants' retirements, savings, and investments. This reliance is built, in part, upon the fiduciary duty owed to these organizations and individuals. We recognize the significance of this role, and our comments are intended to reflect not just the concerns of the Association, but also the concerns of the companies, labor unions, municipalities, families, and individuals we ultimately serve.

[2] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010).

[3] *See* Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators, 77 Fed. Reg. 11,345 (Feb. 24, 2012).

[4] Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed. Reg. 11,252 (Feb. 24, 2012).

Pool Operators and Commodity Trading Advisors on Form PF" (together, the "Finalized Rules").[5] This comment letter summarizes the Association's concerns with the Proposed Harmonization Rule, particularly as it relates to the new regulatory requirements implemented under the Finalized Rules, and its inconsistencies with the existing Securities and Exchange Commission's ("SEC") disclosure requirements.

I. Overview of the Association's Concerns

The Association appreciates the hard work undertaken by the Commission in drafting the Proposed Harmonization Rule. Despite the Commission's efforts, we remain concerned that the Finalized Rules and the Proposed Harmonization Rule are not truly harmonized with the SEC's reporting requirements. We believe the CFTC should permit funds registered under the Investment Advisors Act of 1940 to rely upon the extensive disclosure regime already in place with the SEC, and familiar to investors. Any new requirements should ensure that the information provided to investors is helpful, and not duplicative or inconsistent with current regulatory requirements. Further, these changes should be implemented without imposing unwarranted or excessive costs.

The Proposed Harmonization Rule and statements made by CFTC Chairman Gary Gensler indicate that the Proposed Harmonization Rule is intended to "balance the compliance requirements"[6] and ease the additional regulatory burdens imposed by the Finalized Rules on RICs. However, the CFTC has not adequately addressed the inconsistencies and duplicative disclosures that are incompatible with the current disclosure requirements under the federal securities laws. Further, while the Proposed Harmonization Rule has not been jointly released with the SEC, the rule attempts to address inconsistencies by amending the SEC's RIC compliance requirements. Thus, we believe rather than truly harmonizing the requirements, the Proposed Harmonization Rule adds new, contradictory requirements to the existing requirements.

The Proposed Harmonization Rule also fails to provide adequate cost-benefit analyses of the new disclosure regime to justify additional burdens being added to the existing requirements under the federal securities laws. The costs of complying with these new disclosure requirements will ultimately fall on the end investor, including millions of American workers and retirees. To justify these costs, the CFTC should clarify what benefits the end investor will actually receive by implementing these new requirements. In providing such justification, the CFTC should also explain how it intends to use the data that is disclosed.

[5] Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF, 76 Fed. Reg. 71,128 (Nov. 16, 2011).

[6] Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators, 77 Fed. Reg. 11,345 app 2 (Feb. 24, 2012).

The Proposed Harmonization Rule's inconsistencies include:[7]

1. Disclosure Requirements and Related Processes that are Inconsistent of Current SEC Requirements

The CFTC' disclosure requirements and related processes are inconsistent with the SEC requirements, and the CFTC and SEC should do more to truly harmonize these two regimes. For example, the Proposed Harmonization Rule provides that CPOs claiming exemptive relief under Section 4.12 of CFTC regulations must make "the pool's disclosure document readily accessible on an Internet Web site maintained by the pool operator."[8] Making such information available on a website is duplicative of current SEC requirements. This data is already provided to the investor through various other disclosure documents, including account statements and prospectuses. Indeed, it may actually *hurt* the investor to require the information be publicly available, as it would broadly disclose the fund's trading strategy. Furthermore, the requirement does not appear to be harmonized with the current provisions found under the Investment Company Act and the Investment Advisers Act of 1940 ("Investment Advisers Act"). Thus, the Proposed Harmonization Rule erodes the consistency found across the SEC's disclosure requirements.

Another example of regulatory inconsistency among disclosure requirements can be found in Section 4.26 of the Proposed Harmonization Rule, which prohibits a CPO from using, "a Disclosure Document or profile document dated more than one twelve months prior to the date of its use."[9] This requirement is inconsistent with the SEC's requirement because it uses a different deadline than the deadline the SEC currently imposes on RICs under the securities laws. Currently, the SEC requires RICs that are offering shares to update their annual registration statements within 120 days after the end of the RIC's fiscal year. The additional 120 days are necessary to permit the RIC to prepare its registration statement once the fiscal year is complete. The CFTC should amend its requirement to permit a CPO to use a Disclosure Document or profile document that is dated up to fifteen months prior to the date of its use in order to incorporate the 120 day period found under the SEC's requirement.

2. Unnecessary Account Statement Requirements

The CFTC's monthly account statement requirement mandated under Section 4.22 imposes an unnecessary and overly burdensome obligation on RICs, which would provide investors with little if any additional information and will only create additional costs for investors. The Association believes the monthly account statement is unwarranted, considering the investors already have access to such information under the current SEC regulations. We recognize that the Proposed Harmonization Rule provides an exemption from the account statement distribution requirement under Section 4.12, which states:

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[7] The Association notes just a few examples of inconsistencies in this comment letter. A more complete list of the inconsistencies and difficulties for RICs can be found in SIFMA AMG's letter filed in response to this request for comments.

[8] Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators, 77 Fed. Reg. at 11,351.

[9] *Id.* Please note the proposed harmonization rule provides that commodity trading advisors are also prohibited from using a disclosure document or profile document dated more than one twelve month prior to the date of its use. *See id.*

> "that the pool operator: (A) Causes the pool's Account Statements, including the certification required by § 4.22(h) *to be readily accessible on an Internet Web site maintained by the pool operator within 30 calendar days after the last day of the applicable reporting period and continuing for a period of not less than 30 calendar days*. The commodity pool operator may meet the requirement of § 4.22(h) by including the certification required by Rule 30e–1 under the Investment Company Act of 1940 (17 CFR 270.30e–1) with its posting of the pool's Account Statements; and (B) Causes the Disclosure Document for the pool to clearly indicate: (1) That the information required to be included in the Account Statements will be readily accessible on an Internet Web site maintained by the pool operator; and (2) The Internet address of such Web site"[10] (emphasis added).

While we appreciate the CFTC's attempt to mitigate the burdens associated with Section 4.22 in the Proposed Harmonization Rule, this exemption provided under the proposed Section 4.12 does not afford sufficient relief from this superfluous requirement. According to the Proposed Harmonization Rule, under Section 4.12, RICs will be able to satisfy the requirement to deliver account statements to participants by making such statements available on their internet websites, "thereby substantially reducing any burden under Section 4.22(a)."[11] This exemption creates a new online reporting regime, which is not similarly found in the SEC provisions, and the creation of the online reporting regime will be overly burdensome in terms of time and resources. CPOs will now be required to create and maintain an online website to provide information that is already otherwise available to investors through the SEC disclosure requirements.

3. Selective Disclosure Requirements

According to CFTC Rule 4.23, investors in a commodity pool who request access to the books and records associated with a particular pool must be given access to such information. This information includes records that could reveal a fund's trading strategy.[12] The Association believes that the CFTC should further revise the provisions of Section 4.23 by exempting RICs from the disclosure of such information. A fund's investors could suffer adverse consequences if another were to take portfolio information and use it to trade against the fund. Such "front-running" poses a serious threat to the potential returns those funds would generate and puts the advisor at risk of jeopardizing his or her fiduciary duty. The Proposed Harmonization Rule fails to address this issue, and is thus inconsistent with the SEC's "upon request" selection holdings disclosure policy.[13]

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[10] *Id.* at 11,351.
[11] *Id.* at 11,348.
[12] Under CFTC Rule 4.23(a)(1), a pool participant is required to be given access to the following trading information upon request: "An itemized daily record of each commodity interest transaction of the pool, showing the transaction date, quantity, commodity interest, and, as applicable, price or premium, delivery month or expiration date, whether a put or a call, strike price, underlying contract for future delivery or underlying physical, the futures commission merchant and/or retail foreign exchange dealer carrying the account and the introducing broker, if any, whether the commodity interest was purchased, sold (including, in the case of a retail forex transaction, offset), exercised, expired (including, in the case of a retail forex transaction, whether it was rolled forward), and the gain or loss realized."
[13] *See* Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Holdings, 69 Fed. Reg. 22,300 (Apr. 23, 2004), *available at* http://www.sec.gov/rules/final/33-8408.pdf.

4. Maintenance of Books and Records

The Association believes that the CFTC should amend its regulations to permit funds registered under the Investment Advisor Act of 1940 to maintain their books and records with the custodian of their choosing, as is currently permitted under the SEC regulations. A registered investment adviser is required to specify on its Form ADV each entity that maintains the adviser's required books and records, including the location of the entity, and a description of the books and records maintained at that location, but does not otherwise impose a limitation on who maintains such records. In contrast, the CFTC's Rule 4.12(c)(iii) limits the permissible entities who are allowed to maintain these books and records.[14] This limitation is unnecessary and inconsistent with current SEC regulations.

5. Mandatory Disclosure Language is Inconsistent with SEC's "Plain English" Requirement

The Proposed Harmonization Rule and Part 4 of the CFTC's Regulations include disclosure requirements that contradict the SEC's directive prohibiting boilerplate disclosures. Rule 421 of the General Rules and Regulations of the Securities Act of 1933, requires that material presented in a prospectus be in "plain English," and avoid vague "boilerplate" language.[15] The Proposed Harmonization Rule is inconsistent with this well-established prohibition on boilerplate language.

For example, Section 4.24(a) of the Proposed Harmonization Rule requires a legend "that indicates that the Commodity Futures Trading Commission and the Securities and Exchange Commission have not approved or disapproved of the securities or passed upon the merits of participating in the pool, nor has either agency passed upon the accuracy or adequacy of the disclosure in the prospectus, and that any contrary representation is a criminal offense."[16] Section 4.24(a) goes on to provide explicit mandatory language to be included in this legend. This, along with other requirements found under Part 4's disclosure requirements are in essence drafting boilerplate language that will be required in all CPO disclosure documents.[17] By its very nature, the type of disclosure required by the CFTC is inconsistent with the SEC standards regarding plain language. More importantly, such language is likely to be ignored by the average investor, or worse, will confuse the investor rather than inform him or her.

II. Insufficient Cost-Benefit Analyses

The Proposed Harmonization Rule places new and unnecessary burdens on these funds. The Association agrees with Commissioner Scott O'Malia that "the Commission must do a better job in consulting with the public as it develops sweeping economic reform. It must develop consistent baselines based on the status quo, include policy alternatives and a reproducible quantitative analysis."[18] Compliance with the CFTC's disclosure requirements will require costly expenditures in

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[14] 17 C.F.R. 4.12(c)(iii).
[15] Presentation of Information in Prospectuses, 17 C.F.R. § 230.421 (2011).
[16] Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators, 77 Fed. Reg. at 11,351 (Feb. 24, 2012).
[17] *See id. at* 11,351.
[18] Commissioner Scott D. O'Malia, Statement in Support of OMB Memorandum: Cumulative Effects of Regulations (Mar. 30, 2012), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement032112.

order to create the infrastructure and processes necessary to satisfy these disclosure requirements. The CFTC's cost-benefit analyses fail to adequately account for the build-out necessary to satisfy the new disclosure requirements.

Further, the Proposed Harmonization Rule would require CPOs to break down aspects of the fund to an unprecedented granular level in order to provide specific transaction costs. The CFTC's requirement that the disclosures breakdown to the individual transaction level, which is not required under the SEC's regulations, would be of limited value to the customer, yet extremely costly for all market participants. The cost-benefit analyses fail to account for the costs and resources necessary to report such data. Moreover, this new reporting process will still require registered entities to submit filings with the National Futures Association ("NFA") as well as the Financial Industry Regulatory Authority ("FINRA"), rather than having a streamlined process where all filings can be submitted through a single portal. In sum, the Proposed Harmonization Rule, a rule not required under the Dodd-Frank Act, will divert time and resources away from the implementation of requirements mandated by the Dodd-Frank Act.

III. Suggested Actions

The Association recognizes the substantial amount of work that has gone into implementation of the Dodd-Frank Act, and requests that the CFTC continue to focus on rulemakings required under the legislation before finalizing the Proposed Harmonized Rule or requiring compliance with the Finalized Rules. Given the broad requirements of the Dodd-Frank Act, we suggest that it would assist both the CFTC and the market if the CFTC first took pause and conducted an inventory as to what data is already required and will be required to be reported to regulators and disclosed to investors under the new Dodd-Frank Act regulatory regime. Then, upon completion of such assessment, the SEC and CFTC could come to a coordinated resolution to ensure the market can adequately comply with both agencies' requirements.

Further, there remains additional Commission rulemakings required under the Dodd-Frank Act that have not been completed and will directly affect the Finalized Rules and Proposed Harmonization Rule. Until the Commission issues final rules on these topics, it is difficult for both the Commission and market participants to truly understand the impact on RICs and the market in general. For example, the Commission must still promulgate a definition for the term "swap." This definition will determine which products fall under such designation, thus establishing how RICs will utilize various derivative products. The Association agrees that regulatory harmonization is imperative, and believes it is premature to work toward regulatory harmonization until these rulemakings are complete. Upon completion of the required rulemakings under the Dodd-Frank Act, should the CFTC find there are still data gaps that need to be addressed, the Association would support a collaborative rulemaking effort with the SEC, whereby reporting and disclosure requirements could be truly harmonized, rather than merely stacked upon each other.

IV. Conclusion

The Association recognizes the challenges the CFTC faces in implementing these new requirements and appreciates the Commission's consideration of our comments regarding the Proposed Harmonization Rule. Please feel free to contact me with any questions you may have on our comments at jgidman@loomissayles.com or (617) 748-1748.

On behalf of the Association of Institutional INVESTORS,

John R. Gidman
Association President

cc: Honorable Gary Gensler, Chairman
Honorable Bart Chilton, Commissioner
Honorable Mark Wetjen, Commissioner
Honorable Scott O'Malia Commissioner
Honorable Jill E. Sommers, Commissioner
Commodity Futures Trading Commission

Honorable Mary Schapiro, Chairman
Honorable Luis Aguilar, Commissioner
Honorable Troy Paredes, Commissioner
Honorable Elisse Walter, Commissioner
Honorable Daniel Gallagher, Jr., Commissioner
Securities and Exchange Commission