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

MFA Statement
CFTC Roundtable on Regulation 4.5
July 6, 2011

My name is Tom Lloyd and I am the General Counsel of Campbell & Company, Inc. ("Campbell & Company"). Campbell & Company is one of the oldest commodity trading advisors and commodity pool operators in the United States. Campbell & Company has been registered with the Commission as a commodity trading advisor ("CTA") since May 1978 and as a commodity pool operator ("CPO") since September 1982. Our subsidiary, Campbell & Company Investment Adviser LLC ("CCIA"), has been registered as an investment adviser with the Securities and Exchange Commission ("SEC") since February 2005 and with the Commission as a CTA since December 2005.

I submit this summary on behalf of Managed Funds Association ("MFA") and its members. MFA appreciates the opportunity to participate in the CFTC's roundtable discussion on issues faced by managed funds industry members with respect to the proposed revision to Commission Regulation 4.5. MFA represents the majority of the world's largest hedge funds and is the primary advocate for sound business practices and industry growth for professionals in hedge funds, funds of funds and managed futures funds, as well as industry service providers. MFA's members manage a substantial portion of the approximately $2 trillion invested in absolute return strategies around the world. Our members serve pensions, university endowments, and other institutions to diversify their investments, manage risk and generate reliable returns to meet their obligations to their beneficiaries.

MFA's members are active participants in the commodity, securities and over-the-counter ("OTC") derivatives markets and engage in a variety of investment strategies across many different asset classes. MFA is concerned that requiring registered investment companies ("RICs") invested substantially in commodity futures and other CFTC-regulated derivatives ("commodity derivatives mutual funds") and their offering entities to comply with both the Securities and Exchange Commission ("SEC") regulations under the Investment Company Act of 1940 (the "Company Act") and the Commission's Part 4 regulations concerning CPOs ("Part 4 Regulations") could place commodity derivatives mutual funds in an impossible position. 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. MFA believes that an investor or financial advisor should be able to fairly compare a commodity derivatives mutual fund offering with a commodity pool offering and make an informed decision on investing based on all relevant facts. .

Accordingly, 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; (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.

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.[1] 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.[2]

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.[3] 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

---

[1] 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.

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

[3] 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.

600 14th Street, NW, Suite 900 | Washington, DC 20005 | 202.730.2600 | Fax 202.730.2601 | www.managedfunds.org

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")[4] 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.[5] 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.[6]

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 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;

---

[4] 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.

[5] 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.

[6] *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).

600 14th Street, NW, Suite 900 | Washington, DC 20005 | 202.730.2600 | Fax 202.730.2601 | www.managedfunds.org

(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 (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).

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.[7] 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 note that the National Futures Association, the industry-wide self-regulatory organization for the U.S. futures industry, agrees with this proposal.

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 above.

[7] 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.

600 14th Street, NW, Suite 900 | Washington, DC 20005 | 202.730.2600 | Fax 202.730.2601 | www.managedfunds.org

We note that the National Futures Association, the industry-wide self-regulatory organization for the U.S. futures industry and the principal reviewer of public commodity pool disclosure documents, agrees with this proposal. 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.[8] 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." 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 or 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." 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.

---

[8] 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.

600 14th Street, NW, Suite 900 | Washington, DC 20005 | 202.730.2600 | Fax 202.730.2601 | www.managedfunds.org

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.

* * * * *

600 14th Street, NW, Suite 900 | Washington, DC 20005 | 202.730.2600 | Fax 202.730.2601 | www.managedfunds.org

MFA respectfully urges the Commission to address differences, including conflicting requirements, between certain aspects of the Part 4 Regulations and the Company Act regulations. As discussed, we believe that without regulatory relief from at a minimum certain Part 4 Regulations, it will not be viable for CPOs to offer commodity derivatives mutual funds. We believe there are many legitimate business reasons for a CPO to offer a commodity derivatives mutual fund and oversight by the SEC and CFTC/NFA would offer investors the highest level of investor protection. As such, if the Commission determines to amend Rule 4.5, we respectfully request that the Commission: (1) grant relief to a CPO offering commodity derivatives mutual fund from certain performance disclosure and prior disclosure document delivery requirements; (2) grant comparable disclosure document delivery relief to traditional public commodity pools; and (3) amend Rule 4.5 only with respect to the Marketing Test. MFA supports providing investors in these products with meaningful disclosures and other investor protections. Accordingly, we respectfully urge the Commission to work with the SEC to minimize inconsistencies and conflicts in disclosure requirements for the benefit of investors.

600 14th Street, NW, Suite 900 | Washington, DC 20005 | 202.730.2600 | Fax 202.730.2601 | www.managedfunds.org