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October 18, 2010

VIA E-MAIL AND FIRST CLASS MAIL

David A. Stawick
Office of the Secretariat
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: NFA Petition for Proposed Rulemaking to Amend CFTC Regulation 4.5

Dear Mr. Stawick:

Dechert LLP welcomes the opportunity to submit our comments to the Commodity Futures Trading Commission ("**CFTC**") in response to a petition for rulemaking ("**NFA Petition**") submitted by the National Futures Association ("**NFA**") on August 18, 2010 regarding the exclusion of certain registered investment companies from the definition of commodity pool operator ("**CPO**") under CFTC Regulation 4.5[1] ("**Regulation 4.5**"[2]). As discussed below, we are of the view that the current regulatory language of Regulation 4.5 should remain unchanged. However, in the event that the CFTC determines to propose and adopt any amendments to Regulation 4.5, careful consideration should be taken to harmonize existing and potential conflicting statutes and regulations of the CFTC and the Securities and Exchange Commission ("**SEC**") and/or to provide appropriate exemptive relief, in order to avoid unnecessary and unintended consequences to this important market sector which is otherwise adequately regulated.

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1 Letter from Thomas W. Sexton, III, Senior Vice President and General Counsel, NFA, to David Stawick, Office of the Secretariat, Commodity Futures Trading Commission (August 18, 2010), *available at* http://www.nfa.futures.org/news/newsPetition.asp?ArticleID=3630. The NFA withdrew its original June 29, 2010 Petition for Rulemaking to Amend CFTC Regulation 4.5 by separate letter dated August 18, 2010 and resubmitted its petition on August 18, 2010.

2 17 C.F.R. § 4.5. *See also* 7 U.S.C. § 1a(5).

Background

Since its adoption in 1985, Regulation 4.5 has made available to certain persons an exclusion from the definition of a CPO with respect to their operation of qualifying entities that would otherwise be treated as commodity pools under the Commodity Exchange Act as amended ("**Act**") and the CFTC's regulations, but that are already subject to extensive disclosure and operating requirements of another federal or state regulator.[3] Currently, qualifying entities eligible for the exclusion under Regulation 4.5 include, among others, certain registered investment companies, insurance companies, banks, and pension plan fiduciaries.[4]

In its 2003 amendments to Regulation 4.5 ("**2003 Amendments**"), the CFTC sought to "moderniz[e] the requirements for determining who should be excluded from the CPO definition."[5] The 2003 Amendments were also intended to "encourage and facilitate participation in the commodity interest markets by additional collective investment vehicles and their advisers, with the added benefit to all market participants of increased liquidity."[6] The 2003 Amendments expanded the scope and use of Regulation 4.5 by eliminating certain operating restrictions on qualifying entities. In particular, the CFTC eliminated the requirement that a qualifying entity use commodity futures or commodity options contracts solely for *bona fide* hedging purposes, although five percent or less of the liquidation value of the qualifying entity's portfolio could be allocated to the aggregate initial margin and premiums necessary to establish non-*bona fide* hedging positions ("**five-percent test**").[7] The CFTC also eliminated the language prohibiting a qualifying entity from marketing participations to the public as or in a commodity pool or otherwise as or in a vehicle for trading in the commodity futures or commodity options markets ("**marketing restriction**"). In addition to the CFTC's expressed interest in encouraging and facilitating participation in the commodity interest markets, the 2003 Amendments also benefitted

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3 Additional Registration and Other Regulatory Relief for Commodity Pool Operators and Commodity Trading Advisors, 68 Fed. Reg. 12622 (March 17, 2003) ("**2003 Release**").

4 17 C.F.R. § 4.5(a)(1) – (4).

5 2003 Release.

6 2003 Release.

7 For purposes of computing the five-percent test, unrealized profits and losses on existing commodity interest contracts could be taken into account and, in the case of an option that is in-the-money at the time of purchase, the in-the-money amount could be excluded.

investors by permitting mutual funds to purchase commodity futures and options directly in lieu of entering into over-the-counter ("**OTC**") commodity derivatives. Direct purchases of commodity futures and options enhanced fund transparency, lowered transaction costs, alleviated concerns over counterparty credit risk, and increased participation in and liquidity of the exchange-traded commodity markets.

NFA Petition

The NFA has now requested that the CFTC restore the operating restrictions that were in effect under Regulation 4.5 prior to the 2003 Amendments. In addition to fully reinstating the *bona fide* hedging and the five-percent test for non-*bona fide* hedging positions, the NFA Petition seeks to restore the marketing restriction and expand the scope of that restriction. The NFA Petition expands the restriction by prohibiting the marketing of indirect exposure to the commodity markets through "trading in *(or otherwise seeking investment exposure to)* the commodity futures or commodity options markets" (emphasis supplied). The NFA's purported reason for its proposed changes is to ensure that registered investment companies that engage in more than a *de minimis* amount of commodity futures and options trading and that are offered or marketed to retail customers are subject to the appropriate regulatory requirements and oversight by regulatory bodies with primary expertise in commodity matters.[8] In support of the NFA Petition, on September 1, 2010 CFTC Commissioner Scott O'Malia issued a statement recommending that the "[CFTC] should expeditiously move forward and adopt the proposed changes to Regulation 4.5 as proposed by the NFA" ("**O'Malia Statement**").

For the reasons set forth below, it is our position that Regulation 4.5 should remain unchanged, as the robust and comprehensive statutory requirements of the Investment Company Act of 1940 as amended ("**1940 Act**") and the regulations promulgated thereunder have successfully served the best interests of mutual fund investors for 70 years (including since the 2003 Amendments), and

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[8] Section 721 of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 has expanded the definition of "commodity pool" to include an investment vehicle trading in certain derivatives other than commodity futures and commodity options. If the proposed changes to Regulation 4.5 were to apply to an expanded array of instruments beyond exchange-traded futures and commodity options, including commodity-linked swaps and other derivatives, then there would be even more of a significant, adverse effect on trading and liquidity in the commodity markets by registered investment companies. If such an expansion were to be contemplated or proposed by the NFA Petition or the CFTC, we believe that the CFTC must specifically propose such expansion and seek appropriate industry and public input. We do not otherwise comment on any such expansion in this letter.

the excessive burdens on mutual funds that would result from complying with a revised Regulation 4.5 would not be justified by the purported reasons specified in the NFA Petition.

Prevalence of Commodity-Based Mutual Funds

The NFA Petition states that it has *recently* become aware of at least three entities ("**Commodity Funds**")[9] filing for exclusions under Regulation 4.5 with respect to such entities investing in the commodity futures and options markets. However, registered investment company sponsors have been offering participations in commodity-based mutual funds for many years.[10] As the CFTC has noted in the past, the benefits of diversifying stock and bond portfolios with commodity investments have been widely recognized.[11] Financial research has shown that the risk/return performance of a portfolio is improved by acquiring uncorrelated or negatively correlated assets, and commodities generally perform that role in a portfolio of other financial assets.[12] For many small investors, mutual funds that offer commodity exposure are the only accessible and most efficient and cost-effective means of achieving these investment objectives. In response to this demand from retail customers, the mutual fund industry has provided investors with access to this important asset class by offering commodity-based mutual funds. There are now nearly four dozen mutual funds offering commodity exposure with more than $30 billion in total assets – a level of assets under management ("**AUM**") that substantially exceeds the aggregate AUM of public commodity pools.

The NFA Petition focuses in particular on actively managed futures funds, and the O'Malia Statement notes that "[r]ecently several SEC-registered investment companies have started to offer mutual funds to retail customers that for the most part, if not solely, trade futures."[13] As

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9 The MutualHedge Frontier Legends Fund sponsored by Equinox Fund Management, LLC, Managed Futures Strategy Fund sponsored by AQR Capital Management, LLC, and Highbridge Dynamic Commodities Strategy Fund sponsored by J.P. Morgan Asset Management.

10 *See, e.g.*, Oppenheimer Commodity Strategy Total Return Fund (Inception: 3/31/97), Credit Suisse Commodity Return Strategy Fund (Inception: 12/30/04), DWS Enhanced Commodity Strategy Fund (Inception: 02/14/05), and Rydex Managed Futures Strategy Fund (Inception: 3/2/2007).

11 Risk Management Exemption from Federal Speculative Position Limits, 72 Fed. Reg. 66097, 66098 (Nov. 27, 2007).

12 *Id.*

13 One of the funds named in the NFA Petition does not invest in futures contracts whatsoever.

stated above, mutual funds that offer retail investors exposure to futures contracts have been in operation for many years, and in large part the 2003 Amendments were effected to encourage their formation and operation. In addition, there is no explanation in the NFA Petition as to why actively managed futures funds are of particular concern to the NFA. Investors in actively managed futures funds have not suffered any unique harm as a result of investing in these funds, including throughout the recent financial crises. These funds offer investors the potential for the outperformance of various commodity indices and benchmarks, much like traditional mutual funds that invest in equities offer investors the potential for outperformance of various equity indices and benchmarks. As with mutual funds that actively manage portfolios of equities, there does not appear to be any need for additional scrutiny or separate regulatory oversight for mutual funds that actively manage portfolios of futures contracts and commodity options.[14]

Substantive Disclosure Requirements under the 1940 Act

The NFA Petition cites registration statement disclosure as among its primary concerns regarding mutual fund investments in commodities. However, registered investment companies are subject to robust disclosure requirements under the 1940 Act that must closely track certain long-standing, comprehensive disclosure forms, such as Form N-1A for open-end investment companies and Form N-2 for closed-end investment companies, as well as related guidance promulgated by the SEC.[15] In particular, mutual fund prospectuses must comply with the disclosure requirements set forth in Form N-1A, the disclosure form developed by the SEC specifically for mutual fund use. As the SEC has stated, the purpose of the Form N-1A prospectus "is to provide essential information about the Fund in a way that will help investors to make informed decisions about whether to purchase the Fund's shares described in the prospectus."[16] Thus, mutual funds are required to disclose, among other things, the fund's investment objectives and goals, investment strategies, fees and expenses, and information regarding management of the fund.

The 1940 Act also requires that mutual funds disclose their principal investment strategies and risks[17] and provide performance data.[18] Although, for example, a mutual fund does not provide a

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14 Such commodity interest contracts themselves and the trading and execution thereof are already regulated by the CFTC, the NFA, and designated contract markets.

15 See instruction 2(a) of Form N-1A.

16 Since the NFA Petition focuses on three open-end registered investment companies, this letter only discusses the disclosure requirements applicable to open-end funds.

17 Items 2, 4 and 9 of Form N-1A.

break-even analysis as required under the CFTC rules,[19] it is required to provide illustrative example style disclosure highlighting how fees and performance might affect a fund investment.[20] Mutual funds are further required to provide extensive disclosure regarding the brokers they use to execute portfolio transactions.[21] This is a corollary to the CFTC's Part 4 Regulations regarding the disclosure of information about a commodity pool's futures commission merchants.[22]

While the NFA Petition notes the absence of certain disclosures required by CFTC's Part 4 Regulations in the offering materials of the Commodity Funds, the NFA Petition does not cite a single instance of any harm to any investor in a commodity-based mutual fund. Instead, the comprehensive disclosure requirements under the 1940 Act have likely been helpful, not harmful, in allowing investors to fully and clearly understand and evaluate the potential risks and costs of investing in commodity-based mutual funds.

Substantive Operating Requirements under the 1940 Act

Investors in registered investment companies also benefit from multiple, substantive protections and operational constraints under the 1940 Act that are not required by the CEA or CFTC regulations, and thereby not provided to investors in public commodity pools. Among the most important of these protections is the limitation on leverage under Section 18(f) of the 1940 Act that requires a mutual fund to "cover" potential future obligations arising from its portfolio management activities, including commodity futures and options trading. Mutual funds cover these obligations by segregating liquid assets or holding offsetting positions.[23] Other statutory and regulatory protections under the 1940 Act include requirements regarding liquidity, concentration, and diversification of investments, same-day valuation of fund assets, qualified third-party custody of fund assets, stringent limitations on transactions by the fund's adviser or its

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18 Item 3 of Form N-1A.

19 17 C.F.R. § 4.10(j).

20 Item 3 Example of Form N-1A.

21 Item 21 of Form N-1A.

22 17 C.F.R. § 4.24(e)(6).

23 *See* Securities Trading Practices of Registered Investment Companies, 44 Fed. Reg. 25128 (Apr. 27, 1979), *Dreyfus Strategic Investing & Dreyfus Strategic Income* (pub. avail June 22, 1987), and *Merrill Lynch Asset Management, L.P.* (pub. avail. July 2, 1996).

affiliates with the fund, auditing of financial statements by independent registered accountants, and oversight of fund operations by a board whose composition must include independent directors or trustees. Independent boards are also instrumental in protecting investors from excessive fees and expenses. Board oversight under the 1940 Act helps address the conflicts of interest that may arise between the objectives of fund insiders, such as the adviser, and the interests of the fund and its participants, which include the negotiation of the fund's fee structure. Public and private commodity pools, which generally do not have independent boards, usually charge significantly higher fees than mutual funds.

The SEC has a long, successful track record of protecting investors in retail investment funds. More than 87 million Americans, representing slightly less than half of all households, own mutual funds.[24] There are currently over 9,000 funds available to investors, offering a wide variety of investment strategies, including commodities, to suit different investment needs.[25] The substantive regulations that have been in place for the past 70 years have long served to protect the millions of retail investors throughout the mutual fund industry, including those investors in the long-established commodity-based mutual fund community.

In fact, retail investors have been seeking commodities exposure in their investment choices. The number of public commodity pools currently available to retail customers and the aggregate AUM of these funds are far surpassed by the numerous mutual funds regulated by the SEC that seek investment exposure to commodity investments and, at the same time, supply significant trading volume and liquidity to the commodity markets. In fact, as stated above, increased liquidity for commodity-based funds was one of the specific reasons articulated by the CFTC in its rationale for implementing the 2003 Amendments. Additionally, commodity-based mutual funds have been a welcomed investment choice due to their substantially lower fees, third-party custody arrangements, DTCC clearing, daily liquidity, and rigorous SEC disclosure and operating regulation and oversight. Finally, fund managers themselves are drawn to the SEC-regulated mutual fund space for sound business reasons, including the significantly lower operational costs, the state securities (blue sky) law advantages, and the investment opportunities from plan investors governed by the Employee Retirement Income Security Act of 1974 as amended.

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24 Mutual Fund Distribution Fees; Confirmations, Investment Company Act Release No. 29367 (July 21, 2010).

25 *Id.*

Use of Wholly Owned Subsidiaries

The NFA Petition references the use by commodity-based mutual funds of "a subsidiary for tax and mutual fund regulatory purposes." Prior to 2005, many mutual funds obtained exposure to the commodities markets by entering into commodity-linked total return swap agreements or similar swap agreements. In late 2005, the Internal Revenue Service ("**IRS**") issued a revenue ruling[26] that the income from commodity-linked swaps did not constitute "qualifying income" under Subchapter M of the Internal Revenue Code ("**Code**"). In a subsequent revenue ruling,[27] the IRS indicated that income from alternative investment instruments, including commodity-linked notes, could allow registered investment companies to obtain commodity exposure while complying with the "qualifying income" requirements of Subchapter M. The IRS's revenue ruling had no impact on, and did not affect the scope of, the 2003 Amendments.

Following the subsequent IRS ruling, many commodity-based mutual funds applied for and received private letter rulings from the IRS in which the IRS concluded that income from certain leveraged commodity-linked notes would constitute "qualifying income." Many mutual funds also received private letter rulings in which the IRS concluded that an investment in the equity securities of a subsidiary investing primarily in commodity-linked swaps and other commodity-linked derivatives would constitute "qualifying income." Thereafter, many commodity-based mutual funds began investing in commodity-linked swaps and commodity futures and options through a wholly owned subsidiary ("**Subsidiary**"). In addition, direct purchases of commodity futures and options through a Subsidiary are generally more cost effective and transparent to investors than entering into commodity-linked swaps. Direct purchases of commodity futures and options eliminated the counterparty risk inherent in OTC derivative instruments. The financial turmoil of 2007-2009 heightened concerns over counterparty credit risk and eliminated the number of banks, dealers, and other financial institutions willing to enter into commodity swap transactions. The combination of greater market turbulence and fewer counterparties increased the cost and risk of entering into commodity swaps and further incentivized mutual funds to directly purchase futures contracts and options through their Subsidiaries.

The NFA states that the Subsidiaries are not themselves subject to the 1940 Act, although in fact they are subject to certain investment restrictions applicable to their parent funds. The NFA's analysis does not include the important fact that private letter rulings from the IRS and SEC requirements under the 1940 Act apply substantial investor protections to the Subsidiaries. In order for the income that a Subsidiary generates to constitute "qualifying income," its investing

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[26] Rev. Rul. 2006-1, 2006-2 I.R.B. 1.

[27] Rev. Rul. 2006-31, 2006-25 I.R.B. 1.

activities must meet the requirements of Section 18(f) of the 1940 Act that prohibit the issuance of senior securities.[28] The Subsidiary must meet the same leverage and coverage restrictions applicable to a registered investment company. This constraint on a Subsidiary's activities addresses arguably the riskiest aspect of commodities investing, the embedded leverage in commodity futures and options contracts.

Furthermore, Section 48(a) of the 1940 Act prohibits a registered investment company from engaging indirectly in any act that would otherwise directly violate the 1940 Act or the rules thereunder.[29] Accordingly, a Subsidiary would be prohibited from undertaking any action that would cause its parent fund to violate the 1940 Act. Thus, while the NFA states that Subsidiaries are not subject to the 1940 Act, and while it is true they are not registered under the 1940 Act, as a practical matter Subsidiaries are indirectly subject to the 1940 Act by virtue of their registered investment company parent entities. In addition, several SEC no-action letters provide guidance on the proper operation of a Subsidiary in compliance with certain aspects of the 1940 Act, including the avoidance of the layering of sales charges, fees, and costs.[30]

Congressional Liberalization of Mutual Fund Commodities Investing

The Regulated Investment Company Modernization Act of 2010 ("**Tax Modernization Act**"), which was recently passed by the U.S. House of Representatives, would amend the qualifying income test to include income derived from investing in commodities or derivatives in commodities. Were the Tax Modernization Act to become law, Subchapter M of the Code would no longer be the controlling statute limiting registered investment company investments in commodities. Absent additional law-making, Section 3(a) of the 1940 Act would control the amount of commodity futures and options investing a mutual fund could permissibly engage in and still be able to register as an investment company. Passage of the Tax Modernization Act would result in a significant liberalization of the amount of investing in commodities and derivatives in commodities a mutual fund could undertake. The NFA's request to restrict further the current constraints on registered investment company commodity investing is inconsistent with, and antithetical to, the purposes of the Tax Modernization Act which is to eliminate the

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28 *See e.g.*, I.R.S. Priv. Ltr. Rul. 200822010 *3(Feb. 12, 2008), I.R.S. Priv. Ltr. Rul. 200840039 *8(June 13, 2008) and I.R.S. Priv. Ltr. Rul. 200842014 *11(July 17, 2008).

29 15 U.S.C. § 80a-48(a).

30 *South Asia Portfolio* (pub. avail. Mar. 12, 1997), *Templeton Vietnam Opportunities Fund, Inc.* (pub. avail. Sep. 10, 1996), *The Spain Fund, Inc.* (pub. avail. Mar. 28, 1988) and *The Scandinavia Fund* (pub. avail. Nov. 24, 1986).

current tax restrictions on mutual fund investments in commodities and derivatives in commodities.

Suitability

A recurring theme throughout the NFA Petition is a concern for "unsophisticated" retail investors. However, investors in registered investment companies are already protected by robust suitability requirements imposed by the SEC and the Financial Industry Regulatory Authority ("**FINRA**"). The NFA also states that one of the Commodity Funds discussed in the NFA Petition permits investors simply to "point and click" to buy or redeem shares. While this particular fund may permit self-directed purchases and redemptions, many other mutual funds, including the other Commodity Funds cited in the NFA Petition, only accept purchases from SEC-registered broker-dealers through a subscription network processing platform.

Far from being inadequate or insufficiently restrictive, the substantive disclosure and operational requirements under the 1940 Act and the other investor protections imposed by the SEC and FINRA are likely responsible for the lack of specific incidents or claims related to suitability cited in the NFA Petition and throughout the commodity-based mutual fund industry in general.

Adverse Impact of the NFA Petition's Proposals

If the CFTC were to adopt the changes to Regulation 4.5 proposed in the NFA Petition, potentially all commodity-based mutual funds and their investors would stand to be significantly and unnecessarily adversely affected. The NFA Petition focuses on registered investment companies (and their sponsors, directors, and/or trustees) providing commodity exposure generally and those offering actively managed futures strategies specifically. However, the NFA Petition's proposed amendments would also force commodity index funds (and their sponsors, directors, and/or trustees) to register as CPOs, whether those funds were pursuing a purely passive strategy or one with some active futures management component. Even a commodity index fund's passive commodities investing may be unable to qualify as *bona fide* hedging under CFTC Regulation 1.3(z)(1) and current CFTC guidance.[31] Other funds that may employ limited commodity futures or commodity options strategies that nonetheless fail the *bona fide* hedging test or five-percent test may forego this important commodity trading activity, leaving retail investors with less-diversified portfolios and commodity markets with less liquidity and trading

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[31] 17 C.F.R. § 1.3(z)(1). Since adopting Rule 1.3(z)(1) in 1977, the CFTC has clarified, interpreted, and reinterpreted what it means to be engaged in *bona fide* hedging. *See* Background on Position Limits and the Hedge Exemption, Statement of Dan M. Berkovitz, General Counsel, Commodity Futures Trading Commission (Jan. 14, 2010).

volume. Additionally, every commodity-based registered investment company, regardless of whether its strategy involved passive indexing or actively managed futures investing, would be unable to comply with the NFA's proposed expansion of the Regulation 4.5 marketing restriction without registering as a CPO.

In addition, if mutual funds (and their sponsors, directors, and/or trustees) were required to register as CPOs, the NFA's proposed amendments would create excessive and duplicative or conflicting regulation, forcing registered investment companies to incur significant costs in complying with firm, director, trustee, and employee registration and disclosure, reporting, recordkeeping, and advertising requirements.[32] These costs would be passed on to fund investors, affecting the returns these individuals rely upon for retirement, education, and other important investment objectives.

We believe strongly that any consideration of amending current Regulation 4.5 as described in the NFA Petition or otherwise must be accompanied by harmonization between applicable and conflicting statutes and CFTC and SEC regulations, in order that one, unified regulatory approach is taken with respect to registered investment companies utilizing commodity contracts. For example, the requirement that in some cases a registered CPO must disclose the performance of its other pools in a disclosure document for a pool[33] would likely violate investment adviser regulations under the Investment Advisers Act of 1940 as amended, as well as certain form disclosure requirements for mutual fund registration statements and SEC regulations.[34] Additionally, mutual funds widely held by the general public would likely be unable to comply with the CFTC requirement that a disclosure document be delivered to, and acknowledged, signed, and dated by, each investor.

Finally, if the CFTC were to proceed to consider any changes to Regulation 4.5, the CFTC additionally should consider and take guidance from its past exemptive relief, and recently proposed codification of such relief, in respect of the CPO requirements applicable to commodity exchange-traded funds ("**Commodity ETFs**") and their sponsors, directors, and/or trustees. The

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32 Chuck Jaffe, *Financial Reform Won't Make Commodity Funds Safer*, MARKETWATCH (Aug. 8, 2010), *available at* http://www.marketwatch.com/story/financial-reform-wont-make-commodity-funds-safer-2010-08-08.

33 17 C.F.R. § 4.25(c).

34 *See e.g.*, 17 C.F.R. § 275.206(4)-1 and Item 4(b) of Form N-1A.

same legal, policy, and commercial considerations are equally applicable to Commodity ETFs as to commodity-focused mutual funds covered by the NFA Petition.[35]

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Thank you for considering our views on this important topic. Please contact M. Holland West at 212-698-3527 or holland.west@dechert.com or Matthew K. Kerfoot at 212-641-5694 or matthew.kerfoot@dechert.com if we can provide any additional information that may assist the CFTC and its Staff.

Respectfully submitted,

M. Holland West

M. Holland West

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35 Commodity Pool Operators: Relief From Compliance With Certain Disclosure, Reporting and Recordkeeping Requirements for Registered CPOs of Commodity Pools Listed for Trading on a National Securities Exchange: CPO Registration Exemption for Certain Independent Directors or Trustees of These Commodity Pools, 75 FR 54794 (Sept. 9, 2010).