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October 18, 2010

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

Filed via email: NFAamendrule4.5@cftc.gov

Re: National Futures Association Petition to Amend Commission Rule 4.5 (the "Petition")

Dear Mr. Stawick:

We write on behalf of the Committee on Futures and Derivatives Regulation (the "Committee") of the New York City Bar Association (the "Association") in response to the Notice of Petition and Request for Comment (the "Request") published by the Commodity Futures Trading Commission (the "CFTC") on September 17, 2010.

The Association is an organization of over 23,000 members. Most of its members practice in the New York City area. However, the Association also has members in nearly every state and over 50 countries. The Committee consists of attorneys knowledgeable about the regulation of commodity pool operators ("CPOs") and commodity trading advisors ("CTAs"), and it has a practice of publishing comments on legal and regulatory developments that have a significant impact on CPOs and CTAs.

Without commenting on the supporting arguments set forth in Section III of the Petition, the Committee wishes to emphasize the observations made at the end of Section III of the Petition regarding the need for harmonization of the applicable disclosure rules and regulations of the CFTC and the National Futures Association (the "NFA"), on the one hand, and

the Securities and Exchange Commission (the "SEC"), on the other hand, in the event Rule 4.5 is amended in the manner requested in the Petition.

We note that the disclosure rules of the CFTC and the NFA applicable to commodity pool disclosure documents and statements of additional information and the disclosure rules of the SEC applicable to investment company prospectuses and statements of additional information in certain material respects directly conflict such that compliance with both disclosure regimes is not possible, absent relief.[1] These conflicts between the CFTC/NFA rules and the SEC rules may function to exclude from the market any vehicle for collective investment that is within the definition of the term "investment company" set forth in the 1940 Act and whose management is within the definition of the term "commodity pool operator" set forth in Section 1a(5) of the Commodity Exchange Act (the "CEA") and compel such vehicles to suspend the offering of their shares pending resolution of these conflicts and relief from the SEC, the CFTC or both of them.[2]

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[1] For example, the requirements set forth in CFTC Rule 4.25(c)(2) regarding the inclusion in a disclosure document of the performance of certain pools and accounts other than the performance of the offered pool directly conflicts with guidance published by the Staff of the Division of Investment Management (the "Staff") of the SEC under Section 34(b) of the Investment Company Act of 1940 (the "1940 Act") and Section 206 of the Investment Advisers Act of 1940 (the "Advisers Act") and Rule 206(4)-3 promulgated thereunder, which generally has held that the inclusion in the prospectus of a registered investment company of the prior performance of other investment companies or accounts managed by the investment company's investment adviser is inherently misleading and prohibited by Section 34(b) of the 1940 Act and Section 206 of the Advisers Act, unless the other companies or accounts have investment objectives, policies and strategies substantially similar to those of the offered investment company and certain other requirements are satisfied. See *Growth Stock Outlook Trust, Inc.* SEC No-Act. Ltr. (pub. avail. Apr. 15, 1986); *Nicholas-Applegate Mutual Funds* SEC No-Act. Ltr. (pub. avail. Aug. 6, 1996); *GE Funds* SEC No-Act. Ltr. (pub. avail. Feb. 7, 1997); *ITT Hartford Mutual Funds* SEC No-Act. Ltr. (pub. Avail. Feb. 7, 1997); and *Nicholas-Applegate Mutual Funds* SEC No-Act. Ltr. (pub. avail. Feb. 7, 1997). Moreover, the calculation methodology for the presentation of prior performance information required by the National Futures Association likely is incompatible with both the standardized SEC method of performance calculation and the methods of the Global Investment Performance Standards ("GIPS") established by the CFA Institute (formerly the Association for Investment Management and Research). A complete catalog of all such conflicts cannot be definitively compiled until a CPO has completed a review and comment process with the Staff and with the staff of the NFA in respect of a disclosure document/prospectus and statement of additional information that seeks to comply with both disclosure regimes.

[2] An alternative, or partial, solution to the problem of conflicting disclosure requirements might be for the Staff of the SEC to clarify the scope of the exclusion from the 1940 Act's definition of the term "investment company" available to commodity pools to eliminate, or reduce, the incidence of joint regulation. Most commodity pools presumptively are "investment companies" within the meaning of Section 3(a)(1)(C) of the 1940 Act, but succeed in rebutting this presumption pursuant to Section 3(b)(1) of the 1940 Act and interpretive guidance thereunder published by the SEC and the Staff. Section 3(b)(1) of the 1940 Act provides that notwithstanding Section 3(a)(1)(C), "any issuer primarily engaged...in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities" is excluded from the definition of the term "investment company" in Section 3(a) of the 1940 Act, and therefore is neither required nor permitted to be registered as such thereunder. This provision is narrowly construed and the burden of demonstrating that an issuer is "primarily engaged" in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities falls upon the issuer. See *Securities and Exchange Commission v. American Institute Counselors, Inc.*, (SEC 1975) [1975-1976 Tr. Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,388 (D.D.C. Dec. 30, 1975) at 98,962. However, the "primary engagement" standard set forth in Section 3(b)(1) and its application to commodity pools has been interpreted in a line of

We note also that the disclosure rules of the CFTC/NFA applicable to commodity pool disclosure documents and statements of additional information and the disclosure rules of the SEC applicable to investment company prospectuses and statements of additional information in certain material respects overlap, but are materially incongruent.[3] This incongruity between the CFTC/NFA rules and the SEC rules may function to cause attempts to comply with both disclosure regimes to lead to disclosure that is lengthy, dense, repetitive, and confusing to prospective investors. Indeed, these incongruities could ultimately cause a disclosure document/prospectus and statement of additional information that seeks to comply with the requirements of both disclosure regimes to be so lengthy, dense, repetitive, and confusing as to obscure or impede understanding of the information required to be included by the 1940 Act and the Advisers Act to the point that it violates Section 34(b) of the 1940 Act, Section 206 of the Advisers Act and Rule 206(4)(3) thereunder, as well as potentially violating Section 4o(1) of the CEA.

Any relief afforded by the CFTC to vehicles for collective investment that are within the definition of the term "investment company" set forth in the 1940 Act and whose management is within the definition of the term "commodity pool operator" set forth in Section 1a(5) of the CEA must be equitably harmonized with the applicable rules and regulations of the CFTC/NFA and the SEC. Any exemption from, or amendment to, the Part 4 Rules granted or made with a view to harmonizing CFTC/NFA and SEC regulatory requirements should be crafted carefully and consider the underlying nature of the product offered.[4]

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guidance published by the SEC and the Staff. See *Tonopah Mining Co. of Nevada*, 26 S.E.C. 426 (1947); *Peavey Commodity Funds I, II and III*, 1983 SEC No-Act. LEXIS 2576 (June 2, 1983); *E.F. Hutton and Company Inc.*, SEC No-Act. Ltr. (June 22, 1983); *Ft. Tryon Futures Fund Limited Partnership*, 1990 SEC No-Act. LEXIS 1192 (August 16, 1990); and *Managed Futures Association*, 1996 SEC No-Act. LEXIS 623 (July 15, 1996).

[3] For example, performance data required under CFTC Rule 4.25 includes, among other things, the largest monthly decline during the most recent five calendar years and year-to-date, expressed as a percentage of the pool's net asset value and the worst peak-to-valley draw-down during the most recent five calendar years and year-to-date, expressed as a percentage of the pool's net asset value. Item 4(b)(2) of the SEC's Form N-1A (registration statement for open-end investment companies, commonly called mutual funds) and Item 4.1 of the SEC's Form N-2 (registration statement for closed-end registered investment companies) require disclosure of information, such as a bar chart showing a fund's annual total returns for each of the last ten calendar years subsequent to the effective date of the registration statement, the highest and lowest quarterly return during the ten years covered by the chart (or since inception if less than ten years), a fund's average annual total return for one, five and ten calendar year periods (as well as after taxes on distributions and after taxes on distribution and redemption) and the returns of an appropriate broad-based securities market index for the same periods. Similarly, the fee table required by Item 3 of the SEC's Form N-1A Item 3.1. of the SEC's Form N-2 and the general instructions thereunder require the inclusion of a fee table and synopsis that is incompatible with breakeven table required by CFTC Rule 4.24(d)(5) and related rules and interpretive guidance published by the NFA. A complete catalog of all such incongruities cannot be definitively compiled until a CPO has completed a review and comment process with the Staff and with the staff of the NFA in respect of a disclosure document/prospectus and statement of additional information that seeks to comply with both disclosure regimes.

[4] In light of the reference in the penultimate paragraph of the Petition to the operational relief granted by the CFTC to exchange-traded commodity pools, we take this opportunity to observe that exchange-traded commodity pools that engage in a continuous offering of their shares have not obtained any substantive relief from the

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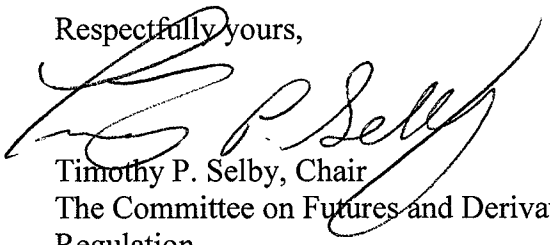
We appreciate the opportunity to present our views to you on this matter of importance to us as counsel to CPOs and CTAs.

Respectfully yours,



Timothy P. Selby, Chair
The Committee on Futures and Derivatives Regulation,
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requirements of Rule 4.21 and comply with the requirements of Rule 4.21 in all respects. In CFTC Letter 06-26 (September 26, 2006), the CFTC staff acknowledged at footnote 11 that "The CPO's obligation to deliver a Disclosure Document (and the requirements to obtain a signed acknowledgment of receipt) extends to the direct purchaser of units of participation, and not to persons who purchase from that purchaser. In this regard, the Commission has stated that, with respect to the transfer of a participation unit in a commodity pool, the CPO of the pool 'is not required to provide a Disclosure Document (Rule 4.21) to a person who purchases a unit of participation or interest in the pool from a pool participant if the pool operator did not solicit the purchase.' 44 Fed. Reg. 25658, 25659 (May 2, 1979)." Exchange-traded commodity pools that engage in a continuous offering of their shares comply with Rule 4.21 in connection with all direct purchases of Shares from the pool. We see no reasonable basis for distinguishing between a jointly regulated entity, on the one hand, and a commodity pool subject to the Part 4 Rules that is not also registered as an "investment company" under the 1940 Act, on the other hand, in connection with the applicability of Rule 4.21. Listing the shares of a commodity pool on a securities exchange, standing alone, has not given rise to any relief from Rule 4.21 in connection with primary transactions in which shares are purchased directly from a pool. Furthermore, mutual fund shares are not exchange-traded, and therefore we do not see the exchange-traded nature of shares of these pools as forming any relevant or appropriate basis of comparison between them and a mutual fund for purposes of the applicability of Rule 4.21. ETFs that are registered as investment companies under the 1940 Act presumably would be treated the same as exchange-traded commodity pools for purposes of Rule 4.21, should they be required to be jointly regulated as a result of the amendments to Rule 4.5 requested in the petition. The CFTC has, however, afforded certain conditional relief from Rule 4.21 to a commodity pool that, unlike a mutual fund or ETF, is a closed-end exchange-traded pool that offered and sold its shares in a "firm commitment" underwriting. See CFTC Letter 10-06 (March 29, 2010). In this letter, the CFTC staff confirmed in the text at note 14, once again, that secondary-market transactions in shares of a commodity pool do not give rise to disclosure document delivery and acknowledgement obligations under Rule 4.21 and therefore no relief is required in connection therewith. However, we note that the manner of distribution of this commodity pool's shares, in a firm commitment underwriting, is distinguishable in several material respects from the "best efforts" basis on which shares of mutual funds and non-exchange traded Part 4 compliant commodity pools are underwritten and distributed.

New York City Bar Association
Committee on Futures and Derivatives Regulation
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