MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

April 12, 2011

Via Electronic Mail: http://comments.cftc.gov

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

Re: Amendments to CPO and CTA Compliance Obligations; RIN 3038-AD30

Dear Mr. Stawick:

Managed Funds Association ("MFA")[1] appreciates the opportunity to provide comments to the Commodity Futures Trading Commission (the "Commission" or "CFTC") on its notice of proposed rulemaking on amendments to compliance obligations for commodity pool operators ("CPOs") and commodity trading advisors ("CTAs").[2] We submit comments under separate cover on the Commission's proposal to rescind sections 4.13(a)(3) and (a)(4).[3]

I. Introduction/Executive Summary

MFA strongly supports the goals of the Dodd-Frank Act[4] to address and mitigate potential systemic risks and enhance regulation of systemically significant financial companies. We commend the Commission for its work in preparing proposed Forms CPO-PQR and CTA-PR (together, the "Proposed Forms") as the Commission continues to implement the Dodd-Frank Act. We generally support the CFTC's effort to increase transparency by requiring certified annual reports for pools operated pursuant to CFTC Rule 4.7 as well as the Commission's effort to enhance the disclosure regime applicable to registered investment companies ("RICs") that engage primarily in CFTC-regulated derivatives trading. This letter contains our suggestions for how the Commission may be able to meet its goals in a more efficient manner.

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[1] MFA is the voice of the global alternative investment industry. Its members are professionals in hedge funds, funds of funds and managed futures funds, as well as industry service providers. Established in 1991, MFA is the primary source of information for policy makers and the media and the leading advocate for sound business practices and industry growth. MFA members include the vast majority of the largest hedge fund groups in the world who manage a substantial portion of the approximately $1.9 trillion invested in absolute return strategies. MFA is headquartered in Washington, D.C., with an office in New York.

[2] 76 FR 7976 (Feb. 11, 2011) (the "Notice").

[3] *See* letter from Stuart J. Kaswell, Executive Vice President and Managing Director, MFA, to David A. Stawick, Secretary, CFTC, dated April 12, 2011, RIN 3038-AD30, *available at:* http://www.managedfunds.org/downloads/MFA.CFTC.Rule.4.13.final.4.12.pdf.

[4] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (the "Dodd-Frank Act").

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As discussed more fully below, in our view the following would significantly enhance the usefulness of the proposed forms:

- Eliminate the repetitiveness of certain substantively similar questions contained in proposed Form PF and Schedule A of proposed Form CPO-PQR by consolidating the forms or, alternatively, by moving such questions from Schedule A of proposed Form CPO-PQR to Schedule B thereof.

- Permit affiliated entities to report on one form that identifies the group of entities for which reporting is being made. For this purpose, affiliated entities would include standard master-feeder structures as well as fund of funds and "feeder funds" (collectively, "FOF") structures that are operated and advised by commonly controlled CPOs and CTAs.

- Accommodate on Form CPO-PQR FOF structures that allocate *to unaffiliated underlying funds* to make clear that FOF advisors do not have to provide information with respect to unaffiliated underlying funds.

- Accommodate on Form CTA-PR situations in which a pool's CTA is unrelated to the pool's CPO and, therefore, does not have sufficient information regarding the pool's overall activities to provide the information requested in the Form. For example, a CTA may not know what percentage of a pool's assets it is advising. Required information should be limited to the names of the pools advised and the positions established by the CTA on behalf of the pool.

- Treat the disclosure of the pool's distribution channels as nonpublic records in confidentiality rules applicable to Form CPO-PQR.

In addition, as discussed more fully below, in our view the following would significantly enhance the proposed amendments to Rules 4.5 and 4.7:

- Grant relief to a CPO offering a commodity derivatives mutual fund from certain Part 4 disclosure and document delivery requirements, and grant traditional public commodity pools similar relief.

- Define and clarify the concept of what constitutes "marketing" in order to help determine whether a fund is marketing itself as a commodity fund in any amendment to Rule 4.5.

- Amend CFTC Rules 4.26(a)(2) and 4.36(b) to require disclosure document updates every 12 months rather than every nine months.

- In situations where a pool's participants are limited to its CPO's and CTA's principals and employees that are described in CFTC Rule 4.7(a)(2)(viii), the pool should be exempt from the certified annual report requirement in the proposed amendment to Rule 4.7.

We have also compiled a list of comments and suggestions to the specific instructions and questions found in Forms CPO-PQR and CTA-PR. Please see **Appendix A**.

II. Data Collection for CPOs and CTAs

A. Forms CPO-PQR and CTA-PR

(i) Eliminate Duplicative Position Information for Dual Registrants.

As a threshold matter, we recommend that the Securities and Exchange Commission (the "SEC") and the CFTC combine their systemic risk reporting requirements into a single Form PF, instead of requiring advisers to file both Form PF and Forms CPO-PQR and CTA-PR, as applicable, as a combined form would be the most efficient and least costly for respondents to complete and regulators to analyze. The forms are far from identical, and asset managers that advise both private funds and commodity pools (that are not also private funds) would be required to track and file two parallel sets of information with the SEC and the CFTC. A combined form would address issues discussed below relating to duplication of reporting and inconsistency among definitions and instructions. By including an additional schedule the CFTC could request information that is unique to commodity pools. A truly joint reporting form would allow regulators to monitor systemic risk using consistent data reported in a consistent manner, would improve the quality of systemic risk analysis and reduce the regulatory expense associated with that analysis. At the same time, it would substantially reduce the compliance burden for advisers.[5]

Alternatively, MFA proposes that to the extent information in the Form PF and Schedule A of Form CPO-PQR is substantively similar, information required in Form CPO-PQR Schedule A should be moved to Schedule B of that form since dual registrants, while still required to file Schedule A, satisfy their Schedule B filing requirements by filing Form PF. Requiring duplicative information increases the chance of inconsistencies between the two forms, which would only hinder the Commission's assessment of potential systemic risk. For instance, question 12 of Form CPO-PQR asks for the pool schedule of investments in listed categories and question 23 of Form PF requests aggregate hedge fund exposures. Both forms proceed to break down the asset classes and direct the entity to provide a dollar value for long and short positions. We believe the duplication in the two forms could be addressed by moving question 12 of Form CPO-PQR to Schedule B.

(ii) Affiliated Entities Should Be Permitted to File a Consolidated Form.

Certain information requested in Form CPO-PQR is similar to Form CTA-PR. Many of our members are registered as both a CPO and a CTA and some members have affiliates that are themselves registered as a CPO, CTA or both. Requiring, for example, a CTA/CPO and its affiliated CPO to file separate Forms CPO-PQR and CTA-PR would result in the filing of duplicative information.[6] Permitting affiliated entities to file a single form would not only decrease their filing burden, both in terms of time

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[5] We also note that the CFTC's and the SEC's joint report to Congress on harmonization of regulation recommends that the two agencies align specific private fund reporting requirements, and we believe that a single combined form would support that initiative.

See A Joint Report of the SEC and the CFTC on Harmonization of Regulation, October 16, 2009, *available at:* http://www.cftc.gov/ucm/groups/public/@otherif/documents/ifdocs/opacftc-secfinaljointreport101.pdf.

[6] We note that the NFA's CTA annual update questionnaire, in order to avoid duplicative reporting, directs the CTA to exclude from its assets under management assets in pools for which the CTA is also the CPO. More specifically, the questionnaire directs the advisor to: "List the approximate nominal amount of customer funds invested in exchange traded futures and/or options. (Do not include funds invested in pool accounts for which you are also the CPO.)"

and expense, but would also decrease the likelihood of error and inconsistencies between and among the various forms. This would also simplify regulators' surveillance and assessment of potential systemic risk from trading conducted by affiliated entities.

(iii) Unique Issues of Funds of Funds and Feeder Funds Should Be Addressed.

We believe the Commission should provide relief and guidance for managers/operators of FOFs. In our view, FOFs that invest primarily in unaffiliated funds are not in the business of trading commodity interests.[7] Furthermore, FOF reporting is unnecessary because the Commission and/or the SEC will oversee the underlying fund (or provide a relevant exemption), and therefore the Commission will have access to information on the size, strategy and positions of such funds. Thus, we believe the Commission would gain no additional information by requiring a FOF to file Form CPO-PQR where the FOF's commodities exposure is solely through its investment in unaffiliated underlying funds. Such reporting not only would impose a significant cost and burden on such entities, but would also unnecessarily burden the Commission. In addition, FOFs would be unable to respond in the level of detail the Commission requests in Form CPO-PQR or Form PF as they do not promote or trade on behalf of the underlying funds and thus have no particular right to access such information.[8] Finally, even if a FOF could obtain such information, any such reporting requirement would engender serious confidentiality and competitive concerns on the part of the underlying funds.

In the alternative, if FOF managers/operators are required to file the proposed form(s), we suggest instead that the Commission adopt the approach taken in Form PF and require only a "check-the-box" that identifies a FOF.[9] Also similarly to Form PF, assets managed by a FOF could be taken into consideration with respect to whether the CPO's business, in aggregate, rises to the level of a Large Pool Operator and require informational filing only with respect to such Large Pool Operator's direct pools.

Finally, we note that, if neither alternative proposed above is adopted, a FOF's CPO will have to receive information from underlying funds in order to file its Form CPO-PQR, and thus should be afforded a longer period of time within which to file the forms, similar to that already provided, by rule or interpretation, for comparable situations.[10]

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7 *See, e.g.,* Section 749 of the Dodd-Frank Act.

8 *See* 76 FR 7976; 76 FR 8068.

9 We note that Instruction 7 of Form PF directs advisers of FOFs to complete the questions on the FOF level. Form PF specifically notes that advisers need only complete Section 1B and that, "[f]or all other purposes, [the adviser] should disregard any 'fund of funds.'" The form does not require FOF advisers to disclose any information about the underlying funds.

10 We note that CFTC Rule 4.22(f)(2) provides relief to the CPOs of a FOF by permitting the CPO to file a notice with the NFA for an extension to file FOF annual reports. A CPO unable to report within 90 days of a pool's fiscal year end because the pool has an investment in another collective investment vehicle may file for an automatic extension of the annual report filing obligation of up to 180 calendar days after the end of the pool's fiscal year. Similarly, pursuant to the SEC's interpretation of the custody rule in the FOF context, a registered investment adviser will not be deemed to have custody under Rule 206(4)-2 of the Investment Advisers Act of 1940 (the "Advisers Act") with respect to a pooled investment vehicle provided that audited financial statements for the vehicle are distributed to investors within 180 days of its fiscal year-end (or 260 days if the vehicle invests 10% or more of its assets in another FOF).

(iv) CTAs Should Not Be Required to Report Detailed Information about Pools Operated by an Unaffiliated CPO.

Question 2(g) on Schedule B of Form CTA-PR directs a pool's CTA to indicate the approximate percent of the pool's funds that are directed by the CTA under its trading program. When a CTA trades on behalf of a multi-advisor pool operated by an unaffiliated CPO, the CTA often does not know the exact percentage of the pool's assets that have been allocated to it. The percentage of a multi-advisor pool advised by a given CTA will change frequently due to changes by the CPO in advisors to the pool, asset allocations among those advisors, relative gains and losses experienced by each advisor to the pool, interest income received and other exigencies. No rule exists to compel the CPO to provide specific pool asset allocation information to the CTA. It should, therefore, be sufficient for the CTA to provide (i) information adequate to allow the Commission to identify the pool and its CPO, and (ii) positions established by the reporting CTA on behalf of the pool.

B. Protecting Confidential Information

The Commission proposes to amend sections 145.5 and 147.3 of its regulations (together, the "Proposed Confidentiality Rules"), respectively, to list specific schedules and questions in the Proposed Forms as nonpublic records pursuant to section 8(a)(1) of the Commodity Exchange Act and exemptions under the Freedom of Information Act ("FOIA"),[11] and to exempt such records from mandatory disclosure, pursuant to exemptions under the Government in the Sunshine Act.[12] MFA agrees with the Commission's analysis that the Proposed Forms would require CPOs and CTAs to report a great deal of proprietary information that, if publicly disclosed, would cause substantial harm to the competitive positions of those entities.[13] In fact, MFA believes that the Proposed Confidentiality Rules do not go far enough in protecting proprietary and sensitive information requested in the Proposed Forms and that the Proposed Confidentiality Rules should protect more information requested in schedules A of the Proposed Forms.

As the Commission recognizes, commercial and financial information and trade secrets are generally exempted from public disclosure under FOIA,[14] and "information will qualify for this exemption if the public disclosure of such information would cause substantial harm to the competitive position of the person from whom the information was obtained."[15]

We are concerned that the Proposed Confidentiality Rules do not list question 9 of Schedule A of the proposed Form CPO-PQR regarding the disclosure of pool distribution channels as nonpublic records, as we believe such information is proprietary commercial information and the public disclosure of such information could cause substantial harm to the competitive position of the person from whom the information was obtained. CPOs of private pools perform extensive research and due diligence on their choice and use of service providers, and guard such information from their competitors to prevent them

[11] Notice at 7982; FOIA, 5 U.S.C. 552 *et seq*.

[12] Notice at 7983; Government in the Sunshine Act, 5 U.S.C. 552b.

[13] Notice at 7982.

[14] *Id.;* 5 U.S.C. 552(b)(4).

[15] Notice at 7982; *Pub. Citizen Health Research Group v. FDA,* 704 F.2d 1280, 1291 (DC Cir. 1983).

from gaining a competitive advantage. For example, CPOs often select or develop distribution channels for strategic reasons, as they are concerned about maintaining the confidentiality of their positions. The choice of service providers may reveal to competitors an entity's strategy, in particular, the entity's activities in certain geographic regions. Additionally, CPOs and CTAs spend considerable effort performing due diligence on firms included in their distribution channels, and believe it would be unfair for their competitors to obtain such information at absolutely no cost. As a public policy matter, regulation should encourage all market entities to perform their own due diligence before selecting a service provider and not rely on, or gain an advantage from, the due diligence performed by others. Public disclosure in the Proposed Forms of service providers could lead to entities performing less due diligence on their service providers and selecting service providers that are used by other entities, such as larger, more reputable firms. We believe this is a risky practice, which the Commission's regulations should not encourage.

Accordingly, we recommend that the Commission include question 9 of proposed Form CPO-PQR Schedule A as nonpublic records under the Proposed Confidentiality Rules.

III. Proposed Amendments to Reinstate Trading Criteria for Exclusion from the CPO Definition in CFTC Rule 4.5

The Commission proposes to amend section 4.5 with respect to RICs ("Proposed Rule 4.5"), as requested in National Futures Association's ("NFA") petition for rulemaking, which proposed the reinstatement of the pre-2003 operating restrictions in CFTC Rule 4.5.[16] The Commission recognizes that Proposed Rule 4.5 may cause some RICs or their operators to have to become registered with both the SEC and the CFTC and requests comment with respect to the regulation of such entities.[17]

MFA is concerned that Proposed Rule 4.5 would have the effect of requiring RICs invested substantially in commodity futures and other CFTC-regulated derivatives ("commodity derivatives mutual funds") and their offering entities to comply with both the SEC regulations under the Investment Company Act of 1940 (the "Company Act") and the Commission's Part 4 regulations concerning CPOs ("Part 4 Regulations"). While some requirements under these two separate regulatory regimes are similar, in other respects the relevant regulations or CFTC and SEC staff requirements are inconsistent or conflict (see examples below). Requiring RICs and their offering entities to comply with both regulatory

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[16] Notice at 7984; *see also* 75 FR 56997 (Sept. 17, 2010).

NFA's petition requests that any entity filing for an exclusion from Rule 4.5 with respect to a RIC include in its notice of eligibility a representation that the RIC's qualifying entity:

(1) will use commodity futures or commodity options contracts solely for *bona fide* hedging purposes (the "*Bona Fide* Hedging Test");

(2) will not have the initial margin and premiums required to establish any commodity futures or commodity options that exceed 5% of the liquidation value of the qualifying entity's portfolio (excluding positions held for *bona fide* hedging purposes) (the "5% Test"); and

(3) will not be marketed to the public as a commodity pool or as a vehicle for investment in commodity futures or commodity options (the "Marketing Test"). 75 FR 56997.

[17] Notice at 7984.

regimes, absent any regulatory relief, could make it impossible or infeasible for commodity derivatives mutual funds to be offered in the United States.

To the extent the Commission determines to amend Rule 4.5, we respectfully urge the Commission to: (1) grant relief to a CPO offering a commodity derivatives mutual fund from certain aspects of the performance disclosure and disclosure document delivery requirements of the Part 4 Regulations;[18] (2) grant comparable disclosure document delivery relief to CPOs of traditional public commodity pools; (3) amend Rule 4.5 only with respect to the Marketing Test; and (4) provide a definition of "marketing" with respect to the Marketing Test to determine whether a fund is holding itself out or marketing itself as a commodity fund.

Finally, assuming the amendments are adopted as proposed, we recommend that the Commission delay the effectiveness of any additional requirements imposed by Rule 4.5 by one year after adoption.[19]

A. The Commission Should Provide Relief from the Performance Disclosure Requirements

One area where requirements under the Part 4 Regulations and the Company Act regulations differ is with respect to performance disclosures. CFTC Rule 4.24(n) requires the inclusion of past performance of a pool as set forth in CFTC Rule 4.25 ("Rule 4.25"). Rule 4.25 requires a significant amount of data that is different from the information required or permitted under SEC Form N-1A for RICs.[20] Generally, the SEC restricts investment companies' use of footnotes and does not allow additional performance disclosures beyond the requirements of SEC Form N-1A, such as the performance of other related funds. Furthermore, the Financial Industry Regulatory Authority, Inc. ("FINRA") also regulates the sales material broker-dealers may distribute and imposes restrictions on the use of related performance information in sales materials.[21]

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[18] To the extent other regulatory inconsistencies or conflicts arise, we respectfully request that the Commission consider providing relief as appropriate and raise the issue before the Joint CFTC-SEC Advisory Committee on Emerging Regulatory Issues.

[19] *See, e.g.,* section 419 of the Dodd-Frank Act (providing unregistered investment advisers a one-year transition period for registration).

[20] For example, performance data required under Rule 4.25 includes 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; 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; performance of each other pool operated by the pool operator (and by the trading manager if the offered pool has a trading manager) in certain instances; and disclosures in certain instances of the performance of each pool operated by and account traded by the trading principals of the pool operator as well as each CTA.

Item 4(b)(2) of the SEC's Form N-1A requires 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 distributions and redemptions); and the returns of an appropriate broad-based securities market index for the same periods.

[21] *See* NASD Rule 2210, administered by FINRA.

The performance disclosure requirements under the Part 4 Regulations and the Company Act regulations are such that it would be impossible for a CPO to comply with both CFTC Rule 4.25 and the performance requirements contained in SEC Form N-1A. We encourage the Commission to engage the SEC on this topic and to reach an agreement with respect to commodity derivatives mutual fund performance disclosures that satisfies both agencies. Indeed, we believe this would be an appropriate issue to raise before the Joint CFTC-SEC Advisory Committee on Emerging Regulatory Issues.[22] In the interim, if the Commission amends Rule 4.5 as proposed, we respectfully request that the Commission grant relief to a CPO that offers a commodity derivatives mutual fund regulated under the Company Act from the requirements of Rule 4.25 that conflict with the requirements of SEC Form N-1A.

B. The Commission Should Provide Relief from the Disclosure Document/Prospectus Delivery Requirements

1. Commodity Derivatives Mutual Funds

The prospectus delivery requirements under federal securities laws applicable to RICs differ from disclosure document/prospectus delivery requirements under CFTC Rule 4.21 ("Rule 4.21")[23] with respect to receipt and timing. We believe that compliance with both CPO and RIC document delivery requirements would be unnecessarily cumbersome and would needlessly interfere with the established document delivery procedures for RICs. Further, we believe that technological advancements since the inception of Rule 4.21, such as the development of the Internet, address earlier investor protection concerns with respect to accessibility of a pool prospectus or other information relating to the investment.[24] We also note that in other circumstances the Commission has provided, or is considering providing, certain CPOs with relief from Rule 4.21 conditioned upon a CPO making its pool disclosure document/prospectus available on its website; clearly informing prospective participants of the availability of the disclosure document/prospectus and the Internet address for accessing it; directing any selling agent through which the pool operator sells pool interests to inform prospective participants where they may obtain the disclosure document/prospectus; and complying with disclosure requirements.[25]

To avoid unnecessary, duplicative and cumbersome regulation, if the Commission amends Rule 4.5 as proposed, we respectfully request that the Commission grant relief to a CPO that offers a

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[22] The CFTC and SEC's joint report to Congress on harmonization of regulation recommends that the two agencies align specific private fund reporting requirements, including: "(i) the use of performance track records; (ii) requirements applicable to investor reports (including the financial statements often used by registered investment advisers to comply with the Advisers Act custody rule and the financial statements delivered to investors by commodity pool operators); and (iii) recordkeeping requirements." Some of these differences or conflicts in reporting requirements are also applicable to the Commission's proposed amendment of Rule 4.5. *See* note 5, *supra*.

[23] Rule 4.21 requires a CPO to deliver to a prospective participant a disclosure document/prospectus prepared in accordance with Rules 4.24 and 4.25, and for the CPO to receive a signed and dated acknowledgment of receipt of the disclosure document/prospectus before the CPO accepts or receives funds from the prospective participant.

[24] For example, investors in commodity derivatives mutual funds can find end-of-day performance on the website of their fund sponsor, as well as other public sites, and are offered daily liquidity.

[25] *See* Commodity Pool Operators: Relief from Compliance with Certain Disclosure, Reporting and Recordkeeping Requirements for Registered CPOs of Commodity Pools Listed for Trading on a National Securities Exchange; CPO Registration Exemption for Certain Independent Directors or Trustees of These Commodity Pools, 75 Fed. Reg. 54794 at 54795 (Sept. 9, 2010).

commodity derivatives mutual fund from the disclosure document/prospectus prior delivery and acknowledgment of receipt requirements of Rule 4.21, provided that:

(1) the commodity derivatives mutual fund's disclosure document/prospectus is readily accessible on a website maintained by the CPO;

(2) the Internet address is disclosed to prospective fund investors;

(3) any selling agent would be directed by the CPO to inform investors where they may access the disclosure document/prospectus; and

(4) the CPO complies with applicable Company Act and/or Part 4 Regulation disclosure requirements.[26]

We respectfully suggest that these changes, modeled on the Commission's own prior actions, would promote greater accessibility of disclosure documents and afford more meaningful protections to purchasers.

2. Traditional Commodity Pools Registered Under the Securities Act of 1933

In requesting that the Commission grant relief from Rule 4.21 to CPOs that offer commodity derivatives mutual funds, we also respectfully urge that the Commission grant comparable relief to CPOs of traditional commodity pools registered under the Securities Act of 1933 (the "Securities Act") to avoid creating a competitive disadvantage in the marketplace. Indeed, we believe that it would be appropriate and consistent with the interests of pool participants for the Commission to modernize Rule 4.21 to take into consideration the accessibility of disclosure documents and other relevant pool information via the Internet.[27] As a result of the accessibility of the Internet and the development of electronic communications, investors today have an easier time accessing relevant investment information.

We respectfully request that the Commission grant relief to a CPO that offers a traditional public commodity pools from the prior delivery and acknowledgment of receipt requirements of Rule 4.21, provided that:

(1) the public commodity pool's disclosure document/prospectus is readily accessible on a website maintained by the CPO;

(2) the Internet address is disclosed to prospective pool participants;

(3) any selling agent would be directed by the CPO to inform participants where they could access the disclosure document/prospectus; and

(4) the CPO complies with Part 4 disclosure requirements, as described in Footnote 26 above.

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[26] Thus, the document would include all disclosures required by the Part 4 Regulations other than performance; the disclosure document/prospectus need not be individually delivered; and, as discussed below, the disclosure document/prospectus would be updated annually, rather than every nine months.

[27] For example, the Commission or NFA could require that an investor confirm receipt of disclosure documents/prospectuses by checking a box on a webpage prior to electronically purchasing interests in a pool.

To the extent that the Commission determines to grant the foregoing relief, we request that such relief become effective immediately.

C. Disclosure Document Update Requirements

CFTC Rule 4.26(a)(2) states that a CPO may not use a disclosure document that is more than nine months old. In comparison, the SEC generally requires that RICs update their registration statements/prospectuses annually.[28] We believe that a relatively simple way for the Commission to reconcile one of the differences between the CFTC and SEC requirements would be to permit pool disclosure documents to be updated on the same schedule as RIC prospectuses. Thus, we respectfully request that the CFTC extend the Rule 4.26(a)(2) updating requirement from nine months to 12 months. For purposes of consistency, we also request that the CFTC make a similar change to the Rule 4.36(b) updating requirement for CTA disclosure documents.

D. Use of the *Bona Fide* Hedging Test and 5% Test Are Not Necessary to Achieve the Objectives of Regulators

The Commission's objective with respect to Proposed Rule 4.5 is "[t]o stop the practice of registered investment companies offering futures-only investment products without Commission oversight."[29] NFA explains in its petition to amend section 4.5 that it "is interested in ensuring that [RICs] that engage in more than a *de minimis* amount of futures trading and that are offered to retail customers <u>or</u> are marketed to retail customers as a commodity pool or otherwise as or in a vehicle for trading in (or otherwise seeking investment exposure to) the commodity futures or commodity options markets are subject to the appropriate regulatory requirements and oversight by regulatory bodies with primary expertise in commodity futures."[30] The Commission and NFA's objectives can be achieved without use of the *Bona Fide* Hedging Test or the 5% Test. In amending section 4.5, we believe the requirement that a RIC not be marketed to the public as a commodity pool or as a vehicle for investment in commodity futures or commodity options—the Marketing Test—would be a sufficient test for addressing regulators' concerns.

The Company Act establishes a stringent disclosure regime for investor protection. Sponsors of commodity derivatives mutual funds will need to disclose the RIC's goal of obtaining returns from actively managed futures strategies or market themselves as commodity derivatives investments. It would be difficult for a retail investor to determine what he or she was investing in or the purpose of a particular RIC if the RIC's disclosure or sales material did not provide a clear description of the RIC's primary objective—*i.e.*, investing in commodity derivatives.

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[28] RICs engaged in a continuous public offering of their shares, such as most open-end investment companies (commonly known as "mutual funds") and closed-end funds operating as "interval funds," must update their Securities Act registration statements, including their prospectuses, annually, pursuant to Section 10(a)(3) of the Securities Act and Rule 427 promulgated thereunder. These annual filings under the Securities Act also satisfy the requirements of SEC Rule 8b-16 under the Company Act for RICs to update their Company Act registration statements annually. RICs that are not engaged in a continuous public offering of their shares generally satisfy the requirements of SEC Rule 8b-16 by filing annual updates to their Company Act registration statements.

[29] Notice at 7984.

[30] See discussion of NFA's petition, *supra* note 16.

If the Commission determines to amend Section 4.5, we respectfully urge that the Commission amend it only with respect to the Marketing Test. To the extent the Commission is interested in requiring a quantitative test, we respectfully urge that the Commission examine NFA's petition in light of the Dodd-Frank Act amendments and that the Commission solicit for alternative tests that would better achieve the Commission's goals than the *Bona Fide* Hedging Test and the 5% Test.

E. The Commission Should Define/Clarify Marketing for Purposes of Rule 4.5

We recommend that the Commission take into consideration some or all of the following when clarifying or otherwise defining the Marketing Test:

(a) the fund's name, objective and marketing materials;

(b) the percentage of the fund's assets used, or proposed to be used, to maintain futures positions, swaps or other CFTC-regulated derivatives;

(c) whether the fund, during the course of its normal trading activities over a given time frame (*e.g.,* on a rolling quarterly basis), has a net short exposure to commodities or financial instruments through futures or other CFTC-regulated derivatives;

(d) whether the fund or its affiliates has directed a trading manager to trade its futures portfolio at an account size exceeding a specified percentage of the fund's total assets;

(e) the fund's primary expected source of returns, gains and losses; and

(f) the percentage of the fund's profits/losses from futures trading or swaps in the past three years.

Additional points to consider include whether a fund (i) holds itself out as "actively" trading in futures and other CFTC-regulated derivatives; (ii) through futures and other CFTC-regulated derivatives seeks to achieve both net long and net short exposure to an underlying asset type over time; and (iii) holds itself out as investing primarily in commodities, CFTC-regulated swaps, notes or futures with underlying economic exposure to nonfinancial (physical) commodities.

We urge the Commission to distinguish clearly a fund primarily holding itself out as investing in CFTC-regulated swaps and futures from a fund that has or seeks to have exposure to commodities through investments in the securities of commodity producers or other companies involved in commodity-related businesses.

IV. Proposed Amendments to Section 4.7

The Commission proposes to amend Section 4.7 by incorporating by reference the "accredited investor" standard and removing exemptive relief from the certification requirements for pool annual reports.[31] We support amending Section 4.7 by incorporating by reference the "accredited investor" standard and believe this will facilitate consistency amongst federal standards for financial sophistication and reduce investor confusion.

[31] Notice at 7984.

We generally agree with the proposal that Rule 4.7 pools be audited. MFA has supported strong auditing standards.[32] The vast majority of our members routinely provide certified annual reports to their investors. We believe, however, that it would be appropriate for the Commission to continue to make this exemption available in limited circumstances. Investment firm principals often test a new strategy by creating a vehicle to trade their personal assets. In connection therewith, the firm or principal may file an exemptive application under CFTC Rule 4.13. To the extent that the Commission rescinds the Rule 4.13 exemptions, and the CPOs of such pools rely on Rule 4.7 in place of Rule 4.13, we believe the Commission should continue to provide exemptive relief from the certification requirements for pool annual reports when the pool's participants include only principals and the types of employees described in CFTC Rule 4.7(a)(2)(viii). We believe that in these circumstances where there are no outside investors, it is of limited value to mandate the delivery of a certified annual report to pool participants.[33]

V. Conclusion

MFA appreciates the opportunity to provide comments on the Commission's proposed amendments to compliance obligations for CPOs and CTAs. As discussed, we believe that the proposed forms could be significantly enhanced by (i) eliminating duplicative position information for dual registrants, (ii) allowing affiliated entities to file a consolidated form, (iii) addressing unique issues of FOFs, and (iv) treating the disclosure of pool distribution channels as nonpublic records. In addition, we believe that the Commission's proposed amendments to section 4.5 could be overly burdensome to some RICs and their sponsors; therefore, we propose (a) that section 4.5 be amended only with respect to the Marketing Test, and (b) that the Commission grant disclosure document delivery and Part 4 disclosure relief to CPOs offering commodity derivatives mutual funds and traditional commodity pools. Finally, while we generally support the proposal that Rule 4.7 pools be audited, we think it would be appropriate for the Commission to continue to make an exemption available in limited circumstances. We believe that a limited exemption from the pool audit requirement is consistent with the objectives of the Dodd-Frank Act.

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[32] *See* letter from Stuart J. Kaswell, Executive Vice President and Managing Director, MFA, to Elizabeth M. Murphy, Secretary, SEC, dated July 28, 2009, file no. S7-09-09, *available at:* http://www.managedfunds.org/downloads/MFA%20Comments%20to%20Custody%20Proposals.pdf.

[33] *See, e.g.,* CFTC Letters 96-37 and 96-35. CPO registration would not be required with respect to a trading vehicle whose assets are comprised only of funds from key executives and employees, which does not pay a management fee, and which is not advertised.

We would be happy to discuss our comments or any other issues raised in the Notice at greater length with the Commission or its staff. If the staff has any questions, please do not hesitate to call Jennifer Han or the undersigned at (202) 730-2600.

Respectfully submitted,

/s/ Stuart J. Kaswell

Stuart J. Kaswell
Executive Vice President & Managing Director,
General Counsel

Cc:

The Hon. Chairman Gary Gensler
The Hon. Commissioner Michael Dunn
The Hon. Commissioner Bart Chilton
The Hon. Commissioner Jill Sommers
The Hon. Commissioner Scott O'Malia
Ananda Radhakrishnan, Director
Division of Clearing and Intermediary Oversight

Appendix A

A. General Comments on Forms CPO-PQR and CTA-PR.

We appreciate the thoughtful approach the Commission has taken in preparing proposed Forms CPO-PQR and CTA-PR. We recognize that preparing an entirely new reporting framework of this type is a complicated task, and we expect that commodity pool operators and advisors will confront a similar challenge in completing these forms.

Under the proposal, CPOs and CTAs are required to file the Proposed Forms quarterly and provide certain information on a monthly basis. We note that filings for commodity pools registered under the 1934 Act are voluminous: in addition to annual report filings to be made with the NFA within 90 days of each year-end and NFA Rule 2-46 filings that must be made within 45 days of each quarter-end, CPOs of such pools are also required to file with the SEC 10-Qs within 45 days of each quarter-end and 10-Ks within 90 days of each year-end. Disclosure document updates must also be made and filed with NFA every nine months. Therefore we recommend instead that CPOs and CTAs submit the Proposed Forms semi-annually and provide information as of the end of the reporting period. Requiring CPOs and CTAs to provide monthly information would be inconsistent with the intended purpose of the Forms, would not materially enhance the assessment of systemic risk, and would impose a burden on CPOs and CTAs disproportionate to any potential benefits.

In addition, semi-annual reporting would be more consistent with the purpose of the Proposed Forms to enable the CFTC to identify whether any pools merit further analysis. Information about investments, use of leverage and collateral, counterparty exposures, and portfolio management practices provided semi-annually would provide the CFTC with meaningful data with which it would be able to monitor and assess the extent to which commodity pools could have systemic effects.

B. Comments to Specific Questions on Form CPO-PQR.

Instructions 1 & 2:

The proposed rules would require CPOs and CTAs to file the Forms within 15 calendar days of each quarter-end. We strongly recommend that the regulators provide CPOs and CTAs with 120 calendar days to submit the Forms. Anything less than a 120-day reporting period would severely limit the ability of CPOs and CTAs to properly value illiquid assets, diverge significantly with industry practice, conflict with periods for other reports by investment advisers, financial companies, and public companies, and ultimately result in less meaningful information being provided on the Forms.

Instruction 3:

We recommend that Instruction 3 be clarified to remove clause (2) of the first paragraph and clause (3) of the second paragraph. For purposes of determining whether a CPO is a "large CPO" or a "mid-sized CPO," aggregating pools across the CPO's affiliated entities does not make sense. As proposed, every CPO, regardless of size, that is affiliated with a large CPO would be deemed to be a large CPO itself. Further, if several smaller CPOs are affiliated with each other and in the aggregate have assets under management above the large CPO threshold, then every CPO in that family would be deemed to be a large CPO. This aggregation concept is sensible in the "large pool" context but not in the "large CPO" context.

Instruction 4:

We request that the NFA and CFTC ensure that there is a way to automatically upload data to the forms, as provided for Form PF filers, so that they do not have to be manually entered. Entering filings manually line by line is not practical or cost-effective given the volume of data requested by the forms.

Instruction 6:

We support the use of GAAP reporting standards for the reporting of financial information. This is consistent with managers' practice in the ordinary course, and we believe it will provide the CFTC with consistent data and minimize the additional burden to managers.

Schedule A

Question 2:

We recommend that the Form clarify that the terms "assets under management" (or "AUM") and "net assets under management" are intended only to capture pools as defined in Form CPO-PQR. These terms should not include other assets under management by the CPO. The proposed definition of AUM ("the amount of all assets that are under the control of the CPO") is subject to multiple interpretations, including gross assets or invested capital. The purpose of Form CPO-PQR is to track systemic risk reporting for commodity pools, and since other assets managed by a CPO are typically subject to other reporting regimes (such as the SEC's Form ADV), it is duplicative and unnecessary to require reporting of assets other than pool assets on Form CPO-PQR.

Question 3:

We recommend that master-feeder arrangements be aggregated as opposed to being reported separately. Such arrangements are not itemized on Form PF and this recommendation would align the required reporting with that of Form PF.

We also recommend that managers should not have to report for any commodity pool that represents less than 5% of the aggregate net assets managed by the CPO and its related persons, unless such pool has AUM of $250 million or more. CPOs should also not have to aggregate data for these small funds except for purposes of determining whether a manager is a mid-size CPO or a large CPO. Like Form PF, the purpose is to track systemic risk at the commodity pool level. Requesting detailed information on small commodity pools is unduly burdensome to managers and small commodity pools are not likely to pose a systemic risk. Therefore they should be excluded from the systemic risk reporting form.

Finally, in question 3(i), please clarify that the number of "investee pool tiers" is intended to be the number of tiers operated by the CPO or its affiliates. Managers will not necessarily be able to determine the number of tiers in pools operated by third parties.

Question 4(a)(vi):

We recommend adding "maintenance of investor/shareholder records" as an additional standard service performed by the administrator. We believe this is a standard service performed by third parties and support its inclusion in the Form for data aggregation/systemic risk purposes.

Question 5:

Please confirm that the term "carrying broker" has the same meaning as the defined term "broker." "Carrying Broker" is not defined in Form CPO-PQR.

Question 6(a)(v):

We recommend revising this question to ask for the "starting year" of the relationship, instead of the "starting date." Obtaining the starting year gives the CFTC sufficient information regarding the length of the relationship for purposes of determining systemic risk, and it would be substantially less burdensome for the manager to provide the starting year as opposed to an exact date.

Question 9:

Please clarify that this question applies only to paid marketers of the pool. Information regarding unpaid third parties who may provide marketing services to the pool is not relevant for systemic risk purposes and would be burdensome for managers to determine and collect.

Question 11:

The proposed Form appears to require historical return data back to 2005; only prospective performance information should be required as acquiring prior data could be unduly burdensome and costly when compared to the benefit of such additional information. Furthermore, we recommend the instructions be modified to provide for reporting of performance on a quarterly basis instead of a monthly basis. While we recognize that CPOs of full Part 4 pools report monthly, monthly reporting of returns for every commodity pool could be unnecessarily burdensome for some of our members, as some portfolios contain illiquid, hard-to-value assets. The proposed frequency of reporting goes well beyond the financial reporting requirements to investors under GAAP and market practice, and detailed monthly reporting is not always available within 15 days of the end of the month (as required by the proposed reporting periods).

Moreover, monthly reports are generally estimated and performance may be adjusted up or down over time based upon new or changed information. For example, performance allocations are often recorded in estimated form until the allocation is crystallized and taken. As a result, there may be situations where performance allocations accrued in prior months are reversed, which may have an impact on a commodity pool's net asset value and may obfuscate the monthly information requested by this question.

In addition, it is unclear whether this question refers to the returns of the pool or of a particular series of shares. We recommend tracking the concept of an "inception class" that appears in Form PF for purposes of reporting on this question. This would harmonize the reporting between the forms, especially since, as proposed, commodity pools that are also private funds would be required to report on a pool-by-pool basis on both Form PF and Schedule A of Form CPO-PQR.

Question 12:

With respect to the itemization of individual investments, we recommend that the CFTC track the structure and questions that appear in Question 31 of Form PF. This would provide consistent reporting across both forms, ease the compliance burden for dual registrants, and allow the CFTC and SEC to better aggregate data across the industry for purposes of measuring systemic risk.

We recommend combining the categories of "agency securitizations" and "agency resecuritizations" into one category. There does not appear to be a clear distinction between the two and so the same asset may be reported differently by different managers.

The proposed sub-asset classes in this question are overly narrow and raise questions about the usefulness of the information received. The level of detail proposed is generally more expansive than what is required for reporting in financial statements under U.S. GAAP, and in many cases managers do not track asset classes using the detail or categories described in this question. This question would require a new, parallel method of tracking asset classes in addition to the methods managers currently use to comply with U.S. GAAP, which would require significant investment to develop and maintain systems to track these categories in parallel to existing, commonly used categories. To avoid this unnecessary burden, we recommend using standard U.S. GAAP categories instead of those proposed in the Form.

We recommend aggregating ABS together with other debt securities. It would be more efficient and in line with market practice to group ABS and debt securities together instead of segregating them as proposed in the Form.

We recommend that the "Forex" line item be moved to the Cash section instead of the Alternative Investments section. We believe Forex instruments are better categorized as cash for systemic risk reporting purposes.

Question 13:

We first recommend deleting questions 13(a) and 13(b), as they are redundant with respect to questions 10(d) and 10(e). With regard to 13(c), high water marks are unique to a class or series of shares of a pool. Please clarify that the question refers to the percentage of the pool that is below the relevant high water mark.

Schedule B

We recommend that the AUM threshold be tested as of the end of the *prior* semi-annual reporting period (instead of the end of the applicable reporting period). Knowing in advance of a reporting period that the manager must report additional information for a mid-sized CPO or large CPO would give the manager additional time to begin tracking the relevant data and would ease the compliance burden for the manager.

Question 1:

The proposed Form does not list any categories, so we recommend conforming the investment strategy categories to the strategies listed in Question 17 of Form PF for consistency of reporting. The strategies in Form PF should in turn be drawn from industry sources. Additionally, the categories should be measured as of the end of the reporting period, instead of "during" the reporting period. To the extent strategy allocations change during the reporting period, it would be difficult and arbitrary to attempt to calculate investment strategies at multiple times during the reporting period. Further, calculating at the end of the reporting period provides consistency among various managers and will lead to more useful information for the CFTC.

In question 1(e), we request that the Form ask for the approximate percentage of the pool's portfolio that is managed solely using quantitative trading algorithms or quantitative techniques to select investments.

We also recommend that question 1(f) be modified to request a range of record shareholders instead of the number of participants. CPOs do not regularly maintain information about beneficial owners of their investors (*e.g.*, limited partnerships, nominees). Information on record holders is readily maintained by managers and should be as helpful to the CFTC for purposes of measuring systemic risk, and requesting a range of shareholders (instead of an exact number) will ease the filing burden on managers while still providing the CFTC with important systemic risk information.

Question 3:

We suggest that a response line of "N/A" be included to allow for pools that do not have exposure to another alternative vehicle.

Schedule C

Part 1, Question 2:

We recommend that turnover be required to be reported only quarterly, as this metric is generally not tracked by the industry in the manner requested by the CFTC. Please clarify that the value of pool assets for calculation of turnover is the absolute value of the portfolio, including the notional value of all derivatives at the beginning and the end of the period.

Part 2, Question 1:

We recommend the instructions be modified to provide for reporting of performance on a quarterly basis instead of a monthly basis. As noted above, while we recognize that CPOs of full Part 4 pools report monthly, monthly reporting of returns for all individual commodity pools could be unnecessarily burdensome for some of our members, as some portfolios contain illiquid, hard-to-value assets. The proposed frequency of reporting goes well beyond the financial reporting requirements to investors under GAAP and market practice, and detailed monthly reporting is not always available within 15 days of the end of the month (as required by the proposed reporting periods). Moreover, monthly reports are generally estimated and performance may be adjusted up or down over time based upon new or changed information.

Part 2, Question 2:

We recommend altering this question to reflect expected investor liquidity assuming that 100% of the pool is subject to redemption. Otherwise, in order to provide the information requested, the calculations required would require significant judgment and assumptions both between pools and between reporting managers, which calls into question the usefulness of the industry data received by the CFTC. The estimates provided would by definition include a large degree of uncertainty and subjectivity due to the difficulties of predicting the impact of market stress on a particular pool's portfolio. Further, if the question is maintained, we recommend that the Commission consider alternatives that would promote consistency with existing reporting regimes.

Part 2, Question 3:

Managers may not have easy access to the data requested by this question. For example, futures commission merchants ("FCMs") typically stand between commodity pools and central counterparties ("CCPs"). FCMs do not always provide a breakdown of the amount of commodity pool assets held by the CCP. Managers generally look to the FCM as the firm to which the commodity pool has the credit exposure. We recommend the CFTC consider removing or modifying this question.

Part 2, Question 4:

Many managers track risk exposure using metrics other than VaR. We recommend this question be revised to ask simply if the manager tracks risk exposure, and if so, to choose the primary metric used and answer questions similar to those provided with respect to VaR. For managers who do not use VaR to track risk but use another metric, the implications of answering "no" to this question are potentially misleading.

Part 2, Question 5:

This format is not practical for reporting of exposures in prime broker accounts. It will be very difficult for commodity pools to segregate out physical and synthetic positions in such situations so we recommend that managers be permitted to look at the entirety of the commodity pool's prime brokerage relationship when responding to the question (that is, in many cases the manager cannot look at the straight borrowing amount after backing out derivatives positions that are in the prime broker accounts). It would be more practical to report the amount borrowed as determined by the prime broker based on the entirety of transactions that reside in the prime broker account, and as such managers should be permitted to report in this manner.

Additionally, it would be more practical to allow managers to report the value of all collateral posted to the prime broker as a single number instead of differentiating types of collateral into subcategories. Managers would not in most circumstances be able to compute the figures requested with respect to the percentage of assets that may be rehypothecated given the complexity of such calculations and the lack of transparency of such calculations from prime brokers. This particular data element is recommended for deletion for this reason.

Part 2, Question 8:

Please see our comment to Schedule C, Part 2, Question 2, above.

We also recommend that this question be clarified to not include parallel pool structures or parallel managed accounts, as such pools or accounts may have different liquidity terms or gates than the reporting pool. Further, please clarify that this question should apply only to the largest class or most representative class of the reporting pool, as different classes may have different liquidity terms or gates. Attempting to aggregate different classes' liquidity terms for the purpose of this question would lead to varying reporting standards by different managers and would call into question the accuracy of the aggregate information received by the CFTC.