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CFTC Roundtable to Discuss Proposed Changes to Registration and Compliance Regime for Commodity Pool Operators and Commodity Trading Advisors - Summary Remarks

The points below summarize the topics that representatives of the Asset Management Group (the AMG)[1] of the Securities Industry and Financial Markets Association (SIFMA) anticipate making at the above referenced roundtable on July 6, 2011. For further detail on the AMG's and its members comments on the Commodity Futures Trading Commission (CFTC or the Commission) proposed rules entitled "Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations," 76 Fed. Reg. 29, 7976 (Feb. 11, 2011), please refer to the comment letters submitted by (i) the AMG, available at: http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=42187&SearchText= (2) Fidelity Investments, available at: http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=42179&SearchText= and (3) Vanguard, available at: http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=42152&SearchText=

AMG Representatives:
Matt Nevins, Fidelity Investments (chair, AMG Derivatives Committee)
Peter Bonanno, Goldman Sachs Asset Management
Steve King, PIMCO
William Thum, Vanguard

Summary:

- As an initial matter, we do not believe that the proposed changes to Rule 4.5 and Rule 4.13 are necessary given the extensive, similar (but different) regulation that registered investment companies (RICs) and registered investment advisers to private pools are subjected to by the Securities and Exchange Commission (SEC).
    - RICs, in particular, are subject to additional protections that make them inherently less risky than other investment vehicles, including senior security restrictions and coverage requirements that greatly restrict the use of leverage.
    - It also makes sense to maintain an exemption for private pools that are only sold to sophisticated investors.

[1] The AMG's members represent U.S. asset management firms whose combined assets under management exceed $20 trillion. The clients of AMG member firms include, among others, registered investment companies, ERISA plans, and state and local government pension funds, many of whom invest in commodity futures, commodity options, and swaps as part of their respective investment strategies.

- If the Commission perceives a need for additional regulation of certain RICs and private pools, there may be other means to address the Commission's main concerns.
    - For RICs that are above certain thresholds, instead of their advisers being required to register with the CFTC as CPOs, require those RICs to become subject to enhanced SEC disclosure requirements.
    - For RICs and private pools that are above certain thresholds, require reporting on their commodity futures, commodity options and swaps usage from their advisers, even though they remain excluded or exempt from the other CPO requirements.
- Nevertheless, if the Commission desires to move forward with changes to Rule 4.5 and Rule 4.13, we recommend several changes to restrict the scope of implicated funds and their advisers.
    - CPO registrations should only be required in connection with those RICs and private pools that utilize commodity futures or commodity options to take active positions[2] as the most substantial portion of their investment strategy. This can be achieved by:
        - Eliminating the proposed marketing restriction or narrowing its scope to only apply to those RICs and private pools that hold themselves out as managed futures vehicles.[3] Managed futures vehicles can be thought of as those funds or pools that use trading algorithms to spot market trends and take active positions (see footnote 2) by frequently trading commodity futures or commodity options to both long and short investments, often across different asset classes, as a primary investment strategy of the fund.
        - In addition to allowing exclusions for bona fide hedging, allowing exclusions for risk management.
        - Increasing the 5% non-hedging limit.
        - Exempting (i) commodity funds (including wholly-owned subsidiaries of RICs) whose commodity exposure is tied to an index, and (ii) fund-of-funds that invest in commodities as a portion of their overall asset mix.
    - Swaps should be excluded from the analysis as the CFTC is adopting a mosaic of rules under the Dodd-Frank Act, including reporting requirements, that will reduce risk and increase transparency for all swap participants.
    - All carve-outs applicable to Rule 4.5 should be adopted for any changes to Rule 4.13 as well.

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[2] "Active positions" generally includes actively trading in and out of derivative instruments to express a view on an underlying investment, but it does *not* include, among other things, using these instruments to hedge (including managing portfolio duration or risk), manage cash positions, or obtain overall exposure tied to a commodity or securities index.

[3] In addition, it is not appropriate for the marketing restriction to be applicable to (i) RICs that obtain investment exposure in commodities through other means, such as notes, that are not within the CFTC's jurisdiction, or (ii) RIC disclosure documentation, i.e., prospectus and statement of additional information.

    - Wholly-owned subsidiaries of RICs should be treated the same as RICs for purposes of Rules 4.5 and 4.13 as they are part of the same overall regulatory structure as their parent funds.[4]
- If changes to Rules 4.5 and 4.13 are made, it is vital that the CFTC harmonize its rules with conflicting SEC regulation that would be applicable to dual registrants and provide clarity on its requirements relating to RICs and private pools. Areas requiring harmonization include:
    - Content and timing of disclosure
    - Form of disclosure documentation
    - Means of document delivery and acknowledgment
    - Reporting
    - Recordkeeping
    - Investor access
- If the CFTC proceeds with changes to these rules, we recommend that the Commission first require reporting on commodity futures, commodity options and swaps usage over certain thresholds from advisers to RICs and private pools for a period of time and allow the new Dodd-Frank requirements to be finalized before implementing any changes to Rule 4.5 and Rule 4.13, particularly if swaps are included as part of the registration analysis.[5]

The AMG and its members appreciate the opportunity to participate in the dialogue on this very important matter and look forward to discussing these points in more detail at the roundtable.

[4] These structures are used for tax purposes that have been sanctioned by the Internal Revenue Service and the SEC, and are in no way utilized to evade regulation.
[5] For example, as the initial margin requirements for both cleared and uncleared swaps are in the process of being established at this time, it is premature to establish the appropriate level for the non-hedging limit contained in the Rule 4.5 proposal.