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April 24, 2012

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

Re: Section 4.5 Harmonization
17 CFR Part 4
77 FR 11345

Ladies and Gentlemen:

This letter is submitted on behalf of the Task Force on Investment Company Use of Derivatives and Leverage (the "Task Force" or "we") of the Federal Regulation of Securities Committee (the "Committee") of the Business Law Section (the "Section") of the American Bar Association (the "ABA"). This letter is in response to the request by the Commodity Futures Trading Commission (the "Commission" or the "CFTC") for comments regarding proposed amendments to the Commission's regulations (the "Proposal")[1] regarding requirements applicable to investment companies registered under the Investment Company Act of 1940 (the "1940 Act") whose advisers are required to register as commodity pool operators ("CPOs") due to recently adopted changes to Section 4.5 of the Commission's regulations. The comments expressed in this letter represent the views of the Committee and the Task Force, and have also been reviewed and approved by the Derivatives and Futures Law Committee of the Section. The comments in this letter have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA.

At the 2009 Spring Meeting of the Business Law Section of the ABA in Vancouver, Andrew J. Donohue, then Director of the Division of Investment Management (the "Division") of the Securities and Exchange Commission (the "SEC"), invited the Committee's Subcommittee on Investment Companies and Investment Advisers to address concerns about investment company use of derivatives and leverage. In response, the Committee established the Task Force to study current industry practices in the context of existing laws and regulatory interpretations and subsequently submitted a report to the Division addressing these matters. Given the experience of the members of the Task Force concerning the use of derivatives by Funds, it agreed to review the Proposal and prepare this comment letter.

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1 77 FR 11345.

The Task Force appreciates the opportunity to comment on the Proposal, and supports the Commission's efforts to lessen the burdens of compliance with Part 4 of the Commission's regulations ("Part 4") on registered investment companies that will no longer qualify for exclusion from the definition of "commodity pool" because of the recently approved amendments to Section 4.5 of the Commission's regulations (herein, "Funds"). This comment letter is in three parts. In the first part, we urge the Commission to reconsider its position, reflected in the Proposal, that some provisions of Part 4 should be applicable to Funds. Because Funds are subject to comprehensive regulation by the SEC under the Federal securities laws, partial compliance with Part 4 would not appear to further the goals of the Commodity Exchange Act (the "CEA") and in fact may be detrimental to the achievement of such goals by causing investor confusion. In addition, such a requirement would impose significant costs that would ultimately reduce the returns of Fund shareholders. The second part of the letter identifies and comments on specific areas of the SEC and Commission disclosure rules, which, in our view, will require duplicative or inconsistent disclosure by Funds if the Proposal is adopted. The third part of the letter responds to certain of the Commission's specific invitations to comment and includes suggestions from the Task Force on specific aspects of the Proposal.

I. *Investment Advisers of Funds Should Not Be Required to Comply with Part 4 of the Commission's Regulations*

a. *In Light of the Substantial Overlap Between the SEC and CFTC Regimes, CPOs of Funds Should Be Exempt from Part 4.*

The Task Force acknowledges that adoption by the Commission of the proposed rule changes set forth in the Proposal would, to a limited extent, lessen the disclosure and reporting burden on Funds that would otherwise exist as a result of Part 4. The Task Force, however, urges the Commission to recognize that Funds are already subject to comprehensive regulation by the SEC under the 1940 Act, the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 and that such regulation by the Commission's sister regulator addresses the relevant goals of the CEA and Part 4 in a satisfactory manner. The Task Force urges that the Commission, pursuant to Section 4.12(a)(1) of its regulations, exempt CPOs of Funds from all of the provisions of Part 4 after finding "that the exemption is not contrary to the public interest and the purposes of the provisions from which the exemption is sought."

In the Proposal, the Commission commented on the comparability of the SEC- and Commission-required disclosures as follows:

> Many of the disclosures required by [Part 4] are consistent with SEC-required disclosures. Where CFTC requirements differ slightly, the Commission believes that CFTC-required disclosures can be presented concomitant with SEC-required information in a registered investment company's prospectus. To address the few instances where conflicts in disclosure have been identified, the Commission is proposing relief to

harmonize these requirements.[2]

In the above language, the Commission asserts that there is broad similarity between SEC and CFTC disclosure requirements, but does not proceed to what appears to the Task Force to be the logical conclusion: that it would be consistent with the public interest and the purposes of Part 4 to exempt CPOs of Funds from compliance with Part 4 because Funds are subject to comprehensive Federal regulation. Instead, the Commission discusses how it believes that the duplicative disclosure requirements can be complied with by Funds.

The Task Force supports not including Part 4 disclosures in Fund prospectuses, but respectfully suggests that the appropriate solution is exemption from the requirement rather than insisting on potentially confusing additional disclosure in Fund prospectuses and Statements of Additional Information ("SAIs") that may be obscure or confusing and impede investor understanding of SEC-required disclosures. The Commission notes in the Proposal the SEC's requirement for extensive and standardized disclosure of fees and expenses in investment company prospectuses, but then comments that disclosure of the break-even point required by the Commission's regulations "is a necessary disclosure because, among other requirements, it mandates a greater level of detail regarding brokerage fees and does not assume a specific rate of return."[3] The Commission goes on to state that it "believes that this results in meaningful disclosure through the break-even analysis and facilitates an investor's assessment of a registered investment company that uses derivatives."[4] The Task Force respectfully asks the Commission to consider the disclosure standard of the Securities Act as discussed in more detail below, and to consider whether it might suggest to the SEC, as the primary regulator of Funds, amending Form N1-A to require (or permit – in some cases the disclosure proposed by the Commission would be inconsistent with SEC requirements) supplemental disclosure of the type that the Commission thinks is especially helpful rather than requiring Funds to comply with disclosure requirements that were developed for conventional commodity pools.

The Task Force notes that the regime for regulation of CPOs is fundamentally incompatible with the 1940 Act. Part 4 was designed for conventional commodity pools "operated" by a general partner type CPO. It was not designed to apply to registered investment companies that are already subject to comprehensive regulation that provides significant investor protections. Part 4 contemplates commodity pools with limited liquidity and that may not be publicly offered, and for which only limited ongoing information is available. It did not contemplate liquid, publicly offered investment companies. Part 4 does not reflect modern investor communications methods, except in Section 4.12.

On the other hand, Funds, consistent with the requirements of the 1940 Act and the SEC's rules thereunder, are independent entities that have boards of directors or trustees with independent members constituting a minimum of 40 percent of the board (most investment

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2 77 FR 11345, 11346-11347.

3 77 FR 11345, 11347.

4 *Id.*

companies have over 75% independent directors according to the Investment Company Institute).[5] Open-end investment companies (known as mutual funds) must compute their net asset value every day and redeem their shares on any business day at the net asset value calculated as of the end of each business day.[6] In addition, mutual fund prospectuses and SAIs, as well as shareholder reports and other supplemental information about Funds, are available on the websites of the Funds or their advisers/distributors. Many closed-end Funds compute and make available their net asset value daily to comply with the rules of the exchanges on which they are listed.

The Task Force also notes that, further to SEC requirements and disclosure guidance,[7] registered investment companies have made substantial efforts to simplify their disclosures and to communicate to investors in "Plain English." The imposition on Funds of requirements to include duplicative and often highly technical disclosures in their offering documents would be inconsistent with the achievement of the investor protection and other goals of the SEC's "Plain English" requirements and simplified disclosure initiatives.

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5 2011 Investment Company Fact Book, 51st Edition, at page 206, *available at* http://www.ici.org/pdf/2011_factbook.pdf .

6 It is clear that some of the CFTC rules were not designed for open-end investment companies. For example, Rule 4.24 requires CPOs to disclose, among other things, that "RESTRICTIONS ON REDEMPTIONS MAY AFFECT YOUR ABILITY TO WITHDRAW YOUR PARTICIPATION IN THE POOL." In light of the requirement that open-end investment companies redeem their shares each business day, this disclosure requirement is inaccurate and likely will confuse investors.

7 For example, the SEC's summary prospectus rules, which the SEC designed to simplify mutual fund disclosures, require mutual funds to provide investors certain key information in plain English and in a standardized order. *See* SEC Release No. 33-8998, "Enhanced Disclosure And New Prospectus Delivery Option For Registered Open-End Management Investment Companies" (Jan. 13, 2009). Similarly, and especially relevant with respect to disclosures by Funds, in a July 2010 letter to the Investment Company Institute the Associate Director, Office of Legal and Disclosure of the SEC's Division of Investment Management noted "we believe that all funds that use or intend to use derivative instruments should assess . . . whether the disclosure is presented in an understandable manner using plain English." SEC Letter to the Investment Company Institute Re: Derivatives-Related Disclosures by Investment Companies (July 30, 2010), *available at* http://www.sec.gov/divisions/investment/guidance/ici073010.pdf. *See also* Form N-1A General Instruction B.4(c): "The plain English requirements of rule 421 under the Securities Act [17 CFR 230.421] apply to prospectus disclosure in Part A of Form N-1A. The information required by Items 2 through 8 must be provided in plain English under rule 421(d) under the Securities Act". Similarly, General Instruction C.1(c) to Form N-1A provides: "Responses to the Items in Form N-1A should be as simple and direct as reasonably possible and should include only as much information as is necessary to enable an average or typical investor to understand the particular characteristics of the Fund. The prospectus should avoid: including lengthy legal and technical discussions; simply restating legal or regulatory requirements to which Funds generally are subject; and disproportionately emphasizing possible investments or activities of the Fund that are not a significant part of the Fund's investment operations. Brevity is especially important in describing the practices or aspects of the Fund's operations that do not differ materially from those of other investment companies. Avoid excessive detail, technical or legal terminology, and complex language. Also avoid lengthy sentences and paragraphs that may make the prospectus difficult for many investors to understand and detract from its usefulness."

b. CEA Statutory Purpose is Satisfied by Fund Compliance with SEC Requirements.

Section 3(b) of the CEA states that the purpose of the statute is "to protect all market participants from fraudulent or other abusive sales practices and misuses of customer assets."[8] The SEC is the primary regulator of registered investment companies and the Federal securities laws and the SEC impose a comprehensive regulatory, disclosure, bookkeeping and reporting regime on all registered investment companies. The SEC regime incorporates stringent disclosure and antifraud provisions that are, in many ways, at least comparable to the Commission's regime applicable to CPOs. In addition, we believe the federal courts have addressed violations of the Federal securities laws significantly more frequently than they have addressed issues involving violations of the CEA.

In the Task Force's view, the comprehensive Federal regulation of Funds provides the Commission satisfactory grounds to exempt CPOs that operate Funds from Part 4. We note that, if granted the benefit of an exemption from Part 4, CPOs of Funds would remain subject to the anti-fraud and liability provisions of the CEA.[9] We believe that when the Commission and SEC requirements are similar, there is little, if any, additional benefit to investors that will outweigh the substantial costs of compliance with the Commission's regulations by CPOs of Funds.

c. Cost-Benefit Analysis Does Not Support Additional Regulation of CPOs of Funds.

The Task Force notes that the Commission is required to consider the costs and benefits of its regulatory proposals under Section 15(a) of the Commodity Exchange Act. However, the Commission has not advanced a rationale to account for any additional benefits to investors that would warrant the substantial costs its new rule amendments (as opposed to an exclusion from Part 4 to CPOs of Funds as recommended by the Task Force) will impose on CPOs of Funds. Moreover, we note that it is likely that compliance costs associated with the Commission disclosure regime will be passed on to investors in Funds. We understand that industry groups and participants may be discussing cost-benefit matters in their comment letters.

II. Comments on Duplicative Disclosure Requirements, Reporting and Recordkeeping

This section reviews specific CFTC disclosure requirements to which CPOs of Funds would be subject under the Proposal and suggests that the Commission reconsider the utility of imposing these requirements on CPOs of Funds in light of the substantial overlap between the disclosure requirements of the Commission and the SEC.

a. Document Delivery and Disclosure Review Requirements.

Although we acknowledge the significant reduction in regulatory obligations provided to CPOs of Funds in the proposed amendments to Section 4.12(c), we believe a better

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8 Commodity Exchange Act, Section 3(b).

9 Commodity Exchange Act, Section 6(c).

resolution of the incompatibilities that exist between the SEC and CFTC regimes is to exempt CPOs of Funds from the CFTC's document delivery requirements and the NFA disclosure review process pursuant to the general exemption from Part 4 recommended by the Task Force. Amended Section 4.12(c) would permit a CPO of a Fund to meet the Disclosure Document delivery requirements of Section 4.21 by making information available on its website and would relieve a CPO of a Fund from the requirement that it receive a signed participant acknowledgement before accepting funds, securities or other property from the participant. However, the Proposal would leave in place the requirement that the NFA review Fund Disclosure Documents under Section 4.26(d)(1) and the periodic Account Statement delivery requirement under Sections 4.22(a) and (b).

The Task Force notes that the SEC reviews investment company registration statements and amendments, including the prospectuses and SAIs therein, and that, in addition to the applicable SEC form requirements, Funds must include any information necessary for their disclosure documents to meet the disclosure standard of the Securities Act, and thus they must not contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading. *See* Section 11(a) and Section 12(a)(2) of the Securities Act. To the extent a Fund supplements its prospectus or SAI, the supplements are filed with the SEC and subject to monitoring and/or review by the SEC. In view of the shared objectives of the NFA and SEC regarding disclosure review, we believe review by the NFA of Fund Disclosure Documents is unnecessary and duplicative and should not be required. Of course, if the Commission accepts that CPOs of Funds should be exempt from Part 4 the question of NFA review would not exist.

Section 4.12(c) as proposed to be amended would permit a CPO of a Fund to meet the requirements under Sections 4.22(a) and (b) to distribute monthly or quarterly Account Statements to participants by making the Account Statements available on its website. However, the Proposal would require CPOs of Funds to prepare and post on their websites Account Statements that would duplicate information already being provided to Fund shareholders in a way that would add costs to Funds with no offsetting benefits to investors (indeed, the duplicative nature of the information presents the potential for investor confusion). We believe CPOs of Funds should be deemed to have satisfied the requirements under Section 4.22(a) and (b) by preparing and providing reports to shareholders in compliance with SEC rules. CPO Account Statements must include a "Statement of Operations" (itemizing certain information about the pool's income including the total amount of realized net gain or loss and the total amount of management fees, brokerage commissions and other fees and expenses incurred during the reporting period) and a "Statement of Changes in Net Assets" (providing certain information about the pool's net asset value, performance and additions or withdrawals during the reporting period).[10]

Registered investment companies must send shareholders semi-annual reports and annual reports that include financial statements and that are filed with the SEC.[11] The financial

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[10] 17 C.F.R. § 4.22(a) and (b).

[11] *See* Rules 30e-1 and 30b2-1 and SEC Form N-CSR.

statements in annual reports must be audited. Registered investment companies must post schedules of their entire portfolios in an SEC filing for the other two quarter ends.[12] Registered investment company semi-annual reports include a "Statement of Assets and Liabilities", "Statement of Operations" and "Statement of Changes in Net Assets" (including notes to financial statements) as well as disclosure of investments.

It seems to the Task Force that the only thing required to be included in the Account Statements by Section 4.22 that is not already included in the financial statements that Funds must provide under the SEC's rules is information about brokerage commissions. While disclosure of brokerage commission information may be appropriate for typical commodity pools, the issue is considerably more complex in the case for Funds, and the Task Force believes that there are sound policy reasons for not requiring disclosure of such information by Funds.

In the context of a Fund rather than a conventional commodity pool, brokerage costs (which themselves may vary significantly from year to year) could provide investors with a highly misleading impression as to trading costs because other, frequently much more important, costs of trading would be left out (*e.g.,* market impact costs, spreads for fixed income, over-the-counter derivatives and foreign currency transactions, etc.). Accordingly, disclosure of brokerage commissions in Fund reports is likely to create confusion among, and potentially mislead, investors.

In addition, many mutual fund families utilize combined prospectuses that may cover numerous funds. Some of those funds covered in the combined prospectus may be subject to the CPO disclosure rules, while others are not. As a result, a single prospectus will contain inconsistent disclosures that apply to individual funds, making a side-by-side comparison by investors of fees and expenses difficult and confusing. If Funds instead decided that these new requirements warranted changing their existing combined prospectus practices, the process of separating out prospectuses would carry inevitable initial and ongoing operational, legal, compliance and marketing costs.

To the extent that the Commission does not exempt CPOs of Funds from Part 4 in its entirety, we urge the Commission to consider exempting CPOs of Funds from Sections 4.22(a) and (b) altogether. First, we note that registered investment companies' semi-annual reports include substantially the same information as the Commission would require in an Account Statement with the entirely appropriate exception noted above. Second, unlike the typical commodity pools to which Section 4.22 applies, open-end investment companies must calculate their net asset value per share, and redeem their shares upon request, on each business day. In addition, investors normally have the opportunity to access their balances online. Finally, most Funds make a significant amount of information available on the internet, including monthly "fact sheets" or other fund data. Additional reporting requirements would impose additional costs on CPOs of Funds with no offsetting benefit to shareholders (who, in fact, are likely to bear the costs indirectly).

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12 *See* SEC Form N-Q.

The Commission's position in the Proposal that no exemption from the Account Statement delivery requirements should be granted to Funds "as the information required to prepare the account statement should be readily available to the operator of an investment vehicle maintaining records of its trading activity and other operations in accordance with recordkeeping requirements under the CEA and applicable securities laws" does not address the overlapping and inconsistent disclosure requirements or the information that would not be relevant to Fund shareholders that would be included in such Account Statements. The Task Force respectfully suggests that the ability to produce reports should not be the criterion for requiring them given the costs of preparing such reports[13] and potential investor confusion in the face of a multiplicity of similar reports.[14]

b. Disclosure Document Updates and Timing Requirements.

The Task Force believes that existing Fund obligations to review and update disclosure continuously in order to comply with the requirement under the Federal securities laws that prospectuses not contain material misstatements or omissions should satisfy the policy goals of CFTC Disclosure Document updating requirements under Section 4.26(c)(1) and that a simple exemption from the Part 4 requirements is appropriate in these circumstances. Under the Federal securities laws, a registered investment company must correct any material inaccuracies or omissions in its prospectus and SAI. Similarly, under Section 4.26(c)(3), a CPO may not use a Disclosure Document that is materially inaccurate or incomplete in any respect and, under Section 4.26(c)(1), must distribute a corrected Disclosure Document within 21 calendar days of learning of the disclosure defect. While Section 4.26(b) provides that CPO's must attach their most current Account Statement and Annual Report to their Disclosure Document, as previously noted, registered investment companies already provide comparable financial information to the Account Statement and their Annual Reports on their websites. We do not believe there are meaningful differences in these disclosure updating regimes. Funds are subject to a comprehensive and well developed disclosure regime that, in our view, should be deemed to satisfy the requirements of Section 4.26. As a result, we believe an exemption from the Part 4 requirements is merited.

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13 For example, the Task Force understands that the accounting systems of Funds are not compatible with the requirements of Section 4.22(vi-vii) of the CFTC Rules that Account Statements "separately itemize… [t]he total amount of all brokerage commissions during the reporting period… [and the] total amount of other fees for commodity interest and other investment transactions during the reporting period" since transaction costs are generally included in the cost of investments on such systems. In addition, as noted in the fifth and sixth paragraphs of this Section II.a, the appropriateness of highlighting commissions paid by Funds, which is not required by the SEC, raises serious disclosure and policy issues. The Task Force urges the Commission to closely review whether mandating a costly overhauling of Fund accounting systems to permit the provision of potentially misleading and confusing information to investors would be in the public interest or consistent with the protection of investors.

14 77 FR 11345, 11347.

c. Recordkeeping Requirements.

The SEC imposes comprehensive recordkeeping requirements on registered investment companies.[15] Among other things, Rule 31a-1 requires registered investment companies to maintain ledgers containing itemized daily records of all purchases and sales of securities and other disbursements, ledgers reflecting all asset, liability, reserve, capital, income and expense accounts, and detailed records of portfolio transactions.[16] We believe that compliance with the SEC rules should be deemed to satisfy CFTC requirements.

Section 4.23(a)(4) of the Commission's rules requires a CPO to maintain ledgers or other equivalent records for each participant in any pool it manages that catalog each participant's "name and address and all funds, securities and other property that the pool received from or distributed to the participant."[17] Investors in registered investment companies, however, frequently hold shares in omnibus accounts maintained by financial intermediaries and, in many instances, the transfer agents for the investment companies (very few investment companies act as their own transfer agent) do not know the identities of beneficial owners of shares held in such omnibus accounts.

If the Commission does not exempt CPOs of Funds from Part 4 generally or its recordkeeping requirements, it should exempt CPOs of Funds from the recordkeeping requirements under Section 4.23(a)(4). Alternatively, we propose the Commission clarify that a Fund's transfer agent's maintenance of records of financial intermediaries holding Omnibus accounts will satisfy the requirements to maintain information regarding pool participants under Section 4.23(a)(4). Any impact on the industry's existing "division of labor" between Funds and their omnibus account holders and other financial intermediaries would present significant operational changes and attendant costs that ultimately would be borne by shareholders.

Section 4.31 and Section 4.23 of the Commission's rules require CPOs to retain records of commodity interest transactions of any commodity pools they operate and require that such records be "available to participants for inspection and copying during normal business hours at the main business office of the pool operator."[18] Therefore, absent any relief from the Commission's rules, participants in Funds operated by CPOs could, upon demand, access detailed information about a Fund's trading activities and current holdings.[19] In contrast, in

[15] SEC Form N-1A, Item 31 and Section 31 of the 1940 Act and the rules promulgated thereunder.

[16] SEC Rule 31a-1.

[17] 17 C.F.R. § 4.23(a)(4).

[18] 17 C.F.R. §§ 4.31 and 4.23.

[19] For example, investors could access a Fund's "itemized daily record of each commodity interest transaction of the pool, showing the transaction date, quantity, commodity interest, and, as applicable, price or premium, delivery month or expiration date, whether a put or a call, strike price, underlying contract for future delivery or underlying physical, the futures commission merchant and/or retail foreign exchange dealer carrying the account and the introducing broker, if any, whether the commodity interest was purchased, sold (including, in the case of a retail forex transaction, offset), exercised, expired (including, in the case of a retail forex transaction, whether it was rolled forward), and the gain or loss realized" under

compliance with an SEC rule that requires registered investment companies to establish policies to govern how and when they share information about fund positions and investment transactions with investors, most registered investment companies have adopted policies that generally prohibit selective disclosure of trading and position information to shareholders in order to curb risks of front running and unfair competition (many registered investment companies publish certain information about securities positions on a delayed basis in order to provide information on a non-selective basis at a time when front running is not an issue).

The Commission's rules are not compatible with compliance with such Fund policies adopted in accordance with the SEC's regulation regarding selective disclosure and could potentially require CPOs of Funds to disclose publicly information about their holdings after every request by participants (such as large traders which may seek to profit by trading against a Fund's investment program) to review records under Section 4.23, in contravention to their SEC-mandated policies. While the SEC's rules may require less extensive disclosure about trading information than is required by the Commission's rules, the Task Force's view is that the information required by the SEC's rules is sufficient to meet investor expectations and satisfy concerns about investor protection, and that therefore CPOs of Funds should be exempt from the obligation under Section 4.23 to make records of trading and investment transactions available to investors.

We urge the Commission to consider exempting CPOs of Funds from its recordkeeping requirements altogether in light of the SEC's extensive requirements. The SEC requirements are tailored to the circumstances of registered investment companies and are compatible with widely adopted registered investment company industry operations while certain aspects of the Commission's rules conflict with basic elements of mutual fund and closed-end fund operations.

d. Specific Disclosure Document Requirements.

We generally take the view that CPOs of Funds should be exempt from the specific disclosure requirements in Part 4 because they are comparable to and duplicative of SEC requirements. The following paragraphs identify specific instances in which the disclosure requirements of the Commission and of the SEC are duplicative and conflicting and from which we believe it is particularly important that CPOs of Funds be exempt.

(i) Past Performance of Other Pools/Accounts. As set forth in detail below in Section III.d, conflicts exist between the Commission's past performance reporting requirements and the permissible scope of such disclosure under the SEC regime. The SEC may allow (but does not require) registered investment companies to include certain information about past performance of accounts and funds other than the offered fund in their prospectus documents. However, the SEC's permission is limited to the performance of other funds and accounts that

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Section 4.23(a)(1) and "[c]opies of each confirmation of a commodity interest transaction of the pool, each purchase and sale statement and each monthly statement for the pool received from a futures commission merchant or retail foreign exchange dealer" under Section 4.23(a)(7).

have substantially similar investment objectives and strategies and is subject to conditions designed to ensure that disclosure of past performance of other accounts does not mislead investors into thinking that past performance of another account indicates future performance of the fund. The SEC's registration statement review process also routinely delays approval of registration statements that include this type of information, so that many firms opt not to use the information. On the other hand, the Commission *requires* CPOs of any pool with a less than three year history to disclose past performance of all pools and accounts operated or managed by the CPO other than the offered pool.[20] The Commission's proposal to permit CPOs of Funds to present past performance information in the SAI does not resolve the conflict between the SEC and CFTC regulations. The limitations imposed by the SEC Staff on past performance disclosure are principles-based and intended to ensure a consistent and comparable quality of disclosure across registered investment companies and to ensure that investors are not misled. We believe requiring CPOs of Funds to abide by the Commission's past performance rule would create inconsistent reporting standards among registered investment companies, and would require Funds to include information that the Funds and the SEC (and potentially plaintiffs) may view as misleading. Such a requirement would also (even if the agency positions were truly harmonized) generally result in delays in the registration statement process, which would operate to the competitive disadvantage of Funds made subject to the requirement. For these reasons, CPOs of Funds should be exempt from the Commission's requirement to disclose past performance information of other pools.

(ii) Break-even Point Disclosure. As described in more detail in Section III.b, the Commission requires CPOs to disclose a one-year "break-even" profit level while the SEC requires registered investment companies to disclose projected fees over various time-periods assuming a 5% rate of return. Although not identical, the requirements are similar and it is not apparent that they serve meaningfully different investor protection purposes. We request that the Commission reconsider its position that CPOs of Funds must include a break-even analysis in their prospectuses.

(iii) Additional Fees and Expenses Data. In the Proposal, the Commission indicated that CPOs of Funds should disclose fee and expense information that is required to be disclosed under the Commission's rules[21] but that is "not included in the fee table required by Item 3 of Form N-1A or Item 3 of Form N-2" in the fund statutory prospectus.[22] However, the SEC form requirements are comparable to the Commission's fees and expenses disclosure requirements and, because there is considerable overlap between the two regulatory structures, requiring CPOs of Funds to meet the requirements of both the Commission and the SEC is not useful and likely will confuse investors.[23] For this reason, we believe that CPOs of Funds should

[20] 17 C.F.R. §§ 4.24(n) and 4.25(c).

[21] 17 C.F.R. § 4.24(i).

[22] 77 FR 11345, 11347.

[23] For example, the SEC and the Commission do not have consistent rules regarding presentation of fund performance net of fees and a requirement to include the information required by each regulatory agency in the prospectus a Fund could confuse an investor.

be exempt from the Commission's fees and expenses disclosure requirements. As an alternative, and if the Commission determines not to exempt Funds from Commission rules regarding the disclosure of fees and expenses, we propose that such information is more appropriately included in a Fund's SAI, which will lessen the likelihood of investor confusion.

(iv) Historical Rate of Return. The SEC and the Commission both require disclosure of historical return rates and CPOs of Funds should not be required to adhere to both rules. Section 4.25(a)(1)(i)(H) of the Commission's rules requires CPOs to disclose the annual rate of return for the pool for the most recent five calendar years and the year-to-date, computed on a compounded monthly basis.[24] The SEC requires certain registered investment companies to disclose historical returns on an annual basis for up to the past ten years.[25] We believe that investors would not receive meaningful additional disclosure if CPOs of Funds were compelled to satisfy both requirements and are concerned that receipt of different versions of historical information would be confusing to investors. Having multiple versions of historical rate of return information would also frustrate the policy goal of requiring performance information to be computed on a consistent basis to permit appropriate cross-fund comparisons.

(v) Historical Loss Information. The SEC and the Commission both require disclosure of historical loss information. However, the standardized disclosure mandated by each regulator is different. Section 4.25(a)(1)(i)(F) and (G) of the Commission's rules require CPOs to present the greatest monthly loss and greatest peak-to-valley losses in the most recent five years and year-to-date.[26] In contrast, the SEC in Form N-1A requires mutual funds to disclose annual returns for up to the most recent ten years and to disclose the highest and lowest return for a quarter during the most recent ten years (or for the life of the fund).[27] In the view of the Task Force, requiring Funds to include the CPO disclosure in their prospectuses would not improve disclosure to investors. Moreover, presentation of substantially similar information side-by-side could confuse investors and will lengthen disclosure documents without increasing their value to investors. In the event the Commission does not exempt CPOs of Funds from Commission requirements regarding disclosure of historical returns and losses, we request that such information be made available in a Fund's SAI.

(vi) Aggregate Gross Capital Subscriptions to the Pool. The Commission requires CPOs to disclose the aggregate gross capital subscriptions to the pools they operate.[28] Investment companies are required to disclose capital transactions in their annual and semi-annual reports to shareholders, and many provide information about their total net assets on their websites on a monthly basis. The practice among registered investment companies provides substantially the same information about subscriptions that the Commission requires under its

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[24] 17 C.F.R. § 4.25(a)(1)(i)(H).

[25] SEC Form N-1A, Item 4.

[26] 17 C.F.R. §§ 4.25(a)(1)(i)(F) and (G).

[27] SEC Form N-1A, Item 4.

[28] 17 C.F.R. § 4.25(a)(1)(i)(D). Under Section 4.26(a), aggregate gross capital subscription information and other performance information must be updated quarterly.

rules, and the Task Force believes that such information is consistent with investor protection and expectations. We believe that CPOs to Funds should be exempt from the Commission's requirement to disclose aggregate gross capital subscriptions to the pools they operate because they provide sufficiently comparable information and urge the Commission to not subject CPOs to the requirement to provide duplicative and potentially confusing information about gross capital subscriptions of Funds.

(vii) Investment Program. Comparable requirements to disclose investment objectives and investment policies are imposed on registered investment companies and CPOs by the SEC and the Commission. The Commission requires CPOs to describe the types of commodity interests and other interests in which the pool will trade and the trading and investment programs and policies of the offered pool.[29] The SEC requires a registered investment company to disclose its "investment objective" and "principal investment strategies" on Forms N-1A and N-2.[30] CPOs of Funds should be exempt from the Commission's requirements because the SEC's requirements are substantially similar. We believe that requiring CPOs of Funds to evaluate whether they need to meet the disclosure requirements of the Commission in addition to those of the SEC will complicate compliance and lead to uneven disclosure, and we suggest that the Commission consider clarifying that compliance with the SEC requirements will exempt CPOs of Funds from the CFTC's requirements.

(viii) Risk Factors. The Commission and the SEC require CPOs and registered investment companies, respectively, to include risk assessments in their disclosure documents. Form N-1A and Form N-2 each require investment companies to describe the risks associated with investing in the registered investment company.[31] Similarly, Section 4.24(g) of the Commission's rules requires CPOs to describe the principal risk factors of participation in the offered pool."[32] Since the requirements are similar, compliance with the SEC's requirements by CPOs of Funds should qualify them for exemption from the Commission's requirements. We encourage the CFTC to consider offering interpretive relief to explain that compliance with the SEC requirements will constitute compliance with the CFTC's regime. In addition, principles of good disclosure are inconsistent with the use of standardized risk legends. Accordingly, Funds should not be required to use the CFTC's mandatory risk disclosures.

(ix) Management. SEC and CFTC requirements regarding management disclosure are also duplicative and inconsistent. Under Section 4.24 of the Commission's rules, CPOs must identify and disclose certain information about the management of the pool including the business background of certain operators, trading managers and commodity trading advisors.[33] Similar requirements appear in Forms N-2 and N-1A.[34] Because both the SEC and

[29] 17 C.F.R. §§ 4.24(h)(1) and (2).

[30] SEC Form N-2, Item 8; SEC Form N-1A, Items 2, 4 and 9.

[31] SEC Form N-2, Item 8; SEC Form N-1A, Item 4.

[32] 17 C.F.R. § 4.24(g).

[33] 17 C.F.R. §§ 4.24(e) and (f).

[34] SEC Form N-2, Item 18; SEC Form N-1A, Item 10.

CFTC regimes require descriptions of the management of a CPO of a Fund, CPOs of Funds should be exempt from the Commission's requirements. Again, we suggest the Commission consider clarifying the regulatory burden placed on CPOs of Funds by offering a clear exemption from its disclosure requirements. Alternately, we suggest that the CFTC permit CPOs to include the additional disclosure in Fund SAIs.

III. Responses to the Commission's Requests for Comments

This section addresses certain of the specific questions posed by the Commission in the Proposal.

a. Are there other approaches to harmonizing these requirements that the Commission should consider?

As outlined in Part I and II of our letter, we suggest that the Commission exempt CPOs of Funds from Part 4 in recognition of the fact that Funds are subject to comprehensive regulation by the SEC under the Federal securities laws and that issuing such an exemption is consistent with the public interest and the goals of Part 4. Nonetheless, if the Commission does not exempt registered investment companies from its Part 4 requirements, Funds should be permitted to meet Commission requirements by including certain information in their SAIs or by posting certain information on their websites, rather than by making new regulatory filings or amending prospectus documents. To the extent the Proposal contemplates incorporation of information into SAIs and presentation of information on Fund websites, we agree with the Commission's approach as an alternative to exemption from reporting requirements.

The Task Force strongly supports the Commission's position that Funds should be able to continue to sell shares on the basis of summary prospectus documents.[35] The amended Commission regulations should not impose new disclosure requirements that would complicate or remove access to the SEC summary prospectus regime as doing so would put registered investment companies that are also Commission registrants at a competitive disadvantage and would impose significant costs on affected registered investment companies without providing offsetting benefits to investors. To the extent the Proposal permits required disclosure to appear "immediately following the summary section of the prospectus for open-ended funds" and the disclosure is consistent with the General Instructions to Form N-1A, we agree with the Commission's approach.[36] We appreciate the Commission's proposal to permit Funds to

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[35] *See* 77 FR 11345 at 11347 (For example, we note the Commission's proposal that, in addition to the break-even point required by Section 4.24(d)(5), "[a]ny other information required to be presented in the forepart of the document by § 4.24(d), but that is not included in the summary section of the prospectus for open-ended registered investment companies, may also be presented immediately following the summary section of the prospectus for open-ended funds.").

[36] The Task Force notes, in this regard, that some technical disclosure mandated by Part 4 would not seem to be consistent with, for example, General Instruction C.1(c) to Form N-1A, which is discussed in footnote 7 above.

incorporate new disclosure required under its rules outside of the summary prospectus under Form N-1A and support adoption of these exceptions.[37]

b. *Do the proposed harmonization provisions for break-even analysis and performance disclosure strike the appropriate balance between achieving the Commission's objective of providing material information to pool participants, and reducing duplicative or conflicting disclosure?*

As set forth above, we suggest that registered investment companies be deemed to have complied with the Commission's requirement to disclose a break-even point under Section 4.24(d)(5) if they comply with the SEC's required disclosure of fees and expenses. However, if the Commission does not exempt Funds from its break-even point disclosure requirement, we suggest that the Commission reconsider the proposed harmonization provisions for break-even analysis in order to avoid delivering to investors information that is potentially confusing and comparable to information Funds must deliver under SEC requirements.

Section 4.24(d)(5) of the Commission's rules requires CPOs to disclose the "break-even point" related to a participant's investment in a commodity pool over a one year period.[38] Section 4.10(j) defines the break-even point as "the trading profit that a pool must realize in the first year of a participant's investment to equal all fees and expenses such that such participant will recoup its initial investment."[39] Additionally, Section 4.24(i)(6) requires a CPO to disclose the calculation of the pool's break-even point in a table.[40]

Item 3 of SEC Form N-1A requires registered investment companies to include in their prospectuses disclosure in a tabular format of the company's actual operating expenses as well as an example that estimates the fees and expenses an investor would pay at the end of each of 1, 3, 5, and 10 years on a hypothetical $10,000 investment in the fund assuming a 5% annual return.[41] Item 3 of SEC Form N-2 imposes a similar requirement that closed-end funds disclose actual operating expenses and the expenses an investor would pay at the end of each of 1, 3, 5,

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[37] In this regard, we note General Instruction C.3(b) to Form N-1A which states, in part, that "[a] Fund may include, except in response to Items 2 through 8, information in the prospectus or the SAI that is not otherwise required. . . Items 2 through 8 may not include disclosure other than that required or permitted by those items." Items 2 through 8 are the items that constitute the summary prospectus.

[38] We also note that because the shares of open-end Funds are redeemable on a continuous basis, while interests of most commodity pools are not, the value of the required "break-even point" disclosure would be lower to shareholders of open-end Funds than it is to investors in commodity pools. The disclosure may, in fact, be misleading to shareholders of open-end Funds. For example, to the extent the "break-even point" reflects a rate of return on a unique underlying pool of assets, it will be less meaningful when the total size of the pool is unknown or subject to change.

[39] Section 4.10(j) also explains that a pool's break-even point "must be expressed both as a dollar amount and as a percentage of the minimum unit of initial investment and assume redemption of the initial investment at the end of the first year of investment." 17 C.F.R. 4.10(j).

[40] 17 C.F.R. § 4.24(i)(6).

[41] Item 3 of Form N-1A.

and 10 years on a hypothetical $1,000 investment in the fund assuming a 5% annual return.[42] The performance estimates required by the SEC necessarily reflect trading (and all other) costs even though such costs are not separately identified. Both the SEC and Commission requirements are designed to offer investors information about the costs of investing in the pool or Fund and to allow investors an opportunity to compare the relative fees of multiple pools and funds and evaluate the impact of fees on their possible future returns;[43] we believe that both approaches achieve these goals.

In the Proposal, the Commission stated that the tabular presentation of the calculation of a pool's break-even point under Section 4.24(i)(6) "is a necessary disclosure because, among other requirements, it mandates a greater level of detail regarding brokerage fees and does not assume a specific rate of return."[44] We suggest that, when presented in combination with the fee and expense information required under Forms N-1A and N-2, the break-even analysis required by Sections 4.24(d)(5) and 4.24(i)(6) may confuse and mislead investors by adding a second, significantly lengthier, presentation of fee estimates and analysis to a disclosure document that already contains a tabular presentation of such information. The analysis serves the same purpose as the SEC's requirements and we question whether such analysis would offer investors beneficial new information. Accordingly, we think registered investment companies should be exempt from Section 4.24(d)(5) and 4.24(i)(6).

Currently, Section 4.24(d)(5) requires CPOs to disclose the break-even point per unit of initial investment[45] in the pool "in the forepart of the Disclosure Document."[46] The Proposal, if adopted, would permit CPOs to incorporate break-even point disclosure in their prospectuses in "the section immediately following all disclosures required by SEC Form N-1A to be included in the summary prospectus" or, for registered investment companies using SEC Form N-2, in the forepart of the prospectus.[47] If the Commission determines that Funds are not exempt from Sections 4.24(d)(5) and 4.24(i)(6), we recommend the information required by

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[42] Item 3 of Form N-2.

[43] For example, the SEC requires registered investment companies to disclose that "This Example is intended to help you compare the cost of investing in the Fund with the cost of investing in other mutual funds." Item 3 of Form N-1A. In the Proposal, the Commission has explained "inclusion of the tabular presentation of the calculation of the break-even point… facilitates an investor's assessment of a registered investment company that uses derivatives." 77 FR 11345, at 11347. Separately, the NFA has commented "[t]he purpose of this requirement is to ensure not only that customers will be clearly informed as to the nature and amount of fees and expenses that will be incurred, but that customers will also be made aware of the impact of those fees and expenses on the potential profitability of their investments." NFA Interpretive Notice, 9023 – Compliance Rule 2-13: Break-Even Analysis (Aug. 24, 1995; revised July 24, 2000), *available at* http://www.nfa.futures.org/nfamanual/NFAManual.aspx?RuleID=9023&Section=9.

[44] 77 FR 11345, at 11347.

[45] We note that because a mutual fund would not have a set unit of initial investment, the SEC has elected to use hypothetical values in its analogous fee disclosure. *See also* discussion above in footnote 37.

[46] 17 C.F.R. § 4.24(d)(5).

[47] 77 FR 11345, at 11347.

those sections should appear in a Fund's SAI or on their websites as additional fee information to avoid duplicative and potentially confusing disclosure in a Fund's prospectus.

c. *Should the Commission consider harmonizing its account statement reporting requirement with the SEC's semiannual reporting requirement?*

Section 4.22(a) of the Commission's rules requires registered CPOs with net assets over $500,000 to deliver Account Statements to their participants on a monthly basis.[48] All other CPOs must deliver Account Statements on a quarterly basis.[49] In contrast, the SEC's rules require registered investment companies to deliver semi-annual reports to investors.[50] In the Proposal, the Commission declined to accommodate commenters' requests that it conform the timing requirements of its rules with those in the SEC's rules but requested comments on whether to do so. We believe that the Commission should revise its Account Statement delivery timing rules to permit Funds to deliver Account Statements semi-annually, with content that is consistent with the SEC's requirements.

Unlike commodity pools, investment companies calculate net asset value on a daily basis and investors normally have opportunity to access their balances online every day. In addition, most Funds are open-end investment companies that issue shares that are redeemable on any business day. The SEC's semi-annual reporting rules reflect the relative transparency of registered investment companies and therefore require less frequent delivery of information to investors.[51] On the other hand, the Commission regulations address a very different market in which daily net asset values are not available to commodity pool participants. Because investors in Funds will be able to determine the net asset value of the Funds on a daily basis, we believe that compliance with the Commission's monthly disclosure regime is not necessary for pools above $500,000. Similarly, we believe the Commission's rules will burden CPOs of Funds without providing an offsetting benefit to their investors. Nonetheless, if the Commission decides not to harmonize its Account Statement requirements under Section 4.22 with the SEC regime, it should still adopt the amendment to Section 4.12(c) as proposed to permit registered investment companies to satisfy Section 4.22 by making their Account Statements available online.

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[48] 17 C.F.R. § 4.22(a). Account Statements consist of a Statement of Operations and Statement of Changes in Net Assets.

[49] *Id.*

[50] Rules 30e-1 and 30b2-1. Semi-annual reports for registered investment companies consist of more information than Account Statements, *e.g.*, balance sheet, list of amounts and values of securities owned, discussion of internal controls and procedures.

[51] We note that in addition to annual and semi-annual reports to shareholders, registered investment companies publicly file Reports on Form N-Q so that detailed information about their holdings is publicly filed on a quarterly basis.

d. Should the Commission consider harmonizing its past performance reporting requirements with the SEC requirements?

Conflicts exist between the Commission's past performance reporting requirements and the permissible scope of such disclosure under the SEC regime. The Commission requires pools with less than a three-year history to disclose performance of pools and accounts, including pools and accounts that are not of the "same class" as the offered pool or account, in their Disclosure Documents. The SEC may allow (but does not require) registered investment companies to disclose past performance of other accounts, but only in certain circumstances and subject to conditions, and then only when the accounts have "substantially similar" investment objectives, strategies and policies under the SEC's guidance. Disclosure permitted by the SEC is narrower than the disclosure required by the Commission. Thus, it is likely that instances will arise in which a CPO of a Fund will be required to disclose past performance information under the Commission's rules and prohibited from doing so under the SEC's rules. In any event, the dual disclosure requirements are likely to create confusion among investors and, as noted above, will complicate the registration statement process for Funds that are subject to the dual disclosure requirement, which would operate to their competitive disadvantage.

Sections 4.24(n) and 4.25 of the Commission rules require CPOs to disclose certain past performance information in commodity pools' Disclosure Documents.[52] Section 4.25(c) requires a pool with less than a three-year operating history to disclose the performance of other pools and accounts operated and traded by the CPO (and the trading manager if the pool has a trading manager).[53] Notably, the Commission requires disclosure of past performance of pools of the "same class" and of a "different class" than the offered pool, although disclosure related to pools of a different class must be presented less prominently than data regarding pools of the same class.[54] Finally, the Commission requires CPOs to describe material differences

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[52] 17 C.F.R. § 4.25.

[53] 17 C.F.R. § 4.25(c). Additionally, "if the pool operator, or if applicable, the trading manager, has not operated for at least three years any commodity pool in which seventy-five percent or more of the contributions to the pool were made by persons unaffiliated with the commodity pool operator, the trading manager, the pool's commodity trading advisors or their respective principals, the pool operator must also disclose the performance of each other pool operated by and account traded by the trading principals of the pool operator (and of the trading manager, as applicable) unless such performance does not differ in any material respect from the performance of the offered pool and the pool operator (and trading manager, if any) disclosed in the Disclosure Document."

[54] 17 C.F.R. § 4.25(a)(3). Disclosure related to pools of a different class may be presented in composite form unless such composite presentation would be misleading and as long as certain information about the composite is also presented. Commodity pools that offer participations privately pursuant to section 4(2) of the Securities Act of 1933, as amended, privately pursuant to Regulation D and publicly are considered pools that are in different classes. Also, principal-protected and non-principal-protected pools are deemed to be in different classes, and multi-advisor pools as defined in §4.10(d)(2) will be presumed to have materially different rates of return from those of non-multi-advisor pools absent evidence sufficient to demonstrate otherwise.

among the pools for which past performance is disclosed, including, without limitation, differences in leverage and use of different trading programs.[55]

In contrast, the SEC does not require (although it does permit) registered investment companies to include certain performance data of other funds in their prospectuses. The SEC Staff took the position in a 1996 no-action letter to Nicholas-Applegate Mutual Funds that it would not recommend enforcement action to the Commission when a mutual fund includes historical private account performance information that was not misleading and did not obscure or impede understanding of information that is required to be included in the prospectus.[56] The *Nicholas-Applegate* no-action letter affirmed the SEC Staff's position that a registered investment company may include in its prospectus the performance of its investment adviser's similarly managed private accounts if "(1) the performance was for all of the adviser's private accounts that were managed with investment objectives, policies and strategies substantially similar to those used in managing the fund; (2) the relative sizes of the fund and the private accounts were sufficiently comparable to ensure that the private account performance would be relevant to a potential investor in the fund; and (3) the prospectus clearly disclosed that the performance information related to the adviser's management of private accounts and that such information should not be interpreted as indicative of the fund's future performance."[57]

In footnote 26 of the Proposal, the Commission indicated that it has had "preliminary discussions with SEC staff on this issue" and that "[t]he SEC staff stated that it would consider requests for no-action relief regarding the performance presentations, if necessary and appropriate."[58] However, we believe that the Commission should harmonize its requirements with the SEC's requirements regarding disclosure of past performance and exempt CPOs of Funds from the Commission's requirements under Sections 4.24(n) and 4.25. Requiring Funds to seek no-action relief from the SEC would impose an unnecessary burden on Funds and create disparate treatment of registered investment companies that are also commodity pools and registered investment companies that are solely registered with the SEC until such relief is granted. Moreover, if the SEC determines to grant no-action relief, requiring Funds to disclose past performance of commodity pools and accounts under the Commission's rules will create a disparity between the disclosure of such registered investment companies and investment companies registered only with the SEC that is likely to confuse investors accustomed to the SEC's restrictions on past performance disclosure. Accordingly, CPOs of Funds should not be required to comply with the Commission's rules regarding past performance. In the event that the Commission does not provide this relief, the Task Force

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[55] 17 C.F.R. § 4.25(a)(3)(iv).

[56] SEC No-Action Letter, *Nicholas-Applegate Mutual Funds* (pub. Avail. Aug. 6, 1996). *See also* SEC No-Action Letter, *Bramwell Growth Fund* (pub. avail. Aug. 7, 1996) (permitting a mutual fund adviser to disclose the adviser's past performance in a fund's prospectus, subject to certain restrictions); SEC No-Action Letter, *GE Funds* (pub. avail. Feb. 7, 1997).

[57] *Id. And see* SEC No-Action Letter, *Growth Stock Outlook Trust, Inc.* (pub. avail. Apr. 15, 1986).

[58] 77 FR 11345, at 11347.

recommends that this requirement not become effective for Funds until 180 days after such time as the SEC has issued published guidance on how Funds should comply.

The Proposal would permit presentation of information in a Fund's SAI if adopted. If the Commission determines not to harmonize its requirements with the SEC's guidance related to disclosure of past performance information, we support the Commission's proposal to include past performance information in a Fund's SAI.

e. Do any provisions of part 4 in addition to those identified in the proposal need to be harmonized?

In the Proposal, the Commission, in response to concerns expressed by commenters that Funds would not be able to distribute amended Disclosure Documents until the NFA reviewed and approved them,[59] stated that Section 4.26(d)(2) of its rules does not require NFA approval prior to distribution to investors of Disclosure Document amendments to correct material inaccuracies under Section 4.26(c). Rather, the Commission noted, Section 4.26(d)(2) "permits CPOs to provide Disclosure Document updates to participants at the same time such updates are filed with NFA." We note that it is common in the investment company industry to supplement (or "sticker") a registration statement, from time to time, in order to update the information therein, and to deliver such supplemented prospectus to investors.[60] We assume that, in light of the Commission's statement regarding the operation of Section 4.26(d)(2), this will continue to be a permissible practice and that CPOs to Funds would not be required to wait for NFA review to distribute a sticker supplement, and would not have to re-distribute a prospectus amendment sticker affirming completion of a NFA review. We would appreciate clarification on this point from the Commission. Additionally, we note that the costs of preparing additional sticker supplements to address NFA comments would be passed on to investors unless the Commission provided relief.

Please see our discussion in Part II for additional provisions in Part 4 of the Commission rules that we believe should be harmonized with the SEC's rules.

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[59] In particular, the NFA Comment Letter dated April 12, 2011 included the following at page 15:

> CPOs currently file an amended Disclosure Document with NFA and cannot distribute the document until approved by NFA. This is problematic in the context of pools that may be RlCs since they provide daily liquidity to investors and, therefore, these investors may not know all the information relevant to an investment decision if the document remains in the review process at NFA. To resolve this issue, NFA encourages the Commission to consider whether it may be appropriate to allow pools that provide for daily liquidity to post the Disclosure Document with the highlighted changes on its Web Site for pool participants at the same time the CPO files it for approval with NFA. The CPO could then post the Disclosure Document on the Web Site upon completion of NFA's review.

[60] As noted in Part II, registered investment companies will evaluate the materiality of the information being revised to determine whether to distribute the supplement to existing investors immediately or on a delayed basis as an amendment to the registration statement to become effective upon the effective date of the next upcoming mandatory prospectus update.

We also note that focusing on the Part 4 obligations, while not also considering the breadth of the NFA rules triggered by NFA membership, provides an incomplete picture of the costs and burdens associated with CPO registration. We encourage the Commission to carefully consider NFA membership requirements that may be inconsistent with compliance and operational practices for registered investment companies.

We refer, for example, to NFA Bylaw 1101, which requires an NFA member to confirm the NFA membership status of persons with which the member conducts commodity-related business. While practice varies in applying this requirement, we understand that many NFA-member CPOs believe that it is incumbent on them to obtain from each of their pools' prospective investors that may be a pool itself an affirmative representation as to its operator's NFA membership and CFTC registration status and frequently to perform some level of follow-on diligence. Given the range of ways in which investors access registered investment companies, including through myriad omnibus, platform and other intermediary structures and often in highly automated processes, importing that type of requirement would be highly impracticable and – for the investor – both unexpected and confusing. The issues associated with such a requirement may be compounded for newly registering CPOs in respect of existing Funds. If such CPOs are required to survey their Funds' existing investors for Bylaw 1101 purposes, they surely will encounter a large contingent that neither reads nor responds to their related inquiries, thus raising the question of whether they must mandatorily redeem such investors – a result utterly at odds with the notion of investor protection. If the Commission or the NFA, despite these objections, ultimately determines to apply Bylaw 1101 to Funds, the Task Force would urge that it be clarified so the Bylaw does not apply to investors in Funds.

f. *Should the Commission adopt an exemption from CPO registration for family offices? What factors weigh for or against the exemption?*

The Task Force believes that the Commission should adopt an exemption from CPO registration for family offices. Incorporating such an exemption in the Commission regime will rationalize SEC and Commission registration requirements, a stated goal of the Commission in its recent rulemaking under Section 4.5 and Section 4.13.[61] We note that Congress appears to have determined that family offices are not sources of the market and systemic risk delineated in the Dodd-Frank Act that the Commission sought to address by amending Sections 4.5 and 4.13.[62]

IV. Conclusion.

The Task Force believes that the concerns described above demonstrate that the Proposals do not address a number of issues that will significantly complicate implementation of the recent amendments to Section 4.5. The Task Force respectfully recommends that the Commission delay implementation of the revisions to Section 4.5 and the compliance

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[61] Dodd-Frank amended the definition of "investment adviser" to exclude family offices and, consequently, to exclude family office advisers from the SEC registration requirement. *See* SEC Final Rule, "Family Offices," 17 C.F.R. Part 275 (June 22, 2011).

[62] *See* 77 FR 11252, at 11253.

requirements for CPOs of Funds with Part 4 until all of the outstanding issues cited in this letter have been fully addressed.

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The members of the Task Force would be pleased to meet and to discuss with you or your staff any of the issues referred to in this letter or in the Proposal.

Sincerely,

/c/ Jay G. Baris
Jay G. Baris, Chair of the Task Force on Investment Company Use of Derivatives and Leverage

/c/ Jeffrey W. Rubin
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