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

Re: Petition of the National Futures Association to the U.S. Commodity Futures Trading Commission to amend Rule 4.5

Dear Mr. Stawick:

We appreciate the opportunity to comment on the rulemaking petition (the "Petition"), filed with the U.S. Commodity Futures Trading Commission ("CFTC"), by the National Futures Association ("NFA"), in respect of CFTC Rule 4.5.

CFTC Rule 4.5 was amended in 2003 to delete several requirements relating to the level of commodities trading activities that persons seeking to rely on the Rule could engage in with respect to the vehicles they managed. In addition, the Commission's 2003 amendment removed the bar to marketing interests in qualifying entities operated by such persons as interests in a commodity pool or as a vehicle for trading in the commodity futures or commodity options markets. Through its Petition, the NFA is requesting that the CFTC re-introduce certain core requirements that were eliminated in 2003 with respect to the use by registered investment companies of commodity futures and commodity options contracts, and the marketing by registered investment companies of interests therein as commodity pool interests or interests in "vehicles for trading in (or otherwise seeking investment exposure to), the commodity futures or commodity options markets."[1]

The NFA's Petition is rooted in the recent formation and registration with the Securities and Exchange Commission (the "SEC"), of open-end management investment companies ("mutual funds"), that are operating in a manner nearly indistinguishable from that of traditional commodity pools, the units in which are registered for sale to the public under the Securities Act of 1933 ("Registered Commodity Pools"). Such mutual fund/commodity pools buy and sell commodity futures and commodity options contracts, swaps, structured notes and other instruments as the principal means of obtaining returns for their investors. In addition, such funds actively market themselves as "managed futures" funds, both in the names they have adopted as well as in their marketing literature.[2] While these funds employ the same strategies used by Registered Commodity Pools to produce returns for their shareholders, because they have registered with the SEC under the 1940 Act, such mutual fund/commodity pools are able to operate outside of the rules adopted by the CFTC to regulate commodity pools.

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[1] Petition of the National Futures Association to Amend Rule 4.5, 75 Fed. Reg. 56997 (September 17, 2010).

[2] The Petition identifies a number of such funds and their marketing materials.

The consequences that flow from the fact that these mutual fund/commodity pools and their operators/advisers are not subject to the CFTC's commodity pool operator ("CPO") regulations are significant. Such vehicles and their sponsor/advisers are not required to follow the CFTC's rules regarding the delivery and content of disclosure documents. Furthermore, while all mutual funds must disclose their expenses, the mutual fund/commodity pools do not have to disclose the expenses associated with accessing trading advisers in the same way that commodity pools are required to do under CFTC rules.[3] Finally, because of the broad, electronic distribution platforms available to mutual funds generally, such mutual fund/commodity pools can be purchased electronically without the need for prior delivery of important risk disclosures and with little or no requirement to determine the "suitability" of a fund for an investor.

In our view, since the new funds operate in the same manner as commodity pools, it is appropriate for the CFTC to act on the Petition and re-assert jurisdiction over the operators of such mutual fund/commodity pools. The CFTC's rules applicable to CPOs and the vehicles they manage are designed to ensure that potential investors in commodity pools receive and acknowledge important information about risks, expenses, conflicts of interests and important service providers in a specified manner and time (i.e., before the sale). Registered commodity pools operated by CFTC-registered CPO firms are required to comply with these specific dictates, and their operators are subject to annual self- and periodic on-site examinations. The new mutual fund/commodity pools bypass this carefully crafted regime in favor of one that places fewer restrictions on firms managing and, importantly, selling interests in such vehicles. To us, this not only undermines the CFTC's oversight of commodity futures and commodity options contracts for pooled vehicles that use these instruments to produce returns for shareholders, but it has also opened the door to less transparency and the masking of unique and important risks associated with investing in managed futures strategies.

In supporting the Petition to restore certain of Rule 4.5's core provisions, we are not saying that innovation should be stifled. Nor are we opposed to the idea of giving investors a choice of investment vehicles to serve their needs. As discussed above, we are very concerned with the lack of uniformity regarding core requirements applicable to these otherwise similar investment vehicles, and we are concerned that the prospectus disclosure and delivery regime applicable to mutual funds does not necessarily bring out all salient facts to investors at an appropriate point in the investment process.

In addition to these important issues, moreover, we are troubled by the fact that, to meet the requirements of Subchapter M, these mutual fund/commodity pools must conduct a significant portion of their trading in commodity futures and commodity options contracts through controlled foreign corporations (or "CFCs"). The use of CFCs by these new mutual fund/commodity pools only contributes to their complexity, opaqueness and cost – an outcome that is quite contrary to investor interests. In addition, such vehicles are not necessarily subject to U.S. regulatory oversight and are outside of the CFTC's rules that otherwise apply to vehicles that trade commodity futures and options contracts. We recognize that the use of CFCs is not unique to these new mutual

[3] There also are questions around the use of underlying funds, pools and separate accounts by these new mutual fund/commodity pools that do not yet appear to have been fully addressed by the SEC. In particular, we question whether the firms that are providing the investment returns to shareholders in these mutual fund/commodity pools are being treated as "investment advisers" under the 1940 Act.

fund/commodity pools, but it is nonetheless concerning to us that a core construct by which the new vehicles are able to qualify under Subchapter M involves a non-U.S. vehicle that adds costs and complexity while taking away from transparency and accountability.[4]

Steben & Company, Inc. has been registered as a CPO since 1989, and currently manages three commodity pools with assets in excess of $1.3 billion. The firm manages one fund for which interests are offered and sold pursuant to an effective registration statement filed with the SEC under the Securities Act of 1933, as amended ("1933 Act"); that fund complies with CFTC regulations as well as the 1933 Act and other, relevant SEC-administered statutes and rules. Any pooled vehicle that is subject to both SEC and CFTC jurisdiction is faced, technically speaking, with different disclosure, operating and/or marketing obligations.

Leaving aside the point that the cause of the varying requirements is the mutual fund industry's desire to effectively "shoe horn" a commodity pool into a mutual fund package, it is nonetheless possible and appropriate for these new mutual fund/commodity pools to adapt their selling, operating and disclosure practices to the requirements of the CFTC regimen. We believe that it is possible to adhere to the CFTC's CPO regulations without running afoul of the SEC's mutual fund regulations. More importantly, we think that it is appropriate to require that these funds bring their operations, disclosure, etc., up to the level applicable to Registered Commodity Pools operated by CPOs rather than let them default to a less exacting regime. Such a result is the simplest and most direct path to protecting and informing investors. And if there are irreconcilable conflicts or differences between CFTC- and SEC-imposed requirement that get identified in the process, we trust that any relief provided by the CFTC to mutual fund/commodity pools will be extended to Registered Commodity Pools that do not otherwise choose to register with the SEC under the 1940 Act.

In conclusion, we believe that the Petition will, if acted upon, come closer to establishing a level playing field for investors with respect to pooled vehicles that utilize the same instruments to meet their investment objectives. For that reason, we support the Petition and encourage the CFTC to take prompt action to bring it forward.

Sincerely,

John H. Grady

John H. Grady
Chief Operating Officer and General Counsel

cc: Ken Steben
Tom Sexton

[4] In this regard, we hope that the CFTC will carefully review these CFCs in considering whether and how to permit these new mutual fund/commodity pools to operate under CFTC oversight.