Alternative Investment Management Association

David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581
USA

Submitted via http://comments.cftc.gov

12 April 2011

Dear Mr Stawick,

Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations; Proposed Rule (RIN 3033-AD30)

The Alternative Investment Management Association (AIMA)[1] appreciates the invitation of the Commodity Futures Trading Commission (the 'Commission') to comment on the proposed rulemaking set out in the Commission's release, 'Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations', published in the *Federal Register* on 11 February 2011 (the 'Release').[2]

AIMA members, as investment managers and advisers to hedge funds all over the world, will be particularly impacted by the proposals contained in the Release. AIMA fully supports the Commission and its staff in the difficult task of implementing the amendments to the Commodity Exchange Act, as amended (the 'CEA'), required by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the 'Dodd-Frank Act') and we applaud the dedication of the Commission staff and the careful thought given to a broad and diverse array of rulemaking areas.

In the Release, the Commission staff has noted that all of its proposed changes are designed to:

(i) bring the Commission's regulatory structure with respect to commodity pool operators and commodity pool operators into alignment with the stated purposes of the Dodd-Frank Act;

(ii) encourage more congruent and consistent regulation of similarly situated entities among Federal financial regulatory agencies, in particular the Commission and the Securities and Exchange Commission ('SEC');

(iii) improve accountability and increase transparency of the activities of CPOs and CTAs and the commodity pools that they operate or advise; and

(iv) facilitate collection of data that will assist the Financial Stability Oversight Council (the 'FSOC'), acting within the scope of its jurisdiction, in the event that the FSOC requests and the Commission provides such data.[3]

---

1 AIMA is the trade body for the hedge fund industry globally; our membership represents all constituencies within the sector – including hedge fund managers, fund of hedge funds managers, prime brokers, fund administrators, accountants and lawyers. AIMA's membership comprises over 1,220 corporate bodies in 44 countries, with 11% based in the US.

2 Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations, 76 Fed. Reg. 7976 (Feb. 11, 2011).

3 Release, 76 Fed. Reg. at 7978.

The Alternative Investment Management Association Limited
2nd Floor, 167 Fleet Street, London, EC4A 2EA
Tel: +44 (0)20 7822 8380 Fax: +44 (0)20 7822 8381 E-mail: info@aima.org Internet: http://www.aima.org

Registered in England as a Company Limited by Guarantee, No. 4437037. VAT registration no: 577 5913 90. Registered Office as above

AIMA agrees wholeheartedly with the Commission's determination to implement rules designed to achieve these goals. For the reasons set out below, however, the proposals set out in the Release often appear to be inconsistent with the Commission's stated goals.

1. The Commission's proposal would dramatically expand the registration obligations applicable to many small advisers and non-US advisers, including many AIMA members.

The CEA provides that the operators and advisers to collective investment pools that trade in "commodity interests" – known as "commodity pools" – must register as "commodity pool operators" ('CPOs') and "commodity trading advisors" ('CTAs'), respectively, absent an applicable exemption.

Section 721 of the Dodd-Frank Act increases the number of fund advisers who will fall under the definitions of CPO and CTA in the CEA by expanding the definition of "commodity interests" beyond contracts traded on a Commission-regulated designated contract market or a non-US trading facility subject to regulation in its local jurisdiction so as to include over-the-counter derivatives which fall within the definition of "swap" in the Dodd-Frank Act. Section 749 of that Act provides that "commodity interests" include futures contracts, options on such contracts, security futures, swaps, leverage contracts, foreign exchange, spot and forward contracts on physical commodities and any money held on an account used for trading commodity interests. Consequently, for the very first time, the existence in a non-US fund of a single US investor and a single "swap" (whether it is entered into for hedging or for investment purposes) would require a manager or adviser of such non-US fund to register as a CPO and/or CTA, or avail itself of an exemption. Similarly, the scope of exemptions for advisers to funds that enter into limited transactions in commodity interests, such as the one provided in Rule 4.12, will be narrowed significantly.

AIMA appreciates that the expansion of the term "commodity interests" to include "swaps" is consistent with the purposes of the Dodd-Frank Act, in particular the need to ensure greater oversight and transparency in the over-the-counter derivatives markets. Currently, many operators of commodity pools, including many AIMA members, rely on the exemptions from CPO registration provided by Commission Rules 4.13(a)(3) or 4.13(a)(4), which require filing of notice with the National Futures Association ('NFA') and the maintenance of certain books and records. Indeed, with the inclusion of "swaps" as "commodity interests", many non-US managers that had previously not needed to rely on these exemptions because they traded solely over-the-counter had anticipated filing notice exemptions from CPO registration with the NFA, pursuant to Commission Rules 4.13(a)(3) or 4.13(a)(4).

The Dodd-Frank Act does not explicitly mandate any additional changes with respect to the scope of regulation of CPOs and CTAs under the CEA and there has not been any evidence that insufficient regulation of commodity pools, their operators or advisers was a significant contributing factor to the recent financial crisis.[4] AIMA believes that the current practice of requiring notice exemptions from CPO registration, rather than allowing self-effectuating exemptions with no affirmative obligations, has provided a useful, balanced approach which allows the Commission and the NFA to monitor the identity of CPOs, including non-US CPOs, and the commodity pools they operate.

The Release, however, includes a proposal to eliminate Commission Rules 4.13(a)(3) and 4.13(a)(4), which would also have the knock-on effect of vitiating the related exemption from CTA registration provided by Commission Rule 4.14(a)(8)(i)(D). Accordingly, the Release would have the direct effect of requiring virtually all non-US

[4] For example, Section 619 of the Dodd-Frank Act, known as the Volcker Rule, is deliberately directed at those issuers that would be investment companies subject to registration under the Investment Company Act of 1940, as amended (the 'Investment Company Act'), but for the exemptions provided by Sections 3(c)(1) or 3(c)(7) thereof, rather than at commodity pools. In particular, the FSOC, in its report on implementing the Volcker Rule, expressly indicated that commodity pools are not the type of investment vehicle that shares the characteristics of traditional hedge funds or private equity funds. See the FSOC *Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds & Private Equity Funds*, January 2011, p. 62.

The Alternative Investment Management Association Limited
2nd Floor, 167 Fleet Street, London, EC4A 2EA
Tel: +44 (0)20 7822 8380 Fax: +44 (0)20 7822 8381 E-mail: info@aima.org Internet: http://www.aima.org

Registered in England as a Company Limited by Guarantee, No. 4437037. VAT registration no: 577 5913 90. Registered Office as above

CPOs operating a commodity pool with at least one US investor to register with the Commission. In this respect, the Commission's proposals represent a dramatic expansion in the regulatory reach of the Commission, which may have significant, material effects on the US and non-US private fund markets and the US investor base wishing to access funds operated by non-US advisers. AIMA would argue that the elimination of the cornerstone of the exemptive relief relied upon by most CPOs involved in the private funds space, including in particular non-US CPOs, goes beyond the scope of the reforms mandated, or even anticipated, by the Dodd-Frank Act.

Another consequence of the expansion of the definition of commodity interest will be that it will be harder for advisers to manage portfolio risk effectively without using instruments that would subject them to regulation by the Commission. As a result, many advisers will find that they have to be registered as CPOs/CTAs as well as investment advisers.

Given the nature of the likely effects of the Commission's proposals, AIMA urges the Commission to provide a clearer explanation of the proposals contained in the Release, in order to justify the reasons behind, and the regulatory interests served by, expanding CPO and CTA registration requirements so significantly.

2. The Commission's proposal would require registration by operators of funds with limited commodities activities and/or limited connections to the United States.

In the Release, the Commission has stated that its proposals regarding CPO and CTA regulations are intended to "encourage congruent and consistent regulation of similarly situated entities among Federal financial regulatory agencies".[5] However, the proposals the Commission has made will in fact create inconsistencies among similarly situated entities since they fail to take into account the clear intention of Congress to exempt certain small advisers, certain advisers with limited amounts of assets under management in the US and certain non-US investment advisers with limited amounts of assets under management from a limited number of US clients and investors in private funds advised by the adviser. In particular, there are significant differences between what the Commission has proposed in the Release and what will be required of investment advisers under the Investment Advisers Act of 1940 (the 'Advisers Act'), as amended by the Dodd-Frank Act and the SEC's proposed rules.

US federal regulators have long recognised that, in certain circumstances, especially where US persons affirmatively choose to conduct financial activities outside the US with non-US financial institutions, there is generally a less-compelling investor protection rationale for extending US regulation to such non-US financial institutions.[6] Although the Commission has long taken the position that a collective investment vehicle which trades in few commodity interests is a commodity pool, the Commission has also historically recognised that for trading in only a *de minimis* amount of commodity interests there is less of an express regulatory rationale for requiring registration. Commission Rule 4.13(a)(3) is one example of this approach. Notably, although the Commission has proposed rescinding this CPO exemption, the Commission has not proposed to rescind the exemption from CTA registration provided by Commission Rule 4.14(a)(10) for *de minimis* levels of commodity trading advice. While AIMA agrees with the Commission that there is a demonstrated need for increased transparency over the activities of commodity pools, AIMA believes that the Commission has not sufficiently explained its regulatory interest in disclosure by commodity pools that can demonstrate only a *de minimis* amount of activity with respect to commodity interests.

---

[5] 76 Fed. Reg. at 7978.

[6] The SEC staff has stated that, when US investors acquire interests in non-US hedge funds with little connection to the US other than the presence of such investors, 'The laws governing such a fund would likely be those of the country in which it is organised or those of the country in which the adviser has its principal place of business. US investors in such fund would not have reasons to expect the full protection of the US securities laws…Moreover, as a practical matter, US investors may be precluded form an investment opportunity in offshore funds if their participation resulted in the full application of the Advisers Act and our rules' (citations omitted). *Registration under the Advisers Act of Certain Hedge Fund Advisers*, 69 Federal Register 72054, 72072 (December 10, 2004).

The Alternative Investment Management Association Limited
2nd Floor, 167 Fleet Street, London, EC4A 2EA
Tel: +44 (0)20 7822 8380 Fax: +44 (0)20 7822 8381 E-mail: info@aima.org Internet: http://www.aima.org

Registered in England as a Company Limited by Guarantee, No. 4437037. VAT registration no: 577 5913 90. Registered Office as above

Unlike the Dodd-Frank Act, the Release does not provide for any exemption from registration or regulatory relief based on a non-US operator or adviser having minimal contact with US investors and/or undertaking all of its advisory activities outside the US. The Release notes that the Dodd-Frank Act does not rescind the exceptions from the definition of investment company under the Investment Company Act provided by Sections 3(c)(1) and 3(c)(7) and requires many investment advisers to such entities to become registered with the SEC. However, the Release does not take full account of the fact that the Dodd-Frank Act also introduced two significant exemptions from SEC registration: the "foreign private adviser exemption" and the "private fund adviser exemption".

The foreign private adviser exemption replaces the private adviser exemption previously in Section 203(b)(3) of the Advisers Act and accords foreign private advisers relying on it exemption from registration, reporting and recordkeeping rules of the Advisers Act. The Dodd-Frank Act defines a "foreign private adviser" as any investment adviser which:

- has no place of business in the US;
- has, in total, fewer than 15 clients and investors in the US in private funds[7] advised by the investment adviser;
- has aggregate assets under management attributable to clients in the US (including US-domiciled private funds) and US investors in private funds advised by the adviser of less than $25 million (which dollar threshold may be increased by the SEC); and
- neither (i) holds itself out generally to the public in the US as an investment adviser nor (ii) advises registered investment companies or registered business development companies.

The other exemption under the Dodd-Frank Act is available to private fund advisers with less than $150 million in assets under management in the US[8] but requires such advisers to maintain such records and provide such reports to the SEC as the SEC so requires (such advisers being classified as "Exempt Reporting Advisers").[9] The Dodd-Frank Act directed the SEC to adopt a rule to implement the requirements for Exempt Reporting Advisers; as a result, the SEC has proposed a rule to implement that provision although the proposed rule treats US advisers (*i.e.*, those advisers with their principal office and place of business in the US) and non-US advisers differently. To rely on the exemption, US advisers may not have more than $150 million in assets under management in total (attributable to US and non-US clients).[10] However, a non-US adviser only needs to include assets managed from a place of business in the US in calculating whether it falls under the $150 million threshold, provided that its only US clients are qualifying private funds.[11] As a result, a non-US adviser would not lose the ability to rely on this exemption based on its business activities outside the US and having US persons invested in the private funds managed does not affect in any way an adviser's ability to rely on the exemption.

If Commission Rules 4.13(a)(3) and 4.13(a)(4) are rescinded, the effect will be that, in respect of any private fund relying on Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act with significant amounts of

---

7 A "private fund" is defined broadly under the Act as any issuer that would be an "investment company" under the Investment Company Act, but for the exceptions set forth in Section 3(c)(1) or Section 3(c)(7) of that Act. Thus, the Fund would qualify as a private fund for this purpose.

8 Section 203(m) of the Advisers Act.

9 Compare this with the exemption from registration for foreign private advisers to be codified as section 203(b)(3) of the Advisers Act as a result of the Dodd-Frank Act, which exempts a foreign private adviser from registration and any reporting or recordkeeping rules imposed by the Advisers Act.

10 *See Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 in Assets Under Management, and Foreign Private Advisers*, SEC Rel. No. IA-3111 (Nov. 19, 2010) ('Exemption Proposal').

11 A qualifying private fund is any private fund that is not registered under section 8 of the Investment Company Act and has not elected to be treated as a business development company.

The Alternative Investment Management Association Limited
2nd Floor, 167 Fleet Street, London, EC4A 2EA
Tel: +44 (0)20 7822 8380 Fax: +44 (0)20 7822 8381 E-mail: info@aima.org Internet: http://www.aima.org

Registered in England as a Company Limited by Guarantee, No. 4437037. VAT registration no: 577 5913 90. Registered Office as above

investment in "commodity interests" (as re-defined by the Dodd-Frank Act), a CPO would be required to register (or severely limit the private fund's investment in commodity interests), regardless of the number of US investors, the level of assets under management attributable to US investors and/or the amount of assets under management from a place of business within the US.

If the intention of the rescission is really "to eliminate the exemptions … for operators of pools that are similarly situated to [investment advisers to] [sic] private funds that previously relied on the exemptions under … [Section] 203(b)(3) of the Investment Advisers Act," it would be consistent with the approach taken by Congress in the Dodd-Frank Act to maintain exemptions from the CPO registration requirements for small CPOs and non-US based CPOs parallel with the exemptions from SEC registration provided under the Dodd-Frank Act.

In summary, the Commission's proposed compliance and reporting requirements for small and non-US based CPOs does not align but exceeds, in some cases significantly, any comparable proposed requirements by the SEC of small advisers and non-US based advisers. Moreover, unlike the elimination of Section 203(b)(3) of the Advisers Act, the changes to the rules under the CEA being proposed were not mandated by the Dodd-Frank Act and fail to take into account the approach to the limited extraterritorial application of the US securities laws that Congress clearly had in mind (*e.g.*, the retention of a form of the private advisers exemption applicable to non-US investment advisers).

Regulatory Arbitrage

One of the reasons given in the Release for the proposed rescission of Rules 4.13(a)(3) and 4.13(a)(4) was that "continuing to grant an exemption from registration and reporting obligations for those market participants is outweighed by the [Commission's] concerns of regulatory arbitrage." The Release goes on to state that the Commission "has determined that it is appropriate to limit regulatory arbitrage through harmonization of the scope of its data collection with respect to pools that are similarly situated to private funds so that operators of such pools will not be able to avoid oversight by either the [Commission] or the SEC through claims of exemption under the [Commission's] regulations."

Many commodity pools are actually "private funds" as defined under the Dodd-Frank Act. Consequently, and as discussed above, the proposed rescission of Rules 4.13(a)(3) and (4) would, in fact, require more CPOs/investment advisers in respect of private funds to register under Commission rules than would be required to register under the Advisers Act. Since Congress chose to exempt certain investment advisers from the requirement to register with the SEC, it could hardly be considered regulatory arbitrage for the same categories of investment advisers to be exempt from registration as CPOs.

Alternatives

The Commission has enquired of commenters whether it should consider an alternative de minimis exemption and, if so, what criteria should be required. As noted below, the preferred outcome is that Rules 4.13(a)(3) and (4) remain in place as they currently apply and, failing that, that any entities with a current exemption filing in effect should be grandfathered. Assuming that the existing criteria are replaced (with a grandfathering provision or without), at a minimum there should be an exemption that is at least co-extensive with the registration exemptions under the Advisers Act as modified by the Dodd-Frank Act. Such an exemption would not require associated persons to register, the CPO would make a filing with information of the types required for Exempt Reporting Advisers but would not otherwise be subject to the substantive requirements of the CEA, would not be subject to the financial statement requirements and would not be required to make any systemic risk reports.

The Alternative Investment Management Association Limited
2nd Floor, 167 Fleet Street, London, EC4A 2EA
Tel: +44 (0)20 7822 8380 Fax: +44 (0)20 7822 8381 E-mail: info@aima.org Internet: http://www.aima.org

Registered in England as a Company Limited by Guarantee, No. 4437037. VAT registration no: 577 5913 90. Registered Office as above

3. **The limited scope of the exemption provided by Rules 4.7 and 4.12 do not provide exemptive relief for small and non-US based CPOs comparable to the exemptions provided to similarly situated investment advisers under the Dodd-Frank Act.**

With the repeal of Commission Rule 4.13(a)(3) and 4.13(a)(4), many operators and advisers of commodity pools may determine to rely on the 'registration lite' provisions of Commission Rule 4.7 or the limited exemption provided by Rule 4.12.[12] Rule 4.7 is not, however, tailored in the same way as the SEC's proposals regarding adviser exemptions and reporting, which affirmatively acknowledge greater relief for small and non-US based advisers.[13]

Due to the limited exemptions available in the event that Rules 4.13(a)(3) and 4.13(a)(4) are rescinded, the Commission's proposals are not "congruent" with the SEC's approach to implementing exemptions from Advisers Act registration for advisers to private funds and for advisers to venture capital funds, together known as Exempt Reporting Advisers. In particular, an Exempt Reporting Adviser is not required to submit to the SEC its proposed Form PF for advisers to private funds and is, instead, required to provide only certain information about its private funds, by completing certain sections of the revised Form ADV.[14]

However, Commission Rule 4.7 imposes a materially heavier compliance burden on CPOs relying on Rule 4.7, including: (i) the CPO must prepare or reconcile the pool's financial statements in accordance with US GAAP (and, according to an amendment set out in the Release, have those financial statements audited by a US certified public accountant) and (ii) ensure that its "principals" and "associated persons" have registered with the NFA and completed the requisite proficiency examination, have provided detailed biographical information and met certain fingerprinting requirements.

Notably, the 'registration lite' provisions of Commission Rule 4.7 for non-US CPOs would be even more expansive than the SEC staff's requirements of registered investment advisers based outside the US. The SEC staff has historically taken the position that the substantive provisions of the Advisers Act do not generally reach the non-US advisory activities of a non-US adviser registered under the Advisers Act[15] and there is no indication that the SEC staff has revisited this view in the course of implementing the Dodd-Frank Act. For example, even where a non-US adviser is registered under the Advisers Act and therefore required to file the proposed Form PF, such adviser would not be required to report information about its non-US private funds and could exclude the assets of such funds when determining whether it met the $1 billion threshold for heightened reporting on the proposed Form PF.[16] In contrast, the Commission's proposed Form CPO-PQR and Form CTA-PR require a CPO or CTA, as applicable, to include information about non-US commodity pools which contain no US investors and to include the assets of such pools when determining the CPO's or CTA's assets under management for enhanced reporting requirements.[17] In addition, the Advisers Act does not require that the personnel of registered

[12] Commission Rule 4.7(b) provides relief from some, but not all, of the substantive compliance requirements applicable to registered CPOs, provided that each investor in a commodity pool is a 'qualified eligible person' and interests in such pool were offered and sold without making a public offering in the US. Registered CTAs benefit from a similar "registration lite" regime under Commission Rule 4.7(c) provided that their advisory clients are 'qualified eligible persons'.

[13] *See* Exemption Proposal, *supra* note 10, and *Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF*, 76 Fed. Reg. 8,068 (Feb. 11, 2011) ('Reporting Release').

[14] Form ADV is the 'Uniform Application for Investment Adviser Registration', which the SEC staff has proposed amending in certain respects to allow 'Exempt Reporting Advisers' to disclose certain basic information regarding the private funds with US investors they advise.

[15] *See, e.g.*, *Uniao de Bancos de Brasileiros S.A.* (avail. July 28, 1992) and related SEC no-action letters.

[16] Similarly, with respect to 'private fund advisers', the SEC staff has proposed that a non-US adviser would be eligible to rely on the exemption for private fund advisers if each of the adviser's US clients is a private fund without regard for whether its non-US clients are exclusively private funds.

[17] In addition to the new provisions applicable to non-US fund managers and advisers under the Dodd-Frank Act and set out in the SEC's proposed rules, the SEC staff has long expressed the view that SEC-registered investment advisers that are not based in the US do not need to comply with certain provisions of the Advisers Act and rules promulgated thereunder with respect to such non-US adviser's non-US clients. AIMA notes that the Commission staff has not provided any similar regulatory relief in respect of non-US CPOs or CTAs, either in earlier interpretations of the Commission's Rules or in the proposals set out in the Release.

The Alternative Investment Management Association Limited
2nd Floor, 167 Fleet Street, London, EC4A 2EA
Tel: +44 (0)20 7822 8380 Fax: +44 (0)20 7822 8381 E-mail: info@aima.org Internet: http://www.aima.org

Registered in England as a Company Limited by Guarantee, No. 4437037. VAT registration no: 577 5913 90. Registered Office as above

advisers meet any examination requirements or submit to any background checks as would be required of CPOs, including non-US based CPOs, that may rely on Commission Rule 4.7.

Consequently, the Release represents a momentous change in the traditional understanding of the proper limits of US jurisdiction over non-US financial institutions. The Commission has proposed a framework in which a non-US operator or adviser to non-US funds must, in terms where it has only a single non-US fund with a single non-US investor, report the entirety of its global commodity pool operations to the Commission. These reporting requirements are likely to exceed what the non-US CPO must report to its home regulator and may in fact exceed the information-gathering and -processing capacities of many non-US CPOs. In this regard, AIMA notes that the costs-benefit analysis in connection with implementing the proposals in the Release may be significant and, in particular, AIMA believes that the Commission has not sufficiently explained the regulatory justification in requiring such extensive disclosure by non-US CPOs of non-US funds with no US investors.

It is worth noting that the SEC's proposed rules to implement the Dodd-Frank Act, in the absence of the Commission's proposed requirements, would not require Exempt Reporting Advisers to file the Form PF – the SEC's form equivalent to the Commission's proposed reporting forms.[18] The Commission's proposal to rescind its Rules 4.13(a)(3) and (4) could lead to many Exempt Reporting Advisers nevertheless being required to file the Commission's equivalent form.

We would point out that many such non-US CPOs/CTAs will also be subject to systemic risk reporting disclosures in their home jurisdictions, which will be shared with regulators in other jurisdictions such as the US; this is now or will soon be the case for CPOs/CTAs based in the European Union and elsewhere. We would suggest that, for CPOs/CTAs regulated in a jurisdiction that is already cooperating with the US on systemic risk reporting, the systemic risk data required of them should be shared between regulators, instead of requiring reporting by CTAs/CPOs to multiple regulators.

Although Rule 4.12 provides some relief with respect to certain commodity pools,[19] the viability of relying on that exemption will be substantially reduced due to the pending increase in the types of interests that will be considered commodity interests. Given the expansion of what is covered as a commodity interest and because Rule 4.12 is premised on the commodity pool not being engaged primarily in transactions involving commodity interests, we request that the Commission consider removing some or all of the other specific requirements of Rule 4.12 in the event it determines to rescind Rules 4.13(a)(3) and (4).

4. Reporting Obligations

New systemic risk disclosure requirements also call for different levels of disclosure for CPOs/CTAs, depending on their size. As an important first point, we note that there is widespread consensus that no hedge fund today poses systemic risk through potential losses being inflicted on their investors. Although there is potential for systemic risk to be introduced through exposures between hedge funds and their counterparties, those exposures are largely collateralised and the amount of uncollateralised exposures has, in survey reports by the UK's FSA as to funds managed by UK advisers, at least, been found to be very small. On the other hand, uncollateralised exposures of pools to the banking system may be found to be much larger. We would, therefore, submit that the current thresholds for requiring pools to report - under Schedule A at $150m AUM, Schedule B at $500m and Schedule C at $1bn - are much too low. We believe that it is not possible, even for a pool comprising $1bn of unleveraged assets, to pose systemic risk to the financial system.

---

[18] Reporting Release, *supra* note 13, at n. 11. "[The SEC believes] that Congress' determination to exempt these advisers from SEC registration indicates Congress' belief that they are sufficiently unlikely to pose systemic risk that regular reporting of detailed information may not be necessary." *Id.*, text at n. 100.

[19] Rule 4.12 exempts CPOs with respect to commodity pools that commit less than 10% of the fair market value of their assets to establish commodity interest trading positions and trade commodity interests in a manner solely incidental to their securities trading activities.

The Alternative Investment Management Association Limited
2nd Floor, 167 Fleet Street, London, EC4A 2EA
Tel: +44 (0)20 7822 8380 Fax: +44 (0)20 7822 8381 E-mail: info@aima.org Internet: http://www.aima.org

Registered in England as a Company Limited by Guarantee, No. 4437037. VAT registration no: 577 5913 90. Registered Office as above

Second, we note that the SEC's proposed Form PF also includes similar reference to AUM. Many CTAs will also be either registered with the SEC or registered as Exempt Reporting Advisers. In calculating the AUM of a CTA or a CPO, it is likely that such AUM will cover all commodity pools, whether they include any US investors or not. From the point of view of SEC regulations, it is commonly understood that certain non-disclosure related regulations such as the Custody Rule only apply to clients that are US persons (as defined in Regulation S). Consequently, it could be argued that a CTA would not need to make reference to any non-US funds (especially if it does not have any US investors) for the purpose of establishing its relevant AUM when reporting under Form PF. It does not seem sensible for different US regulators to apply different metrics to establish AUM. In addition, the SEC applies a much higher and more appropriate AUM limit for requiring the more onerous quarterly filing (as opposed to annual filing).

It also appears that the SEC defines its AUM limits in relation to assets, while the Commission has chosen to apply a net asset measure. Again, we would expect the measures to be coordinated between the SEC and the Commission.

The attached Annex contains responses to various of the specific questions posed by the Commission in respect of the proposed reporting obligations.

5. The volume of information reported could overwhelm the Commission's resources.

There are thousands of US and non-US CPOs in respect of private funds (and other commodity pools) that currently rely on Rule 4.13(a)(3) or Rule 4.13(a)(4). For the reasons discussed above, the Release would in effect mandate the registration of a substantial number of CPOs and can also be read to require that such an operator, once registered, provide an extensive amount of data in respect of each commodity pool it operates, without regard to the presence or absence of US investors in such pools.

The purpose of obtaining such information is to aid the Commission and the FSOC in their duties, mandated by the Dodd-Frank Act, to maintain the financial stability of the US. The Commission staff has not sufficiently explained what regulatory purposes would be served in requiring the disclosure of information related to non-US commodity pools with no or very few US investors or a limited use of commodity interests. This type of information would at most be only marginally relevant to the financial stability of the US and the sheer volume of information could prove to be counterproductive by impairing the ability of the Commission and the FSOC to assess information reported by CPOs and CTAs to commodity pools which have a much greater connection to the US financial system.

6. The Release could have the unintended consequence of limiting investment opportunities for sophisticated institutional investors in the United States.

For the reasons discussed above, if the Release were finalised as currently proposed, the extraterritorial effects will be both widespread and burdensome. The Commission would, therefore, run the risk that, rather than submitting to the extensive demands for information (and the resulting compliance costs), many non-US fund managers and advisers may simply choose to exclude US investors from the non-US funds they operate or advise, in order to avoid registration as a CPO or CTA. AIMA does not believe that this is the Commission's intention but such a result, no matter how inadvertent, would undoubtedly impair the ability of the US investor base (including institutional investors) to diversify its investment portfolios by investing in non-US funds. AIMA believes that the exclusion of US investors, regardless of their level of sophistication, would be a particularly harsh result, given that, as mentioned above, a typical US institutional investor would be unlikely to expect that the protections of the CEA or the Commission Rules apply to its investments in non-US funds operated or advised by non-US investment managers or advisers.

The Alternative Investment Management Association Limited
2nd Floor, 167 Fleet Street, London, EC4A 2EA
Tel: +44 (0)20 7822 8380 Fax: +44 (0)20 7822 8381 E-mail: info@aima.org Internet: http://www.aima.org

Registered in England as a Company Limited by Guarantee, No. 4437037. VAT registration no: 577 5913 90. Registered Office as above

7. The Commission should at the very least consider grandfathering all CPOs currently exempt under Rule 4.13(a)(3) and 4.13(a)(4) and/or providing an extended period to come into compliance with respect to existing commodity pools.

If the rescission proposals are adopted as proposed (without any grandfathering provisions), a CPO seeking to rely on an exemption from registration will be required to limit the scope of its transactions in commodity interests (which will be complicated by the expanded definition of 'commodity interest'). In light of the requirements for fingerprinting and Series 3 examinations for relevant personnel, the process of meeting the registration requirements could take a substantial period of time.

In more particular terms, data available from the national securities regulators in the UK, Hong Kong and Singapore[20] indicates that there are now more than 3,500 asset managers in those three jurisdictions who might become subject to the proposed registration requirements. If one takes into account asset managers active in other jurisdictions, that figure could be significantly higher.

Accordingly, we suggest that the Commission should at the very least consider grandfathering all existing exempt CPOs under Rule 4.13(a)(3) and (4) with respect to all existing commodity pools. In the absence of this type of grandfathering provision, the Commission should consider extending the ability to rely on the rescinded rules for an extended transition period.

8. The Commission should give further consideration to the relative costs and benefits of these proposals.

The Release does not provide data on the costs and benefits of the proposals. There will be significant costs associated with CPOs and CTAs that are currently exempt coming into compliance with the registration requirements. In addition, the costs of being a dual registrant are likely to significantly outweigh the regulatory benefit of dual regulation.

In addition to the costs to be borne by the CPOs, the Commission should also give consideration to the substantial costs that will be associated with regulating all of the new registrants. Because of the volume of reporting to be required from each CPO, the sheer volume of the filings may quickly overwhelm the limited budget and resources available to the Commission. In addition, many of the new CPO registrants will be non-US persons, increasing the Commission's enforcement costs.

Conclusion

We have noted recent reports that the SEC may consider providing additional time, beyond July 2011 and into the first quarter of 2012, for advisers affected to register and comply with its proposed new rules. We presume that, if that is so, the reporting deadline for Exempt Reporting Advisers would similarly be extended.

We have also read the indication in the Commission's Chairman's speech to the Futures Industry Association on 16 March that certain of the Commission's final rules may be delayed and phased in in publishing and implementation, beyond the deadlines set for implementation in the Dodd-Frank Act. We encourage the

[20] http://www.sfc.hk/sfc/doc/EN/research/stat/c02.pdf

http://masnet.mas.gov.sg/fin/findir/sdwfidir.nsf/sdwvothr/sdwfcate?opendocument

http://www.fsa.gov.uk/pubs/annual/ar09_10/Appendix8.pdf

The Alternative Investment Management Association Limited
2nd Floor, 167 Fleet Street, London, EC4A 2EA
Tel: +44 (0)20 7822 8380 Fax: +44 (0)20 7822 8381 E-mail: info@aima.org Internet: http://www.aima.org

Registered in England as a Company Limited by Guarantee, No. 4437037. VAT registration no: 577 5913 90. Registered Office as above

Commission not to press ahead but to take all due time to consider all submissions it receives in response to its proposals contained in the paper and generally.

We are, of course, happy to discuss further with you any point or detail that arises from this submission.

Yours sincerely,

Mary Richardson
Director, Head of Tax Affairs

The Alternative Investment Management Association Limited
2nd Floor, 167 Fleet Street, London, EC4A 2EA
Tel: +44 (0)20 7822 8380 Fax: +44 (0)20 7822 8381 E-mail: info@aima.org Internet: http://www.aima.org

Registered in England as a Company Limited by Guarantee, No. 4437037. VAT registration no: 577 5913 90. Registered Office as above

ANNEX

Persons Required To Report on Proposed Forms CPO-PQR and CTA-PR - the Commission requests comment on the proposed reporting scheme.
Q: Should the Commission require that all CPOs and CTAs registered or required to be registered with the Commission complete all of the information on their respective forms regarding the pools that they operate or advise? Please provide detail supporting your position.
A: Many private funds are set-up as master-feeder structures where the trading portfolio as well as all major counterparty risks are at the level of the master fund. In order to avoid duplication of reporting, it would be advisable that the structure of the reporting be altered to be carried out at the level of the master fund (or at the level of the consolidated master/feeder entity) for classic master/feeder structures. The master fund could very well disclose certain key figures for its feeder funds, but undertaking fully-fledged CTA and CPO reporting both at the level of master and feeder funds does not seem sensible. In addition, there is already significant duplication in the proposed scheme as both the CTA and the CPO would be carrying out aggregate and individual pool level filings. For a large CTA/CPO advising 10 pools, that could require more than 500 pages of filing per quarter.
Q: Are there more appropriate thresholds for determining which CPOs and CTAs must report more extensive information? Should the assets under management thresholds be lower or higher?
The $150m threshold for mid-sized CTAs / CPOs seems too low. A manager of this size would in today's market be seen as very small. This threshold should be increased to $500m. It is possible that the $1bn mark for large CTAs/CPOs should similarly also be increased. A mid-sized manager would be at $500m - $5bn. Managers above $5bn would be seen as large.
Q: Is there additional information that should be requested?
A: No; the information requested should be reduced.
Frequency of Reporting - the Commission requests comment on the proposed filing frequency.
Q: Is quarterly reporting an appropriate amount of time to gather the information necessary to assess risk posed by filers?
A: The preparation of accounts for funds / managed accounts is usually outsourced to a third party service provider acting as "administrator". Many of the requested statistics require the establishment of a net asset value ('NAV') for each reporting pool, with the NAVs calculated by the administrator on the valuation date of the respective pool. Considering that the requested information must be filed under "oath and affirmations" that the "information is accurate and complete", CTAs/CPOs will not want to rely solely on their internal systems (which are estimates) but will require all key financial figures to be reconciled with those of the administrator. Such reconciliation is only possible at the valuation dates, when the administrator establishes a NAV. As the majority of hedge funds provide monthly or quarterly liquidity, at which point the pool is also valued, requiring reporting no more frequently than quarterly would seem sensible. There are, however, pools that only establish NAVs bi-annually or annually and such pools may require an exemption to allow for less frequent reporting.

The Alternative Investment Management Association Limited
2nd Floor, 167 Fleet Street, London, EC4A 2EA
Tel: +44 (0)20 7822 8380 Fax: +44 (0)20 7822 8381 E-mail: info@aima.org Internet: http://www.aima.org

Registered in England as a Company Limited by Guarantee, No. 4437037. VAT registration no: 577 5913 90. Registered Office as above

In addition, any reporting which is more frequent than quarterly would expose the regulators to the risk of becoming the "risk managers of the industry". Although hedge fund portfolios may be of high velocity in relation to individual positions, the overall risk level and the composition of the portfolio in terms of asset classes, types of exposure, leverage and credit exposure changes much more slowly for the vast majority of pools. Considering the amount of resources that will be required by both the CTAs/CPOS and the regulators to operate the proposed reporting on a quarterly basis, it would not seem sensible to look at any shorter reporting frequencies.
Q: Is the 15-day deadline for reports too long to ensure reporting of timely information by filers?
A: The full reconciliation of an investment pool, including establishing a NAV, usually takes up to 15 days. This can be even longer for illiquid portfolios that require third party valuation. The proposed deadline is much too short and should be extended to 30 or 45 days. The information requested by the Commission would be seen as proprietary information, which trading advisers would not under normal circumstances disclose to any third party. From the point of view of the CTA/CPO, extending the deadline for filing to 30 or 45 days would partly mitigate this perceived risk in relation to the confidentiality of information. CTAs would also have less incentive to "window-dress" their portfolios at the reporting dates if the reporting deadline were extended. Again, we do not believe the intention of the Commission is to be in a position to "trade" up or down the industry risk. We believe the information will be useful to monitor the overall risk level of the industry and the development of major concentration risks, as well as identifying the build-up of any “freak” pools and industry level liquidity mismatches which develop as part of the “asset transformation process”. Receiving the proposed reports with a 30 or 45 day lag would largely address any such concerns and objectives. We feel sure that the Commission will ultimately conclude that systemic risks related to hedge funds are limited, compared with the overall risks of the banking system. This has been the conclusion of the FSA in the UK as a result of its bi-annual surveys of managers.
Implementation of Reporting Obligation - the Commission requests comment as to when proposed § 4.27 should become effective, requiring the filing of forms CPO-PQR and CTA-PR.
A: Due to the very extensive nature of the requested information, CTAs and CPOs will need time to develop and configure their systems to provide the requested information. We would suggest that Schedule A should be required six months after enacting the proposal and that Schedules B and C should be required after one year.
Information Required on Form CPO-PQR - Proposed Schedule A - the Commission is requesting comment on the appropriateness and completeness of the information requested
Q: Is there additional basic information that the Commission should require of all CPOs filing form CPO-PQR or regarding the commodity pools that they operate?
A: No. The information is very extensive and should be cut down if possible.
Q: Is there any information that is included in schedules B and C for larger CPOs that should be included in schedule A for all CPOs?
A: Question 1 of Schedule B could form part of Schedule A, in order to give a general view of the pool.

The Alternative Investment Management Association Limited
2nd Floor, 167 Fleet Street, London, EC4A 2EA
Tel: +44 (0)20 7822 8380 Fax: +44 (0)20 7822 8381 E-mail: info@aima.org Internet: http://www.aima.org

Registered in England as a Company Limited by Guarantee, No. 4437037. VAT registration no: 577 5913 90. Registered Office as above

Q: Conversely, is there any information in schedule A that the Commission should not require or that the Commission should only require of large CPOs and, if so, why?
A: Question 12 of Schedule A should be moved to Schedule B. This is even more appropriate for the itemised disclosure on page 23. We believe there is limited value in such itemised disclosures. The table in question 12 should be on a much more aggregated level. There is, for example, no sense in showing exposures in equities on a sector level.
Proposed Schedule B - the Commission is requesting comment on the appropriateness and completeness of the information proposed to be requested from all CPOs with AUM equal to or exceeding $150m.
Q: Is there additional information that the Commission should request of midsized and large CPOs?
A: Question 1 of Schedule C should form part of Schedule B.
Q: Is there information that the Commission should not require to be reported?
A: No. The amount of information should be reduced.
Q: Should the Commission set a threshold net asset value for pools for which CPOs must report information under proposed schedule B, and if so, what threshold would be appropriate?
A: See above.
Proposed Schedule C - the Commission requests comment on the information proposed large CPOs.
Q: Is there additional information that should be included and, if so, why? Is there information that should be omitted and, if so, why?
A: In question 2 we see little need to disclose volume metrics. We do not believe this is relevant from the point of view of measuring systemic risk. In question 3, we see little value in breaking up collateral into Independent Amounts and Variation Amounts; the pools will be general creditors to the banks on both amounts. The disclosure of separate collateral requirements split into initial and variation margin for derivatives collateral is not meaningful. First, there is no difference in credit risk between variation and initial margin and second, most large funds will be subject to margin netting agreements. It will thus be impossible to separate derivatives margin from other margin. Margin should only be disclosed on an aggregate basis per counterparty. Very few prime brokers would be willing to disclose re-hypothecation at position level. For CTAs and CPOs to answer this question, the SEC and overseas regulators would need to require this disclosure by prime brokers. Considering the amount of information already included in the disclosures, the crash tests to be performed based on different scenarios in question 4 seem overwhelming. We do not believe the regulators need this type of market risk disclosure.

The Alternative Investment Management Association Limited
2nd Floor, 167 Fleet Street, London, EC4A 2EA
Tel: +44 (0)20 7822 8380 Fax: +44 (0)20 7822 8381 E-mail: info@aima.org Internet: http://www.aima.org

Registered in England as a Company Limited by Guarantee, No. 4437037. VAT registration no: 577 5913 90. Registered Office as above

Q: Is there information that the Commission should require only on an aggregate basis that the Commission is proposing to require CPOs to report on an individual pool basis?
A: The information should only be required on an aggregate basis and only for individual pools that are larger than, say, $1bn.
Q: Are there additional risk metrics or market factors that the Commission should require CPOs to employ?
A: No. The amount of information should be reduced.
Q: Should the Commission require the proposed market factors but with different parameters?
A: The crash metrics section should be deleted.
Q: Is there information currently proposed that would not result in comparable or meaningful information for the Commission?
A: We have some experience of risk disclosures to third parties. We believe most of the information included in the proposed forms will be of limited value from a point of view of aggregation if the Commission does not spend significant time on improving the definitions. It would be much more meaningful to start with a smaller data set which can then be extended as definitions are worked out and as the regulator assesses the use of the data.
Q: If so, how can changes to the questions or instructions improve the utility of the information?
A: Much clearer definitions of how the metrics should be applied. Such definitions should be standardised between the Commission, the SEC and the main overseas regulators. More of the information should only be reported on an aggregate basis. Only the very largest pools should be reported on an individual basis.
Q: Is there information that should be broken down further and reported as of smaller time increments, such as weekly?
A: No; this should definitively not be required.
Q: Is there information that should be reported to show ranges, high points, or low points during the reporting period, rather than as of the last day of the month or quarter?
A: This could make sense, but only for a much smaller data set.
Q: Should clearing information be collected with respect to pools with a net asset value less than $500 million?
A: No. To some extent, this is a question to be asked of the clearers as they and not the pool control the clearing process. The pool only sees the resulting cash flows and is not well-positioned to determine whether clearing is on a CCP basis or not. In addition, there are hybrid situations in both the US and the EU where, although clearing and the depository function is organised on a centralised basis, the exposure of the pool is to a private matching contract with the counterparty or a securities entitlement at the intermediary. Here it should be for the legislators to sort out the capital markets infrastructure (i.e., eliminating such matching

The Alternative Investment Management Association Limited
2nd Floor, 167 Fleet Street, London, EC4A 2EA
Tel: +44 (0)20 7822 8380 Fax: +44 (0)20 7822 8381 E-mail: info@aima.org Internet: http://www.aima.org

Registered in England as a Company Limited by Guarantee, No. 4437037. VAT registration no: 577 5913 90. Registered Office as above

contracts, which are common in, for example, the UK futures markets) before applying reporting and obligations to the end clients.

Information Required on Proposed Form CTA-PR - Proposed Schedule A - *t*he Commission is seeking comment on the content of proposed schedule A and which entities would be required to report under form CTA-PR.

Q: Should all CTAs be required to file proposed schedule A of form CTA-PR?

A: As this is at a programme level and as the information is less granular, we believe the requirements are more sensible here.

Q: If not, what criteria would be appropriate for limiting which CTAs are required to file proposed schedule A of form CTA-PR?

A: The criteria should be in line with the SEC's criteria for filing Form PF.

Proposed Schedule B - the Commission is seeking comment on the information proposed to be required under schedule B of form CTA-PR.

Q: Is there additional information that should be included and, of so, why?

A: No; the form is adequate.

Q: Is there information that should be omitted and, if so, why?

A: The information should be given at the level of the Trading Program and not the individual pools. Only very large pools should be reported individually. The sector disclosure of equities in question 6 is unnecessary. In general this table should be simplified.

Q: Is there information currently proposed that would not result in comparable or meaningful information for the Commission?

A: See above.

Q: If so, how can changes to the questions or instructions improve the utility of the information?

A: We would suggest that the Commission simplify the proposed forms significantly, in order to focus on a smaller set of core figures that can be aggregated over markets and with the information received from other regulators.

The Alternative Investment Management Association Limited
2nd Floor, 167 Fleet Street, London, EC4A 2EA
Tel: +44 (0)20 7822 8380 Fax: +44 (0)20 7822 8381 E-mail: info@aima.org Internet: http://www.aima.org

Registered in England as a Company Limited by Guarantee, No. 4437037. VAT registration no: 577 5913 90. Registered Office as above