INVESTMENT COMPANY INSTITUTE

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June 29, 2011

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

Re: Written Statement of Karrie McMillan, General Counsel, Investment Company Institute for July 6, 2011 Roundtable on CFTC Proposal to Amend Rule 4.5 and Rescind Rules 4.13(a)(3) and 4.13(a)(4) (RIN No. 3038-AD30)

Dear Mr. Stawick,

As requested by the staff of the Commodity Futures Trading Commission, please find attached a written summary of the opening remarks I plan to present at the staff's roundtable on July 6, 2011.

Please contact me at 202/326-5815, Sarah A. Bessin at 202/236-5835, or Rachel H. Graham at 202/236-5819 if you have any questions.

Sincerely,

/s/

Karrie McMillan
General Counsel

Attachment

cc: Kevin P. Walek, Assistant Director
Amanda Lesher Olear, Special Counsel

INVESTMENT COMPANY INSTITUTE

STATEMENT OF KARRIE MCMILLAN

GENERAL COUNSEL

INVESTMENT COMPANY INSTITUTE

AT THE U.S. COMMODITY FUTURES TRADING COMMISSION'S ROUNDTABLE

ON CFTC PROPOSAL TO AMEND RULE 4.5 AND RESCIND RULES 4.13(A)(3) AND 4.13(A)(4)

JULY 6, 2011

Thank you for the opportunity to participate in today's roundtable discussion and to offer the views of the Investment Company Institute on this important topic. ICI is the national trade association of mutual funds and other registered investment companies (collectively, "funds"), and our members are entrusted with managing $13.8 trillion in assets on behalf of more than 91 million individual shareholders.

The fund industry has long recognized that efficient, effective, and even-handed regulation is crucial to protecting investors and ensuring well-functioning markets. We have a lot of experience with regulation: funds are the only financial product in America subject to all of the four major federal securities laws. The comprehensive regulatory scheme for funds:

- ensures thorough disclosure to investors;
- limits funds' use of leverage;
- promotes diversification;
- ensures safe custody of fund assets; and
- governs conflicts of interest.

Funds are overseen by their independent directors and by the Securities and Exchange Commission ("SEC"). Over all of this, advisers have a fiduciary duty to their funds and a fiduciary culture that puts shareholders first. We embrace this regulatory scheme as vital to our success.

On the other hand, we strenuously oppose subjecting funds to overlapping or conflicting regulatory requirements, or to new regulation that provides little additional benefit to fund investors or the broader financial markets. For this reason, we have serious concerns about the broad reach of the proposal by the Commodity Futures Trading Commission (the "CFTC" or the "Commission") to revise Rule 4.5. We also are troubled by the fact that the Commission has provided little rationale for this sweeping proposal, including why it is necessary to impose a second, costly layer of regulation on funds, given the comprehensive regulation to which they already are subject.

The Commission maintains that it needs to "stop the practice of registered investment companies offering futures-only" products without CFTC oversight. But the proposed amendments reach far beyond the limited number of funds that could reasonably be described as "futures-only" products. The amended rule would impose two layers of regulation – by the CFTC and the SEC – on hundreds, if not thousands, of funds, ranging from basic S&P 500 stock funds to tax-exempt bond funds. These are products for buy-and-hold investors and retirement savers, not for futures and options speculators.

Even if the Rule 4.5 proposal is appropriately scaled back, some number of funds and their investment advisers would likely be unable to rely on the rule and would become subject to regulation by both the CFTC and the SEC. Many of the CFTC's requirements duplicate those of the SEC. Others directly conflict with SEC rules, making it impossible for funds to comply with one requirement without violating the other agency's requirement. For example, the SEC generally prohibits a fund from including in its prospectus performance information about other funds or accounts managed by the fund's adviser.[1] The CFTC rules, by contrast, *require* disclosure of such information in certain circumstances.

In our April comment letter on the Rule 4.5 proposal,[2] we make several recommendations as to how the CFTC could resolve particular conflicts between its rules and those of the SEC. As a general matter, we recommend that the CFTC, before imposing an *additional* regulatory requirement on funds, evaluate its regulatory purpose in doing so and consider why a regulation to which funds and their advisers are *already* subject would be insufficient to satisfy that purpose. It is essential that the CFTC work closely with the SEC throughout this reconciliation process.

I would like to mention two additional aspects of proposed Rule 4.5 that deserve particular consideration:

First, the Commission's inclusion of swaps in the proposal is highly problematic. The rule's proposed trading condition hinges upon margin levels on derivative positions held by funds, yet the regulators have not made critical determinations regarding swap margin levels. It is our strongly held view that the new regulatory framework for swaps must be put in place and margin requirements for swaps finalized *before* the CFTC can propose any amendments to Rule 4.5 that implicate the use of swaps. Moreover, a wholesale inclusion of swaps in a revised Rule 4.5 could result in advisers to a large number of funds being unable to rely on the rule, even if their uses of swaps would not raise the concerns that CFTC regulation is designed to address.

Second, the proposal as drafted would prevent funds that seek to rely on the exclusion from holding commodities through a wholly owned subsidiary, as funds investing in commodities often do today. This subsidiary structure is used by funds for legitimate tax purposes and not to evade regulation. Funds establish these subsidiaries in accordance with Internal Revenue Service rulings in order to avoid an additional level of taxation that would effectively be borne by the fund's shareholders. Both the fund and its subsidiary are subject to regulation under the federal securities and tax laws, including limitations on the use of leverage.

ICI and its members strongly believe that the Rule 4.5 exclusion should not prohibit the use of this subsidiary structure. If the CFTC has any remaining regulatory concerns about the operation of these subsidiaries, we recommend that it require a fund's adviser to disclose any fees charged by the

[1] FINRA, which has oversight over fund advertising, similarly prohibits funds from advertising the adviser's other fund or account performance.

[2] Letter from Karrie McMillan, General Counsel, ICI, to David A. Stawick, Secretary, CFTC, dated April 12, 2010.

subsidiary, which most funds already do, and to make the subsidiary's books and records available for inspection by the CFTC and the National Futures Association ("NFA"). Our recommendations are consistent with the views expressed by the NFA in its comment letter on the Rule 4.5 proposal.[3]

In my remarks, I have mentioned only a few of the many complex and interrelated issues that are raised by this proposal. How each issue is ultimately resolved, and how they fit together within the context of a revised Rule 4.5, could have significant implications for many industry participants. For this reason, we urge the staff to recommend reproposal of amendments to Rule 4.5 that address the concerns that ICI and other industry participants have raised about the proposal, and provide an opportunity for public comment on the revised proposal.

[3] Letter from Thomas W. Sexton, III, Senior Vice President and General Counsel, NFA, to David A. Stawick, Secretary, CFTC, dated April 12, 2011.