August 11, 2020

Mr. Christopher J. Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Submitted via portal: https://comments.cftc.gov

Re: Proposed Amendments to Commission Regulation 3.10(c): Exemption From Registration for Certain Foreign Persons Acting as Commodity Pool Operators of Offshore Commodity Pools [RIN 3038-AE46]; Exemption From Registration for Certain Foreign Persons [RIN 3038-AE46]

Dear Mr. Kirkpatrick,

The Alternative Investment Management Association Limited ("**AIMA**"), the Asset Management Group of the Securities Industry and Financial Markets Association ("**SIFMA AMG**" or "**AMG**"), the Investment Adviser Association ("**IAA**"), ICI Global, and the Managed Funds Association ("**MFA**") (collectively, the "**Associations**")[1] appreciate the opportunity to submit comments to the Commodity Futures Trading Commission (the "**CFTC**" or the "**Commission**") with respect to the Commission's proposals to amend Regulation 3.10(c) (the "**3.10 Exemption**") as set forth in the notices of proposed rulemaking entitled "Exemption From Registration for Certain Foreign Persons Acting as Commodity Pool Operators of Offshore Commodity Pools" (the "**2020 Release**" or the "**Release**") and "Exemption from Registration for Certain Foreign Persons" (the "**2016 Release**") (collectively, the "**Proposal**").[2] The Associations' memberships include many domestic and non-U.S. commodity pool operators ("**CPOs**") and commodity trading advisors ("**CTAs**"), both registered and exempt, that have or are part of organizations that have global operations. A clear and rational approach to CFTC regulation of our members' global operations that do not involve U.S. investors is of paramount importance.

The Associations truly appreciate and applaud the Commission's actions in turning its attention to the increasingly global nature of the asset management space and proposing rule changes that will better align the express terms of its regulations with both the Commission's policy goals and current global practices. This alignment will bring welcome certainty and efficiencies to non-U.S. asset managers that

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1 A description of each of the Associations is included as Appendix C.

2 *See* Exemption From Registration for Certain Foreign Persons Acting as Commodity Pool Operators of Offshore Commodity Pools, 85 Fed. Reg. 35,820 (June 12, 2020); Exemption From Registration for Certain Foreign Persons, 81 Fed. Reg. 51,824 (Aug. 5, 2016).

wish to participate in the U.S. commodity markets on behalf of non-U.S. investors in a manner that adds vibrancy to those markets, while fully protecting the interests of U.S. investors and appropriately allocating the Commission's scarce resources.

I. Summary of the Proposal and the Associations' Recommendations

A. Key Elements of the Proposal

The Commission has proposed amendments to the 3.10 Exemption that would expressly:

1. Allow non-U.S. CPOs to rely on the 3.10 Exemption for offshore pools on a pool-by-pool basis, based on whether all of the participants in a particular offshore pool are located outside the United States and, accordingly, to rely on the 3.10 Exemption concurrently with other exemptions available to CPOs (the "**Stacking Provisions**");

2. Establish a safe harbor with respect to inadvertent participation of U.S. participants in offshore pools;

3. Permit contributions of initial capital by U.S. controlling affiliates of an offshore pool's CPO, by specifying that such capital contributions are not considered participation in the pool for purposes of the 3.10 Exemption, subject to conditions designed (1) to prevent evasion of Part 4 of the Commission's regulations and (2) to prevent contributions by persons barred from the U.S. commodity interest markets (the "**Affiliate Support Exemption**"); and

4. Codify previously issued no-action relief (the "**2016 Letter**")[3] that expressly permits offshore CPOs and CTAs to rely on the 3.10 Exemption for U.S. commodity interest transactions without regard to whether the transactions are cleared (that is, clarifying that the 3.10 Exemption does not impose a separate clearing requirement for transactions that are not otherwise required to be cleared) (the "**CPO/CTA Codification Proposal**").[4]

B. The Associations' Recommendations

The Associations strongly support the proposed amendments to the 3.10 Exemption described above.

In addition, the Associations believe that the purposes of the Proposal can be better achieved, without any sacrifice of U.S. investor protection, by incorporating the following adjustments in the final 3.10 Exemption amendments:

1. Adjusting the Affiliate Support Exemption (a) to permit contributions from U.S. affiliates without limiting the exemption to "controlling affiliates"; (b) to permit U.S. affiliate

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[3] *See* CFTC No-Action Letter No. 16-08, Regulation 3.10(c)(3)(i): No-Action Position for Failure to Register as an Introducing Broker, Commodity Trading Advisor, or Commodity Pool Operator Solely with Respect to Activities Involving Swaps Not Subject to a Clearing Requirement (Feb. 12, 2016).

[4] In the 2020 Release, the Commission re-opened the comment period for the CPO/CTA Codification Proposal, which was originally published for comment in 2016. *See* 2020 Release at 35,826-27.

contributions that serve the same commercial support purpose as initial capital but may be necessary later in the offshore pool's lifecycle; and (c) to align the terms of the condition intended to ban contributions from U.S. persons that "are barred from participating in the U.S. commodity interest markets" with the purpose of that condition;[5]

2. Aligning the text of the proposed Stacking Provisions to conform to the Commission's stated purpose, which is to permit a registered or exempt CPO to rely on the 3.10 Exemption on a pool-by-pool basis while relying simultaneously, for other activities, on full or partial exemptions or exclusions provided by other Commission rules (for example, but not limited to, Regulations 4.13(a)(3) and 4.5); and

3. Adding corresponding provisions to paragraphs (c)(3)(ii) and (v) of the 3.10 Exemption for CTAs, in order to provide consistent regulatory treatment for global asset management activities that do not involve U.S. investors, in alignment with the Commission's policy goals and current global practices.

These suggested adjustments would advance the Commission's goals articulated in the Releases and affirm "its longstanding policy of focusing 'customer protection activities upon domestic firms and upon firms soliciting or accepting orders from domestic users'" of the commodity interest markets.[6] We discuss each of these proposed adjustments in greater detail below. We also include, as Appendix B, proposed text of the final rule incorporating these adjustments.

II. Adjustments to the Affiliate Support Exemption Consistent with and in Furtherance of its Purpose

A. The Proposed Affiliate Support Exemption and the Commission's Goals[7]

The Commission has proposed an amendment to the 3.10 Exemption that would expressly permit a U.S. affiliate that controls a non-U.S. CPO (a "**controlling affiliate**") to contribute initial capital (often referred to as seed money) to an offshore pool, without jeopardizing the non-U.S. CPO's ability to rely on the 3.10 Exemption, subject to the two conditions described below.[8] Under this provision, the U.S.

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5 *See* 2020 Release at 35,826.

6 *See* 2020 Release at 35,821 (quoting Exemption From Registration for Certain Foreign Persons, 72 Fed. Reg. 63,976, 63,977 (Nov. 14, 2007)).

7 While the Release refers to this provision as the "Affiliate Investment Exemption," in this letter we use the term "Affiliate Support Exemption," which we believe better captures the economic reality of the contributions addressed. As described below, these contributions are in the nature of commercial support for the pool and the CPO, on behalf of the enterprise, rather than an investment by a particular affiliate for the purpose of seeking investment returns for that affiliate or its shareholders.

8 *See* Proposed Regulation 3.10(c)(3)(iii). The proposed amendment uses the term "control affiliate," which is defined as an affiliate of the CPO (within the meaning of Commission Regulation 4.7(a)(1)(i)) that controls the CPO (within the meaning of Regulation 49.2(a)(4)). Because in other contexts the term "control affiliate" is often used to refer more broadly to affiliates that control, are controlled by, or are under common control with the entity in question, to avoid confusion, in this letter we use the term "controlling affiliate" when we describe the affiliates covered by the Affiliate Support Exemption as proposed.

controlling affiliate contributing the initial capital would not be considered a participant of the pool for purposes of the requirement under the 3.10 Exemption that all offshore pool participants be located outside the United States.

This proposed amendment is based on the Commission's preliminary conclusion that "participation in an offshore pool by a U.S. controlling affiliate does not raise the same regulatory concerns as would an investment in the same pool by an unaffiliated participant located within the United States."[9] The Release recognizes that U.S. capital contributed to offshore pools can provide valuable benefits to the markets and investors by enabling non-U.S. CPOs "to test novel trading programs or otherwise engage in proof of concept testing with respect to innovations in the collective investment industry that might otherwise not be possible due to a lack of a performance history for the offered pool."[10] The Release also recognizes that seed money generally results from "commercial decisions" to support the pool, rather than as a mechanism for the U.S. affiliate to generate returns for its own investors.[11]

As proposed, the Affiliate Support Exemption would impose two conditions, which are designed (1) to protect against use of such capital contributions to evade the purposes of the Part 4 regulation and (2) to prevent such contributions by persons who are "barred from participating in the U.S. commodity interest markets."[12]

B. The Associations' Recommendations

The Associations strongly support the proposal to permit offshore pools to receive capital contributions from U.S. affiliates of the CPO without disqualifying the pool's CPO from relying on the 3.10 Exemption.[13] The Associations agree that support contributions from affiliates provide important benefits to the markets and investors and that, because of the fundamental nature and circumstances of these contributions, the U.S. affiliate entity contributing the capital does not need the protections afforded by Part 4 to U.S. pool investors. Accordingly, requiring an offshore CPO to register solely because of such capital contributions from its U.S. affiliates would impose the unnecessary costs and burdens of Commission registration and regulation on offshore CPOs that wish to engage in the U.S. commodity interest markets on behalf of non-U.S. investors and, as a result, would discourage such engagement and thus detract from the vibrancy of these markets. The rationale reflected in the Affiliate Support Exemption is also consistent with the Commission's historical approach to affiliate capital contributions in offshore pools, including seed money, in its other rules and previous no-action positions.

However, the Associations recommend adjusting the proposed exemption in the following

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9 *See* 2020 Release at 35,830.

10 *Id.* at 35,826.

11 *Id.*

12 *Id.*

13 Where the pool has a board of directors or trustee(s) (for example pools organized as a corporation), the affiliation would be with the entity performing the CPO functions, by delegation or otherwise.

respects, which we believe will further the Commission's stated goals without sacrificing investor protection for U.S. investors.

1. The Affiliate Support Exemption Should Permit Support Contributions by Any Affiliated Entity, Not Only Controlling Affiliates

a. Affiliated Entities Contributing Capital to Offshore Pools Are Not Participants in Need of the Part 4 Protections

The Commission and its staff have long recognized that the contribution of capital to an offshore pool, including but not limited to seed money, by a CPO's U.S. affiliate does not constitute "participation" in the pool by U.S. persons that requires the protections of Part 4. This approach, which is reflected in no-action and interpretive letters as well as specific rule provisions, recognizes that these capital contributions are not "investments" made for the purpose of seeking returns from a pooled vehicle, as is the case for investor participants, but rather reflect "commercial" business decisions made by an enterprise to support the pool in furtherance of the CPO's business goals and thus to support the CPO's ability to innovate and offer investment opportunities to others.

For example, in granting CTA and CPO registration no-action relief to an offshore entity, the CFTC staff stated that, while companies affiliated with the offshore CTA/CPO "may contribute seed capital to the . . . Funds, the Division does not believe that these contributions constitute participation by U.S. persons."[14] More broadly, the CFTC staff has confirmed that relief under Staff Advisory 18-96, which provides relief for registered CPOs of offshore pools, remains available notwithstanding the participation in an offshore pool by a principal of the CPO.[15]

Similarly, a number of existing Commission regulations recognize that a CPO's affiliates contributing capital to offshore pools do not need the information that Part 4 requires the CPO to provide investors for their protection. For example, Regulation 4.7 provides that the category of qualified eligible persons (persons that do not need the protections of the Part 4 information disclosure requirements) automatically includes an exempt pool's CPO, CTA, or investment adviser, or an affiliate of any of the foregoing.[16]

For these reasons and those set forth below, the Associations recommend that the Affiliate Support Exemption apply to contributions by all affiliates, as that term is defined in Regulation 4.7(a)(1)(i), subject to the anti-evasion conditions of the proposed exemption.[17]

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[14] *See* CFTC No-Action Letter No. 03-18, at n.13 (April 4, 2003).

[15] *See* CFTC Interpretive Letter No. 97-48 (May 6, 1997).

[16] *See* Regulation 4.7(a)(2)(viii)(A)(1) (definition of qualified eligible persons). *See also* Regulation 4.22(c)(8) (cited in the 2020 Release at note 51).

[17] Under the Associations' recommendation, the Affiliate Support Exemption would retain the reference to the definition of affiliate in Regulation 4.7(a)(1)(i), as proposed, but would eliminate the requirement that the affiliate control the CPO as defined in Part 49 (the Commission's rules relating to swap data repositories. Rule 4.7(a)(1)(i)

b. There is no Regulatory Need to Limit Affiliate Capital Contributions to Contributions by Controlling Affiliates

The Commission's precedents permitting contributions of seed money and other capital in offshore pools by U.S. affiliates do not limit such contributions to affiliates that control the CPO. Nor is there any regulatory need for such a limitation. The premise of the proposed exemption, and of the broad relief provided in the precedents described above, is that the CPO's affiliates contributing capital to support the enterprise are not "participants" in the pool that need the Part 4 investor protections that CPO registration is designed to provide, and thus requiring Commission registration and regulation of offshore CPOs of pools receiving such capital imposes unnecessary costs and burdens. This is no less true for contributions that come from other affiliates within a corporate structure that do not fit the proposed narrow definition of a "controlling affiliate."

As explained in the Release, the requirement that the U.S. affiliate contributing capital be a controlling affiliate is designed to ensure that the affiliate in question has the ability to obtain the Part 4 type information that CPO registration ensures is provided to participants. We respectfully submit, however, that this goal is misplaced, for two reasons.

First, contributions of capital by affiliated entities are not made with the same investment motivation on the part of the contributing affiliate – expectation of returns from investment of their money – that applies to the U.S. investors that Part 4 seeks to protect. On the contrary, these affiliate capital contributions reflect commercial business decisions intended for the purpose of supporting the organization's business operations, including offering non-U.S. commodity pools to non-U.S. investors. For this reason, the information that the organization, as a whole, would need to make the capital contribution will be entirely different from the information Part 4 seeks to provide investors. Thus, the ability of a particular entity in the organizational structure to obtain Part 4 type information is not relevant.

Second, the "controlling affiliate" requirement is neither necessary nor appropriate to ensure that global organizations can obtain the information they need for commercial decision-making. Nor does this limitation accurately reflect the realities of enterprise decision-making and information flow. The Associations believe that, as long as all entities involved are under common control of an entity ultimately responsible for the success of the enterprise, there is no basis for requiring the entity directly contributing the capital to control the CPO. The Commission's stated goal of ensuring that U.S. affiliates have appropriate information on which to base their commercial decisions to make the support contributions in question does not require limiting such contributions to those from controlling affiliates. Rather this goal is equally well served by permitting contributions by other affiliates as well.

The Associations support the Commission's concern that the Affiliate Support Exemption should

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provides that "*[a]ffiliate* of, or a person *affiliated* with, a specified person means a person that directly or indirectly through one or more persons, controls, is controlled by, or is under common control with the specified person."

not be used to evade Part 4 protections for U.S. investors, in particular direct or indirect U.S. natural person investors. However, we believe that the anti-evasion condition of the Proposal appropriately addresses this concern. Under that condition, interests in the affiliate providing the capital cannot be marketed as providing access to trading in the U.S. commodity markets. The Associations believe that this is an important condition and, as proposed, is well tailored to achieve its purpose – prevention of the use of the Affiliate Support Exemption as an indirect mechanism to introduce U.S. participants into an offshore pool without offering them the Part 4 protections. The Associations also suggest that, in order to further the anti-evasion goal, the Commission could specify, in the rule text or the final adopting release, that only affiliated entities, and not natural person affiliates, are contemplated by the exemption.[18]

c. Limiting the Affiliate Support Exemption to Controlling Affiliates Would Substantially Restrict the Availability of the Exemption and thus Thwart Achievement of the Commission's Goals Without Serving an Investor Protection Purpose

As proposed, the Affiliate Support Exemption would effectively be available only to contributions by those entities in an organizational structure that are upstream of the CPO, and would exclude contributions from all other affiliates. This will prevent many global organizations from being able to rely on the exemption in circumstances that do not present any of the concerns the controlling affiliate requirement is designed to address.

For a number of reasons unrelated to the Commission's regulatory concerns, it may be necessary or beneficial for different organizations to structure capital contributions and the related decision-making process in different ways. The reasons will vary based on the specific circumstances of particular business enterprises, and may include, for example, decisions based on achieving tax efficiency or navigating multi-jurisdictional non-CFTC regulatory requirements. In some organizations, it may be advantageous for capital contributions to come from an upstream entity. But in many cases, driven by these internal organizational concerns entirely independent of CFTC regulatory considerations or any remote intention to evade Part 4 regulation, the contributions may come from other affiliated entities within the corporate structure.

For example, a classic scenario is a UK CPO in a global organization that includes a U.S. sister affiliate, both subsidiaries (direct or indirect) of a non-U.S. parent. While the parent is a non-U.S. entity, the seeding often comes from the U.S. sister entity, for purposes of tax efficiency. While this is a common scenario, it is by no means the only one that, based on economic and regulatory factors unrelated to the Commission's jurisdiction and expertise, may drive organizations to use affiliates other than upstream

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[18] Such a clarification would address concerns raised by circumstances presented in a 2015 no-action letter, where a number of U.S. natural person employees sought, either directly or through a special purpose vehicle, to provide seed money to an offshore fund. *See* CFTC No-Action Letter No. 15-46 (May 8, 2015) ("**Letter 15-46**"). This letter relates to a narrow situation, involving natural persons.

affiliates as the source of support capital for offshore pools. Limiting the exemption to contributions from controlling affiliates, therefore, would substantially restrict its availability, and thus undermine the goals underlying the Proposal.

Importantly, this limitation of the use of the exemption would in no way further the protection of U.S. investors. Because of the economic realities of seed money support, these contributions are not properly viewed as participant investments that require Part 4 protection. In addition, the organization's use of an affiliated entity to contribute the capital would, of course, have to comply with the anti-evasion conditions of the exemption. Given the economic realities described above, the Associations respectfully submit that no U.S. investor protection purpose is served by requiring the contributing entity to be a "controlling affiliate," and that where investor protection is not implicated, Commission rules should not dictate the process and channels that global organizations employ for internal corporate decision-making and resource allocation.

2. The Affiliate Support Exemption Should Not Be Limited to Initial Capital

As proposed, the Affiliate Support Exemption would be limited to "initial" capital, described as capital contributed during the period of time at or near the offshore pool's inception. The Release explains the purpose of the initial capital limitation as follows (emphasis added):

> The Commission preliminarily intends to limit the exception for U.S. controlling affiliate capital contributions to those made at or near a pool's inception, **which generally result from commercial decisions by the U.S. controlling affiliate**, typically in conjunction with the non-U.S. CPO, to support the offshore pool until such time as it has an established performance history for solicitation purposes, although the contributed capital may remain in the offshore pool for the duration of its operations. The Commission preliminarily believes that this limitation is appropriate **to ensure that the capital is being contributed in an effort to support the operations of the offshore pool at a time when its viability is being tested, rather than as a mechanism for the U.S. controlling affiliate to generate returns for its own investors**.[19]

The Associations believe that this rationale applies equally to affiliate support provided at other points in a pool's life cycle, and that limiting the exemption to "initial" contributions would thus reduce the effectiveness of the exemption without serving any U.S. investor protection purpose.

There are many situations in the life of an offshore pool, after the initial startup period, where it is beneficial, and may be essential, to the pool's viability and to its participants for the CPO or its affiliates to provide additional support for the pool. For example, maintenance of pool assets at a certain level may be required for a range of regulatory and business reasons, such as: limits on owner concentration; investment diversification requirements; internal guidelines of potential institutional investors; or ensuring qualified purchaser status under applicable regulatory requirements. Since pool assets are subject on an ongoing

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[19] *See* 2020 Release at 35,826.

basis to matters that are beyond the CPO's control and difficult to predict with precision, such as shareholder redemption activity and market disruptions, it is important for the pool to have continuing access to affiliate capital support in order to maintain these required asset levels. In addition, capital could be required to seed a new share class of an existing offshore pool. Finally, under certain market conditions, a capital contribution from the CPO or its affiliate may be useful to facilitate the offshore pool's operations. In order to ensure that the exemption is used properly, the Associations would not oppose a "purpose" provision along the lines of "contributions of the affiliate will be for the purpose of establishing, or providing ongoing support to, the pool to attract or retain non-U.S. investors and will not be used as a mechanism for the U.S. affiliate to generate returns for its own investors."

Like the initial capital contributed in the startup situations described in the Release, capital contributed at these other stages can equally be viewed as the result of "commercial" decisions geared toward supporting the operations of the offshore pool for viability and related offshore promotional purposes, and not "as a mechanism for the U.S. controlling affiliate to generate returns for its own investors."[20] The absence of a need for applying the Commission's investor protection rules to affiliate capital contributions does not stem from the timing of the contributions, and thus would apply equally to these subsequent infusions. In such situations, causing the CPO to choose between accepting support from its U.S. affiliates or ceasing to trade in the U.S. commodity interest markets would harm pool investors and would not afford any regulatory benefits to U.S. investors.

Accordingly, the Associations recommend that the exemption for capital contributions not be limited to initial capital contributions.

For similar reasons, the Associations strongly support the Commission's preliminary conclusion that the Affiliate Support Exemption should not impose a limit on the length of time the capital may remain in the pool. The Associations note that Letter 15-46, which imposed such a time limit, addressed indirect contributions by individuals, which would be prevented by the anti-evasion condition of the proposed exemption.[21]

3. The Proposed Statutory Condition Disqualification is Overly Broad for the Regulatory Purpose

The proposed affiliate capital exemption would include the following condition:

> (A) the control affiliate and its principals are not subject to a statutory disqualification, ongoing registration suspension or bar, prohibition on acting as a principal, or trading ban with respect to participating in commodity interest markets in the United States, its territories or possessions[.][22]

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[20] *See id.*

[21] *See* Letter 15-46, *supra* note 18.

[22] *See* Proposed Regulation 3.10(c)(3)(iii)(A), 2020 Release at 35,832.

As explained in the Release, the purpose of this provision is the preliminary belief that "U.S. controlling affiliates that are barred from participating in the U.S. commodity interest markets should not be permitted to gain indirect access to those markets through an affiliated non-U.S. CPO's offshore pool as this would undermine the purposes of such a ban."[23]

The ban imposed by the proposed condition, however, goes far beyond this stated purpose. While the regulatory purpose is to keep out affiliates that are barred from participating in the U.S. commodity interest markets, the proposed ban, by its terms, applies to the vague and far broader universe of persons that are "subject to a statutory disqualification." While it is far from clear what is meant by the phrase "subject to a statutory disqualification" in this context – there is no commonly understood definition of that phrase – it appears to refer in some way to Section 8a of the Commodity Exchange Act (the "**CEA**"). Section 8a describes an extremely broad range of circumstances, among which being barred from participating in the U.S. commodity interest markets would be a small subset. Moreover, in addition to being a solution that does not at all fit the regulatory rationale, the proposed language used in the condition is too vague to provide any meaningful guidance as to what the Commission has in mind. Introducing this fundamental ambiguity and uncertainty into a critical condition of the 3.10 Exemption is entirely at odds with the spirit of this rulemaking.

Accordingly, the Associations strongly recommend that the language of the condition be adjusted to fit its regulatory purpose, so that this condition applies only with respect to entities that are in fact barred from participating in the U.S. commodity interest markets and that the phrase "a statutory disqualification" be removed.

4. Response to the Commission's Requests for Comment on the Affiliate Support Exemption

The Commission has requested comment on a number of specific questions related to the Affiliate Support Exemption. We believe that most of these questions have been addressed in the discussion above. However, to ensure that we are being responsive to the Commission's concerns, we have addressed each of the questions in Appendix A.

III. Clarifying the Text of the Stacking Provisions to Eliminate Ambiguity and Inconsistency

The Associations strongly support the revised structure of the 3.10 Exemption that the Commission has proposed, which clearly and expressly provides for reliance on the exemption on a pool-by-pool basis and also, in a separate provision, expressly acknowledges the ability to combine or "stack" exemptions. We agree that these revisions "better reflect the current state of operations of CPOs" and more clearly align the text of the rule with the Commission's policy goals.[24] However, the proposed

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[23] *Id.* at 35,826. As a general matter, the Associations do not believe such a provision is necessary, as the same goal is achieved by the anti-evasion condition. However, in this letter we focus on the fit between the purpose and the proposed rule, rather than the need for such a provision.

[24] *See* 2020 Release at 35,822; *see also* Letter dated Sept. 13, 2019 to Joshua B. Sterling Re: Request for Clarification

language may inadvertently undermine these goals by introducing ambiguity that is inconsistent with the Commission's intentions, as expressly stated in the Release.

The intention to permit an exempt or registered non-U.S. offshore CPO to rely on the 3.10 Exemption on a pool-by-pool basis is crystal clear, both in the language of the proposed amendment and the Release.[25] It is a logical corollary of pool-by-pool reliance that the non-U.S. CPO can rely on its registered status, if applicable, or on other exemptions for pools that do not meet the criteria of the 3.10 Exemption. The Release describes these two logically-linked concepts as components of the pool-by-pool proposal: "[T]he Commission is proposing that non-U.S. CPOs may claim an exemption from registration with respect to its qualifying offshore commodity pools, while maintaining another exemption from registration, relying on an exclusion, or registering as a CPO with respect to the operation of other commodity pools."[26] Further, in order to incorporate this logic expressly in the 3.10 Exemption, the Commission has proposed a specific provision to this effect in a new paragraph (c)(3)(v).

In the Release, the Commission consistently and repeatedly describes the new provision as permitting simultaneous reliance on different exemptions or registration, giving examples of such exemptions, but without limiting the exemptions in question. For example, the Release states that the proposed amendments:

> explicitly provide that non-U.S. CPOs may claim the 3.10 Exemption while that CPO also claims other registration exemptions or regulatory exclusions with respect to other pools it operates**, *e.g.,* the *de minimis* exemption under Commission regulation 4.13(a)(3), or an exclusion from the definition of CPO under Commission regulation 4.5, or to register with respect to such pools**, in order to address the concerns articulated by commenters to the 2018 Proposal.[27]

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of Cross-Border Statements in Part 4 Proposal Preamble, submitted by SIFMA AMG, IAA, Willkie Farr, and Fried Frank ("We believe that, as the comment letters more fully demonstrate, a restrictive application of Rule 3.10(c)(3)(i) in the manner suggested in the [Part 4 Proposal] Preamble would be both incorrect as a matter of interpretation and contrary to a broad range of the Commission's long held policy goals.").

[25] For this purpose, as well as for the Affiliate Support Exemption, the Associations note that the term pool must be understood to refer to a series, sub-fund, or segregated portfolio (collectively "**segregated portfolios**") within a structure that provides for statutory ring-fencing of assets and liabilities of the segregated portfolio. This is a widely used structure for non-U.S. funds, analogous to the use of "series trusts" in the United States for registered investment companies, which both the Securities and Exchange Commission and the CFTC treat as separate funds or pools for regulatory purposes. Investors in non-U.S. segregated portfolios, like investors in U.S. investment companies, make their investment decisions separately for each segregated portfolio, on the basis of the investment strategy, policies, and risks of that portfolio, independently of investments by other segregated portfolios within the structure; each segregated portfolio may be launched at different times, may be marketed to different categories of potential investors, and may have different investor acceptance criteria. Because treatment of segregated portfolios as separate pools is essential to the workability of the 3.10 Exemption as contemplated by the Proposal, the Commission may wish to provide clarification to that effect in the final release.

[26] *See* 2020 Release at 35,820.

[27] *Id.* at 35,824 – 25 (footnotes omitted, emphasis added).

Similarly, the Release goes on to state that:

> the Commission is also proposing to add Commission regulation 3.10(c)(3)(iv) [*sic*] to establish that a non-U.S. CPO's reliance upon the 3.10 Exemption for one or more pools will not affect that CPO's ability to claim other exclusions or exemptions, **including those in Commission regulations 4.5 or 4.13**, or to register with respect to the other pools that it operates.[28]

Despite this clear intent, however, the proposed text of this provision appears to limit the available exemptions to those available under Regulations 4.5 and 4.13, instead of giving those as examples (emphasis added):

> (v) Claiming an exemption under paragraph (c)(3)(ii) of this section will not affect the ability of a person to register with the Commission or qualify for and/or **claim an exclusion or exemption otherwise available under § 4.5 or 4.13 of** this chapter, with respect to the operation of a qualifying commodity pool or trading vehicle not covered by the relief in this section.

While the Associations support adding this express provision to provide clarification that stacking is permitted, the bolded language is confusing in that it appears to limit the relief provided in paragraph (ii) by specifying two specific exemptions, instead of giving these as examples. There is no basis or discussion in the Release, including the cost-benefit analysis, that would justify limiting the exemptions available.

Accordingly, the Associations believe that to align with the stated goals, the provision must be adjusted either to eliminate the references to specific exemptions or to clarify, as in the Release, that these are merely examples of the types of exemptions that may be stacked with the 3.10 Exemption.

IV. Codification of the CPO and CTA Relief Provided in the 2016 Letter

In the 2016 Letter, the Division of Swap Dealer and Intermediary Oversight ("**DSIO**") provided relief that, in effect, makes clear that non-U.S. CPOs and CTAs can rely on the 3.10 Exemption for U.S. commodity interest transactions without regard to whether those transactions are cleared or uncleared. AMG and IAA requested this relief because of uncertainty created by language added to the exemption in 2013, which referred specifically to transactions submitted for clearing through a U.S. registered futures commission merchant ("**FCM**"). In their request, AMG and IAA pointed out that limiting the 3.10 Exemption to cleared swaps would not be reasonable given that (1) the CEA and Commission regulations do not require that all swaps be cleared and (2) some swaps are not accepted for clearing by any derivatives clearing organization. The 2016 Letter stated DSIO's belief that the 3.10 Exemption "was not intended to impose an independent clearing requirement on commodity interest transactions involving [non-U.S. CPOs and CTAs] that the CEA and Commission regulations do not otherwise require to be cleared."[29]

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[28] *Id.* at 35,825 (emphasis added). Although the text refers to Commission Regulation 3.10(c)(3)(iv), it appears that proposed Regulation 3.10(c)(3)(v) was intended.

[29] *See* 2016 Letter at 2. The 2016 Letter and the CPO/CTA Codification Proposal also included relief for introducing brokers. In this letter, the Associations address the 3.10 Exemption only as it applies to CPOs and CTAs.

Later in 2016, in the CPO/CTA Codification Proposal, the Commission proposed to codify this relief in amendments to the 3.10 Exemption. The CPO/CTA Codification Proposal echoed the rationale stated in the 2016 Letter. The comment letters submitted on the CPO/CTA Codification Proposal overwhelmingly supported codification of the 2016 Letter. These included letters of support from all of the Associations.

The Associations continue to support codification of the 2016 Letter. The 2016 Letter provided, and continues to provide, much needed certainty with respect to language in the 3.10 Exemption that was inconsistent with the regulatory intent. As a general matter, the Associations believe that rulemaking provides greater clarity and certainty than no-action relief. Moreover, if the Commission were to adopt amendments to the 3.10 Exemption that, instead of codifying the 2016 Letter, retain the reference to clearing, there would be additional confusion as to the impact of the 2016 Letter.

The Associations strongly urge the Commission to proceed in accordance with the rationale and policy goals stated in the CPO/CTA Codification Proposal. Developments since 2016 have demonstrated that not all products are eligible for clearing, which emphasizes the wisdom of the 2016 Letter. The Associations are aware of no reason or Commission policy that would support reversing the position stated in the 2016 Letter or backing away from the regulatory determination reflected in the CPO/CTA Codification Proposal.

The Associations note that the actual text of the amendments set forth in the 2016 Release reflected a restructuring of the 3.10 Exemption, which now has been overtaken by the current Proposal. Thus, mechanically, it is not possible to adopt the rule text of both proposals. In Appendix B, we provide a suggestion for how the codification of the 2016 Letter, as it relates to CPOs and CTAs, can be incorporated in the current proposal.

V. Adding Corresponding Provisions to the 3.10 Exemption for CTAs to Ensure that the 3.10 Exemption Provides a Clear and Consistent Regulatory Framework for Non-U.S. Asset Managers Acting on Behalf of Non-U.S. Investors

A. Corresponding CTA Provisions

The Associations recommend that the Commission adjust proposed Regulation 3.10(c)(3)(ii) and (v) to expressly include corresponding provisions for reliance on the 3.10 Exemption by non-U.S. CTAs on behalf of persons located outside the United States. Effectively, this would expressly permit non-U.S. CTAs to rely on the 3.10 Exemption on an account-by-account basis, based on a determination of whether the investors in the account are U.S. or non-U.S. investors, and simultaneously rely on registration or other exemptions or exclusions for CTA activities on behalf of U.S. investors, in the same manner as the proposed amendments provide for CPOs. This adjustment would also make clear that the exemption would apply to a non-U.S. CTA providing commodity trading advice to a pool covered by the CPO provisions of the 3.10 Exemption.

The regulatory goals described in the 2020 Release apply equally to CTAs. The regulatory policies permitting CTAs to stack exemptions and recognition of the Commission's focus on advice to U.S.

investors are well established in the Commission's regulatory framework.[30] For example, Regulation 4.14(a)(10) expressly provides that when counting investors for purposes of relying on the 15-person exemption provided in Section 4m(1), a non-U.S. CTA need only count U.S. investors.[31] In addition, because of the limits of Section 4m(1), on which many CTAs, whether U.S. or non-U.S., cannot exclusively rely, the Commission and staff have also expressly permitted stacking of other exemptions, such as both Section 4m(1) and Section 4m(3) with Regulation 4.14(a)(8), as well as combining CTA registration with reliance on available exemptions.

With respect to stacking Section 4m(1) and Regulation 4.14(a)(8), the Commission has stated:

> [T]he Commission wishes to make clear that the relief provided by § 4.14(a)(8) is mutually exclusive from that provided by section 4m(1) – that is, depending upon the nature of its activities a CTA may be exempt from registration as such under either or both provisions. **Thus, the fact that a CTA who is claiming exemption under § 4.14(a)(8) has more than 15 clients for the purpose of that rule will not affect the CTA's ability to claim exemption under section 4m(1) for a different set of clients** – *i.e.* clients who are other than §4.5 trading vehicles.[32]

Similarly, with respect to Section 4m(3), another statutory exemption that applies when specified conditions are met, the CFTC staff has advised that it "sees no reason why the Commission's reasoning with respect to simultaneous reliance upon Section 4m(1) and [Regulation] 4.14(a)(8) should not also apply where a CTA seeks to rely simultaneously upon Section 4m(3) and [Regulation] 4.14(a)(8).[33]

Accordingly, the Associations recommend that the Commission codify these longstanding positions in the context of non-U.S. CTAs acting on behalf of non-U.S. investors by incorporating them into the 3.10 Exemption alongside the similar changes for CPOs and the codification of the 2016 Letter for both CPOs and CTAs. Absent such corresponding changes, the Associations are concerned the Proposal will create fragmentation and uncertainty among non-U.S. asset managers that wish to engage in the U.S. commodity interest markets on behalf of non-U.S. investors, and thus frustrate the purpose of the Proposal.[34]

B. Consistency with Cost-Benefit Analysis

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[30] In addition, this would be consistent with the revised language and structure of the 3.10 Exemption proposed in the CPO/CTA Codification Proposal, which focused on the specific activities subject to the exemption.

[31] *See* Regulation 4.14(a)(10)(ii)(C).

[32] *See* Relief From Regulation as a Commodity Trading Advisor for Certain Persons; Relief From Compliance With Subpart B of Part 4 for Certain Commodity Pool Operators; Disclosure Documents and Annual Reports, 52 Fed. Reg. 41,975, 41,978 (Nov. 2, 1987) (emphasis added).

[33] *See* CFTC Interpretative Letter No. 05-13 (Aug. 15, 2005). For a registered CTA's ability to combine registration with exemptions, *see* Regulation 4.14(c)(2).

[34] For these reasons, and those discussed in the next section, incorporating into the 3.10 Exemption corresponding provisions for CTAs would be a logical outgrowth of the Proposal and an important step in completing the Commission's goals.

The Associations believe that including corresponding provisions for non-U.S. CTAs is consistent with the Commission's understanding of global operations that is reflected in its weighing of the costs and benefits of the Proposal in the Release:

> The consideration of costs and benefits below is based on the understanding that the markets function internationally, with many transactions involving U.S. firms taking place across international boundaries; with some Commission registrants being organized outside of the United States; with some leading industry members typically conducting operations both within and outside the United States; and with industry members commonly following substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the discussion of costs and benefits below refers to the effects of this proposal on all activity subject to the proposed amended regulations, whether by virtue of the activity's physical location in the United States or by virtue of the activity's connection with activities in or effect on U.S. commerce under CEA section 2(i).[35]

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[35] *See* 2020 Release at 35,828.

We would be happy to elaborate further on any of the points raised in this letter. For further information, please contact Jennifer Wood at +44 (0) 20 7822 8380 or jwood@aima.org, Jason Silverstein at 212-313-1176 or jsilverstein@sifma.org, Monique Botkin at 202-293-4222 or Monique.botkin@investmentadviser.org, Eva Mykolenko at 202-326-5837 or eva.mykolenko@ici.org, or Jennifer Han at 202-730-2943 or jhan@managedfunds.org.

Yours sincerely,

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Appendix A - Responses to the Commission's Requests for Comments

1. To establish that the funds of the controlling affiliate are being used for seeding purposes, should the exception state that the purpose of the investment by the controlling affiliate shall be for establishing the commodity pool and providing sufficient initial equity to permit the pool to attract unaffiliated non-U.S. investors? Similarly, should the exception be conditioned on the investment being limited in time to one, two, or three years after which time the investments of the controlling affiliate must be reduced to a de minimis amount of the pool's capital, such as 3 or 5 percent? What customer protection benefits would such limitations serve?

Response:

The Associations do not support the additional limitations described and believe that they would not provide any additional protection to U.S. investors, customers, or the U.S. commodity interest markets.

For the reasons stated in the letter, the Associations believe that the contributions permitted by the Affiliate Support Exemption are not properly viewed as investments, should not be limited to contributions by controlling affiliates, and should not be limited to initial capital. In particular, a requirement to remove capital at a specified time would unnecessarily limit the ultimate purpose of supporting the offshore pool, given that shareholder activity, which is an unknown factor, has a significant impact on the level of pool assets and the need to maintain capital in the fund. Thus, setting an arbitrary time limit, without regard to the pool's actual circumstances, would undermine the goal of the exemption.

However, in order to ensure that the exemption is used properly, the Associations would not oppose a "purpose" provision along the lines of "contributions of the affiliate will be for the purpose of establishing, or providing ongoing support to, the pool to attract or retain non-U.S. investors and will not be used as a mechanism for the U.S. affiliate to generate returns for its own investors."

2. Regarding the nature of controlling affiliates, to protect the U.S. persons invested therein, should the exception be limited to entities or persons that are otherwise financial institutions that are regulated in the United States to provide investor protections? For example, should the exception only be available to U.S. controlling affiliates regulated by the Securities and Exchange Commission, a federal banking regulator, or an insurance regulator?

Response:

The Associations do not believe that there would be any benefit to limiting the affiliates that contribute capital to regulated entities. Such a limitation would further introduce the CFTC into the decision-making process for commercial decisions and resource allocation of global organizations. It would also prevent the use of common practices for this type of funding,

including holding companies and trust companies. For the reasons described in the letter, the Associations do not believe that are any CFTC regulatory purposes that would be served by the CFTC's intervention in these matters.

3. The Proposal notes that one of the reasons underlying the U.S. controlling affiliate exception is the affiliate's likely ability to demand that the non-U.S. CPO provide it with the information necessary to assess the operations and performance of the offshore pool. However, because these offshore pools are by definition non-U.S. entities and it is not possible to ascertain with certainty whether such information must be provided to a U.S. controlling affiliate under the laws applicable to the non-U.S. CPO and offshore pool, should the exception be conditioned on there being an obligation on the non-U.S. CPO that is legally binding in its home jurisdiction to provide the U.S. controlling affiliate with information regarding the operation of the offshore pool by the affiliated non-U.S. CPO?

Response:

As the discussion above indicates, an organization's decision to contribute capital to support the operations of an offshore CPO is a commercial business decision, not an investment decision of the type that Part 4 information addresses. Accordingly, the Associations believe that there is no need for the Commission to determine what type of information global business organizations will need to exercise their business judgment in this regard or for the Commission otherwise to intervene in the organization's decision-making process. Moreover, requiring this exception to be conditioned on there being a legally binding obligation in the non-U.S. CPO's home jurisdiction would create unnecessary non-U.S. legal analysis on the part of the affiliate.

Appendix B - Suggested Text for Amendments to the 3.10 Exemption

Please see below for our suggested amendments to the proposed rule, in red.

The revisions and additions read as follows:

§ 3.10 Registration of futures commission merchants, retail foreign exchange dealers, introducing brokers, commodity trading advisors, commodity pool operators, swap dealers, major swap participants, and leverage transaction merchants.

* * * * *

(c) * * *

(3)(i) A person located outside the United States, its territories or possessions engaged in the activity of: An introducing broker, as defined in §1.3 of this chapter~~; or a commodity trading advisor, as defined in §1.3 of this chapter~~, in connection with any commodity interest transaction executed bilaterally or made on or subject to the rules of any designated contract market or swap execution facility only on behalf of persons located outside the United States, its territories or possessions, is not required to register in such capacity provided that any such commodity interest transaction is submitted for clearing through a futures commission merchant registered in accordance with section 4d of the Act.

(ii) A person located outside the United States, its territories or possessions engaged in the activity of a commodity pool operator, as defined in § 1.3 of this chapter, in connection with any commodity interest transactions that are ~~executed bilaterally or made on or subject to the rules of any designated contract market or swap execution facility, is not required to register in such capacity when such transactions are~~ executed on behalf of a commodity pool the participants of which are all located outside the United States, its territories or possessions, or in the activity of a commodity trading advisor, as defined in § 1.3 of this chapter, in connection with any commodity interest transactions that are executed on behalf of an account of a person located outside the United States, its territories or possessions (including a pool described above),~~-~~and provided that any cleared commodity interest traded in the United States ~~any such commodity interest transaction~~ is submitted for clearing through a futures commission merchant registered in accordance with section 4d of the Act.

(iii) With respect to paragraphs (c)(3)(ii) and (iv) of this section, ~~initial~~ capital contributed to a commodity pool by an affiliate, as defined by § 4.7(a)(1)(i) of this chapter, ~~that controls, as defined by § 49.2(a)(4) of this chapter,~~ of the pool's commodity pool operator shall not be a "participant" for purposes of determining whether such commodity pool operator is executing commodity interest transactions on behalf of a commodity pool, the participants of which are all located outside of the United States, its territories or possessions, *provided that:*

(A) The ~~control~~ affiliate and its principals are not subject to ~~a statutory disqualification,~~ an ongoing registration suspension or bar, prohibition on acting as a principal, or trading ban with respect to participating in commodity interest markets in the United States, its territories or possessions; and

(B) Interests in the ~~control~~ affiliate are not marketed as providing access to trading in commodity interest markets in the United States, its territories or possessions.

(iv) With respect to paragraph (c)(3)(ii) of this section, a commodity pool operated by a person located outside the United States, its territories or possessions shall be considered to be satisfying the terms of paragraph (c)(3)(ii) of this section if:

(A) The commodity pool is organized and operated outside of the United States, its territories or possessions;

(B) The commodity pool's offering materials and any underwriting or distribution agreements include clear, written prohibitions on the commodity pool's offering to participants located in the United States and on U.S. ownership of the commodity pool's participation units;

(C) The commodity pool's constitutional documents and offering materials are reasonably designed to preclude persons located in the United States from participating therein and include mechanisms reasonably designed to enable its operator to exclude any persons located in the United States who attempt to participate in the offshore pool notwithstanding those prohibitions;

(D) The commodity pool operator exclusively uses non-U.S. intermediaries for the distribution of participations in the commodity pool;

(E) The commodity pool operator uses reasonable investor due diligence methods at the time of sale to preclude persons located in the United States from participating in the commodity pool; and

(F) The commodity pool's participation units are directed and distributed to participants outside the United States, including by means of listing and trading such units on secondary markets organized and operated outside of the United States, and in which the commodity pool operator has reasonably determined participation by persons located in the United States is unlikely.

(v) Claiming an exemption under paragraph (c)(3)(ii) of this section will not affect the ability of a person to register with the Commission or qualify for and/or claim an exclusion or exemption otherwise available under ~~§ 4.5 or 4.13 of~~ this chapter with respect to the operation of or provision of advisory services to a qualifying commodity pool, ~~or~~ trading vehicle, or account not covered by the relief in this section.

(vi) A person acting in accordance with paragraph (c)(3)(i) or (ii) of this section remains subject to section 4*o* of the Act, but otherwise is not required to comply with those provisions of the Act and of the rules, regulations and orders thereunder applicable solely to any person registered in such capacity, or any person required to be so registered.

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Appendix C – Description of Each Association

The Alternative Investment Management Association Limited ("AIMA"):

AIMA, the Alternative Investment Management Association, is the global representative of the alternative investment industry, with more than 1,900 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than $2 trillion in assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programmes and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council (ACC) to help firms focused in the private credit and direct lending space. The ACC currently represents over 170 members that manage $400 billion of private credit assets globally. AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the first and only specialised educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors). For further information, please visit AIMA's website, www.aima.org.

The Asset Management Group of the Securities Industry and Financial Markets Association ("SIFMA AMG"):

SIFMA AMG brings the asset management community together to provide views on U.S. and global policy and to create industry best practices. SIFMA AMG's members represent U.S. and global asset management firms whose combined assets under management exceed $45 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds. For more information, visit http://www.sifma.org/amg.

The Investment Adviser Association ("IAA"):

The IAA is the largest organization dedicated to advancing the interests of SEC-registered investment advisers. For more than 80 years, the IAA has been advocating for advisers before Congress and U.S. and global regulators, promoting best practices and providing education and resources to empower advisers to effectively serve their clients, the capital markets, and the U.S. economy. The IAA's member firms manage more than $25 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. For more information, please visit www.investmentadviser.org.

ICI Global:

ICI Global carries out the international work of the Investment Company Institute ("**ICI**"), the leading association representing regulated funds globally. ICI's membership includes regulated funds publicly offered to investors in jurisdictions worldwide, with total assets of US$31.7 trillion. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the

interests of regulated investment funds, their managers, and investors. ICI Global has offices in London, Hong Kong, and Washington, DC.

The Managed Funds Association ("MFA"):

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