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April 12, 2011

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

Re: Rulemaking Proposal (RIN 3038 – AD30)

Dear Mr. Stawick:

We appreciate the opportunity to comment on the recent proposal by the Commodity Futures Trading Commission ("CFTC" or the ""Commission"), to make changes to a number of important CFTC rules, including Rule 4.5. Steben & Company, Inc. has been registered as a CPO since 1989, and currently manages multiple commodity pools with assets in excess of $1.8 billion. While we have reviewed all of the proposed changes included within the Commission's Proposal, we have focused for the purposes of this letter on the changes proposed with respect to Rule 4.5.

Overview

The CFTC's rulemaking proposal (the "Proposal"), relates to a number of important compliance and reporting obligations applicable to commodity pool operators ("CPOs"), and commodity trading advisors ("CTAs"). As set forth in its Notice of Proposed Rulemaking (the "Notice"), the Commission decided in the wake of the enactment of Dodd-Frank Act,[1] to reconsider "the level of regulation that it believes is appropriate with respect to entities participating in the commodity futures and derivatives markets." We laud the Commission's desire to "approve accountability and increase transparency of the activities of CPOs, CTAs and the commodity pools that they operate or advise…," and we endorse its desire to "encourage more congruent and consistent regulation of similarly-situated entities among federal financial regulatory agencies…"

As it pertains to Rule 4.5, the Commission's Proposal is founded upon the concern that the registration and reporting regime for pooled investment vehicles and their operators and/or advisors not be "incongruent with the registration and reporting regimes of other regulators, such as that of the [Securities and Exchange Commission] for investment advisers under the Dodd-Frank Act." Rule 4.5 provides an exclusion from the definition of CPO to persons who would otherwise fall under CFTC jurisdiction due to their

[1] The Dodd-Frank Act is more formally known as the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 (2010).

operation of specific trading vehicles, including investment companies registered with the SEC (herein, "mutual funds").

Through 2003, Rule 4.5 required entities seeking to rely the exclusion provided thereby to make certain representations regarding the level of commodities trading activities that vehicles they managed could engage in, as well as representations about marketing interests in entities operated by such persons as interests in a commodity pool or as a vehicle for trading in the commodity futures or commodity options markets. The Rule was amended in 2003 to remove those required representations as they pertained to mutual funds. Through itd Proposal, the Commission is now proposing *inter alia* to re-instate some or all of the pre-2003 criteria consistent with the language proposed by the NFA in its petition.

The CTFC's proposed actions with respect to Rule 4.5 are rooted in the recent formation and registration with the SEC of mutual funds that operate in a manner that is appears to be indistinguishable from that of registered commodity pools. Such mutual fund/commodity pools buy and sell commodity futures and commodity options contracts, swaps, structured notes and other instruments as the principal means of obtaining returns for their investors. In addition, certain of these funds actively market themselves as "managed futures funds," both in the names they have adopted as well as in their marketing literature. While these funds employ the same strategies used by registered commodity pools to produce returns for their shareholders, because they have registered with the SEC under the Investment Company Act of 1940 (the "1940 Act"), such funds are able to operate outside of the rules adopted by the CFTC to regulate commodity pools in reliance upon Rule 4.5.

The consequences that flow from the fact that these funds and their operators/advisers are not subject to the CFTC's CPO regulations are significant. Such vehicles and their sponsor/advisers are not required to follow the CFTC's rules regarding the delivery and content of disclosure documents. Furthermore, while all mutual funds must disclose their expenses, the funds in question do not have to disclose the expenses associated with brokerage costs, nor those associated with their trading advisers, in the same way that commodity pools are required to do under CFTC rules.[2] Finally, because of the electronic distribution platforms available to mutual funds generally, such funds can be purchased electronically by a broad range of investors and entities without prior delivery of important disclosures.

Specific Comments

In the Notice, the CFTC requested comment on a number of issues relating to its desire to ensure "consistent treatment of operators of commodity pools regardless of registration

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

status with other regulators." Here are the CFTC"s requests, paired with Steben & Company's responsive thoughts thereon with regard to each such request:

1. Should the proposed restriction on marketing as a commodity pool or as a vehicle for providing exposure to commodity interests be broader or more narrow?

We agree that the exclusion provided by Rule 4.5 should not be available to the advisor to (or operator of), any mutual fund that is, to quote the Notice, a "de facto commodity pool." To us, whether a mutual fund is a commodity pool can and should be determined in one of two separate (but related) ways: first, by making an assessment of the fund's holdings and trading activities involving futures, options and/or swaps to see if it is above an appropriate threshold level established by the CFTC. And second, by assessing whether the fund is, through its objective(s), descriptions and offering (or selling) materials, holding itself out as providing investors in whole or in substantial part with the potential for returns associated with trading in commodities, futures, derivatives and commodity interests.

There are various ways in which mutual funds market themselves to investors and their financial advisers. Primary amongst them are their statutory prospectuses, where the funds must describe their investment objectives, principal investment strategies and means for achieving them, and their marketing literature, which is prepared in accordance with rules adopted by the SEC and FINRA. In our view, any mutual fund that uses the words "managed futures" or a close approximation thereof in its name is in fact "marketing" itself as a commodity pool. In addition, we believe that some or all of the following elements go a long way toward determining whether a mutual fund is marketing itself in a way that should require it to comply with the CFTC's rules applicable to commodity pools: (i) the fund engages in futures, etc., trading through a wholly-owned (or controlled) corporation; (ii) the fund compares its performance to that of a commodities-centric or managed futures (or analogous) index or benchmark; (iii) the fund makes statements in its prospectus or marketing literature to the effect that an ownership interest in the fund provides the holder thereof with meaningful exposure to the benefits of managed futures investment strategies.

While there is no one single factor (apart from the use of the words "managed futures" in the fund's name), that is or should be determinative here (other than the use of the words "managed futures"), it is generally the case that the mutual funds that are operating as de facto commodity pools employ or otherwise have all or nearly all of these elements in their materials and structure. In our opinion, it is highly unlikely that a mutual fund that is not a de facto commodity pool will meet enough of these criteria to raise the concern that such funds will be found to have met the "marketing" test.

2. Is there a differential impact on various trading strategies implemented by funds that would come under revised Rule 4.5? Are there certain types of funds that might be more severely impacted than others?

There are numerous sponsors of mutual funds that cannot qualify for Rule 4.5 because of the significant level of futures, options and swaps used in their operations. We believe that such funds ought to be subject to the CFTC's reporting rules rather than the full panoply of the Part 4, including disclosure, document delivery and related requirements. In other words, to the extent that such funds utilize such instruments in amounts sufficient to take them above the operational threshold added by the proposed rulemaking to Rule 4.5, they need to be within the ambit of the CFTC's reporting system.

3. What considerations should be made with respect to defining the term "marketing"? What specific areas related to marketing are most problematic?

Mutual funds that operate as de facto commodity pools and promise investors returns that are similar to (or are designed to mimic or closely parallel), the returns produced by commodity trading advisors, pose several significant investor-related concerns. In our view, their marketing representations as we have seen them are potentially misleading and their structures increase the risks to investors compared to the traditional commodity pool structure.

* The mutual funds that we are focused on use off-shore subsidiaries ("controlled foreign corporations" or "CFCs"), to trade their commodity interests in order to obtain the favorable tax treatment available to mutual funds.

* The funds often invest their CFCs' assets in underlying pooled vehicles or thinly-veiled "separate accounts" in order to access CTAs in a way that (i) obscures the performance and incentive fees paid to such firms; and (ii) avoids the prohibition contained in the Investment Advisers Act against paying fees to advisers based upon a percentage of the account's gains.

* Many of the funds are employing very high levels of "gearing" or "leverage" in their CFCs in order to produce the promised returns.

* The fees in the CFC's and their underlying fund investments are generally not disclosed. The trading advisor fees are some of the highest fees paid by commodity pools and the exclusion of the fees (where applicable) is misleading to potential investors.

Marketing and sales literature should disclose the complex structure of these vehicles, including their offshore entities, and the associated risks to the potential investor. We believe they should be subject to the disclosure and promotional material rules of the CFTC for commodity pools.

4. Which SEC rules and regulations are in conflict with the CFTC's regulations applicable to commodity pools, and how can these conflicts be best addressed? What issues should the CFTC consider with respect to the ability of Mutual Funds to comply with the disclosure document and reporting delivery requirements; recordkeeping; and

related fund performance disclosure requirements under part 4 of the Commission's regulations?

As noted above, we have been registered as a CPO since 1989, and currently manage pools with assets in excess of $1.5 billion. One pool managed by the Firm offers and sells interests therein pursuant to an effective registration statement filed with the SEC under the Securities Act of 1933, as amended ("1933 Act"); that fund complies with CFTC regulations as well as the 1933 Act and other, relevant SEC-administered statutes and rules. Any pooled vehicle that is subject to both SEC and CFTC jurisdiction is faced, technically speaking, with different disclosure, operating and/or marketing obligations.

We are very concerned about the lack of uniformity regarding core requirements applicable to these otherwise similar investment vehicles, and we are concerned that the prospectus disclosure and delivery regime applicable to mutual funds does not necessarily bring out all salient facts to investors at an appropriate point in the investment process. We believe that it is possible and appropriate for these new funds to adapt their selling, operating and disclosure practices to the requirements of the CFTC regimen. We believe that it is possible to adhere to the CFTC's CPO regulations without running afoul of the SEC's mutual fund regulations. Most importantly, we think that it is appropriate to require that these funds bring their operations, disclosure, etc., up to the level applicable to registered commodity pools operated by CPOs rather than let them default to a less exacting regime. Such a result is the simplest and most direct path to protecting and informing investors.

5. How much time should firms that previously could rely on the Rule 4.5 exclusion be granted to come into compliance with the new regime? Should Mutual Funds that previously claimed exclusion under Rule 4.5 be exempted from compliance with the proposed revisions to Rule 4.5?

Out of a desire to market them as "managed futures" funds, these new mutual funds and their adviser/sponsors have employed several structural and operational complexities – in particular the movement of U.S. investors' capital offshore to non-U.S. CFCs – that we believe work against the long term best interests of U.S. investors.[3] U.S. investors should at least have the option and ability to invest in a managed futures fund mutual fund without having the core trading function move offshore and without having to take on unwanted risks. Offshore schemes only increase the prospect for less scrupulous fund operators to engage in behavior that would otherwise be clearly revealed in a U.S. regulatory environment. In addition, the CFC structural element appears to add additional leverage or complexity risk. In order for these new funds to duplicate the full potential benefits of a normal commodity pool (i.e., to obtain the returns available where 100% of the fund is invested in the strategy), we believe that they have to substantially raise the level of trading leverage in the CFC. This increased leverage creates operational

[3] We recognize that the use of CFCs is not unique to these new mutual fund/commodity pools, but it is nonetheless concerning to us that a core construct by which the new vehicles are able to qualify under Subchapter M involves a non-U.S. vehicle that adds costs and complexity while taking away from transparency and accountability.

challenges of moving the money back and forth between U.S. and offshore entities, and may increase the overall level of risk to investors.

In our view, the deficiencies associated with and the risks posed to investors by the slate of mutual fund/commodity pool vehicles currently in existence and/or registration requires prompt attention. We believe investors in these funds do not fully understand their structure and the associated risks. The trading advisors, trading strategies, allocation and leverage levels, offshore trading arrangements, sub funds invested in and many other pertinent and important matter are simply not adequately being disclosed to investors. These issues and others that the CFTC is looking at with respect to these new mutual funds originate from the simple fact that the sponsors of and advisors to these new investment vehicles want to fit them vehicle into the distribution-friendly envelope known as a "mutual fund". We do not think that the CFTC should bow to the commercial desires of industry participants to delay implementation as this is not in the best interest of the investors who are being actively solicited. Excluding mutual funds already in existence from revised Rule 4.5 would simply reward firms that took advantage of a regulatory loophole in their product creation efforts at the risk of investors who are not getting adequate disclosures about the investments they are making. The right answer is to require the mutual funds that are operating as de facto commodity pools to come into compliance with Part 4 in a very short time frame, and to ensure that any fund formed during the pendency of this regulatory initiative is similarly given only a short period of time to come into compliance.

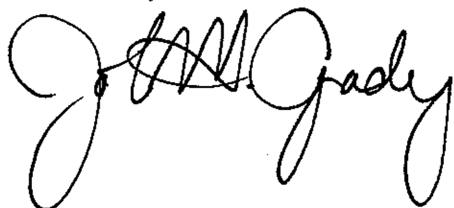
In our view, the need to bring these funds under CFTC jurisdiction and to require them to promptly comply with the Part 4 rules is not a matter of convenience. We understand that requiring the operators of these funds to comply with the rules generally applicable to commodity pools will require diligent effort and, quite possibly, some significant re-tooling of their approach to disclosure, document delivery and structure (especially as it pertains to their use of CFCs for commodity trading purposes). Requiring them to come into prompt and full compliance is warranted, however, by one important and fundamental consideration: investor protection. In general, the American public tends to view mutual funds are reliable and inherently prudent investment vehicles. They are mainstays of retirement plan investment menus, and an enormous percentage of the U.S. investing public uses mutual funds to achieve their various goals.

Not all mutual funds deserve to be accorded the reputation for prudence, diversification and even "safety" claimed by the fund industry for its members. Mutual funds, particularly those that pursue sophisticated or risky strategies, are not any "safer" because of their registration under the 1940 Act. Shareholders in mutual funds can be and often are exposed to the risk of large losses across a wide range of asset classes, instruments and strategies. Mutual funds that engage in offshore futures trading and that transact in swaps and other complex derivative instruments, as the new mutual fund/commodity pools do, should be treated no differently than commodity pools are under the Commission's regulations. In short, they should have to comply in full with the disclosure, document delivery, operating and reporting rules imposed on commodity pools by the CFTC.

We are principally concerned with ensuring that investors are well informed about their investments, and that funds are managed in their interests. If investors are not well informed because the vehicles they can choose from operate without full disclosure regarding fees, structure, strategies and trading instruments, offshore entities, leverage, expenses and risks, they may select what they think is a diversified managed futures fund but instead find themselves invested in a risky fund whose aggressive trading is not apparent because of their structure. A mutual fund pursuing a managed futures investment strategy that surprises uninformed investors with substantial or rapid losses would likely give a black eye to the entire managed futures business. The sooner that the CFTC can ensure proper disclosure, document delivery and operating structures for these new mutual fund/commodity pools, the better. For everyone concerned.

Thank you for the opportunity to submit our views on this important issue.

Sincerely,



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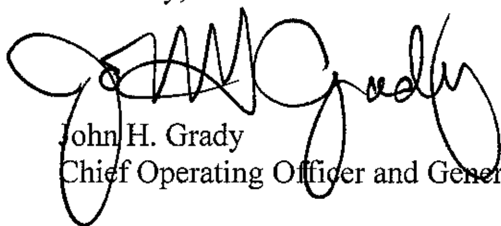

John H. Grady
Chief Operating Officer and General Counsel