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David A. Stawick
Secretary
Commodity Futures Trading Commission
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Filed via email: etfcpoexemptcomment@cftc.gov

Re: Proposed Regulatory Relief for CPOs of Exchange-Listed Commodity Pools
Notice of Proposed Rulemaking (75 Federal Register 54794) (September 9,
2010) (the "Proposal")

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 Proposal.

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.

The Committee would like to take this opportunity to propose a clarification as to the intended scope of the Proposal and certain other matters.

The CFTC states in Section 2 of the Proposal that “[t]hese CPOs sought relief from the specific Disclosure Document delivery and acknowledgement requirements of Regulation 4.21...” This is not entirely accurate. The CPOs of open-end exchange-traded commodity pools that engage in a continuous offering of their shares (“Open-End Commodity ETFs”) have not sought or obtained any relief from the requirements of Rule 4.21 and comply with the requirements of Rule 4.21 in all respects.¹ What they have sought, and what they have obtained, is merely confirmation that secondary-market transactions in units of participation in a commodity pool are not within the reach of Regulation 4.21, a position first articulated by the CFTC in May, 1979. In CFTC Letter 06-26 (September 26, 2006), in connection with the launch of the first commodity pool to be listed on a securities exchange in the United States, the CFTC 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).” This position has since been reaffirmed numerous times, including in the Proposal in Footnote 23. Open-End Commodity ETFs comply with Rule 4.21 in connection with all direct purchases of Shares from the pool.

One CPO has sought, and the CFTC has afforded, certain conditional relief from Rule 4.21 in connection with the launch of a closed-end exchange-traded commodity pool that offered and sold its shares in a one-off “firm commitment” underwriting and distribution (a “Closed-End Commodity ETF”). See CFTC Letter 10-06 (March 29, 2010).² Letter 10-06 afforded relief only from the requirement of Regulation 4.21(b) to obtain a signed acknowledgment of receipt of a Disclosure Document before accepting funds, securities or property from a prospective pool participant with respect to sales of shares in the pool’s initial public offering. No relief was provided from the requirements of Regulation 4.21(a), and it was represented to the CFTC that the underwriters/distributors would provide a Part 4 compliant Disclosure Document that had been reviewed by the National Futures Association to prospective pool participants before accepting funds, securities or property from them, and that appropriate records thereof would be kept. Letter 10-06 re-affirmed at footnote 14 that the CPO was not required to comply with Rule 4.21 in connection with secondary market purchases, citing 44 Fed. Reg. 25658, 25659 (May 2, 1979). Moreover, we note that the one-off “firm commitment” basis on which the shares of this Closed-End Commodity ETF were underwritten and distributed is distinguishable in several material respects from the continuous “best efforts” basis on which shares of mutual funds and non-exchange-traded, traditional public commodity pools are underwritten and distributed, and from the continuous “no efforts” basis on which shares of ETFs (including Open-End Commodity ETFs) are underwritten and distributed, as discussed further below.

¹ The term “open-end” in this context refers to a commodity pool whose shares are redeemable. The term “closed-end” refers to a commodity pool whose shares are not redeemable.

² To date, there is only one Closed-End Commodity ETF listed for trading on a securities exchange in the United States, but there are perhaps several dozen Open-End Commodity ETFs.

Shares in an Open-End Commodity ETF may be purchased directly from the pool only by certain qualified financial institutions that are in privity of contract with the offered pool and its CPO, called Authorized Participants. It is clear that proposed paragraph (c)(2), as written, would exempt direct purchases by Authorized Participants. But the CPOs of Open-End Commodity ETFs have no difficulty complying with Rule 4.21 in connection with these transactions. Proposed paragraph (c)(2), as written, also would exempt resales by Authorized Participants and secondary market transactions generally, as well as resales by underwriters/distributors in the initial public offering of a Closed-End Commodity ETF. The Proposal in this regard could be clarified so as to codify the CFTC's statement at 44 Fed. Reg. 25658, 25659 (May 2, 1979) and make clear that a CPO has no Rule 4.21 obligation when an Authorized Participant resells a share purchased directly from an Open-End Commodity ETF in a secondary market transaction, whether on- or off-exchange, or in connection with other secondary market transactions in shares. The Proposal also could be clarified as to whether the CPO of a Closed-End Commodity ETF has obligations under Rule 4.21 in respect of resales by underwriters/distributors in connection with the initial public offering of the pool.

Underwriters and distributors of non-exchange-traded, traditional public commodity pools generally are contractually obligated to use "best efforts" to underwrite and distribute shares of the offered pool, and receive commissions from the offered pool or the CPO in connection with sales actually made. Historically, they have been viewed by the CFTC as agents of the CPO for purposes of the CPO's compliance obligations under Rule 4.21, and generally are contractually obligated to assist the CPO in connection with the CPO's obligation to comply with the requirements of Rule 4.21. The underwriters and distributors of the Closed-End Commodity ETF that was the subject of CFTC Letter 10-06 were bound by a "firm commitment" to underwrite and distribute shares of that Closed-End Commodity ETF and were paid a commission in connection therewith. They too were viewed by the CFTC in Letter 10-06 as agents of the CPO for purposes of the CPO's compliance obligations under Rule 4.21. Authorized Participants are distinguishable from the underwriters and distributors of non-exchange-traded, traditional public commodity pools and from the underwriters and distributors of the Closed-End Commodity ETF that was the subject of Letter 10-06 because Authorized Participants are not under any obligation to exert any effort whatsoever to sell shares of the offered pool and do not receive any commissions or other compensation from the offered pool or the CPO in connection with their activities as an Authorized Participant. For these reasons, Authorized Participants have not been viewed as agents of the CPO in connection with their direct purchases of shares of an Open-End Commodity ETF, but rather are viewed merely as direct purchasers from the pool who may then resell in the secondary market without creating any obligation for the CPO under Rule 4.21 in accordance with the interpretive position first articulated by the CFTC in 1979 at 44 Fed. Reg. 25658, 25659 and reaffirmed in the Proposal in footnote 23.

In light of the foregoing, we propose that the CFTC amend the Proposal to exempt from Rule 4.21, (i) any direct purchases of shares of the offered pool and re-sales of such shares by any underwriter or distributor thereof, provided that the underwriter or distributor is under no obligation to exert any effort whatsoever to purchase or sell shares of the offered pool and receives no commission or other compensation from the CPO or the offered pool in connection therewith, and (ii) any secondary market transaction in shares of a pool not involving any underwriter or distributor. We believe this would clarify the scope of the proposed relief and

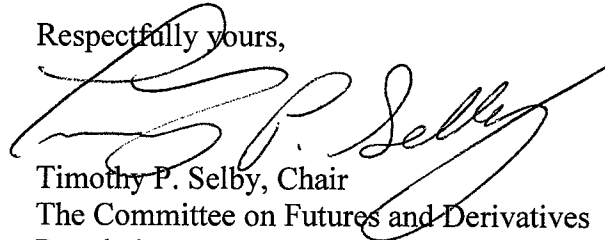
codify the position first articulated by the CFTC in 1979 at 44 Fed. Reg. 25658, 25659 and reaffirmed in the Proposal in footnote 23. It also would serve to distinguish between an underwriter/distributor that is acting as an agent of the CPO for purposes of the CPO's compliance obligations under Rule 4.21 from a direct purchaser that may be deemed to be an underwriter under the securities laws, but who is under no obligation to sell shares and is not compensated by the CPO or the pool for selling shares.

The CPO seeking relief in Letter 10-06, like CPOs of Open-End Commodity Pools that have sought relief from the CFTC from certain of the Part 4 Regulations, agreed to make a Part 4-compliant Disclosure Document available to the public at all times on an Internet web site, and this has been incorporated into the Proposal at paragraphs (c)(2)(i)(A) through (D). Proposed paragraph (c)(2)(C) would require a CPO claiming the proposed relief, among other things, to "[c]learly inform prospective pool participants of the Internet address of such Web site..." It is not clear how the CPO of an exchange-traded pool can comply with this requirement in practice, as the CPO cannot know the identities of prospective pool participants. Consequently, we recommend that any final rule clarify how a CPO can comply with this requirement, or that it be removed.

* * *

We appreciate the opportunity to present our views to you on this matter of importance to us as counsel to CPOs of exchange-traded commodity pools.

Respectfully yours,



Timothy P. Selby, Chair
The Committee on Futures and Derivatives
Regulation,
New York City Bar Association

New York City Bar Association
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Adjunct Members

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Michael Sackheim
Howard Schneider
Lore Steinhäuser*

* These members of the Committee did not participate in this comment letter.