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April 24, 2012

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

Re: Regulation 4.5 Harmonization

Dear Mr. Stawick:

The Investment Company Institute[1] ("Institute" or "ICI") appreciates the opportunity to comment on the proposal by the Commodity Futures Trading Commission ("Commission" or "CFTC") that seeks to "harmonize" certain aspects of its regulatory regime with existing regulatory requirements applicable to investment companies registered under the Investment Company Act of 1940 ("registered investment companies" or "funds"), as administered by the Securities and Exchange Commission ("SEC").[2] The Proposal is occasioned by the CFTC's recent amendments to Rule 4.5 under the Commodity Exchange Act ("CEA"), which, if they survive judicial challenge,[3] would require investment advisers to certain funds to register with the CFTC as commodity pool operators ("CPOs").[4] We believe the Proposal, if adopted, would impose substantial and unnecessary regulatory

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[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $13.3 trillion and serve over 90 million shareholders.

[2] *Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators*, 77 Fed. Reg. 11345 (Feb. 24, 2012), available at http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-3388a.pdf ("Proposal").

[3] *See* Complaint, *Investment Company Institute, et al. v. CFTC*, Case No. 1:12-cv-00612 (D.D.C. Apr. 17, 2012) ("Complaint").

[4] *Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations*, 77 Fed. Reg. 11252 (Feb. 24, 2012) ("Rule 4.5 Adopting Release"); *correction notice published at* 77 Fed. Reg. 17328 (Mar. 26, 2012).

burden on such funds and advisers in addition to the burdens they already face as a result of the new registration requirements.

I. Introduction

We begin by reiterating our strong objections to the Rule 4.5 amendments. The Commission adopted those amendments without demonstrating the need to impose a second level of regulation on funds and their advisers. Moreover, the Rule 4.5 amendments do not reflect consideration by the Commission of many critical issues raised by ICI and other interested parties during multiple rounds of public comment, at the CFTC staff's July 2011 roundtable discussion ("July 2011 Roundtable"), and in meetings with Commissioners and staff.[5] The Commission also failed to perform even the most basic tasks of an appropriate cost-benefit analysis and should not have adopted the rule. For these and other reasons, ICI and the U.S. Chamber of Commerce have filed a legal challenge to the adoption of the Rule 4.5 amendments and we incorporate the Complaint into this comment letter.[6]

When it adopted the Rule 4.5 amendments, the Commission neglected the complex and important task of evaluating the consequences for funds and their advisers unable to rely on amended Rule 4.5—specifically, the consequences of having to adhere to two separate regulatory regimes and being subject to oversight by two separate federal regulators and separate self-regulatory organizations. It chose instead to tackle those issues in a separate rulemaking. The Rule 4.5 Adopting Release states:

> [I]n conjunction with finalizing the proposed amendments to § 4.5, the Commission has proposed to adopt a harmonized compliance regime for registered investment companies whose activities require oversight by the Commission . . . [I]t is not the Commission's intention to burden registered investment companies beyond what is required to provide the Commission with adequate information it finds necessary to effectively oversee the registered investment company's derivatives trading activities.

[5] These issues have been under consideration since the National Futures Association ("NFA") filed a rulemaking petition in June 2010 seeking amendments to Rule 4.5 (which petition the NFA replaced in August 2010 with one seeking amendments to Rule 4.5 that would apply solely to funds). *See, e.g.*, Letter from Karrie McMillan, General Counsel, Investment Company Institute, to David A. Stawick, Secretary, Commodity Futures Trading Commission, dated Oct. 18, 2010 (responding to CFTC request for comment on NFA petition); Letter from Karrie McMillan, General Counsel, ICI, to David A. Stawick, Secretary, CFTC, dated Apr. 12, 2011 ("April 2011 Letter") (commenting on CFTC proposed amendments to Rule 4.5); Letter from Karrie McMillan, General Counsel, ICI to David A. Stawick, Secretary, CFTC, dated June 29, 2011 (submitting written summary of oral remarks for July 2011 Roundtable); Letter from Karrie McMillan, General Counsel, Investment Company Institute, to David A. Stawick, Secretary, Commodity Futures Trading Commission, dated July 28, 2011 ("July 2011 Letter") (providing further comment for July 2011 Roundtable record).

[6] Complaint, *supra* note 3.

> Through this harmonization, the Commission intends to minimize the burden of the amendments to § 4.5.[7]

Sadly, this Proposal fails to deliver on the Commission's stated intention. Indeed, to call it a "harmonization" is a gross mischaracterization. The Proposal does very little to address the "duplicative, inconsistent, and possibly conflicting disclosure and reporting requirements" cited in the Proposal.[8] To the contrary, the Proposal, if adopted in its current form, would do great harm to fund investors by essentially nullifying the SEC's efforts over the past 30 years to make fund disclosure clear, concise, and therefore more useful to investors.[9] The Proposal would also impose extremely burdensome, costly, and unnecessary reporting requirements on funds and their advisers.

We respectfully urge the CFTC to assess the vast amount of information that funds and their advisers already provide to the SEC and investors. We believe such an examination will demonstrate that the Commission's stated objective—of having "adequate information . . . to effectively oversee [funds'] derivatives trading activities"—would be met by accepting the forms that funds already file with the SEC. Indeed, Chairman Gensler recently concurred with this view in his remarks to the U.S. Chamber of Commerce, stating that "I think once they're registered we ought to be able to take the forms from the [SEC]."[10]

If the CFTC concludes that SEC filings by funds and advisers do not provide it with adequate information about funds' derivatives trading, the Commission should explain what information is missing, why the information is necessary, propose tailored requirements designed to obtain such information in a manner that does not interfere with current SEC requirements, and provide interested parties with the opportunity to comment on those specific proposals. Alternatively, the CFTC should engage in a true harmonization effort jointly with the SEC. Such an effort by the two agencies should include developing an integrated disclosure document for funds advised by registered CPOs that is focused on the informational needs of investors in such funds, as well as disclosure filing and review,

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[7] Rule 4.5 Adopting Release, *supra* note 4, at 11255.

[8] Proposal, *supra* note 2, at 11345.

[9] *See, e.g.,* Registration Form Used by Open-End Management Investment Companies, SEC Release Nos. 33-6479 and IC-13436 (Aug. 12, 1983), 48 Fed. Reg. 37928, 37929 (Aug. 22, 1983) (stating that "mutual fund prospectuses are not effective disclosure documents for most investors because they are too long and complex" and therefore adopting a two-part disclosure form to "shorten and simplify" the prospectus).

[10] *See* The Honorable Gary Gensler, Chairman, Commodity Futures Trading Commission, "Outlook from the CFTC," Remarks to the U.S. Chamber of Commerce Sixth Annual Capital Markets Summit, Washington, D.C. (Mar. 28, 2012), webcast available at http://www.uschamber.com/webcasts/6th-annual-capital-markets-summit. *See also infra* at notes 55-56 and accompanying text.

reporting, and recordkeeping requirements and procedures designed to provide effectively and efficiently both regulators with the information they need to conduct the appropriate oversight.

II. The Proposal Fails to Achieve the CFTC's Stated Intention of Minimizing the Burden of the Rule 4.5 Amendments

The Proposal is a far cry from what the Commission said it intended, *i.e.*, "not burden[ing] registered investment companies beyond what is required to provide the Commission with adequate information it finds necessary to effectively oversee the registered investment company's derivatives trading activities."[11] In this section, we point out the absence of any meaningful effort to achieve regulatory harmony. We outline the existing SEC regulatory framework for funds and advisers, with particular focus on fund disclosure and reporting obligations, to provide context for our objections to the Proposal. Finally, we address the Commission's failure to conduct a proper cost-benefit analysis of the Proposal, consistent with its legal obligations, and discuss the findings of ICI's own cost-benefit survey.

A. The Proposal is Far Broader than Necessary to Achieve the CFTC's Regulatory Objective and Makes No Meaningful Attempt at Harmonization

In adopting the Rule 4.5 amendments, the Commission said that its regulatory objective in this rulemaking is to ensure that the agency has "adequate information" to oversee funds' derivatives trading.[12] There is, unfortunately, a wide gap between the information the Commission would need to fulfill such a goal, which we believe already is available, and the vast increase in disclosure and reporting that this Proposal would require.

With limited exceptions, the Proposal essentially calls for an overlay of the CFTC's disclosure and reporting requirements for CPOs onto the SEC's current disclosure and reporting framework for funds and their advisers. Indeed, in the words of the Proposal, "the Commission believes that CFTC-required disclosures can be presented concomitant with SEC-required information in a registered investment company's prospectus."[13] This is not harmonization. Nor is it at all consistent with the Commission's stated intention to minimize the burden of its Rule 4.5 amendments on funds and their advisers.

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[11] Rule 4.5 Adopting Release, *supra* note 4, at 11255.

[12] *Id.*

[13] Proposal, *supra* note 2, at 11346.

B. The Proposal Disregards the Current Regulatory Framework for Funds and Advisers

Implicit in the Proposal to "harmonize" is a recognition that funds and their advisers already operate under another regulatory framework. Beyond that, however, the Proposal demonstrates a complete lack of appreciation for, or analysis of, that framework and its implications for the Commission's pursuit of its stated goals.

The SEC has substantively regulated registered investment companies since 1940, when the Investment Company Act of 1940 ("Investment Company Act") was enacted. Consistent with its focus on investor protection,[14] the SEC has developed a rigorous regulatory framework for funds, which includes requirements regarding transparency, daily valuation and liquidity requirements, limitations on leverage, custody of fund assets, prohibitions on affiliated transactions, and oversight by an independent board of directors, among others.[15] Fund advisers are subject to additional regulation under the Investment Advisers Act of 1940 ("Advisers Act"), including, registration and public disclosure requirements, reporting and recordkeeping requirements, anti-fraud provisions, and requirements regarding segregation of investor assets. Supplementing the SEC's substantive regulation of funds and advisers is a comprehensive disclosure regime designed to help investors understand the material aspects of funds without drowning them in information. To meet further informational needs for its own regulatory purposes, the SEC requires funds to file additional information with the agency that is not delivered to investors, although it is publicly available to them.

Over the past 30 years, the SEC, the fund industry, and others have devoted a tremendous amount of time, attention, and resources to improving the fund disclosure regime for the benefit of investors. The SEC has long taken the position that fund investors are best served by clear, concise disclosures that focus investors' attention on the fundamental characteristics of the funds they are considering.[16] We agree. The Institute and its members have consistently supported and actively

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[14] "The mission of the U.S. Securities and Exchange Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation." How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation (Apr. 11, 2012), available at http://www.sec.gov/about/whatwedo.shtml.

[15] For a discussion of the core principles underlying fund regulation, see Investment Company Institute, "How U.S.-Registered Investment Companies Operate and the Core Principles Underlying Their Regulation," Appendix A of the ICI Factbook, available at http://www.icifactbook.org/fb_appa.html. In addition to this framework for fund regulation, the Financial Industry Regulatory Authority has oversight authority over a fund's principal underwriter and distributing broker-dealers.

[16] *See, e.g.,* Registration Form Used by Open-End Management Investment Companies; Proposed Guidelines, SEC Release Nos. 33-6447 and IC-12927 (Dec. 27, 1982), 48 Fed. Reg. 813, 814 (Jan. 7, 1983) ("The [SEC] believes… that investors would be better served if they were provided with a prospectus that is substantially shorter and simpler, so that the prospectus clearly discloses the fundamental characteristics of the particular investment company they are considering"); Registration Form Used by Open-End Management Investment Companies, SEC Release Nos. 33-7512, 34-39748, and IC-23064 (Mar. 13, 1998), 63 Fed. Reg. 13916, 13917 (Mar. 23, 1998) ("[T]he objective of the Proposed Amendments was to provide investors with prospectus disclosure that presents clear, concise, and understandable information about an

participated in SEC initiatives to improve fund disclosure.[17] Investor advocates, too, generally agree that the SEC's focus on clear, concise disclosure is the right approach for investors.[18] Indeed, this approach is supported by years of investor research.[19]

Over time, the SEC's disclosure regime has evolved into what can best be described as a "layered" approach, in which the most essential information is separated out and highlighted for investors, with additional and more detailed information readily available for those investors who want more. This approach had its debut in 1983 with the adoption of new Form N-1A, the form that mutual funds and ETFs (together, "open-end funds") use for registration under the Securities Act of 1933 ("Securities Act") and the Investment Company Act. Form N-1A initially divided the prospectus into two parts, the prospectus and the statement of additional information ("SAI").[20] In 1998, the SEC

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investment in a fund"); Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, SEC Release Nos. 33-8998 and IC-28584 (Jan. 13, 2009), 74 Fed. Reg. 4546, 4549 (Jan. 26, 2009) (rule is "intended to help investors who are overwhelmed by the choices among thousands of available funds described in lengthy and legalistic documents to access readily key information that is important to an informed investment decision").

[17] *See, e.g.,* Investment Company Institute, *Shareholder Assessment of Risk Disclosure Methods* (Spring 1996) (empirical research on risk disclosure to supplement SEC's concept release on improving fund risk disclosure); Investment Company Institute, *The Profile Prospectus, An Assessment by Mutual Fund Shareholders* (May 1996) (study by ICI and several members to evaluate investor reactions to proposed profile prospectus); Investment Company Institute, *Investor Views on the U.S. Securities and Exchange Commission's Proposed Summary Prospectus* (March 2008) (survey of investor reactions to SEC's proposal).

[18] *See, e.g.,* Letter from David Certner, Legislative Counsel and Director of Legislative Policy, AARP, to Nancy M. Morris, Secretary, Securities and Exchange Commission, dated Feb. 28, 2008 ("We commend the Commission for its commitment to plain language, accessible, user-friendly disclosure that is essential to facilitating informed decision-making by investors"). *See also* Letter from Mercer Bullard, Founder and President, Fund Democracy; Barbara Roper, Director of Investor Protection, Consumer Federation of America; and Ken McEldowney, Executive Director, Consumer Action, to Nancy M. Morris, Secretary, Securities and Exchange Commission, dated Feb. 28, 2008 and Letter from Niels Holch, Executive Director, Coalition of Mutual Fund Investors, to Nancy M. Morris, Secretary, Securities and Exchange Commission, dated Feb. 13, 2008 (supporting the summary prospectus).

[19] *See supra* note 17; *see also* Abt SRBI Inc., Final Report: Focus Groups on a Summary Mutual Fund Prospectus, Prepared for the Securities and Exchange Commission, May 2008 (finding that focus group participants were generally in favor of the concept of providing investors with a streamlined disclosure document).

[20] Registration Form Used by Open-End Management Investment Companies (Aug. 22, 1983), *supra* note 9. There is a similar layered disclosure regime in place for closed-end funds, which use Form N-2 for registration under the Securities Act and the Investment Company Act. *See* Registration Form for Closed-End Management Investment Companies, SEC Release Nos. 33-6967 and IC-19115 (Nov. 20, 1992), 57 Fed. Reg. 56826, 56827 (Dec. 1, 1992) (adopting the two-part disclosure format used by open-end funds and updating closed-end fund disclosure standards because "a shortened and simplified prospectus is necessary to permit individual investors to assess matters of fundamental importance about the fund"). While much of the discussion of disclosure in this letter relates to open-end funds, the requirements of Form N-2 are comparable in many respects to those of Form N-1A, and therefore the comments provided in this letter generally would apply to both open-end funds and closed-end funds, unless indicated otherwise.

adopted the "risk/return summary," a section in the front of the prospectus that was intended to provide an "executive summary" of key information about the fund,[21] and began requiring funds and other issuers of securities to use "plain English" in their prospectuses, to make them "simpler, clearer, more useful, and we hope, more widely read."[22] And in 2009, the SEC adopted the summary prospectus, which permitted funds to send investors a well-designed summary document with key information presented in a standardized manner that promotes comparison across funds.[23] Like previous reforms, the summary prospectus preserves more detailed information – *e.g.,* the long-form prospectus and SAI – in a readily accessible format for those who desire it. The very high adoption rate of the summary prospectus by funds suggests the widespread appeal of this format;[24] Institute members report that the response from investors has been positive.[25]

In developing this approach, the SEC has provided guidance on the appropriate level of detail to be included in each layer of disclosure. For example, Item 9 of Form N-1A, which is part of the long-form prospectus, directs funds to describe their *principal* investment strategies and *principal* risks of investing in the fund. Item 4, which is part of the summary prospectus and summary section, requires a fund to *summarize* the information contained in Item 9 regarding principal investment strategies and principal risks. And finally, Item 16, which is found in the SAI, calls for a description of *any investment strategies… that are not principal strategies and the risks of those strategies.* The SEC staff charged with

[21] Registration Form Used by Open-End Management Investment Companies (March 13, 1998), *supra* note 16. *See also* New Disclosure Option for Open-End Management Investment Companies, SEC Release Nos. 33-7513 and IC-23065 (Mar. 13, 1998), 63 Fed. Reg. 13968 (Mar. 23, 1998) (permitting funds to offer potential investors a "fund profile" summarizing key information about a fund).

[22] Plain English Disclosure, SEC Release Nos. 33-7497, 34-39593 and IC-23011 (Jan. 28, 1998), 63 Fed. Reg. 6370 (Feb. 6, 1998) ("Plain English Adopting Release").

[23] Funds that use the summary prospectus also must make the long-form prospectus and SAI available online and, if requested, in paper form. Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, *supra* note 16. Funds must also include the information contained in the summary prospectus in a "summary section" at the front of the long-form prospectus, so investors will receive the summary presentation whether or not their fund uses the summary prospectus. To promote comparability across funds, the summary prospectus and summary section generally may not contain any information that is not expressly permitted or required to be provided in the summary.

[24] Broadridge, which provides prospectus fulfillment services (*i.e.,* delivers prospectuses to fund investors) for the vast majority of funds sold through broker-dealers (85 percent), estimates that by year-end 2012, 85 percent of these deliveries will be summary prospectuses.

[25] For example, one ICI member surveyed its investors' reaction to the summary prospectus in 2010, and found that the vast majority (over 80%) prefer to receive the summary prospectus over the long-form prospectus they received previously. Other Institute members that have adopted the summary prospectus report receiving more questions about information contained in those documents, even when the same information had been disclosed in the long-form prospectus previously, suggesting that the summary prospectus is more widely read.

reviewing fund filings routinely comments on the appropriate place for fund disclosure based on this hierarchy, and has even issued written guidance reminding funds to focus, in Items 4 and 9, on strategies that it expects to be most important and the related risks, and to include in Item 16 those strategies *used by a fund* that are not principal strategies; the staff cautioned against using "generic" disclosure in any part of the Form.[26]

SEC disclosure and reporting requirements take into consideration that some information is intended primarily for use by investors, some is meant to assist the regulator in fulfilling its oversight responsibilities, and some can serve both purposes.[27] In addition to complying with the disclosure requirements described above, funds must send to their shareholders and file with the SEC annual and semi-annual shareholder reports. These reports contain the fund's financial statements (audited, in the case of the annual report) and information about fund performance, fund expenses, and fund portfolio holdings during the reporting period. To supplement this information, funds publicly file Form N-Q with the SEC to report their portfolio holdings for the first and third fiscal quarters.[28] Fund shareholder reports must disclose the availability of Form N-Q.[29]

Other information filed with the SEC is available to the public but is clearly designed primarily to serve the SEC's regulatory oversight purposes. For example, on a semi-annual basis funds file reports on Form N-SAR. These reports contain extensive identifying information and "raw data" relating to funds and their operations, activities, investments and positions, and policies. Similarly, Part C of Form N-1A (Other Information) comprises various exhibits to the registration statement (such as fund organizational documents and certain contracts) as well as other items of information that the SEC requires but that need not be disseminated to investors.

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[26] *See* Letter from Barry Miller, Associate Director, Office of Legal and Disclosure, U.S. Securities and Exchange Commission, to Karrie McMillan, General Counsel, Investment Company Institute, dated July 30, 2010. The letter, while written to the ICI, requests that the Institute convey the staff's views to all of its members. *See also* General Instructions, Preparation of the Registration Statement, Instruction (C)(1)(c) of Form N-1A ("The prospectus should avoid… disproportionately emphasizing possible investments or activities of the Fund that are not a significant part of the Fund's investment operations").

[27] As the cover page to Form N-1A explains, "[t]he Commission has designed Form N-1A to provide investors with information that will assist them in making a decision about investing in an investment company eligible to use the Form. The Commission may also use the information provided on Form N-1A in its regulatory, disclosure review, inspection, and policy making roles."

[28] These quarterly portfolio holdings disclosures include open derivatives positions, including terms of the contracts, their notional value and fair value. The SEC staff takes the view that for over-the-counter derivatives such as swaps, "terms" include the identity of the counterparty. *See* Letter from Barry Miller, *supra* note 26.

[29] Money market funds report additional information about the fund and its portfolio holdings monthly on Form N-MFP under the Investment Company Act.

For their part, fund advisers file Form ADV to register with the SEC. Form ADV requires, among other things, public disclosure of assets under management, business practices, potential conflicts of interest, ownership, clients, employees, affiliations, and disciplinary proceedings involving the adviser or its employees. Form ADV must be updated on an annual basis and amended more frequently if certain information becomes inaccurate.[30]

As a result of the SEC disclosure and filing requirements described above, funds and advisers make available an enormous amount of information and data. These requirements have been designed based on how funds and advisers are regulated and operate.

C. The Proposal Would Have Serious Negative Implications for Funds, Their Advisers, and Their Investors

In the area of disclosure, the approach envisioned in the Proposal—which for the most part simply would overlay CFTC disclosure requirements on top of the requirements the SEC has so meticulously crafted for funds—would be a huge step backward for funds and their investors. As we discuss in more detail in Section III, the SEC's existing disclosure requirements address many of the same issues as the CFTC's disclosure requirements, but with differences in form and emphasis as between the two regimes. Consequently, the Proposal would call for funds to provide additional disclosure that is at best unnecessary, and in some cases potentially misleading.

Such a result would run directly contrary to the SEC's decades-long focus on clear, concise disclosure for fund investors. Indeed, in its instructions to Forms N-1A and N-2, the SEC states that a fund may include information in its prospectus or SAI that is not otherwise required by those forms only "so long as the information is not incomplete, inaccurate, or misleading and *does not, because of its nature, quantity, or manner of presentation, obscure or impede understanding of the information that is required to be included*."[31] Even the federal courts have cautioned against including extraneous information in fund prospectuses. As the U.S. Court of Appeals for the Second Circuit has stated, "[t]he federal securities laws require that 'disclosure in a prospectus must steer a middle course, neither submerging a material fact in a flood of collateral data, nor slighting its importance through seemingly cavalier treatment.'"[32] In our view, the CFTC's proposed approach threatens to obscure and impede the understanding of important required information and is inconsistent with these requirements.

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[30] Rule 204-1 under the Advisers Act.

[31] *See* General Instructions, Preparation of the Registration Statement, Instruction (C)(3)(b) of Form N-1A, and General Instructions for Parts A and B, Instruction 2 of Form N-2 (emphasis added).

[32] Meyer Pincus & Assoc., P.C. v. Oppenheimer & Co., Inc., 936 F.2d 759, 762 (2nd Cir. 1991) (quoting Greenapple v. Detroit Edison Co., 618 F.2d 198, 210 (2d Cir. 1980)).

We have similar concerns with regard to the Commission's decision simply to add the CPO reporting requirements to those that funds and their advisers are already subject by the SEC.[33] The requirement in Rule 4.22(a) under the CEA that CPOs prepare monthly account statements for investors, for example, makes little sense when applied to funds and would involve considerable burden and expense. Yet the Commission has not established why it believes funds should furnish such statements and brushed aside commenters' concerns with its unsubstantiated observation that the information needed to prepare such statements "should be readily available." As with disclosure, this approach to "harmonizing" the reporting requirements of the two regulatory regimes does not square with the Commission's stated intention to minimize the burden of its Rule 4.5 amendments on funds and their advisers.

As discussed with more specificity throughout this letter, the Proposal has numerous negative implications for funds, their advisers, and fund investors. Fund disclosure and reporting would greatly increase in terms of volume, but decrease in terms of usefulness to investors and, in our view, to the regulators themselves. The resulting burdens would include significant costs, which the CFTC has failed to acknowledge.

D. The CFTC Has Not Properly Considered the Costs of the Proposal

1. <u>The CFTC's Cost-Benefit Analysis is Deeply Flawed</u>

The Commission's cursory cost-benefit analysis significantly underestimates the potential costs and burdens of the Proposal for advisers that will be unable to rely on amended Rule 4.5 and the funds they manage. Indeed, our analysis suggests that the Commission failed to identify *any* of the significant costs that would be imposed by the Proposal, and therefore vastly underestimated its total cost.[34] We believe the Commission's cost-benefit analysis would not satisfy the applicable requirements of the CEA or the Administrative Procedure Act ("APA"). In order to assess with some reasonable accuracy the Proposal's costs and benefits, the Commission must conduct a new cost-benefit analysis that identifies, and attempts to quantify, the costs and benefits of the Proposal, and repropose that analysis for public notice and comment.[35]

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[33] *See infra* Section V.H.

[34] ICI conducted a detailed member survey regarding the costs of compliance with the disclosure and reporting requirements that would apply under the Proposal. The survey is attached as Appendix B to this letter. Our findings are summarized below in Section II.D.2. and discussed in more detail in *ICI Cost-Benefit Analysis of Proposed Disclosure Requirements Under Rule 4.5 Harmonization Proposal*, attached as Appendix A to this letter ("ICI Cost-Benefit Analysis").

[35] An agency's "failure to 'apprise itself – and hence the public and the Congress – of the economic consequences of a proposed regulation' makes promulgation of the rule arbitrary and capricious and not in accordance with law." *See* Business Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (quoting Chamber of Commerce v. SEC, 412 F.3d 133, 144, 366 U.S App. D.C 351 (D.C. Cir. 2005)).

In issuing the Proposal, the Commission must "examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choices made."[36] It also has an obligation to "use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."[37] It should then adopt a regulation "only upon a reasoned determination that its benefits justify its costs," and should "tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations . . ."[38] The Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, recently provided guidance to heads of agencies on the cumulative effects of regulations, "[t]o promote consideration of cumulative effects, and to reduce redundant, overlapping, and inconsistent requirements."[39] The guidance recommends, among other steps:

- [H]armonizing regulatory requirements, reducing administrative costs, avoiding unnecessary or inconsistent requirements, and otherwise improving regulatory outcomes;

- Careful consideration, in the analysis of costs and benefits, of the relationship between new regulations and regulations that are already in effect; and

- Identification of opportunities to integrate and simplify the requirements of new and existing rules, so as to eliminate inconsistency and redundancy.[40]

The Proposal altogether fails to meet these standards and contains a flawed cost-benefit analysis that does not satisfy the requirements of the CEA or the APA. A rule may be vacated where an agency

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[36] Business Roundtable v. SEC, 647 F.3d at 1148 (*internal citations omitted)*.

[37] Exec. Order No. 13563, *Improving Regulation and Regulatory Review* (Jan. 18, 2011), 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011). The President has stated that, to the extent permitted by law, independent agencies should comply with provisions of Executive Order 13563, and the Commission has stated its intention to comply with these principles. *See* Exec. Order No. 13579, Regulation and Independent Regulatory Agencies (July 11, 2011), 76 Fed. Reg. 41587 (July 14, 2011); CFTC, Reducing Regulatory Burden; Retrospective Review Under E.O. 13563, 76 Fed. Reg. 38,328 (June 30, 2011).

[38] Exec. Order No. 13563, *supra* note 37.

[39] Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, Executive Office of the President, Office of Management and Budget, Memorandum for the Heads of Executive Departments and Agencies, *Cumulative Effects of Regulations* 1,2 (Mar. 20, 2012) (explaining that, consistent with Exec. Order 13563, agencies should take active steps to take account of the cumulative effects of new and existing rules and to identify opportunities to harmonize and streamline multiple rules).

[40] *Id.*

has "neglected its statutory obligation to assess the economic consequences of its rule,"[41] and fails to sufficiently account for the extent to which the purported benefits of a rule were already provided by existing regulations.[42] While the Commission states, without explanation, that "there are some incompatibilities between SEC and Commission regulations," it fails to identify those "incompatibilities" or address the many concerns raised by commenters about how advisers that must register as CPOs will be able to comply with two sets of overlapping and sometimes inconsistent, if not conflicting, regulatory requirements. Thoughtful consideration of these issues is required as part of the Commission's cost-benefit analysis.[43] Instead, the Commission merely concludes that, as a result of the Proposal, the burden of compliance for fund advisers that will be required to register as CPOs will *fall* from 16.68 hours to 2 hours annually, per firm.[44] Based on the Commission's estimate of 416 entities, this equals 832 hours annually. The Commission provides absolutely no analysis or discussion to support this conclusion, which has no basis in reality. In contrast, ICI's cost-benefit analysis found that the initial burden for survey respondents to comply with the Commission's CPO regulations would be over 86,000 hours, costing approximately $21.7 million dollars. Ongoing compliance would take an additional 64,000 hours annually costing approximately $10.9 million annually.[45]

The Commission is required, under the CEA, to evaluate the costs and benefits of its actions in light of five specific areas.[46] While the Commission's cost-benefit analysis lists these five areas, it

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[41] Business Roundtable v. SEC, 647 F.3d at 1150.

[42] Am. Equity Life Ins. Co. v. SEC, 613 F.3d 166 (D.C. Cir. 2010).

[43] Business Roundtable v. SEC, 647 F.3d at1148-49, 1151 (an agency engaging in a cost-benefit analysis may not "fail[] to respond to substantial problems raised by commenters" and must consider every important problem posed by a rule).

[44] Proposal, *supra* note 2, at 11349, n. 46 (emphasis added). The Commission does provide separate estimates for burdens associated with Form CPO-PQR, which are six hours per response per firm for Schedule A, four hours per response per firm for Schedule B, and18 hours per response per firm for Schedule C. The Commission provides no basis for these estimates, which we believe are gross underestimates.

[45] As discussed in more detail in ICI's cost-benefit analysis, there are substantial costs associated with monitoring those funds that would currently be able to rely on amended Rule 4.5 compliance to ensure that they do not in the future trigger a registration requirement. *See* Appendix A.

[46] Section 15(a) of the CEA requires the CFTC to consider the costs and benefits of its actions before issuing rules, regulations or orders. Section 15(a)(2) requires the CFTC to evaluate the costs and benefits in light of the following five areas: (1) protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The CFTC's own Commissioners, its inspector general, and members of Congress have recently raised concerns regarding the inadequacies of the CFTC's cost-benefit analyses in its recent rulemakings, including Rule 4.5 itself. *See, e.g.,* Commissioner Jill E. Sommers, *Dissenting Statement, Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations* (Feb. 9, 2012), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/sommersstatement020912a ("Sommers Dissent") ("I could nevertheless support a revision of the current exclusions and exemptions that would give us access to information we determine is necessary to carry out our regulatory mission if supported by a sufficient cost-benefit analysis.

includes only conclusory statements of how the Proposal satisfies their requirements, and lacks any analysis or data to support its conclusions. For example, the Commission states that it "believes that these regulations protect market participants and the public by achieving the same regulatory objectives of its proposed part 4 registration and reporting requirements but at reduced costs."[47] The remainder of the Commission's analysis in the cost-benefit section is a statement that it "believes that harmonization and its concomitant reduction in regulatory burden promotes the efficiency of futures markets in an indirect way; by lessening the costs that entities must bear to operate within markets, participants can pass along such savings to their customers or devote more resources to serving those customers. Moreover, as registered participants are relieved of some burdens, the incentive to remain unregistered may diminish."[48]

It is apparent that the Commission has made no attempt to identify, or in any way quantify, the costs and burdens of the Proposal, many of which would ultimately be borne by fund shareholders. Nor has it made any attempt to identify, or quantify, any tangible benefits that could result from its Proposal, including any purported benefits to fund shareholders, who already enjoy comprehensive protections as a result of the Investment Company Act and other federal securities laws. This deeply flawed analysis would not satisfy the requirements of the CEA or the APA, and the Commission may not finalize the Proposal without reproposing it with a proper cost-benefit analysis, subject to public notice and comment.[49]

The rationale underlying a number of the decisions encompassed by the rules is sorely lacking, however, and is not supported by the existing cost-benefit analysis"); Letter from Frank D. Lucas, Chairman, Committee on Agriculture, and K. Michael Conaway, Chairman, Subcommittee on General Farm Commodities and Risk Management, to the Honorable Gary Gensler, Chairman, Commodity Futures Trading Commission, dated July 14, 2011 ("We believe that the Commission's current approach [to cost-benefit analysis] does not satisfy statutory cost-benefit analysis provisions . . . Unfortunately, in a report issued in April, your Inspector General found significant weaknesses in your Agency's economic analysis, and a general bare-minimum approach that ignored input from your Chief Economist"). We also note that one of the CFTC's own Commissioners recently wrote to the Acting Director of the Office of Management and Budget expressing "concern that the Commission's cost-benefit analysis has failed to comply with the standards for regulatory review outlined in OMB Circular A-4, Executive Order 12866, and President Obama's Executive Orders 13563 and 13579." Letter from Commissioner Scott O'Malia to the Honorable Jeffrey Zients, Acting Director, Office of Management and Budget, the White House, dated Feb. 23, 2012, available at http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/omalialetter022312.

[47] Proposal, *supra* note 2, at 11350.

[48] *Id.*

[49] *See* Business Roundtable v. SEC, 647 F.3d at 1148.

2. <u>ICI's Analysis Demonstrates Far Higher Costs than Projected by the CFTC</u>

In conjunction with preparing this letter, ICI undertook an independent analysis to assess the costs to funds and advisers of compliance with four general areas related to the Proposal: (1) evaluation of which funds and advisers would be subject to the disclosure and reporting requirements; (2) general disclosure requirements under Rule 4.24 under the CEA; (3) performance disclosure requirements under Rule 4.25 under the CEA; and (4) financial reporting requirements under Rule 4.22 under the CEA.[50] Our findings demonstrated a cost to those responding to the survey of $21.7 million to comply initially and an additional $10.9 million to comply on an annual ongoing basis, *for just the disclosure and reporting requirements discussed in the Proposal.*[51] As discussed in our cost-benefit analysis, because of our limited sample size and other limitations in our methodology, we believe that our findings could *substantially underestimate* the expected costs for the disclosure and reporting obligations of funds and their advisers stemming from the Rule 4.5 amendments. We believe these costs could be as high as $50 million initially and $25 million on an annual ongoing basis for the industry as a whole, if funds whose advisers did not respond to the survey have the same incidence of triggering CPO registration requirements as those whose advisers did respond.[52]

In addition to the disclosure and reporting requirements, *all* fund advisers would have to evaluate all of their funds according to the trading and marketing tests under Rule 4.5 to ascertain whether they could rely on the rule.[53] Altogether, the costs to the industry to apply the trading and marketing tests could be as high as $15.2 million initially and $8.8 million on an annual ongoing basis.

In sum, the cost to the industry just to apply the trading and marketing tests and comply with the disclosure and reporting requirements could be as high as $65.2 million initially and $33.8 million on an annual ongoing basis.[54]

Our cost-benefit survey was designed to capture the costs to funds and advisers of *only* the disclosure and reporting obligations contemplated by the Proposal. As a result, a number of costs are not factored into our findings that, if considered, could considerably raise the cost estimates of

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[50] *See* Appendix A.

[51] The cost-benefit analysis was *not* intended to, and does not, capture all of the costs associated with the amendments to Rule 4.5.

[52] Indeed, as Congress scores legislation, these ongoing costs could amount to $250 million over a 10-year period. If we consider the present value of the ongoing costs in perpetuity and discounted at the 20-year risk-free rate, these ongoing costs would amount to $800 million.

[53] These tests are described in Appendix A to this letter.

[54] Again considering the present value of the ongoing costs in perpetuity and discounted at the 20-year risk-free rate, these ongoing costs would amount to over $1 billion.

complying with the Proposal. These costs, which are described in our cost-benefit analysis, include, among others: costs to registrants if, because of complications associated with a different review process and/or more than one reviewing entity, their disclosure documents are not approved in a timely fashion and they must temporarily stop issuing shares; costs associated with seeking relief from the SEC, CFTC, or NFA to comply with CFTC disclosure and reporting regulations, where conflicts exist; costs to the CFTC, SEC, and NFA of reviewing the additional filings; likely significant investor confusion due to inconsistent and at times inapplicable disclosures; and costs associated with undoing decades of effort by the SEC to develop streamlined, effective and useful fund disclosure.

We were unable to ascertain any benefits of the Proposal – *i.e.,* the disclosure and reporting obligations proposed to be imposed on funds and advisers as a result of the recently adopted amendments to Rule 4.5. As discussed in detail elsewhere in this letter, funds and their advisers are already required to provide extensive disclosure and reporting to the SEC and to fund investors. The vast majority of the information required under Part 4 is already provided to the SEC, although in some cases the information differs in format, scope, and/or placement from the Part 4 requirements. We cannot discern, and the CFTC has not explained, the benefits – conferred to the Commission or fund investors – of requiring funds to provide similar information in a different format from that which they already provide. Indeed, as discussed elsewhere in our letter, we are concerned that the Proposal would, in fact, be detrimental to investors. Compliance with Part 4 as required by the Proposal would, among other things: add length to a fund's prospectus; incorporate a number of disclosures that are essentially inapplicable to funds and are likely to confuse investors; result in longer disclosures that draw attention away from the more focused, fund-specific disclosures currently required by the SEC; and require redundant presentations of certain information, which may add to investor confusion.

III. The CFTC Should Accept the Disclosure and Reporting Forms That Funds Currently File with the SEC

Rather than require funds and their advisers to conform to the disclosure and reporting requirements in the Commission's Part 4 Rules, the CFTC should accept the forms that funds and advisers already file with the SEC. Indeed, this is precisely the approach described by Chairman Gensler in his recent remarks to the Chamber of Commerce. In response to a series of questions, the Chairman explained that the intent of the recent Rule 4.5 amendments was to provide the CFTC with a "regulatory or enforcement hook" over certain funds; that is, "if an investor in one of those funds think they're being defrauded then we have the statutory authority to pursue it."[55] He stated that for these purposes, the CFTC should accept the forms filed with the SEC:

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[55] The Honorable Gary Gensler, Chairman, Remarks to the U.S. Chamber of Commerce Sixth Annual Capital Markets Summit, *supra* note 10 (specific quote on Webcast Part 2 beginning at 24:00).

> Yes, you need to register with the CFTC but we are more than happy to use the forms that you use over at the SEC… just send the same stuff over… You are right, they would be dually registered but we take all the same documents… I think once they're registered we ought to be able to take the forms from the [SEC].[56]

This is the right approach. The federal securities laws and regulations already provide a comprehensive disclosure regime for funds, with a strong focus on investor protection. Much of the information required by the Part 4 Rules is already required in fund registration statements or elsewhere under the SEC's disclosure and reporting regime. To the extent it is not, our comparison of the two regulatory regimes shows that, in most cases, the SEC requires information addressing the same underlying concept but in a different manner, or alternatively, the information simply is not relevant or applicable to the registered investment company model. This approach also would eliminate the need for funds to file disclosure documents with the NFA for review, as well as the costs and potential problems that would be associated with dual review of disclosure documents by the NFA and the SEC.

A. Current Fund and Adviser Disclosures Provide Information Comparable to Required Disclosures Under the CFTC's Part 4 Rules

The CFTC states that, "[m]any of the disclosures required by part 4 of the Commission's regulations are consistent with SEC-required disclosures."[57] We agree that, in many cases, SEC disclosure and reporting requirements would direct funds and advisers to provide comparable information to that required by the CFTC. However, the format, scope, and placement of the information may differ.[58] Examples of comparable topics under the two regulatory regimes include information about:

- Basic identification and background information.[59]

[56] *Id.*

[57] Proposal, *supra* note 2, at 11346.

[58] ICI's comparison of required CFTC and SEC disclosures is attached as Appendix C (Rule 4.24 under the CEA) and Appendix D (Rule 4.25 under the CEA) of this letter. In certain instances, the CFTC and SEC require information regarding the same underlying concept, albeit in a different manner. For example, both regimes require disclosure that is intended to inform investors about the expected costs associated with investment in the pool/fund (*i.e.*, "break-even" table, as required by the CFTC, and standardized fee table and expense example, as required by the SEC). *See infra* Section V.B.

[59] *Cf.* Rules 4.24(d) and (f) under the CEA with Items 1(a), 1(b), 5(a), 5(b), (10)(a)(1)(i), 10(a)(2), 15(a), and 25(a)(2) of Form N-1A and Items 1, 5(1)(d), 8(a), 9(1)(b), and 9(1)(c) of Form N-2. There are also relevant SAI disclosure requirements in both Forms N-1A and N-2. *See also* Part 1A of Form ADV, which requires relevant disclosure in Item 1 (adviser identifying information, including principal office and place of business); Item 3 (adviser's place and form of

- Investment strategies of the pool/fund.[60]
- Principal investment risks of the pool/fund.[61]
- Information about conflicts of interest raised by the activities of the pool/fund or its adviser.[62]
- Information about transferability and redemption of interests in the pool/fund.[63]
- Performance information about the pool/fund, including current net asset value,[64] annual and year-to-date rate of return,[65] and a visual presentation of pool/fund performance.[66]
- Management of the pool/fund.[67]
- Payments to broker-dealers and other financial intermediaries.[68]

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organization); Item 10 and Schedule A and Schedule B (control person information including direct and indirect owners and executive officers); and Item 11 (disciplinary history of adviser and advisory affiliates).

[60] *Cf.* Rule 4.24(h) under the CEA with Items 4, 9, and 16 of Form N-1A and Items 8(2) and 17(2) of Form N-2.

[61] *Cf.* Rule 4.24(g) under the CEA with Items 4 and 9 of Form N-1A and Items 8(3)(a) and 8(3)(b) of Form N-2.

[62] *Cf.* Rule 4.24(j) under the CEA with Items 8, 16(f)(vi), 17(f), and 20(a)(4) of Form N-1A and Items 18(16) and 21(1)(d) of Form N-2. The more targeted disclosures in fund registration statements reflect the fact that Section 17(a) of the Investment Company Act prohibits most transactions between a fund and its adviser or other affiliated parties absent SEC exemptive relief. *See also* Form ADV, Part 2A, Item 6 (disclosure of conflicts of interest for management of accounts with performance-based fees and accounts that are charged another type of fee and how these conflicts are addressed); Item 10 (disclosure of any relationship or arrangement with certain related persons that creates a material conflicts of interest with clients and how these conflicts are addressed); Item 12 (disclosure of conflicts of interest for any soft dollar arrangements); and Item 17 (disclosure of conflicts of interest in voting client securities and how they are addressed).

[63] *Cf.* Rule 4.24(p) under the CEA with Items 6(b), 10(b), 11(a), 11(c), and 11(e) of Form N-1A and Item 10(1) of Form N-2.

[64] *Cf.* Rule 4.25(a)(1)(i)(E) under the CEA with Item 13 of Form N-1A and Item 4 of Form N-2.

[65] *Cf.* Rule 4.25(a)(1)(i)(H) under the CEA with Items 4(b)(2)(ii), 4(b)(2)(iii), and 13 of Form N-1A and Item 4 of Form N-2.

[66] *Cf.* Rule 4.25(a)(2)(iii) under the CEA with Item 4(b)(2)(ii) of Form N-1A.

[67] *Cf.* Rules 4.24(e)(1)-(5) and 4.24(f) under the CEA with Items 5 and 10 of Form N-1A and Items 9(1)(b) and 9(1)(c) of Form N-2. There are also relevant SAI disclosure requirements in Forms N-1A and N-2.

[68] *Cf.* Rules 4.24(i)(2)(i)-(vii) under the CEA with Items 3, 8, 10, 12(a), 19(a), 19(e), 19(g), 21, 25(a)(3), 25(c) and 32(c) of Form N-1A and Items 3, 9, and 21 of Form N-2.

- Legal proceedings.[69]

In addition, the Investment Company Act and rules thereunder require that funds provide shareholders with periodic reports containing financial statements and other important information. Funds must publicly file these periodic reports, as well as other reports designed to satisfy regulatory reporting requirements, with the SEC.[70] As we explain in more detail in Section V.H., these requirements are comparable to those applicable to registered CPOs under the CEA.[71]

In some instances, however, the CFTC's requirements do not have an analog in the SEC's disclosure and reporting framework because the information simply is not relevant or appropriate in the registered investment company context. For example, the CFTC, under certain circumstances, requires disclosure of prior performance of related pools and accounts that far exceeds that which is permitted by the SEC, and could include information that is irrelevant to investors.[72] In fact, the SEC has determined that performance disclosures of the sort called for by the CFTC's Part 4 Rules could be misleading to investors. We discuss this area in more detail below.[73] The CFTC also requires disclosures, in Rule 4.24(s)(1)-(5) under the CEA, relating to capital subscriptions and treatment of funds prior to commencing trading, that are largely irrelevant for most funds, as funds are "seeded" by their advisers with the expectation that assets will increase over time.

B. Any Additional CFTC Requirements on Fund Adviser CPOs Should be Narrowly Tailored

If the CFTC nevertheless concludes that existing SEC filings by funds and advisers do not provide it with adequate information to oversee effectively funds' derivatives trading, the Commission should propose narrowly tailored requirements designed to obtain such information in a manner consistent with the SEC's existing framework. In particular, the CFTC should consider carefully how its additional requirements fit into the current narrative of funds' and advisers' disclosure documents,

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[69] *Cf.* Rule 4.24(l) with Item 10(a)(3) of Form N-1A and Item 12 of Form N-2. *See also* Form ADV Part 1A, Item 11 (legal proceedings relating to the adviser and its employees).

[70] *See, e.g.,* Rules 30b1-1 (requiring funds to file with the SEC a semi-annual report on Form N-SAR that includes certain detailed financial, operational and transactional information), 30b1-5 (requiring funds to file with the SEC quarterly reports on Form N-Q that includes quarterly portfolio holdings information), 30b2-1 (requiring funds to file with the SEC semi-annual reports on Form N-CSR that include the shareholder reports required pursuant to Rule 30e-1 and certain other information), and 30e-1 (requiring funds to transmit annual and semi-annual reports to shareholders that include financial statements, a discussion of fund performance, expense and other information) under the Investment Company Act and Forms N-SAR, N-CSR, and N-Q under the Investment Company Act.

[71] *See, e.g.,* Rule 4.22 under the CEA and Form CPO-PQR.

[72] Rule 4.24(n) and Rule 4.25 under the CEA.

[73] *See infra* Section V.A.

and should take care not to require these documents to be reorganized in order to accommodate the additional information the CFTC requires. Such reorganization would not benefit investors, and indeed may confuse them; it would also be costly for funds, their advisers, and ultimately their investors.[74] In proposing any additional disclosure requirements, the Commission must explain *why* it believes that this disclosure is lacking in the SEC's current regulatory regime and why adding the disclosure is necessary and appropriate to accomplish its regulatory objectives, *where* such information would be disclosed, and *how* the proposed requirements are consistent with the SEC's existing disclosure and reporting framework for funds and advisers. The CFTC also must provide the public with notice and the opportunity to comment on its proposed determination and analysis.[75]

IV. Alternatively, the CFTC Should Engage in a True Harmonization Effort Jointly with the SEC

If the CFTC concludes that the SEC's disclosure and reporting regime for funds and advisers does not adequately address its regulatory needs and is not willing to take our recommendation above, the agency should engage in a true harmonization effort with the SEC through joint rulemaking. Such an approach, in our view, would ensure that both agencies are able to provide effective regulatory oversight—without funds, advisers and fund investors being caught in the middle.

A central focus of harmonization would be the development of an integrated disclosure document for funds advised by registered CPOs that is premised on the informational needs of fund investors. In creating a form for this document, the two agencies would need to come to a "meeting of the minds" on a variety of issues, especially in areas where the CFTC and SEC have taken different approaches to address the same concern. We highlight in Section V, for example, the fact that risk disclosure to investors is required by both agencies, but that any harmonization should include developing cautionary language that is acceptable to both the CFTC and SEC while preserving funds' use of the summary prospectus.

Consistent with the SEC's many disclosure improvement efforts over the years and its investor protection mandate, the form for an integrated disclosure document should be designed to promote comparability across funds.[76] Similarly, the two agencies' requirements relating to periodic reports to

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[74] The estimated costs associated with reorganizing fund registration statements to comply with the Proposal are discussed in Section 3.3.1 of our cost-benefit analysis. *See* Appendix A.

[75] *See Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994) (stating that "agencies must include in their notice of proposed rulemaking 'either the terms or substance of the proposed rule or a description of the subjects and issues involved' . . . [a]nd they must give 'interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.' " (internal citations omitted); *see also* Business Roundtable v. SEC, 647 F.3d at 1148.

[76] *See, e.g.*, Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, *supra* note 16, at 4549 (explaining that the summary prospectus and summary section are designed to be

investors would need to be evaluated with a clear focus on what information investors need as they continue to own a fund that is subject to oversight by both agencies, and the frequency of its delivery.

A joint harmonization effort also should address differences in the disclosure filing and review processes under both regimes, and outline the appropriate roles of the SEC and NFA. The importance of achieving a coordinated approach cannot be overstated. As discussed below in Section V, current NFA review procedures do not have an analog to the automatic effectiveness provisions applicable to certain filings with the SEC, and thus contemplate that NFA will comprehensively review all disclosure filings before they are deemed effective. This means, for example, that if the NFA's review of a fund's annual update to its registration statement were not completed by the required date, the fund could face significant operational and legal risks if forced temporarily to suspend sales of its shares including, for example, suspension of shareholder dividend and other automatic reinvestment programs. A coordinated approach also will help conserve NFA resources, as it otherwise will have to review hundreds—if not thousands—of fund filings.

Finally, it is critically important that any joint harmonization effort address the agencies' oversight efforts, including by developing a uniform approach to periodic regulatory reporting requirements and examinations that does not result in undue burden on funds and advisers. Similarly, a harmonization effort should seek to ensure that recordkeeping requirements and procedures are uniform across both regulatory regimes for advisers that are unable to rely on Rule 4.5 and their funds.

V. Conflicts and Concerns Presented by the Proposal; Recommendations

In its request for comment on the Proposal, the CFTC poses seven questions. These include questions in four specific areas—three (*i.e.*, break-even analysis, prior performance disclosure, and monthly account statements) that we addressed in our April 2011 Letter and discuss again below, and one (*i.e.*, the factors for or against adoption of a family offices exemption from CPO registration) that is irrelevant to Rule 4.5 harmonization. The agency also poses more open-ended questions, such as "do any provisions of part 4 in addition to those identified in the proposal need to be harmonized?" and "[s]hould the Commission consider applying any of the harmonization provisions to operators of pools that are not registered investment companies?"[77]

We have identified several specific areas of concern for advisers unable to rely on amended Rule 4.5 and the funds they manage. These issues are insufficiently addressed (or not addressed at all) by the Proposal. They include, among others, the presentation of certain fees and expenses, risk disclosures, periodic reporting requirements, the location of books and records, and the costs and potential

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comparable across funds); *see also* Registration Form Used by Open-End Management Investment Companies (March 13, 1998), *supra* note 16, at 13917 (SEC's intent was, in part, to "enhance the comparability of information about funds").

[77] Proposal, *supra* note 2, at 11348.

problems that would be associated with any dual review of fund disclosures by the NFA and the SEC. We address each of these issues in detail below.

A. Performance Disclosure

CFTC regulations require a CPO to disclose, under certain circumstances, prior performance of other pools and accounts managed by the CPO, the pool's trading manager or a major commodity trading advisor ("major CTA"), or of any "major investee pool."[78] This requirement directly conflicts with SEC staff positions on prior performance, which permit funds to disclose prior performance information *only* for those related funds and accounts that are managed with substantially similar investment objectives, policies, and strategies.[79] The performance information required by Rule 4.24(n) under the CEA is far broader in scope, however, and is directly at odds with the SEC's staff positions, which is that prior performance of related funds or accounts may be misleading to fund investors because it may impede understanding of required disclosures and may cause investors to draw an

[78] Specifically, Rule 4.24(n) under the CEA requires a CPO to disclose past performance of each pool it operates in accordance with Rule 4.25. If the pool has fewer than three years of actual performance, this disclosure must include past performance information for the CPO's other pools and accounts, as well as past performance information of pools and accounts managed by the pool's trading manager, if any, pools and accounts managed by major CTAs of the pool, and past performance of any major investee pool. *See* Rule 4.25(c) under the CEA. A major CTA generally is any commodity trading advisor ("CTA") that is allocated or intended to be allocated at least ten percent of the pool's funds available for commodity interest trading. *See* Rule 4.10(i) under the CEA. A "major investee pool" means any pool in which the fund invests or participates that is allocated or intended to be allocated at least ten percent of the net asset value of the offered fund. *See* Rule 4.10(d)(5) under the CEA.

[79] *See, e.g.,* Growth Stock Outlook Trust, Inc., SEC No-Action Letter (Apr. 15, 1986) (permitting the presentation in an investment company prospectus during the first year of the company's operations of an adviser's prior performance for private accounts managed by the adviser provided that, among other things, accounts "not managed in a substantially similar manner" to the fund must not be included in the performance); *see also* Nicholas-Applegate Mutual Funds, SEC No-Action Letter (Aug. 6, 1996) (permitting portfolios of a registered investment company to include in their prospectuses information concerning the performance of certain private accounts managed by the investment company's adviser beyond the first year of the investment company's operations, provided, among other things: (i) 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 portfolio; (ii) the relative sizes of the portfolio and the private accounts were sufficiently comparable to ensure the private account performance would be relevant to an investor; (iii) the prospectus clearly disclosed that the performance information was related to the adviser's management of private accounts and that such information should not be interpreted as indicative of the portfolio's future performance; and (iv) the private account performance would be updated no less frequently than annually); Bramwell Growth Fund, SEC No-Action Letter (Aug. 7, 1996) (SEC staff permitted an investment company to include in its prospectus, in addition to total return information for the investment company, performance information relating to another open-end investment company for which the fund's portfolio manager previously served as portfolio manager under certain circumstances including that the prior investment company had investment objectives, policies, and strategies that were substantially similar in all material respects to those of the investment company).

inappropriate conclusion about how the offered fund may perform.[80] This concern is particularly acute for those fund complexes that manage a large number of funds, in addition to separate accounts. Such funds and accounts are likely to have widely varying investment strategies and objectives that are likely to be irrelevant – and possibly confusing – to prospective investors in the offered fund.[81] Further, providing prior performance information for all of these funds would add pages upon pages of irrelevant information to the fund's prospectus or SAI.[82]

The Proposal recognizes the conflict between the Commission's requirement and the SEC staff's positions on prior performance, stating that "[t]he Commission has had preliminary discussions with SEC staff on this issue. The SEC staff stated that it would *consider requests for no-action relief regarding the performance presentations, if necessary and appropriate*."[83] This statement does not reflect a harmonized approach to regulation but merely defers the resolution of a known problem to another day. It fails to provide sufficient assurance that funds would not face regulatory action from the SEC, and does not address the fundamental and very legitimate concerns expressed by the SEC staff about investor confusion, orthe costs that funds and advisers would incur in seeking a no-action position.

For all of these reasons, we recommend that funds with fewer than three years' actual performance be required to disclose only prior performance information for other funds and accounts with substantially similar investment objectives, policies, and strategies that are managed by the same adviser, consistent with the standards for disclosure set forth in relevant SEC staff positions.[84] We believe this solution would strike an appropriate balance between the Commission's approach to providing performance information in cases where a pool has a limited performance history and the SEC's concern that such information may be misleading to investors.

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[80] Nicholas-Applegate Mutual Funds, *supra* note 79. This potential for confusion is present for open-end fund and closed-end fund investors alike. There is a particular risk of confusion in the context of new fund offerings (*e.g.*, closed-end funds engaged in initial public offerings) where the fund does not have any performance history of its own. For example, under the Proposal, a closed-end fund unable to satisfy amended Rule 4.5 that is engaged in an initial public offering would be required to include in its registration statement potentially a large amount of performance data for other pools and accounts, whether or not the fund's adviser manages those pools and accounts pursuant to the same or a substantially similar strategy.

[81] According to ICI data, the average number of registered funds per complex is 23, and the range is from 1 to 603. Thirty-two complexes have more than a hundred registered funds. This number could be compounded if the adviser uses a number of unaffiliated subadvisers, or manages separate accounts and/or private funds as well as registered funds, which we understand to be common.

[82] The Proposal states that this information may be presented in a fund's SAI. *See* Proposal, *supra* note 2, at 11347.

[83] *Id*., at 11347, n. 26 (*emphasis added*).

[84] *See supra* note 79.

B. Break-Even Calculation and Table

Rules 4.24(d)(5) and (i)(6) under the CEA require commodity pools to include in their disclosure document a break-even table that reflects all fees and other expenses of the pool. This CFTC requirement is similar to standardized SEC fee table disclosure requirements. Requiring funds to comply with both sets of requirements would be redundant and confusing to investors and would add unnecessary length to fund prospectuses.

Item 3 of both Form N-1A and Form N-2 requires funds to include in their prospectuses a standardized fee table and expense example. Fee tables generally must include the following information: (1) "Shareholder Fees," which include the maximum front-end or deferred sales charge, redemption fees, exchange fees, and maximum account fees; (2) "Management Fees," which include investment advisory fees (including any fees based on the fund's performance); (3) "Distribution and Service (12b-1) Fees," which include all distribution or other expenses incurred during the most recent fiscal year under a plan adopted pursuant to Rule 12b-1 under the Investment Company Act; (4) "Other Expenses," which include all expenses not otherwise disclosed in the table that are deducted from the fund's assets or charged to all shareholder accounts; and (5) "Annual Fund Operating Expenses," which reflects the total annual operating expenses for the fund's last fiscal year. Expense examples generally must show the total fees and expenses, expressed in dollars, that a shareholder would incur over 1, 3, 5 and 10 years, assuming an initial investment of $10,000 and a 5% annual rate of return.

The fees and expenses covered in Item 3 generally are the same fees and expenses that must be reflected in the CFTC's break-even table. We take issue with the Commission's suggestion that the break-even table is "a necessary disclosure" that "mandates a greater level of detail regarding brokerage fees and does not assume a specific rate of return."[85] This is not accurate – in fact, Form N-1A and Form N-2 require extensive disclosure regarding brokerage matters[86] and require explicit fee disclosures, including the fee table itself, that do not assume a specific rate of return. The only portion of the fee table that assumes a specific rate of return is the expense example, and the SEC adopted this requirement specifically to facilitate investor comparisons among different funds.[87] The Commission's

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[85] Proposal, *supra* note 2, at 11347.

[86] Item 21 of Form N-1A requires funds to disclose the aggregate amount of brokerage commissions paid by a fund to brokers during the three most recent fiscal years, the amounts paid to any broker that is affiliated with the fund, policies with respect to the selection of brokers to execute fund transactions, commissions paid in connection with directed brokerage arrangements, and the amount of any investments by a fund in securities issued by one of the fund's regular broker-dealers.

[87] *Consolidated Disclosure of Mutual Fund Expenses*, Release Nos. 33-6752 and IC-16244 (Feb. 1, 1988), 53 Fed. Reg. 3192, 3195 (adopting fee table requirements and stating that the expense example "is vital to permit investors to comprehend and compare increasingly disparate and complex fund expense structures").

suggestion that the SEC's fee table requirements are based on an assumed rate of return as a general matter is simply incorrect.

We believe that the fee and expense information provided to investors in Item 3 is comparable to that provided in the CFTC's break-even table, and funds should not be required to provide both disclosures. Providing the break-even table, in addition to the fee table, in a fund prospectus is likely to confuse investors, due to the different terminology and calculations it includes, and offers no greater benefits to investors. We therefore recommend that funds not be required to include the break-even table required by Rule 4.24.

C. Required Risk Disclosures

Rule 4.24 requires a standardized cautionary statement to be "prominently featured" on the cover page of a pool's disclosure document,[88] immediately followed by additional standardized risk disclosure statements, as well as a detailed discussion of a list of enumerated risks "without limitation."[89] As discussed in our April 2011 Letter, the CFTC's standardized risk disclosures do not accurately convey the risks associated with fund investing and may mislead investors.[90] Additionally, the CFTC's required risk disclosure – both standardized and detailed – is fundamentally inconsistent with the SEC's layered approach to risk disclosure, discussed above in Section II.B, and is likely to arouse concerns from the SEC's disclosure staff. We recommend that funds not be required to satisfy the CFTC's risk disclosure requirements and instead continue to provide the risk disclosures required by the SEC.

1. Standardized Risk Disclosure Statements are Misleading as Applied to Funds

While we fully support strong risk disclosure to investors, such disclosure must be accurate in order to be effective and legal. The CFTC's standardized risk disclosures are, in many cases, simply inaccurate as applied to funds. For example, Rule 4.24(b) under the CEA would require a fund prospectus to state prominently:

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[88] The cautionary statement explains that the CFTC has not passed on the merits of the pool or the adequacy or accuracy of the disclosure document. We appreciate that the CFTC has proposed relief so a fund may satisfy this requirement by including a statement that essentially combines the language of the CFTC's legend and the SEC's similar legend required by Rule 481(b) under the Securities Act without corresponding relief from the SEC, however, funds would be unable to take advantage of the CFTC's proposed relief. The CFTC must ensure that the SEC has taken action necessary for funds to use a harmonized cautionary statement, before imposing this requirement.

[89] *See, e.g.,* Rules 4.24(a), (b)(1)-(4), and (g) under the CEA.

[90] *See* April 2011 Letter, *supra* note 5.

> . . . YOU SHOULD BE AWARE THAT COMMODITY INTEREST TRADING CAN QUICKLY LEAD TO LARGE LOSSES AS WELL AS GAINS. SUCH TRADING LOSSES CAN SHARPLY REDUCE THE NET ASSET VALUE OF THE POOL AND CONSEQUENTLY THE VALUE OF YOUR INTERESTS IN THE POOL. IN ADDITION, RESTRICTIONS ON REDEMPTIONS MAY AFFECT YOUR ABILITY TO WITHDRAW YOUR PARTICIPATION IN THE POOL.[91]

This disclosure is inapposite to mutual funds, which issue redeemable securities and are not permitted, under the Investment Company Act, to suspend redemptions without obtaining an SEC order.[92] Furthermore, shares of ETFs trade on exchanges and, accordingly, may be bought or sold over the exchange on a daily basis. The same is true of closed-end funds, whose shares trade on an exchange. Even though shares of such funds typically are not redeemable by the fund itself, they may be bought or sold over the exchange on a daily basis. The CFTC's standardized disclosure goes on to state:

> ALSO, BEFORE YOU DECIDE TO PARTICIPATE IN THIS POOL, YOU SHOULD NOTE THAT YOUR POTENTIAL LIABILITY AS A PARTICIPANT IN THIS POOL FOR TRADING LOSSES AND OTHER EXPENSES OF THE POOL IS NOT LIMITED TO THE AMOUNT OF YOUR CONTRIBUTION FOR THE PURCHASE OF AN INTEREST IN THE POOL AND ANY PROFITS EARNED THEREON.[93]
>
> HIGHLY CUSTOMIZED SWAPS TRANSACTIONS IN PARTICULAR MAY INCREASE LIQUIDITY RISK, WHICH MAY RESULT IN A SUSPENSION OF REDEMPTIONS. HIGHLY LEVERAGED TRANSACTIONS MAY EXPERIENCE SUBSTANTIAL GAINS OR LOSSES IN VALUE AS A RESULT OF RELATIVELY SMALL CHANGES IN THE VALUE OR LEVEL OF AN UNDERLYING OR RELATED MARKET FACTOR.[94]

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[91] Rule 4.24(b)(1) under the CEA.

[92] *See* Section 22(e) of the Investment Company Act and Rule 22c-1 under the Act. On rare occasions, the SEC has granted relief, either under Section 22(e) or Rule 22c-1, to open-end funds experiencing "emergency situations" that make it difficult to calculate their net asset values in order to meet purchase or redemption requests. Snowstorms, power outages, and similar events fall into this category.

[93] Rule 4.24(b)(3) under the CEA.

[94] Rule 4.24(b)(5) under the CEA.

The Investment Company Act does not permit funds to engage in "highly leveraged transactions," as they are subject to strict asset coverage requirements.[95] Further, fund investors are not subject to potential liability greater than the amount of their investment in the fund.[96] Finally, the CFTC's standardized statement about swaps fails to capture the variety of ways in which funds may use swaps, and may present a misleading impression of the risks associated with such use. Requiring funds to make such standardized disclosures would be requiring them to make materially misleading statements.[97]

The CFTC has failed to address our fundamental concerns about the accuracy of this disclosure as applied to funds.[98] Instead, it asserted that standardized risk disclosure with respect to swaps is "necessary due to the revisions to the statutory definitions of CPO, CTA, and commodity pool enacted by the Dodd-Frank Act," and has taken the position that potential inaccuracies in standardized risk disclosures are addressed through the additional risk disclosures required by Rule 4.24(g) under the CEA,[99] discussed in subsection 2 below. These answers are not responsive to our concerns. First, revisions to definitions in the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") did not require the agency to impose inaccurate, boilerplate risk disclosures. Second, even if the CFTC is correct in its implication that a fund may negate inaccurate, misleading disclosure in one part of its registration statement by providing additional disclosures elsewhere in the document,[100] it is wholly unreasonable for a regulator to require such misleading disclosure. Finally, the CFTC should not adopt requirements that would place a fund's independent board and the fund's adviser in the untenable position of deciding between authorizing misleading disclosure or violating regulations.

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[95] *See* Section 18 of the Investment Company Act. Both open-end funds and closed-end funds are subject to leverage limitations. The SEC staff also requires any wholly-owned subsidiary of a fund that engages in commodity interest trading to comply with these leverage limits.

[96] *See, e.g.,* Del. Code Ann. tit.12 § 3803 (2012) (beneficial owners of statutory trusts are entitled to the same personal liability limitation as stockholders of corporations who are not liable for debts beyond the amount of their investment); Md. Corporations and Associations Code Ann. § 2-215 (2012) (a stockholder is not liable to a corporation or its creditor with respect to the stock except to the extent that the agreed consideration for the stock has not been paid or liability is imposed by statute). Many funds are organized as Delaware statutory trusts or Maryland corporations.

[97] The format of the CFTC's standardized risk disclosures also conflicts with the SEC's plain English disclosure guidance, which applies to fund prospectuses. *See, e.g.*, Plain English Adopting Release, *supra* note 22 (stating that "[u]sing all capitalized letters for . . . legends does not give them proper prominence . . . [r]ather, it makes them hard to read.").

[98] *See* April 2011 Letter, *supra* note 5.

[99] Rule 4.5 Adopting Release, *supra* note 4, at 11266 (*internal citations omitted*).

[100] *See, e.g.,* Meyer Pincus, *supra* note 32, at 761 (quoting McMahan v. Wherehouse Entertainment, Inc., 900 F.2d 576, 579 (2d Cir. 1990) ("The central inquiry in determining whether a prospectus is materially misleading ... is therefore 'whether defendants' representations, taken together and in context, would have [misled] a reasonable investor' about the nature of the investment.").

To put it simply, the CFTC cannot require funds or their advisers to make misleading statements about the risks of investing in a fund. Rather, the CFTC should permit them to provide disclosure tailored to the particular risks associated with a fund's investment strategy, as currently required by the SEC.

2. Discussion of Principal Risk Factors

As discussed above,[101] the SEC has taken a layered approach to fund disclosure, including with respect to the risks associated with a fund's investment strategies. Under this approach, a fund must "summarize" its principal risks in its summary section and (where applicable) summary prospectus, "describe" the principal risks in the long-form prospectus, and then include information about additional (*i.e.,* not "principal") risks in the SAI.[102] Rule 4.24(g) under the CEA requires a complete discussion of principal risk factors, including discussion of an enumerated list of potential risks "without limitation," to appear together in a CPO's disclosure document.

The risk disclosures required in a fund's prospectus and SAI serve the same purpose as those required by Rule 4.24(g), and provide investors with the information they need to understand the risks associated with investment in a particular fund. We therefore recommend that funds not be required to follow the CFTC's more generic risk disclosure requirements but instead continue to offer the layered and tailored risk disclosure currently required by Forms N-1A and N-2.

D. Use of Summary Prospectus

As discussed in Section II.B., the summary prospectus has proven to be a milestone in improving the quality and comparability of information provided to fund investors. One of the keys to the success of the summary prospectus is that it specifically limits funds to providing *only* that information that is expressly permitted or required to be contained therein, in order to promote disclosure that is easy to understand, concise and comparable across funds.[103] We believe the Commission intended to preserve the ability of funds to use the summary prospectus. We have continuing concerns, however, about the effect of the Proposal on funds' ability to use the summary

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[101] *See supra* note 26 and accompanying text.

[102] *See* Items 4, 9 and 16 of Form N-1A and Items 3, 8 and 17 of Form N-2.

[103] *See* Rule 498(b)(2) under the Securities Act ("Contents of the Summary Prospectus. Except as otherwise provided in this paragraph (b), provide the information required by Items 2 through 8 of Form N-1A, and *only that information,* in the order required by the form. . . .") (*emphasis added*). *See also* General Instructions for Preparation of the Registration Statement, Item (C)(3)(b) of Form N-1A ("Items 2 through 8 may not include disclosure other than that required or permitted by those items."). The SEC disclosure review staff rigorously enforces these instructions.

prospectus. Any limitations on such use would be a huge loss for fund investors and a dramatic step backward for the SEC's carefully crafted disclosure regime.

Specifically, with respect to disclosure of the break-even point, which is required to be included in the "forepart" of the disclosure document, [104] the Proposal states that the Commission will consider the forepart to be "the section immediately following all disclosures required by SEC Form N-1A to be included in the summary prospectus."[105] It further states that "any other information required to be presented in the forepart of the document by [Rule] 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…"[106] We read these statements in the Proposal to permit such information to follow the summary section—*i.e.,* to not be contained in the summary prospectus—and thereby conform with the SEC's requirement that the summary prospectus and summary section only contain the information that is expressly required or permitted to be included therein.[107]

Nonetheless, other elements of the Proposal are inconsistent with SEC rules and may preclude use of the summary prospectus. The cautionary statement required by Rule 4.24(a) under the CEA[108] must appear on the cover page of the disclosure document, [109] and the risk disclosure statement is required to be "prominently displayed immediately following any disclosure required to appear on the cover page of the Disclosure Document…"[110] Rule 498(b)(2) under the Securities Act is clear, however, that *no* information other than that expressly set forth by the rule is permitted in the summary prospectus.[111] This SEC rule enumerates specific information that may appear on the cover page; no

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[104] *See* Rule 4.24(d) under the CEA.

[105] Proposal, *supra* note 2, at 11347 (*internal citations omitted*).

[106] *Id*.

[107] *See supra* note 103.

[108] *See supra* note 88.

[109] *See* Rule 4.24(a) under the CEA.

[110] *See* Rule 4.24(b) under the CEA.

[111] *See supra* note 103. Similarly, General Instruction C.3.A. of Form N-1A makes clear that disclosures required by Items 2-8 of the form must appear in numerical order at the front of the prospectus and may not be preceded by any other disclosure, except the cover page and table of contents. Thus, the placement requirement for the risk disclosure statement in Rule 4.24(a) raises similar issues with the summary section of the long-form prospectus for open-end funds. Moreover, while closed-end funds do not use the summary prospectus, Form N-2 requires that "Items 1, 2, 3, and 4 must appear in order in the prospectus and may not be preceded or separated by any other information." Form N-2, General Instruction 1 for Parts

cautionary or risk language is included.[112] Moreover, even if the SEC were to grant relief to permit inclusion of a cautionary legend and risk disclosure on the cover page of the summary prospectus, the required risk language is of such length that it would likely not fit on a cover page. This would raise additional concerns, for the SEC as well as funds themselves, for a document that is intended to be a summary presentation of three to four pages.[113]

As discussed in Section V.C., we strongly recommend that funds be permitted to satisfy their risk disclosure requirements by providing those risk disclosures that the SEC currently requires of funds. We believe such disclosures are better tailored for fund investors and fully responsive to the CFTC's regulatory needs.

E. Disclosure Review Process

For the reasons set forth in Section III above, the CFTC should accept funds' compliance with the SEC's filing requirements as satisfying its own regulatory objectives. Such an approach would eliminate the need for funds to file disclosure documents with the NFA for review, as well as the costs and potential problems that would be associated with dual review of disclosure documents by the NFA and the SEC. Accordingly, we request that the CFTC implement the approach described in Section III and exempt funds from the requirement to file disclosure documents with the NFA.

If the CFTC does not accept our recommendations, and intends to require funds to file disclosure documents with the NFA for review, we believe that the CFTC must address how the review process would be coordinated between the SEC and the NFA. These issues must be addressed in a harmonized manner by the CFTC and the SEC in order to avoid significantly disrupting funds' existing business practices. Rule 4.26(d)(1) under the CEA generally requires CPOs to file their commodity pool disclosure documents and any subsequent amendments with the NFA electronically not less than 21 calendar days prior to the date the CPO first intends to deliver such document to a prospective participant in the pool. We understand that the NFA reviews all disclosure documents and all changes and supplements to existing disclosure documents (even those containing only minor, grammatical, stylistic and other non-material changes), and that a CPO may not use a disclosure

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A and B. Thus, the CFTC's cautionary statement and risk disclosure statement are similarly problematic for closed-end funds.

[112] While Rule 481(b) under the Securities Act requires funds to include a legend similar to the cautionary statement on the cover of their full prospectus, the legend is not required or permitted to be included on the cover page of the summary prospectus. The SEC staff informally confirmed this position in a conference call with the industry hosted by the ICI in October 2009.

[113] *See* Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, *supra* note 16, at 4551 (stating that while no page limit will be imposed, "it is our intent that funds prepare a concise summary (on the order of three or four pages)").

document (including any updated or supplemented disclosure document) without express approval of the NFA. While this procedure generally is comparable to SEC procedures for reviewing initial registration statements and pre-effective amendments to registration statements, it differs significantly from SEC procedures for reviewing annual updates to registration statements and certain supplements. In addition, having a fund's registration statement reviewed by two different organizations with different standards, guidelines and expertise—yet which have the same ultimate purpose—creates significant issues that, in certain cases, could force a fund to temporarily suspend sales of fund shares.

Because open-end funds typically are engaged in a continuous offering of their shares, such funds must update their registration statements each year to remain current.[114] Under paragraph (b) of Rule 485, a post-effective amendment filed by an open-end fund may become effective immediately upon filing, without affirmative action on the part of the SEC or its staff, provided that, among other things, it is filed for certain limited purposes, including (1) updating the financial statements; (2) designating a new effective date for a previously filed post-effective amendment; (3) disclosing or updating portfolio manager information; and (4) making any non-material changes. Amendments that include changes other than those specified in paragraph (b) must be filed pursuant to paragraph (a) of Rule 485 under the Securities Act, which generally become effective 60 days after filing (75 days when the post-effective amendment includes disclosure about a new fund). The SEC staff reviews post-effective amendments filed pursuant to paragraph (a) of Rule 485, but generally does not review post-effective amendments filed pursuant to paragraph (b).[115] The SEC review procedure acknowledges that the majority of post-effective amendments filed by open-end funds do not present novel or complex questions of law or fact and therefore do not require SEC staff review.[116] It also provides certainty to funds that continuously offer their shares that they will have an updated prospectus and SAI that is effective by the required date.[117]

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[114] Section 10(a)(3) of the Securities Act states that, "when a prospectus is used more than nine months after the effective date of the registration statement, the information contained therein shall not be as of a date more than sixteen months prior to such use." We appreciate the Commission's proposal to require CPOs and CTAs to file updates of all disclosure documents twelve months from the date of the document, rather than the current nine month requirement in Rule 4.26(a)(2), which would conform to the normal update cycle for funds engaged in a continuous offering.

[115] Indeed, it is common for a fund to file a post-effective amendment under Rule 485(a) and then file a superseding amendment under Rule 485(b) which addresses staff comments and makes other permitted changes.

[116] *Revised Procedures for Processing Post-Effective Amendments Filed by Investment Companies*, SEC Release Nos. 33-6229 and IC-11315 (Aug. 25, 1980), 45 Fed. Reg. 57702 (Aug. 29, 1980).

[117] *See, e.g., Revised Procedures for Processing Post-Effective Amendments Filed by Investment Companies*, SEC Release Nos. 33-6205 and IC-11114 (Apr. 3, 1980), 45 Fed. Reg. 24500, 24501 (Apr. 10, 1980) (proposing changes to the SEC review process for fund filings to ensure, among other things, that SEC review of such filings "is accomplished thoroughly, timely, and in a manner fair to registrants").

The NFA review procedures differ significantly from the SEC procedures in that they do not provide for automatic effectiveness and they contemplate that the NFA will review *all* filings, even routine annual updates. Under the current NFA review procedures, we believe that there is a significant risk that the NFA may not be able to process annual updates on a timely basis, particularly in light of the novel issues likely to surface in this process and the significant increase in workload that will result from the CFTC's amendments to Rules 4.5 and 4.13. If this were to happen, a fund may be forced to temporarily suspend sales of its shares, which would create significant operational and legal risks.[118] In addition, because funds often file post-effective amendments pursuant to paragraph (b) of Rule 485 on, or relatively close to, the date on which they are scheduled to become effective, the NFA's current review process will require funds to revise their procedures for preparing annual updates to allow time for NFA review, which will increase costs for funds and their shareholders. Moreover, the NFA could provide a comment on a fund's annual update requiring a change that constitutes a material change for purposes of Rule 485, precluding the fund from filing the update pursuant to paragraph (b). Under these circumstances, the fund would be required to file a post-effective amendment pursuant to paragraph (a) of Rule 485, which generally would not become effective for at least 60 days after filing. This could result in the post-effective amendment not becoming effective until after the updating period for the registration statement has expired, potentially forcing the fund to suspend sales of its shares. Similarly, it is possible that the SEC staff could provide a comment requiring a change to a disclosure document that has already been reviewed and approved by the NFA, which would require the fund to re-file the document with the NFA for review and approval, even if the change was not material. This also could result in an unnecessary and disruptive delay in the updating process that could force a fund to suspend sales of its shares.

Our concerns in this regard are not hypothetical. Prior to enactment of the National Securities Markets Improvements Act of 1996 ("NSMIA"), fund disclosure was subject to review and approval by the SEC and every state in which a fund planned to offer its shares for sale. To satisfy state disclosure requirements, funds were often required to rewrite, supplement, rearrange, and relabel disclosure that had been already been reviewed by the SEC for compliance with the federal securities laws and that was

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[118] Suspending sales of fund shares would require funds and their principal underwriters and transfer agents to, among other things, expend significant time and resources to reconfigure their systems for processing transactions in fund shares in what would likely be a very short period of time so that the systems will not accept purchase orders. In addition, fund shares often are sold through dozens, if not hundreds or thousands, of third party intermediaries (including broker-dealers, retirement plans, banks and insurance companies) that have their own systems for processing transactions in fund shares for their clients, which also would have to be reconfigured in a very short period of time so that they do not accept purchase orders. Moreover, funds and their service providers would need to take steps to ensure, among other things, that the suspension of sales of fund shares is communicated effectively (through prospectus supplements and other communications) to potential investors and to persons selling fund shares, including broker-dealers and their registered representatives and other intermediaries, so that such persons do not accept any orders for purchases of fund shares. Because of the scope of the actions required and the likelihood that there would be limited time available, it is unclear that all of these actions could be implemented in a timely manner, which could create significant legal risks for the funds and their service providers.

presented in a "clear, concise, and understandable manner" as required by the SEC.[119] In some cases, problems resolving inconsistent comments between the SEC and state regulators, including with respect to the format, ordering, and substance of the disclosure, resulted in funds being unable to offer their shares to investors in particular states. The difficulties that funds experienced in navigating multiple disclosure regimes was a significant factor leading to Congressional passage of NSMIA, which amended the Securities Act of 1933 to preempt the states from imposing any registration or qualification requirements on any federally registered investment company.

For these reasons, we request that the CFTC direct the NFA to adopt, in coordination with the SEC, a rule implementing a process for review of fund annual updates that is similar to the process for annual updates currently utilized for open-end funds under Rule 485. Any rule adopted by the Commission for the review of fund updates must address the potential issues that could arise when filings must be made with both the SEC and the NFA. In order to avoid the possibility that one regulator could provide a comment that is inconsistent, or conflicts, with the requirements administered by the other regulator, the NFA and the SEC must harmonize their disclosure review processes for those funds whose advisers will be required to register as CPOs, and provide guidance, as necessary, regarding the dual review process, so that funds are not caught between two regulators. One potential approach could be to expressly limit the NFA's review to disclosure that is required by the CFTC and/or the NFA. While this would not resolve all potential issues arising from dual review, it could limit the likelihood of a conflict arising. Such a review process could reduce operational and legal risks and could limit the increased costs associated with dual review of disclosure documents by the NFA and the SEC.

In developing a harmonized review process, the CFTC could look, as a starting point, to its "instant filing" procedure under which a CPO or CTA that previously has filed a disclosure document that has been accepted may file subsequent disclosure documents that qualify for an expedited review (generally 3 days).[120] The NFA continued this procedure when it assumed the disclosure document review process from the CFTC. According to the NFA Disclosure Guide, instant filing is available for disclosure documents that do not contain material changes from a previous filing that NFA has accepted, new pool offerings that are substantially similar to disclosure documents of other pools operated by the CPO that NFA has accepted, and pools that will be operated pursuant to an exemption under CFTC Rule 4.12(b).[121] While the "instant filing" procedure may expedite the review of a filing by the NFA, it only applies in limited circumstances and it does not provide certainty to funds that continuously offer their shares that they will have an updated prospectus and SAI that is effective by the required date.

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[119] Rule 421(b) under the Securities Act.

[120] *Instant Filing Procedure for Commodity Pool Operator and Commodity Trading Advisor Disclosure Documents*, CFTC Staff Advisory No. 95-44, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,385 (Apr. 20, 1995).

[121] National Futures Association, *Disclosure Documents: A Guide for CPOs and CTAs* at 45 (Oct 2010).

We also request relief from Rules 4.26(c)(1)(i) and (d)(2) under the CEA, which require commodity pools to file amendments to the disclosure document within 21 calendar days of the date upon which the CPO first knows or has reason to know of a defect requiring the amendment and to deliver updated disclosure documents correcting any defect to *existing investors* within 21 calendar days. The federal securities laws, by contrast, generally require that shareholders have all material information at the time they purchase and sell fund shares. This allows a fund to assess the materiality of any change to its registration statement and determine the appropriate timeframe in which to provide the revised information. Complying with Rule 4.26 would significantly disrupt established disclosure document delivery practices and would significantly increase costs to funds and their shareholders. Accordingly, we believe that funds should be able to deliver supplements consistent with the federal securities laws, rather than Rule 4.26.

F. Registration Statement Requirements for Funds that Have Concluded an Offering of Shares

The Proposal would extend to funds the relief from the CFTC's disclosure document delivery and acknowledgement requirements currently provided to exchange-traded commodity pools ("commodity ETFs").[122] In particular, CPOs of commodity ETFs can comply with the disclosure document delivery and acknowledgement requirements by making such documents available on their websites. We seek confirmation that a closed-end fund would only be required to maintain an updated disclosure document on a website in accordance with Rule 4.12(c) under the CEA for the period of time during which the fund is engaged in an offering of shares, and would not be required to prepare updates to its disclosure document after the offering has concluded. We discuss this issue in more detail below.

Closed-end funds generally do not continuously offer their shares for sale. Rather, closed-end funds typically sell a fixed number of shares at one time (whether in an initial public offering or a follow-on offering), after which the shares generally trade on a secondary market. When the CFTC adopted paragraph (c) of Rule 4.12, it stated that a "CPO is obligated to keep the Commodity ETF's disclosure document current and posted on the CPO's Web site, regardless of whether the CPO of the Commodity ETF has characterized its pool as an 'open-end' or 'closed-end' fund."[123] We agree that this

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[122] *See* Rule 4.12(c) under the CEA; *see also* 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, 76 Fed. Reg. 28641 (May 18, 2011) (adopting, among other things, new paragraph (c) to Rule 4.12) ("Commodity ETF Release").

[123] Commodity ETF Release, *supra* note 122, at 28642. Closed-end funds typically provide disclosure about the funds on websites established by their advisers or distributors because closed-end funds themselves generally do not have websites. We note that, similarly, open-end fund websites may be maintained by parties other than the fund or the fund's adviser (*e.g.,* the fund's distributor).

requirement should apply to open-end and closed-end funds alike that are engaged in an offering of shares to investors. However, the CFTC's statement could be read to mean that all funds, even those closed-end funds that have concluded an offering many years (or decades) prior, must maintain an updated disclosure document on a website. We believe that the CFTC did not intend this result because there is no regulatory purpose served by requiring a closed-end fund to maintain or deliver an updated disclosure document that is intended for *prospective* participants when the fund is not currently offering shares for investment.

Moreover, closed-end funds already provide updated information about their investment strategies, holdings, risks, performance and other matters to existing investors through annual and semi-annual reports as required by the federal securities laws.[124] Listed closed-end funds also are subject to additional disclosure requirements, such as those requiring NYSE-listed funds to promptly issue press releases upon the occurrence of certain material events.[125] In addition, closed-end funds typically provide information about their strategies, holdings, performance, management team, and risks on websites.[126] Because existing investors already have extensive information about the fund, requiring a closed-end fund to prepare and deliver an updated disclosure document for purposes of providing information to existing investors would impose a new, unnecessary, and substantial additional regulatory burden on closed-end funds.

Clarifying the meaning of Rule 4.21 under the CEA as we recommend would be consistent with the plain language of Rule 4.21, and recent CFTC interpretations. In particular, Rule 4.21 only contemplates delivery of disclosure documents to "prospective" participants purchasing shares or interests directly from the pool,[127] and the CFTC has stated that secondary market transactions are not subject to the disclosure document delivery requirements under Rule 4.21.[128] After the conclusion of a

[124] *See, e.g.*, Rule 30e-1 under the Investment Company Act and Item 24 of Form N-2.

[125] *See, e.g.,* Section 202.05 of the NYSE Listed Company Manual (stating that a "listed company is expected to release quickly to the public any news or information which might reasonably be expected to materially affect the market for its securities").

[126] *See supra* note 123.

[127] *See* Rule 4.21(a) (stating generally that a "commodity pool operator registered or required to be registered under the [CEA] must deliver or cause to be delivered to a *prospective* participant in a pool that it operates or intends to operate a Disclosure Document for the pool prepared in accordance with §§4.24 and 4.25 by no later than the time it delivers to the *prospective* participant a subscription agreement for the pool") (emphasis added).

[128] *See* 44 Fed. Reg. 25658, 25659 (May 2, 1979) (stating that "[t]he operator of a commodity pool is not required to provide a Disclosure Document [Rule 4.21] to a person who purchases a unit of participation or interest in the pool from a pool participant if the pool operator did not solicit the purchase"), an interpretation which the staff has applied in recent no-action letters regarding commodity ETFs. *See, e.g.,* Staff Letters 10-06 (March 29, 2010), 06-27 (September 26, 2006) and 05-19 (November 10, 2005); *see also* Commodity ETF Release, *supra* note 122, at 28642 (stating that "the [CFTC] believes

listed closed-end fund offering, purchases and sales of fund shares are limited solely to secondary market transactions, as the fund is no longer issuing shares.

This clarification also would be consistent with federal securities laws applicable to closed-end funds. For example, because closed-end funds generally do not continuously offer their shares, the registration statement updating requirements under the Securities Act generally do not apply after an offering has concluded.[129] Similarly, closed-end funds are exempt from the requirement to annually update their registration statements under the Investment Company Act, provided that such funds deliver an annual report to existing investors.[130]

It does not make sense to require a fund to update and deliver its disclosure document when it may not legally sell shares to prospective investors. In addition, it would substantially and unnecessarily increase costs for the adviser, fund, and ultimately, fund investors. Given the extensive information already required to be provided to existing shareholders, which serves their informational purposes, additionally requiring an updated disclosure document serves no discernable benefit for investors. For all of these reasons, we urge the Commission to clarify that its disclosure document updating and delivery requirements would not apply to any fund that has concluded an offering of its shares.[131]

G. Underlying Funds for Variable Insurance Products

The Proposal does not address application of the CFTC's rules to those funds ("underlying funds") that underlie variable annuities and variable life insurance contracts ("variable products") issued by state-regulated insurance companies. These underlying funds are a significant component of the

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that secondary market transactions to which a CPO or any person acting as the agent of the CPO is not a party do not trigger the requirement for the CPO to deliver a Disclosure Document or to obtain a signed acknowledgment of receipt"). Of course, the delivery requirement would apply if a closed-end fund issued new shares in a secondary offering.

[129] *See generally* Section 5 of the Securities Act. *See also* Registration Form for Closed-End Management Investment Companies, SEC Release Nos. 33-6842 and IC-17091 (July 28, 1989), 54 Fed. Reg. 32993 (Aug. 11, 1989) (proposing amendments to Rule 8b-16 under the Investment Company Act and stating that closed-end funds do not generally make a public offering of shares after the initial offering and therefore update their registration statements only as required under the Investment Company Act and not the Securities Act); and Registration Form for Closed-End Management Investment Companies, Release Nos. 33-6967 and IC-19115 (Nov. 20, 1992), 57 Fed. Reg. 56826 (Dec. 1, 1992) (adopting amendments to Rule 8b-16 under the Investment Company Act).

[130] *See* Rule 8b-16(b) under the Investment Company Act (which requires a closed-end fund's annual report to include, among other information, any material changes to the fund's investment objectives or policies, any material changes in the principal risk factors associated with investment in the fund, and any changes to the identity of the persons who are primarily responsible for the day-to-day management of the fund's portfolio).

[131] The CFTC's failure to consider the costs and benefits of potentially requiring disclosure document updates when a fund is not engaged in a current offering of shares indeed may reflect its view that this updating is not required. The CFTC's cost-benefit analysis, for example, in no way considers these costs. *See supra* Section II.C.1.

fund industry.[132] The Commission cannot impose regulatory requirements on advisers to underlying funds that must register as CPOs without first acknowledging and addressing the unique issues that would be faced by underlying funds in complying with the CFTC's rules.[133]

Underlying funds are purchased as part of a "two-tiered" structure, under which insurance company separate accounts, not retail customers (who are contract owners of the variable products), purchase shares of the funds.[134] As a result, underlying funds and their advisers do not typically have any relationship or contact with contract owners. An underlying fund serves as but one component of the variable product, which has its own fees and charges, withdrawal restrictions, and other features such as guarantees and investment restrictions. Variable products are sold by the insurance company distribution network, by means of a separate product prospectus prepared in accordance with special forms designed for that purpose, and the products and issuers themselves are highly regulated, both by the SEC and under state law. Allocation of responsibilities for securities law compliance and other aspects of the two-tiered structure are typically governed by a detailed agreement between the insurance company parties and the underlying fund parties, called a fund participation agreement.

Because of this structure, and the necessary coordination required between the two tiers of the variable product, the extra layer of substantive and operational requirements that would be imposed by the Proposal may be unworkable for underlying funds and at best would pose logistical problems that are even more pronounced for underlying funds than for funds that are not sold as part of an insurance product. For example, those aspects of the Proposal that would require the posting of information to a website maintained by the CPO is at odds with the current infrastructure for these products, in which the website for the variable product and underlying fund documents is often maintained by the insurance company or its distributor, not the underlying fund or its adviser or distributor.[135] Similarly, because the insurance company distributor, not the underlying fund, controls the physical production and distribution of insurance contract and fund prospectuses used in sales, the operational logistics of

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[132] As of December 31, 2011, assets in underlying funds accounted for $1.3 trillion of the $11.6 trillion of industry open-end fund assets.

[133] Section 553 of the APA requires that an agency provide the public with adequate notice of the substance of a proposed rule and an opportunity to provide meaningful comment. *See Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994) (court stated that "agencies must include in their notice of proposed rulemaking 'either the terms or substance of the proposed rule or a description of the subjects and issues involved' . . . [a]nd they must give 'interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.'" (internal citations omitted); *see also* Business Roundtable v. SEC, 647 F.3d at 1148.

[134] We note that Rule 4.5 was not amended with respect to the ability of insurance companies to rely on the exclusion for their separate accounts, as qualifying entities. *See* Rule 4.5(a) and (b) under the CEA.

[135] *See infra* note 154.

coordinating any required NFA review[136] of changes in underlying fund documents with the schedule and processes of the insurance company distributor would impose costs and burdens that the CFTC does not appear to have considered. This concern is particularly acute for underlying funds that are offered in an unaffiliated insurance company's product. Moreover, some of the CFTC's mandated disclosures in its disclosure document, such as risk disclosures about redemption limitations,[137] are designed for direct investors in commodity pools and, if they were included in an underlying fund prospectus, could be confusing, or even misleading, for prospective contract owners of variable products.[138]

H. Periodic Reporting Requirements

As noted in Section III, funds are subject to requirements under the Investment Company Act to provide periodic reports to shareholders and to file publicly both these periodic reports, as well as others designed to satisfy regulatory reporting requirements, with the SEC. These requirements concern information comparable to that required from registered CPOs under the CEA,[139] and, for the reasons described below, the SEC filings should be deemed to satisfy the periodic reporting requirements of advisers to registered investment companies that must register as CPOs with the CFTC.

1. Periodic Reports to Shareholders

The rules under the CEA, like the rules under the Investment Company Act, require that periodic reports be delivered to existing shareholders. Both the SEC and the CFTC require the delivery of annual reports to shareholders containing audited financial statements and other information.[140] The SEC also requires the delivery of semi-annual reports to shareholders containing

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[136] *See supra* Section V.E.

[137] *See* Rule 4.24(b) under the CEA.

[138] The SEC received similar comments from insurance companies, underlying funds, and other industry groups in connection with its summary prospectus rulemaking and, in the final rules, permitted underlying funds to omit or modify certain otherwise required legends or information items as appropriate. "[W]e are modifying the proposal to permit funds that are used as investment options for retirement plans and variable insurance contracts to modify or omit certain information required in the new summary section. This modification addresses commenters' concerns that certain information is not relevant to those funds." Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, *supra* note 16.

[139] *See, e.g.,* Rule 4.22 under the CEA and Form CPO-PQR.

[140] *See* Rule 30e-1 under the Investment Company Act, Item 27(b) of Form N-1A and Item 24(4) of Form N-2 and Rule 4.21(c) under the CEA.

unaudited financial statements.[141] These annual and semi-annual reports, which include a schedule of the fund's investments and other information, must be transmitted to shareholders and certified and filed with the SEC not more than 60 days after period end.[142] In addition, the rules under the Investment Company Act require a fund to publicly file a report 60 days after the close of the first and third quarters that contains a schedule of the fund's investments and other disclosures.[143] The CFTC, however, requires that CPOs of pools with net assets of more than $500,000 at the beginning of the pool's fiscal year deliver to pool participants a *monthly* account statement not more than 30 days after period end that includes an unaudited statement of operations and a statement of changes in net assets.[144] The vast majority of funds would meet the rule's $500,000 threshold.[145] The statement of operations and statement of changes in net assets included in the monthly account statement are substantially identical to the statements included in a fund's semi-annual and annual report to shareholders, except for the treatment of brokerage commissions, as described below.[146]

In our April 2011 Letter, we explained that requiring funds and advisers to comply with the monthly reporting requirement would be unduly burdensome and costly because funds are not currently required to create monthly reports, most registered investment companies redeem their shares on a daily basis, and shares are often held in book-entry form.[147] We requested that funds not be required to prepare and deliver monthly account statements but instead continue to satisfy the periodic reporting requirements under the Investment Company Act.

Despite our request and explanation in the April 2011 Letter, the CFTC has determined not to propose relief with respect to the frequency or timing of the monthly account statement, "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."[148] The CFTC states that,

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[141] *See* Rule 30e-1 under the Investment Company Act, Item 27(c) of Form N-1A and Item 24(5) of Form N-2.

[142] *See* Rules 30a-2 and 30b2-1 under the Investment Company Act and Form N-CSR under the Investment Company Act.

[143] *See* Rules 30a-2 and 30b1-5 under the Investment Company Act and Form N-Q under the Investment Company Act.

[144] *See* Rule 4.22(a) under the CEA.

[145] Of the 10,484 funds for which ICI maintains data, only 39 (less than 0.4%) have assets of $500,000 or less.

[146] From an accounting perspective, commodity pools meet the definition of an investment company and follow the same accounting provisions as registered investment companies. These accounting provisions are found in FASB Accounting Standards Codification (ASC) 946, *Financial Services—Investment Companies.*

[147] April 2011 Letter, *supra* note 5.

[148] Proposal, *supra* note 2, at 11347.

because the Proposal would permit funds to satisfy the delivery requirement for the monthly account statements by making those statements available on their internet websites, their burdens associated with preparing such account statements would be substantially reduced.[149]

We strongly disagree with the Commission's conclusion as to the burdens that would be imposed by the requirement to create monthly account statements. The Commission provides no basis or data to support its statement regarding the overall lack of burden, nor has it demonstrated why the periodic reports provided by funds under the Investment Company Act are not sufficient to satisfy its regulatory objectives.

We have surveyed our members regarding the burdens that would be imposed in preparing monthly account statements, and they believe the obligation to create such statements would involve considerable burdens and costs. Among other things, the monthly account statements would require funds to break out brokerage commissions on portfolio trades as an expense in the statement of operations. Generally accepted accounting principles, however, permit brokerage commissions to be included in the cost basis of the purchased securities and deducted from proceeds of sales, and therefore reflected in the gains and losses on investment securities.[150] As a result, funds do not currently break out brokerage commissions, and doing so would be inconsistent with their treatment of these costs under generally accepted accounting principles.[151] Funds also would be required to incur the additional cost of providing the affirmation required by Rule 4.22(h) on a monthly basis, and also would incur costs and operational considerations associated with producing the financial statements and posting and maintaining them on a website on a monthly basis.

The periodic reporting requirements under the Investment Company Act provide information and protections to fund shareholders that are comparable to those provided by the rules under the CEA, and the Commission has failed to present any facts to the contrary. Indeed, in certain respects, the reporting requirements under the Investment Company Act are more comprehensive than the monthly account statement requirement and annual report requirement under Rule 4.22. For example, funds are required to disclose all investment securities and all open derivatives contracts publicly on a quarterly basis. By contrast, neither the statement of operations nor its statement of changes in net assets required by the CFTC's monthly account statement provide any information on securities holdings or derivatives contracts.[152] In addition, fund net asset value and total return information are

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[149] *Id.* at 11347-48.

[150] FASB ASC 946-320-40-1.

[151] Funds must disclose the aggregate amount of brokerage commissions paid for each of the three most recent fiscal years. *See, e.g.*, Item 21(a) of Form N-1A.

[152] Publicly offered commodity pools make similar disclosures on a quarterly basis, but this requirement stems from the federal securities laws, as administered by the SEC.

readily available in a standardized format in the general media and on websites, further diminishing the utility of monthly account statements.

For these reasons, we reiterate our request that funds satisfying the periodic reporting requirements under the Investment Company Act be granted relief from the monthly account statement requirements under the CEA. Such relief should be subject to the following conditions, which are generally analogous to (but would be in lieu of) those in the Proposal:[153]

- Keeping the annual and semi-annual reports sent to shareholders readily accessible on a specified website for a period of at least 30 days following the date they are first posted on the website;
- Indicating in the fund's prospectus or SAI that the fund's annual and semi-annual reports will be readily accessible on the specified website; and
- Including in the prospectus or SAI the Internet address where the fund's annual and semi-annual reports are available.[154]

2. Regulatory Reporting Requirements

We object to the requirement under new Rule 4.27 that CPOs, including fund advisers that must register as CPOs, file periodic reports with the Commission on Form CPO-PQR. As Commissioner Sommers points out in her dissenting statement to final Rule 4.5, the Dodd-Frank Act does not direct the Commission to require reporting by registered investment companies for systemic risk purposes, and the Commission has not established why it needs this information, how it will use it, or even that such alleged systemic risk exists.[155] Furthermore, registered investment companies already provide extensive information, both in regulatory reports to the SEC and reports filed with the Commission, that effectively furthers the same purpose as the Form CPO-PQR. We discuss these issues further below.

The Commission has failed to establish a basis to impose systemic risk reporting on registered investment companies. The Commission is required by the APA to have a basis for the rules it adopts, and provide the public with an adequate explanation of its reasoning.[156] The Commission has not met this obligation in imposing the requirements of new Form CPO-PQR on fund advisers. The

[153] *See* Proposed Rule 4.12(D)(2)(ii)(A).

[154] The April 2011 Letter recommended that the annual and semi-annual reports be accessible on "the adviser's website." We have modified our recommendation slightly in order to acknowledge that fund websites may be maintained by parties other than the fund's adviser (*e.g.,* the fund's distributor).

[155] Sommers Dissent, *supra* note 46.

[156] Business Roundtable v. SEC, 647 F.3d at 1148.

Commission states, without explanation, in the Rule 4.5 Adopting Release that "[t]he sources of risk delineated in the Dodd-Frank Act with respect to private funds are also presented by commodity pools" and that, "[t]o provide the Commission with similar information to address these risks [such as the information required by the Dodd-Frank Act to be reported for private funds], the Commission has determined to require registration of certain previously exempt CPOs and to further require reporting of information comparable to that required in Form PF, which the Commission has previously adopted jointly with the SEC."[157] We agree with Commissioner Sommers that "this overstates the case" and that "Congress was aware of the existing exclusions and exemptions for CPOs when it passed Dodd-Frank and did not direct the Commission to narrow their scope or require reporting for systemic risk purposes."[158]

Furthermore, the Commission does not appear to appreciate the significant difference between private funds, for which Form PF was designed, and registered investment companies, which do not trigger Form PF reporting requirements.[159] The Commission has not made any attempt to demonstrate that registered investment companies raise systemic risk concerns, nor has it demonstrated how requiring fund advisers to file information in a new reporting form would address those purported risks.

Form CPO-PQR requires registered CPOs to file, on an annual or quarterly basis, depending on the CPO's assets under management, detailed information regarding size, strategy, and investment positions held by pools advised by the CPO. The form includes three schedules, A, B, and C, the latter two of which are required to be completed depending on the size of the CPO. The schedules require very detailed information about investment positions held by the CPO's pools. The Commission has made clear that advisers to registered investment companies that must register as CPOs would be subject to the reporting requirements of Form CPO-PQR.[160] Registered investment companies, however, already publicly file a semi-annual reporting form with the SEC, Form N-SAR, that requires generally comparable information to that required by CPO-PQR.[161] This information includes, among

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[157] Rule 4.5 Adopting Release, *supra* note 4, at 11253.

[158] Sommers Dissent, *supra* note 46.

[159] Chairman Gensler noted in his recent remarks to the Chamber of Commerce that that "if you do enough business in futures and swaps, yes, you need to register with the CFTC, but we are more than happy to use the forms that you use over at the SEC – these forms are called PFs – but we're glad to use – if you file them with the SEC, just send the same stuff over – the PFs." *See* The Honorable Gary Gensler, Chairman, Remarks to the U.S. Chamber of Commerce Sixth Annual Capital Markets Summit, *supra* note 10. In fact, advisers to registered investment companies are *not* required to report on Form PF, which primarily solicits information about private funds.

[160] Rule 4.5 Adopting Release, *supra* note 4, at 11266.

[161] *See* April 2011 Letter, *supra* note 5, at Appendix A, vii, comparing the requirements of Form N-SAR and Form CPO-PQR. In addition, other disclosure and reporting forms, such as annual and semi-annual reports to shareholders, and

other things, identifying information about the funds, information about portfolio investments and positions, subscriptions and redemptions, investment strategies, liabilities from borrowing and other portfolio management techniques, and information regarding brokerage transactions.[162] Furthermore, registered investment companies, like other participants in the commodity markets, are subject to the Commission's new swap data reporting requirements, which would capture an important portion of the data the Commission requests in Form CPO-PQR,[163] and the Commission's large trader and other reporting rules.[164]

We believe that, given the information registered investment companies currently file publicly with the SEC, as well as information registered investment companies currently report to the Commission, it is unnecessary for advisers to registered investment companies to file Form CPO-PQR. In adopting Form CPO-PQR as it applies to registered investment companies, the Commission failed to conduct an analysis of whether the information registered investment companies currently provide is sufficient to meet its regulatory objectives, as is required by the APA and the President's Executive Orders on rulemaking.[165] The CFTC must at least undertake such a review before subjecting registered investment companies to the requirements of Form CPO-PQR.

I. Books and Records

1. Location

CFTC rules require that a CPO maintain required pool books and records at its main business address.[166] The Proposal would allow CPOs to maintain these records with specified third parties, subject to certain conditions. The Commission first suggested this approach in its January 2011 release proposing amendments to Rule 4.5. In our April 2011 Letter, we explained why this proposed relief should be broadened to accommodate current recordkeeping practices in the fund industry. We briefly reiterate these arguments and again request that the Commission refrain from imposing different recordkeeping requirements on funds and their advisers.

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quarterly schedules of investments, filed by registered investment companies would provide other information required by Form CPO-PQR.

[162] *Id.*

[163] *See Real Time Public Reporting of Swap Transaction Data*, 77 FR 2909 (Jan. 20, 2012); *Swap Data Recordkeeping and Reporting Requirements*, 77 FR 2136 (Jan. 13, 2012). As noted above, they also are subject to the Commission's large trader reporting rules, which provides another important source of data already available to the Commission.

[164] *See* Parts 15-21 of the CFTC's Regulations.

[165] Am. Equity Life Ins. Co. v. SEC, 613 F.3d at 166; *Cumulative Effects of Regulations*, *supra* note 39.

[166] *See* Rule 4.23 under the CEA.

The SEC permits funds and advisers to maintain their records with certain third parties.[167] A fund is required to disclose in its registration statement the name and address of each person that maintains the fund's required books and records.[168] An investment adviser is also required to disclose on its Form ADV each entity that maintains its required books and records, including the location of the entity, and a description of the books and records maintained at that location.[169]

Similarly, if the fund has a subadviser that is registered with the CFTC as a CTA, it and the registered investment company it advises should be permitted to represent to the CFTC that the disclosure in Form ADV and fund registration statement will include disclosure of the names and locations of any third party service providers that maintain books and records as required by Rule 4.33 under the CEA. Such a CTA serving as a subadviser should also be permitted to maintain books and records on behalf of a registered investment company it advises, for purposes of Rule 4.23 under the CEA, to the same extent as if it were the CPO of the fund.[170]

As we discussed in our April 2011 Letter, funds often maintain their books and records with professional service providers beyond those the CFTC has included in its proposed exemptive relief (*e.g.*, professional records maintenance and storage companies). In addition, fund shareholder records typically are maintained by a fund's transfer agent, rather than the fund or its adviser. If the Commission does not broaden its proposed relief to accommodate these recordkeepers, many advisers would be forced to change their existing recordkeeping arrangements.[171] We therefore request that the Commission's relief apply to professional records maintenance and storage companies, transfer agents, and other companies that are commonly used for records maintenance in the fund industry. This

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[167] *See, e.g.,* Rule 31a-3 under the Investment Company Act (permitting a fund to use a third party to maintain books and records on its behalf, if the fund and the third party enter into a written agreement specifying that the records are the property of the fund and stating that such records will be surrendered promptly on request). A registered investment adviser may keep records with administrators, distributors, custodians, banks, broker-dealers and/or futures commission merchants as well as with other third parties under certain conditions (*e.g.,* the adviser has ready access to the records and the third party agrees to certain undertakings including retaining the records for up to six years). *See, e.g.,* ABA Subcommittee on Private Investment Entities, SEC No-Action Letter (Dec. 8, 2005); and First Call Corporation, SEC No-Action Letter (Sept. 6, 1995).

[168] *See* Item 33 of Form N-1A and Item 32 of Form N-2.

[169] *See* Item 1(L) of Part 1A of Form ADV and Section 1.L. of Schedule D of Part 1A of Form ADV.

[170] We also request relief from the requirements of Rule 4.23(a)(4) under the CEA, which requires a CPO to maintain a ledger or other equivalent record for each participant in the pool. Investment company shares typically are held through omnibus accounts or intermediaries.

[171] Of the respondents to our member survey that will be required to register as a CPO, more than one third use a recordkeeper for the funds they manage that is not covered by the exemptive relief set forth in the Proposal. *See* Appendix A.

approach would in no way reduce protections for investors or compromise the Commission's regulatory objectives.

2. Investor Access

We also request that the Commission provide relief to fund advisers from the requirement under Rule 4.23 under the CEA that investors be provided access to the adviser's books and records. Concerns about the implications of this requirement for funds and their advisers were discussed at length during the July 2011 Roundtable,[172] and also are addressed in ICI's letter to the Commission as part of the record for the July 2011 Roundtable.[173] We continue to believe that investor access to such books and records would violate the SEC's rules on "selective disclosure," or disclosure only to certain third parties, of a fund's non-public investment holdings.

Registered investment advisers are required to maintain policies and procedures to prevent the misuse of material, nonpublic information, which may include information about current holdings, valuations of, and transactions in, instruments held by funds they manage.[174] Mutual funds are required to disclose in their registration statements and on their websites their policies and procedures with respect to disclosure of the fund's portfolio holdings and any ongoing arrangements to make available information about the fund's portfolio securities.[175] The SEC is concerned about selective disclosure because it "can facilitate fraud and have severe, adverse ramifications for a fund's investors if someone uses . . . portfolio information to trade against the fund, or otherwise uses the information in a way that would harm the fund."[176] The SEC takes the view that "[d]ivulging nonpublic portfolio holdings to selected third parties is permissible only when the fund has legitimate business purposes for doing so and the recipients are subject to a duty of confidentiality, including a duty not to trade on the nonpublic information,"[177] a duty to which fund investors typically would not be subject.

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[172] Transcript of July 2011 Roundtable at 182-184, available at http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission27_070611-trans.pdf.

[173] July 2011 Letter, *supra* note 5.

[174] Section 204A of the Advisers Act.

[175] *See* Items 9(d) and 16(f) of Form N-1A.

[176] *See Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Holdings*, SEC Release Nos. 44-8408 and IC-26418 (Apr. 16, 2004), 69 Fed. Reg. 22300, 22300 (Apr. 23, 2004). As discussed above, funds are required to disclose their portfolio holdings publicly in a quarterly report that is filed with the SEC 60 days after the close of the first and third quarters, as well as in the annual and semi-annual reports to shareholders they file publicly with the SEC.

[177] *Id.* at 22306.

We understand, from the discussion at the July 2011 Roundtable, that commodity pool investors have not often exercised their right to access a CPO's books and records. Nevertheless, the concern regarding selective disclosure is serious. It is a greater risk with respect to open-end funds than commodity pools because open-end funds, unlike commodity pools, offer daily liquidity and therefore are more vulnerable to market timing and other practices that rely on the ability to arbitrage the price of an open-end fund's portfolio holdings. Moreover, providing access to an open-end fund's holdings can result in front-running of those holdings, to the detriment of the fund's shareholders.[178] We therefore again request that funds and advisers not be subject to the investor access provision of Rule 4.23.

VI. Request for Reproposal and Adequate Compliance Period

As outlined above, the Proposal has fundamental shortcomings and requires significant additional modification, which will necessitate a reproposal by the CFTC (alone or jointly with the SEC). We respectfully request that the CFTC carefully consider the concerns raised in our letter and by other commenters before determining how to proceed with this rulemaking. Any reproposal should, of course, address the views expressed by commenters.

At such time as the CFTC adopts any rules governing the compliance obligations of fund advisers required to register as CPOs, it will be critical that such funds and advisers be given adequate time to change their disclosures, operations, and policies and procedures as necessary to comply with such rules. It is our hope that the Commission would provide a substantial transition period for compliance with such rules, although it is impossible to predict at this time what that period should be. Accordingly, the length of such a transition period should be a specific request for comment in any reproposal.

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[178] Preserving the confidentiality of information regarding funds' holdings has been a longstanding concern for ICI and its members. Any premature or improper disclosure of this information can adversely impact the price of a stock that the fund is buying or selling. *See, e.g.,* Letters from Paul Schott Stevens, President, Investment Company Institute, to Christopher Cox, Chairman, Securities and Exchange Commission, dated Sept. 14, 2005, Aug. 29, 2006, and Sept. 29, 2008, *available at* http://www.ici.org/pdf/comment_leakage_05.pdf, http://www.ici.org/pdf/comment_leakage_06.pdf, http://www.ici.org/pdf/comment_leakage_08.pdf.

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The ICI appreciates the opportunity to comment on the Proposal. If you have questions or require further information, please contact me at 202/326-5815, Sarah A. Bessin at 202/326-5835, or Rachel H. Graham at 202/326-5819.

Sincerely,

/s/ Karrie McMillan

Karrie McMillan
General Counsel

cc: The Honorable Gary Gensler, Chairman
The Honorable Jill E. Sommers, Commissioner
The Honorable Bart Chilton, Commissioner
The Honorable Scott D. O'Malia, Commissioner
The Honorable Mark Wetjen, Commissioner

The Honorable Mary L. Schapiro, Chairman, SEC
The Honorable Elisse B. Walter, Commissioner, SEC
The Honorable Luis A. Aguilar, Commissioner, SEC
The Honorable Troy A. Paredes, Commissioner, SEC
The Honorable Daniel M. Gallagher, Commissioner, SEC

Eileen Rominger, Director
Douglas Scheidt, Associate Director and Chief Counsel
Division of Investment Management, SEC

INVESTMENT COMPANY INSTITUTE

Appendix A

ICI Cost-Benefit Analysis of Proposed Disclosure Requirements Under Rule 4.5 Harmonization Proposal

1. Introduction and Scope of Survey

In February 2012, the Commodity Futures Trading Commission ("CFTC" or "Commission") adopted amendments to Rule 4.5 under the Commodity Exchange Act ("CEA"), as a result of which investment advisers to certain registered investment companies ("funds") will be required to register with the CFTC as commodity pool operators ("CPOs") and comply with attendant regulations.[1] In conjunction with these amendments, the CFTC issued a proposal (the "Harmonization Proposal") to "harmonize" certain elements of the new compliance obligations for these funds and advisers with the existing regulatory framework established by the U.S. Securities and Exchange Commission ("SEC"), the primary regulator of these funds and their advisers.[2] Most notably, the Harmonization Proposal would essentially overlay the CFTC's disclosure and reporting requirements for CPOs onto the SEC's current disclosure and reporting framework for funds and their advisers.

In conjunction with preparing a comment letter to the CFTC on the Harmonization Proposal,[3] the Investment Company Institute ("ICI") undertook an independent analysis to assess the costs to funds and advisers of compliance with four general areas related to the Harmonization Proposal: (1) evaluation of which funds and advisers would be subject to the disclosure and reporting requirements; (2) general disclosure requirements under Rule 4.24 under the CEA; (3) performance disclosure requirements under Rule 4.25 under the CEA; and (4) financial reporting requirements under Rule 4.22 under the CEA.[4]

Our findings demonstrated a cost to those *responding to the survey* of $21.7 million to comply initially and an additional $10.9 million to comply on an annual ongoing basis, *for just the disclosure and*

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[1] *Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations*, 77 Fed. Reg. 11252 (Feb. 24, 2012) ("Rule 4.5 Adopting Release"); *correction notice published at* 77 Fed. Reg. 17328 (Mar. 26, 2012).

[2] *Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators*, 77 Fed. Reg. 11345 (Feb. 24, 2012).

[3] *See* Letter from Karrie McMillan, General Counsel, Investment Company Institute, to David A. Stawick, Secretary, Commodity Futures Trading Commission, dated April 24, 2012 ("April 2012 Letter").

[4] A copy of the survey is provided as Appendix B to the April 2012 Letter.

reporting requirements discussed in the Harmonization Proposal. **The analysis was *not* intended to capture all of the costs associated with the amendments to Rule 4.5.** As discussed in more detail below, because of our limited sample size and other limitations in our methodology, we believe that our findings could *substantially underestimate* the expected costs for the disclosure and reporting obligations of funds and their advisers stemming from the Rule 4.5 amendments. We believe these costs could be as high as $50 million initially and $25 million on an annual ongoing basis for the industry as a whole, if advisers to funds that did not respond to the survey have the same incidence of triggering CPO registration requirements as those that did respond.[5]

In addition to the disclosure and reporting requirements, *all* fund advisers would have to evaluate *all* of their funds according to the trading and marketing tests to ascertain whether they could rely on Rule 4.5. Altogether, the costs to the industry to apply the trading and marketing tests could be as high as $15.2 million initially and $8.8 million on an annual ongoing basis.

In sum, the cost to the industry just to apply the trading and marketing tests and comply with the disclosure and reporting requirements could be as high as $65 million initially and $33.8 million on an annual ongoing basis.[6]

Scope of the Survey

ICI developed a survey designed to assess the costs to funds and their advisers of compliance with four general areas related to the Harmonization Proposal mentioned above. For each of these areas, the survey requested estimates of the number of hours and dollar costs necessary to comply with the required disclosure on an initial and annual ongoing basis. We received information from 42 fund advisers, which together offer 4,188 long-term (equity, bond, and hybrid) mutual funds (including funds of funds), closed-end funds, and exchange-traded funds registered under the Investment Company Act of 1940 ("ICA"). These advisers accounted for 43 percent of all funds and 65 percent of total net industry assets (including funds of funds) as of December 2011.

With the exception of the initial evaluation as to which funds and advisers would become subject to the disclosure and reporting requirements, which must be made for *all* funds, we elected not to extrapolate our findings to the industry at large. Because the use of derivatives varies substantially by

[5] Indeed, as Congress scores legislation, these ongoing costs could amount to $250 million over a 10-year period. If we consider the present value of the ongoing costs in perpetuity and discounted at the 20-year risk-free rate, these ongoing costs would amount to $800 million.

[6] Again, considering the present value of the ongoing costs in perpetuity and discounted at the 20-year risk-free rate, these ongoing costs would amount to over $1 billion.

adviser and fund investment objective, we could not be certain that survey respondents reflected a representative sample of the entire industry, and we did not want to overestimate the costs to the industry as a whole. Thus, the cost estimates for the disclosure and financial reporting requirements set out in the tables below reflect *only* the aggregate costs for the funds that responded to the survey. As we note throughout the discussion, however, these costs could be *more than twice as much* for the industry as a whole, if the advisers to funds that did not respond to our survey were to have the same incidence of triggering CPO reporting requirements as those funds that did respond.

Limitations of the Survey

As noted above, we designed this survey to capture the costs to funds and advisers of *only* the disclosure and reporting obligations contemplated by the Harmonization Proposal. As a result, a number of costs are not factored into our findings. These costs fall into two broad categories:

(1) Additional costs associated with the Harmonization Proposal, including, but not limited to:

- Costs to registrants if, because of complications associated with a different review process and/or more than one reviewing entity, their disclosure documents are not approved in a timely fashion and they must temporarily stop issuing shares;
- Costs associated with seeking relief from the SEC, CFTC, or NFA to comply with CFTC disclosure and reporting regulations, where conflicts exist;[7]
- Costs to the CFTC, SEC, and NFA of reviewing the additional filings, including the potential for multiple reviews of each filing in the early stages, as registrants seek to develop disclosures that are acceptable to all regulators;
- Likely significant investor confusion due to inconsistent and at times inapplicable disclosures; and
- Costs associated with undoing decades of effort by the SEC to develop streamlined, effective and useful fund disclosure.

(2) Costs associated with the amendments to Rule 4.5 other than the disclosure and reporting obligations contemplated by the Harmonization Proposal, including, but not limited to:

[7] Indeed, because of the potential variability of such costs, which are in large part dependent on a regulator's willingness to grant such relief either individually or to the industry as a whole, we specifically instructed respondents to ignore these costs, *i.e.,* "do not include time or costs associated with applying for no-action relief or other guidance."

- Registration and other costs associated with becoming a CFTC-regulated entity, including registering individuals, preparing for and taking required licensing examinations, and ongoing expenses associated with oversight by the NFA and compliance with its rules;

- The costs of complying with other CFTC requirements that apply to CPOs, including new Form CPO-PQR, which will impose burdensome, redundant reporting obligations on fund CPOs and detailed recordkeeping obligations; and

- Possible impacts on the derivatives markets and other markets that may result from increasing the costs to funds of using derivatives.

We believe the results from our targeted inquiry demonstrate that the costs of compliance with only the disclosure and reporting obligations are substantial and, as discussed in more detail below and in our comment letter to the CFTC on the Harmonization Proposal,[8] *there is no evidence of a corresponding benefit.*

2. Survey Methodology

In the proposing release adopting amendments to Rule 4.5, the Commission stated that its intent was to:

> . . . adopt a harmonized compliance regime for registered investment companies whose activities require oversight by the Commission . . . [I]t is not the Commission's intention to burden registered investment companies beyond what is required to provide the Commission with adequate information it finds necessary to effectively oversee the registered investment company's derivatives trading activities. Through this harmonization, the Commission intends to minimize the burden of the amendments to § 4.5.[9]

The survey ICI sent to its members was intended to assess the costs of the Harmonization Proposal and primarily focused on three general areas related to the proposal: (1) general disclosure requirements under Rule 4.24; (2) performance disclosure requirements under Rule 4.25; and (3) financial reporting requirements under Rule 4.22.[10] For each of these areas, the survey requested estimates of the number of hours and dollar costs necessary to comply with the required disclosure on an initial and annual ongoing basis.

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[8] *See* April 2012 Letter.

[9] Rule 4.5 Adopting Release, *supra* note 1, at 11255.

[10] A copy of the survey is provided in Appendix B to the April 2012 Letter.

We received information from 42 fund advisers, which together offer 4,188 long-term (equity, bond, and hybrid) mutual funds (including funds of funds), closed-end funds, and exchange-traded funds registered under the ICA. These advisers accounted for 43 percent of all funds and 65 percent of total net industry assets (including funds of funds) as of December 2011. Thirty-three of the 42 fund advisers that responded to the survey anticipate they will be required to register as CPOs for one or more of their funds as a result of the CFTC's recent amendments to Rule 4.5. About three-quarters of these respondents provided complete information on hours and dollar costs necessary to comply with the disclosure requirements under the Harmonization Proposal, while the remainder provided partial information.

For eight of the 33 fund advisers that anticipate registering as CPOs for their funds registered under the ICA, their asset management firms are currently registered with the CFTC as a CPO for other commodity pools that they operate. Some of these advisers are familiar with the CPO disclosure requirements under Part 4 and have experience regarding the infrastructure necessary to produce the CFTC-required disclosures. Presumably, it will take these advisers less time to coordinate and establish the necessary systems. Some possibly could transfer processes and systems already in place to the ICA side of their business. Their estimated initial hours and dollar costs, which tended to be lower than other respondents, reflected this familiarity.

This is important to note because the hours and dollars cost estimates in this study are represented as a weighted average. Each adviser's per fund hour estimate and dollars per hour estimate was weighted by the ratio of the number of funds it anticipated registering to the total number of funds that expect to register across all the advisers. The eight advisers for which their asset management firms are already registered as CPOs altogether have 270 funds registered under the ICA that they expect would trigger CPO registration under amended Rule 4.5. Because these funds account for almost half of the 551 funds that respondents expect would be subject to the CFTC's regulations, *their lower initial costs are fully incorporated into the total initial cost estimates*. In addition, we use a weighted average to reflect any economies of scale in time and dollar costs of advisers that expect to have more funds subject to CFTC's regulations.

Also, total cost estimates of the disclosure and reporting requirements in the Harmonization Proposal should be viewed *as a minimum* as they reflect only the expected costs for the 551 funds that survey respondents anticipate will fail the trading and marketing tests under amended Rule 4.5. Because use of derivatives varies substantially by adviser and fund investment objective, we were unable to predict for those advisers that did not complete the survey how many of their funds would fail the trading and marketing tests, requiring additional entities to register as CPOs. **As a result, actual costs**

for the industry as a whole would be higher, perhaps more than twice what we report for the sample of 551 funds that responded to our survey.[11]

3. Costs Associated With Applying Tests Under Rule 4.5

In order to conduct an analysis of the costs that would be imposed on funds and their advisers as a result of the Harmonization Proposal, we first needed to identify the funds that would trigger registration of their advisers as CPOs. Under the recent final amendments to Rule 4.5, an adviser to a fund will have to register as a CPO if the fund fails to meet the conditions of the two trading tests described below. That is, an adviser may rely on the exclusion under Rule 4.5 if the fund meets at least one of the two trading tests. Even if a fund qualifies for the exclusion under Rule 4.5 on the basis of the trading tests, however, the CFTC may still require registration on the basis of newly adopted marketing restrictions ("marketing test"). Based on our survey, 33 fund advisers out of the 42 that responded anticipate that 551 of their funds with total net assets of $773 billion will fail the trading or marketing tests.

3.1 Trading Tests

A fund adviser will be required to register as a CPO if any of its funds fails both of the trading tests. Briefly, the trading tests evaluate a fund's aggregate required initial margin ("5% Margin Test") and its aggregate net notional value ("Net Notional Test") of positions in commodity futures, commodity options contracts, or swaps relative to thresholds specified by the Commission. Advisers of funds whose test results exceed the thresholds of both of the trading tests will be required to register as CPOs. Immediately below is more detailed information regarding the instructions and assumptions ICI provided to survey participants to use in estimating which of their funds might fail the trading tests.

- 5% Margin Test: The fund's aggregate initial margin and premiums required to establish positions in commodity futures, commodity options contracts, or swaps[12] (exclusive of (1)

[11] We received information from 42 fund advisers, which together offer 4,188 long-term (equity, bond, and hybrid) mutual funds (including funds of funds), closed-end funds, and exchange-traded funds registered under the ICA. Of these 4,188 funds, the 42 advisers who responded to our survey anticipate they would be required to register as CPOs for 551 funds—an incidence of 13 percent. If we applied this same incidence rate to the 5,628 funds that did not respond to our survey, an additional 731 funds could be subject to CFTC regulations under Part 4 and total industry costs could rise by as much as a factor of 2.3.

[12] ICI provided survey participants a list of instruments that would be captured by Rule 4.5 and assumptions for margin requirements on swaps for the purposes of applying the trading tests. Briefly, commodity futures were defined as futures contracts on *any* commodity, including physical commodities, as well as futures on financial instruments and indices. Commodity options were defined as options on the commodity itself and options on futures contracts. Survey participants

trading for "*bona fide* hedging"[13] and (2) the amount by which an option is in-the-money[14]) does not exceed five percent of the liquidation value (*i.e.*, NAV) of the fund's portfolio after taking into account unrealized profits and losses on such positions, **OR**

• Net Notional Test: The aggregate net notional value of positions in commodity futures, commodity option contracts, or swaps (exclusive of trading for *bona fide* hedging purposes) does not exceed 100 percent of the liquidation value of the fund's portfolio after taking into account unrealized profits and losses on any such positions.[15]

After applying these tests to their long-term mutual funds, exchange-traded funds registered under the ICA, and closed-end funds, 32 fund advisers anticipate that 417 of their funds with combined total net assets of $344 billion would be unable to meet the conditions of at least one of the trading tests. Three factors likely resulted in survey respondents concluding that over 400 funds would fail the trading tests: (1) the inclusion of swaps; (2) the 5 percent threshold on the trading test; and (3)

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were informed that options on commodities would now also be classified as swaps and were warned to avoid double-counting. The survey noted that the CFTC has not yet finalized its definition of "swap," but for the purposes of the survey swaps should be defined to include "traditional" swaps (an agreement, contract or transaction based upon an exchange or netting of payments tied to a notional amount of an asset or rate), options on commodities, "event" contracts, and "mixed" swaps. Survey participants were informed that security-based swaps should not be included in the definition of swap. For instruments involving currencies, survey participants were instructed to classify an instrument that solely involves an exchange of currencies as either a foreign exchange forward or a foreign exchange swap, and assume them to be exempt from the definition of "swap." However, the survey instructed participants that instruments that do not involve an exchange of currencies and settle in a single currency such as U.S. dollars, should be deemed a swap. For the purposes of the survey, participants were instructed to treat "non-deliverable" forwards as swaps. To help ensure the consistency of the data provided by respondents, ICI provided survey participants with assumptions on initial margin requirements as a percent of notional exposure for swaps as follows: (1) credit default swap with 0 to 2-year duration = 2%, (2) credit default swap with 2- to 5-year duration = 5%, (3) credit default swap with 5-year or more duration = 10%, (4) physical commodity swap = 15%, (5) equity swap = 15%, (6) foreign exchange/currency swap = 6%, (7) interest rate swap with 0 to 2-year duration = 1%, (8) interest rate swap with 2- to 5-year duration = 2%, (9) interest rate swap with 5-year or more duration = 4%, and (10) other swap not classified = 15%.

[13] ICI provided survey participants with a summary of the definitions of *bona fide* hedging that are relevant for the purposes of Rule 4.5 to transactions in financial instruments and physical commodities and also provided survey participants with examples of transactions that would, and would not, be considered *bona fide* hedging under the relevant definitions.

[14] As defined in Rule 190.01(x).

[15] Survey participants were provided examples of how to determine notional value and netting of notional value for the purposes of the Net Notional Test. For cleared swaps, survey participants were instructed to assume that the notional value was the notional amount of the swap and to net swaps cleared by the same derivatives clearing organization and where the swaps actually offset each other. For uncleared swaps, survey participants were instructed to assume that the notional value was the notional amount of the swap and to assume, for purposes of the survey, that netting of uncleared swaps was not permitted.

the Commission's narrow definition of *bona fide* hedging. Fund advisers noted that some of their international funds and bond funds failed the trading tests. These funds may use swaps as cost effective way to adjust the duration of their portfolios and hedge against inflation, currency, and credit risks. As the Commission has acknowledged, margin levels for securities futures products are significantly higher than 5 percent, and the margin levels for swaps may be as well.[16] In addition, many of the derivative positions that funds routinely assume as part of their standard risk management practices may not qualify as *bona fide* hedging for the purposes of Rule 4.5. Also, we note that the CFTC's adoption of a final definition of "swap" could result in a further increase in the number of funds that would trigger the trading test, as the test is, in part, dependent on funds' trading in swaps.

Several fund advisers indicated that applying the trading tests was difficult because their systems were not yet established to access readily or track some of the necessary information to conduct the tests precisely.[17] Many indicated that they would need to build programs to apply the trading tests to all of their funds on a regular basis.[18] Some fund advisers, including those that reported all their funds had met the trading test thresholds and therefore their adviser would not have to register as a CPO at this time, noted their expectation that these new programs would monitor all of their funds' proximities to the trading test thresholds. For example, if a fund that was not subject to CFTC regulations under Rule 4.5 exceeded a buffer (an internally-specified threshold that would be set some amount below the trading test thresholds), the fund manager would receive a report or an alert and would need to take actions to reduce derivative positions to ensure that the fund remained below the trading test thresholds. These controls, when put in place, may have a dampening effect on the use of derivatives by funds, which could have implications for overall market liquidity in certain derivative instruments.

Overall, respondents indicated that it would take an average of 6 hours of internal and external time per fund, at an average cost of $234 dollars per hour, to build and program their systems to apply the trading tests to all of their funds (Figure 1). These estimates include costs for staff time in legal, accounting, risk management, compliance, and information technology, as well as purchases of new or upgraded software and hardware.

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[16] Rule 4.5 Adopting Release, *supra* note 1, at 11256.

[17] As a result, some fund advisers noted that they applied the trading tests manually. Three advisers indicated that they relied on the Net Notional Test in making the determination of whether they anticipated they would be required to register as a CPO. The Net Notional Test was easier for them to conduct in the short timeframe for the survey and they surmised that if the fund failed the Net Notional Test, it also would likely fail the 5% Margin Test.

[18] One adviser noted that despite future changes to its systems to conduct the trading tests, the process of determination would remain predominantly manual on an ongoing basis.

Even when automation is taken into account, fund advisers expect to spend 5.5 hours per fund, on average, at an average cost of $148 per hour each year, monitoring all of their funds and taking additional measures with respect to those funds that either exceed the trading test thresholds or are within some pre-determined range of the trading test thresholds on a regular basis. Time is expected to be spent ascertaining whether positions are *bona fide* hedges, identifying netting opportunities, and adjusting portfolio positions for funds that are not subject to CFTC regulations under Rule 4.5 and are close to the trading test thresholds. These costs would be borne by the entire industry, as most fund advisers would do this.

Figure 1
ICI Respondents' Estimated Burdens to Apply Trading Tests

	Hours per fund*	Dollars per hour*
Initial compliance	6	$234
Annual ongoing compliance	5.5	$148

*Weighted average. Each fund adviser's estimate was weighted by the ratio of the number of funds at the adviser to the total number of funds that responded to the question. Hours per fund estimates were rounded to the nearest half-hour. Dollars per hour estimates were rounded to the nearest dollar.

In order to ensure compliance with amended Rule 4.5, *all* fund advisers would need to evaluate *all* of their long-term mutual funds (including funds of funds), exchange-traded funds registered under the ICA, and closed-end funds to determine if the funds meet the exclusion based on the trading tests. Because all fund advisers would need to conduct such an evaluation, we were able to translate these initial and annual ongoing hour and dollar costs to ascertain an industry estimate of the costs to apply the trading tests to the 9,816 funds in existence as of year-end 2011. Overall, we estimate that the industry would spend $13.8 million initially to establish processes and systems to administer the trading tests and nearly $8 million each year thereafter applying the trading tests and monitoring funds' proximities to the thresholds (Figure 2).

Figure 2
Estimated Industry Monetary Costs to Apply Trading Tests*

Initial compliance	$13,781,700
Annual ongoing compliance	$7,990,200

*Calculated from Figure 1 as (# of hours) x ($ per hour) x (# of funds = 9,816). Rounded to the nearest $100.

3.2 Marketing Test

Even if a fund may qualify for the exclusion under Rule 4.5 on the basis of the trading tests, the Commission could still require registration on the basis of newly adopted marketing restrictions. In order to qualify for the exclusion, funds may not market themselves to the public as a vehicle for trading in the commodity futures, commodity options, or swaps markets. Based on the description of the Marketing Test in the Rule 4.5 Adopting Release, the survey instructed participants to consider in their determinations the following factors as indicative of "marketing" a fund as a vehicle for investing in commodity interests:

- Name of the fund;
- Fund's primary investment objective is tied to a commodity index;
- Fund makes use of a controlled foreign corporation for its derivatives trading;
- Fund's marketing materials, including its prospectus or disclosure document, refer to the benefits of the use of derivatives in a portfolio or make comparisons to a derivatives index;
- During the course of normal trading activities, the fund or entity on its behalf has a net short speculative position to any commodity through a direct or indirect investment in other derivatives;
- Futures/options/swaps transactions engaged in by the fund or on behalf of the fund will directly or indirectly be its primary source of potential gains and losses; and
- Fund is explicitly offering a managed futures strategy.[19]

After applying these marketing factors to those funds that were below the trading tests' thresholds, 18 advisers anticipate that 134 funds with combined total net assets of $429 billion may fail the marketing test.

Overall, respondents indicated that it would take approximately 35 minutes per fund at a cost of $274 per hour, on average, to make the initial determination of whether a fund would fail the marketing test (Figure 3). These estimates include time spent by staff in legal (including outside counsel), accounting, risk management, compliance. Once the initial determinations are made, respondents expect to spend 25 minutes per fund, at a cost of $223 per hour, each year to confirm the continuing accuracy of the determinations for funds relying on Rule 4.5. Many advisers indicated that they would conduct the same review process on an annual basis.

[19] *See* Rule 4.5 Adopting Release, *supra* note 1, at 11259.

Figure 3
ICI Respondents' Estimated Burdens to Apply Marketing Test

	Minutes per fund*	Dollars per hour*
Initial compliance	35	$274
Annual ongoing compliance	25	$223

*Weighted average. Each fund adviser's estimate was weighted by the ratio of the number of funds at the adviser to the total number of funds that responded to the question. Minutes per funds were rounded to nearest 5 minutes. Dollars per hour estimates were rounded to the nearest dollar.

In order to ensure compliance with amended Rule 4.5, *all* fund advisers would need to evaluate *all* of their long-term mutual funds (including funds of funds), exchange-traded funds registered under the ICA, and closed-end funds that meet the conditions of the trading test to determine if the funds meet the exclusion based on the marketing test. The estimates shown in Figure 4 below represent only the costs of applying the marketing tests to the 3,771 funds that passed the trading tests from the 42 fund advisers that responded to the survey. The total cost for just these advisers to administer the marketing tests initially and on an annual ongoing basis is estimated to be $602,700 and $350,400, respectively. *Actual costs to the industry will be higher*—potentially as much as $1.4 million initially and $805,900 on an annual ongoing basis.

Figure 4
ICI Respondents' Estimated Monetary Costs to Apply Marketing Test

Initial compliance	$602,700
Annual ongoing compliance	$350,400

* Calculated from Figure 3 as (# of hours) x ($ per hour) x (# of funds = 3,771). Rounded to the nearest $100.

4. Requirements under Part 4

Registration as a CPO imposes disclosure, financial reporting, and recordkeeping requirements under Part 4 of the CFTC's regulations. These requirements are a focus of the Commission's Harmonization Proposal. The survey focused on Rules 4.24 and 4.25, which require disclosure that would necessitate changes to funds' registration statements,[20] and Rule 4.22, which imposes financial reporting requirements (monthly account statements). Based on responses to our survey, we estimate that the 551 funds whose advisers anticipate registering as CPOs would spend a total of $21.7 million initially and $10.9 million annually to comply with these disclosures required under Part 4. *Because these numbers, reflect only those advisers that responded to the survey, they underestimate the costs to the industry as a whole, which could be as much as $50 million initially and $25 million on an annual ongoing basis.*

4.1 General Disclosures Required by Rule 4.24

The Harmonization Proposal would require advisers of funds that do not meet the trading or marketing tests to comply with the general disclosure requirements set forth in Rule 4.24. As discussed in more detail in our comment letter[21] and analyzed in Appendices C and D to the letter, much of the disclosure required by Rule 4.24 is already captured by Form N-1A. This information includes descriptions of: basic identification and background on the fund and its adviser; investment strategies, principal investment risks; fees and expenses; conflicts of interest raised by the activities of the fund or its adviser; transferability and redemption of interests in the fund; management of the fund; payments to broker-dealers and other financial intermediaries; and legal proceedings.

In many cases, however, the information required to be contained in Form N-1A differs in format, scope, and/or placement from the information required by Rule 4.24. Therefore, even though there is considerable overlap in the requirements, compliance with Rule 4.24 would require funds to extensively revise their registration statements. Because the federal securities laws impose liability for inaccurate registration statements even in the absence of fraud, funds expend great effort and cost to ensure that their registration statements are thorough and accurate. Additionally, because most open-

[20] Open-end funds (including most ETFs) use Form N-1A to register their securities under the Securities Act of 1933 and the ICA. Form N-1A consists of the prospectus and statement of additional information, which are intended to convey information to investors, as well as other information. Form N-2 captures similar information for closed-end funds.

[21] *See* April 2012 Letter.

end investment companies are continuously offered, these funds must regularly update their registration statements.

To help respondents assess the costs associated with complying with Rule 4.24 on an initial and ongoing basis, we separated the required disclosure elements into six categories based on the estimated level of difficulty and asked participants to provide estimates of hours and dollar costs for each category. Based on responses from the survey, we estimate that advisers would spend 42 hours per fund, on average, to comply initially with the required disclosures under Rule 4.24. On an ongoing basis, we estimate advisers would spend 20-1/2 hours per fund on average, to verify and update these disclosures each year. For just the 551 affected funds, we estimate they would spend $5.8 million initially and $2.4 million annually to comply with the requirements under Rule 4.24 (Figure 6, line 6*). For the industry as a whole, these costs could be as high as $13.3 million initially and $5.5 million on an annual ongoing basis.*

Because much of the disclosure work is completed by lawyers, the cost estimates primarily reflect time spent by legal staff employed by the adviser and outside legal counsel. Those advisers and funds that make more use of outside legal counsel, particularly for initial compliance, would have significantly higher costs. It is not unusual for hourly charges for outside legal counsel to average between $500 and $700 per hour and often more. Detailed information on the six disclosure categories and the associated cost estimates for each disclosure category are shown immediately below. As explained in more detail in our April 2012 Letter, the vast majority of "new" disclosures are a result of slight differences in the instructions for such disclosure, which changes the scope or format of the disclosure funds already provide.

Existing Information: Item is already included in fund's registration statement. We did not ask for cost estimates on this category.

Standardized: Item, if applicable, would require the inclusion of specified standardized language based on certain characteristics of the fund(s). This category included:

- Cautionary statement and
- Risk disclosure statement.

Respondents would expect to spend 2 hours per fund at a cost of $291 per hour, on average, to produce these initial standardized disclosures (Figure 5, line 1, columns 1 and 2). Thereafter, respondents would expect to spend an average of 1 hour at a cost of $201 per hour to annually verify and update these disclosures (Figure 5, line 1, columns 3 and 4). Total estimated initial and annual ongoing costs for the just the 551 affected funds that responded to our survey are $320,700 and $110,800, respectively (Figure 6, line 1). For the industry as a whole, these costs could be as high as $737,600 initially and $254,800 on an annual ongoing basis.

Although this disclosure is "standardized," the risk disclosure statement contains several sections that must be included only if a fund may engage in certain strategies, such as foreign futures or options contracts, swaps, or retail foreign exchange transactions. Thus, the estimated time is likely based on how long it would take to assess whether such disclosures are necessary for each fund.

New, But Likely Not Difficult: Item, if applicable, would require the inclusion of information not currently found in the fund's prospectus, but we believe the information should be relatively easy to gather and provide. Some information may be contained in other SEC disclosure documents, including the statement of additional information or the adviser's Form ADV. This category included:

- Information required in the forepart of the disclosure document;
- Trading for own account;
- Transferability and redemption;
- Inception of trading and other information; and
- Reporting to pool participants.

Respondents would expect to spend 5-1/2 hours per fund at a cost of $250 per hour, on average, to produce these disclosures initially (Figure 5, line 2, columns 1 and 2). Thereafter, respondents would expect to spend an average of 3 hours at a cost of $205 per hour to annually verify and update these disclosures (Figure 5, line 2, columns 3 and 4). Total estimated initial and annual ongoing costs for only the 551 affected funds that responded to our survey are $757,600 and $338,900, respectively (Figure 6, line 2). For the industry as a whole, these costs could be as high as $1.7 million initially and $779,500 on an annual ongoing basis.

The disclosure requirements in this category are either (1) information that funds currently provide in a slightly different manner or format, thus necessitating reorganization of or revisions to the prospectus; or (2) partially or completely inapplicable to funds, presumably necessitating the drafting of new language to explain their inapplicability. For example, in the first item noted above, the information required in the forepart includes such basic information as the name, address and phone number of the fund and the adviser, and where the books and records are kept. Funds currently provide this information in several different places, including the prospectus and Form ADV. In the third item, funds currently explain the procedures for redeeming shares in the prospectus; however, because open-end funds are not permitted to restrict redemptions and always redeem at NAV, there is no need for the enumerated level of detail prescribed by Rule 4.24 regarding "frequency, timing, and manner" of permitted redemptions or how a redeeming interest is valued. Similarly, "inception of trading" (fourth item shown above) is not relevant in the fund context, since funds do not hold investments or wait to achieve a minimum aggregate size before commencing trading. Despite their inapplicability, funds presumably would need to draft disclosure that is responsive to the requirement.

New Drafting Required: Item, if applicable, would require the drafting of additional disclosure language. Some investigation and/or legal analysis may be required before drafting. This category included:

- Persons to be identified;
- Business background;
- Principal risk factors;
- Description of calculations of fees paid by fund; and
- Conflicts of interest.

Respondents would expect to spend 9-1/2 hours per fund at a cost of $285 per hour, on average, to produce these disclosures initially (Figure 5, line 3, columns 1 and 2). Thereafter, respondents would expect to spend an average of 5-1/2 hours at a cost of $242 per hour to annually verify and update these disclosures (Figure 5, line 3, columns 3 and 4). Total estimated initial and annual ongoing costs for only the 551 affected funds that responded to our survey are $1.5 million and $733,400, respectively (Figure 6, line 3). For the industry as a whole, these costs could be as high as $3.4 million initially and $1.7 million on an annual ongoing basis.

This category generally includes disclosure that is different in scope than is currently provided in fund registration statements. For example, funds must provide background information about their portfolio managers, adviser and subadvisers, but do not provide background information about the principals thereof. Similarly, funds provide detailed fee disclosures in the manner prescribed by the SEC, which does not require a "complete description of each fee, commission, and other expense…" incurred by the fund. Thus, funds would need to draft additional disclosures to meet these requirements.

New Drafting and Ongoing Maintenance: Item, if applicable, would require the gathering of information, drafting of additional disclosure language (including legal analysis), and regular updating. This category included:

- Investment program and use of proceeds;
- Related party transactions;
- Litigation; and
- Ownership in pool.

Respondents would expect to spend 13 hours per fund at a cost of $268 per hour, on average, to produce these disclosures initially (Figure 5, line 4, columns 1 and 2). Thereafter, respondents would expect to spend an average of 6-1/2 hours at a cost of $215 per hour to annually verify and update these disclosures (Figure 5, line 4, columns 3 and 4). Total estimated initial and annual ongoing costs for only the 551 affected funds that responded to our survey are $1.9 million and $770,000, respectively

(Figure 6, line 4). For the industry as a whole, these costs could be as high as $4.4 million initially and $1.8 million on an annual ongoing basis.

As with the previous category, this category generally includes disclosure that is different in scope than is currently provided in funds' registration statements; these disclosures may also require regular revisions or updating. For example, funds currently provide information about *pending, material* legal proceedings, whereas Rule 4.24 requires disclosure about *any* legal proceedings over the last five years, whether pending or concluded. Likewise, funds provide both summary and detailed information about investment strategies; this is similar in concept to the "investment program" disclosure, but because the investment company business model does not utilize "trading programs" and because funds often have broader mandates than commodity pools, it does not include information such as descriptions of trading programs or a list of the countries in which a fund may invest. Thus, funds would need to draft additional disclosures to meet these requirements.

<u>New Calculations/Evaluations, Drafting, and Potential Maintenance</u>: Item, if applicable, would require new calculations or evaluations of fund's practices prior to the drafting of additional disclosures (including legal analysis) and could require regular updating. This category included:

- Break-even point and
- Tabular presentation of how break-even point is calculated.

Respondents would expect to spend 12 hours per fund at a cost of $204 per hour, on average, to produce these disclosures initially (Figure 5, line 5, columns 1 and 2). Thereafter, respondents would expect to spend an average of 4-1/2 hours at a cost of $188 per hour to annually verify and update these disclosures (Figure 5, line 5, columns 3 and 4). Total estimated initial and annual ongoing costs for only the 551 affected funds that responded to our survey are $1.3 million and $466,100, respectively (Figure 6, line 5). For the industry as a whole, these costs could be as high as $3 million initially and $1.1 million on an annual ongoing basis.

The disclosure of a break-even point requires funds to conduct new calculations of a fund's fees. As discussed in more detail in our April 2012 Letter, the SEC requires detailed fee disclosures that are designed with the same intent as the break-even point – to show investors the expected costs of investing in the fund.[22] The fees captured and calculations for the fee table are slightly different, however. Funds would expend a substantial amount of time initially to comply with the disclosure because many would need to develop new systems to calculate the CFTC-required break-even point disclosure. Ongoing costs are associated with monitoring and reporting the break-even points.

[22] *See* April 2012 Letter, Section V.B.

Figure 5
ICI Respondents' Estimated Burdens for General Disclosures Required by Rule 4.24

Type of disclosure	Initial compliance		Annual ongoing compliance	
	Hours per fund* (1)	Dollars per hour* (2)	Hours per fund* (3)	Dollars per hour* (4)
(1) Standardized	2	$291	1	$201
(2) New, but likely not difficult	5.5	$250	3	$205
(3) New drafting required	9.5	$285	5.5	$242
(4) New drafting & ongoing maintenance	13	$268	6.5	$215
(5) New analysis and drafting	12	$204	4.5	$188

*Weighted average. Each fund adviser's estimate was weighted by the ratio of the number of funds at the adviser to the total number of funds that responded to the question. Hours per fund estimates were rounded to the nearest half-hour. Dollars per hour estimates were rounded to the nearest dollar.

Figure 6
ICI Respondents' Estimated Monetary Costs for General Disclosures Required by Rule 4.24

Type of disclosure	Initial compliance*	Annual ongoing compliance*
(1) Standardized	$320,700	$110,800
(2) New, but likely not difficult	$757,600	$338,900
(3) New drafting required	$1,491,800	$733,400
(4) New drafting & ongoing maintenance	$1,919,700	$770,000
(5) New analysis and drafting	$1,348,800	$466,100
(6) Total	**$5,828,600**	**$2,419,200**

* Estimated monetary costs calculated from Figure 5 as (# of hours) x ($ per hour) x (# of funds = 551). Rounded to the nearest $100.

4.2 Performance Disclosures Required by Rule 4.25

The Harmonization Proposal would require funds that do not meet the trading or marketing tests to provide performance disclosures as set forth in Rule 4.25. Specifically, all funds must disclose their prior performance in a manner prescribed by the rule. In addition, if a fund has fewer than three years of actual performance, it must also disclose prior performance information for other pools and accounts managed by the CPO, as well as prior performance information of pools and accounts managed by the fund's trading manager, if any, pools and accounts managed by major CPOs of the fund, and prior performance of any major investee fund. Each of these disclosures would require regular updating.

We asked respondents to provide the initial and ongoing costs associated with calculating and disclosing prior performance information for all of their affected funds, and then to estimate separately the initial and ongoing costs of complying with the prior performance disclosures for other pools and accounts for those affected funds that have less than three years of actual performance. These disclosures are discussed separately below.

Based on responses from the survey for the 551 affected funds, we estimate they alone would spend $3.7 million initially and $2.1 million annually to comply with the requirements under Rule 4.25. *For the industry as a whole, these costs could be as high as $8.5 million initially and $4.8 million on an annual ongoing basis.*

Prior Performance Disclosure for All Funds: Funds currently are required to provide extensive performance information in their prospectus. For example, Form N-1A requires funds to disclose the individual annual total returns for each of the ten most recent calendar years in a bar chart format, the best quarterly total return during the ten year period, and the worst quarterly total return during the ten year period. In addition, funds are required to disclose, in a tabular format, the average annual total return for the one, five and ten year periods. These average annual total returns must include: a) total return before taxes; b) total return after taxes on distributions; c) total return after taxes on distributions and sale of fund shares; and d) the total return for a benchmark index. The performance information required by Rule 4.25 would require funds to expend a substantial amount of time to comply because the performance information is for different periods (*e.g.,* monthly total returns, worst monthly total return, worst peak to valley total return during the most recent five years), and appears to require a different calculation (*i.e.*, annual total returns calculated on a compounded monthly basis).

On average, advisers expect they would spend 18 hours per fund at a cost of $227 per hour, on average, to initially establish processes and systems to produce the prior performance calculation for each affected fund. After the initial set-up, advisers expect to spend 9-1/2 hours at a cost of $225 per

hour, on average, to update the prior performance information for each fund each year. Estimated total initial and annual ongoing costs for only the 551 affected funds that responded to our survey are $2.3 million and $1.2 million, respectively (Figure 8). *For the industry as a whole, these costs could be as high as $5.2 million initially and $2.7 million on an annual ongoing basis.*

Figure 7
ICI Respondents' Estimated Burdens for Prior Performance Disclosures Required by Rule 4.25

	Hours per fund*	Dollars per hour*
Initial compliance	18	$227
Annual ongoing compliance	9.5	$225

*Weighted average. Each fund adviser's estimate was weighted by the ratio of the number of funds at the adviser to the total number of funds that responded to the question. Hours per fund estimates were rounded to the nearest half-hour. Dollars per hour estimates were rounded to the nearest dollar.

Figure 8
ICI Respondents' Estimated Monetary Costs for Performance Disclosures Required by Rule 4.25

Initial compliance	$2,251,400
Annual ongoing compliance	$1,177,800

* Estimated monetary costs calculated from Figure 7 as (# of hours) x ($ per hour) x (# of funds = 551). Rounded to the nearest $100.

Additional Disclosure for Funds with Less Than a Three-Year Operating History: As noted above, under Rules 4.25(c)(2)–(5), affected funds with less than a three-year operating history are subject to additional prior performance disclosures. According to the results from the survey, 29 advisers had a total of 159 affected funds with less than a three-year operating history. For these funds, the adviser must disclose the prior performance of all of its funds registered under the ICA as well as any other pools and accounts, such as collective investment trusts, separate accounts, and hedge funds that it may manage. For advisers that manage many funds, and frequently launch new funds, this requirement is a

daunting and expensive task.[23] As of year-end 2011, these 29 advisers managed a total of 2,350 other long-term mutual funds (including funds of funds), exchanged-traded funds registered under the ICA, and closed-end funds that would not themselves be subject to CFTC regulations under Part 4, but for which the adviser would be required to provide prior performance.[24]

Compliance with this requirement would entail a substantial undertaking by many of these advisers and any other adviser that has recently launched or would contemplate opening a new fund that would be subject to the CFTC registration requirements. As shown in Figure 9, advisers to these funds expect to spend, on average, 34 hours per affected fund at a cost of $265 per hour to set up processes and systems to track, gather, and update the prior performance disclosure for all of their other 2,350 funds registered under the ICA that themselves would not be subject to CFTC regulations under Part 4. That is equivalent to roughly 2 hours for each of the 2,350 funds. Even with the significant initial investment in infrastructure to produce this information, these advisers expect to spend 25-1/2 hours at a cost of $233 per hour each year to produce prior performance information for their other 2,350 funds registered under the ICA that would themselves not be subject to CFTC regulations under Part 4. That is equivalent to roughly 1-1/2 hours for each of the 2,350 funds.

Figure 9
ICI Respondents' Estimated Burdens for Prior Performance Disclosure for Funds with Less than a Three-Year Operating History

	Hours per fund*	Dollars per hour*
Initial compliance	34	$265
Annual ongoing compliance	25.5	$233

*Weighted average. Each fund adviser's estimate was weighted by the ratio of the number of funds at the adviser to the total number of funds that responded to the question. Hours per fund estimates were rounded to the nearest half-hour. Dollars per hour estimates were rounded to the nearest dollar.

[23] Mutual fund complexes often have a large number of registered funds. According to ICI data, the average number of registered funds per complex is 23, and the range is from 1 to 603. Thirty-two complexes have more than a hundred registered funds. Advisers to these complexes often advise other types of pools and accounts as well.

[24] While these advisers also have other pools and accounts for which they would be required to provide prior performance disclosure as well, we do not know how many.

Estimated total initial and annual ongoing costs to provide prior performance disclosures for only the 159 affected funds that responded to our survey with less than a three-year operating history are $1.4 million and $944,700, respectively (Figure 10). *For the industry as a whole, these costs could be as high as $3.2 million initially and $2.2 million on an annual ongoing basis.*

Figure 10
ICI Respondents' Estimated Monetary Costs* for Prior Performance Disclosure for Funds with Less than Three-Year Operating History

Initial compliance	$1,432,600
Annual ongoing compliance	$944,700

* Estimated monetary costs calculated from Figure 9 as (# of hours) x ($ per hour) x (# of funds = 159). Rounded to the nearest $100.

4.3 Additional Burdens Related to Disclosure Requirements

We believe there are two additional significant costs associated with the disclosure requirements under Rule 4.24 and Rule 4.25. First, fund advisers may decide to reorganize their funds' registration statements to incorporate the CFTC-required disclosure alongside the comparable SEC-required disclosure. Second, the document review process with the National Futures Association (NFA) can be quite time consuming.

4.3.1 Reorganization of Funds' Registration Statements

Despite the overall similarity of the disclosures required by Rules 4.24 and 4.25 to those already found in funds' registration statements, the order of presentation of the information is quite different. Funds may need to consider how and where to include the additional disclosures so as to present the required information in an order that makes sense to an investor and complies with both SEC and CFTC requirements.

In addition, Form N-1A permits multiple funds to be included in a single registration statement, and many fund advisers currently use multi-fund prospectuses. According to the survey, 25 fund advisers with 469 affected funds have multi-fund prospectuses. As a result of the additional disclosures, which respondents estimated would add approximately 100 pages, on average, to the statutory prospectus, some of these advisers may determine that a multi-fund prospectus is no longer

beneficial to investors.[25] Advisers may also determine that it is beneficial to regroup their multi-fund prospectuses, such as to keep together those funds for which they must comply with Part 4, and to separate out those funds that may rely on the Rule 4.5 exemptions. A total of five advisers indicated that for their 198 affected funds, they expect to separate existing multi-fund prospectuses and regroup funds into different multi-fund prospectuses or create single fund prospectuses.

We asked respondents to provide, in dollars and hours, the total costs associated with rearranging their affected funds' registration statements, both with respect to organizing disclosure content and grouping of funds. Advisers expect they would spend 15 hours per fund at a cost of $215 per hour, on average, rearranging their registration statements (Figure 11). The total cost of this reorganization is estimated to be $1.8 million for only the 551 affected funds that responded to our survey (Figure 12). For the industry as a whole, these costs could be as high as $4.1 million.

Figure 11
ICI Respondents' Estimated Burden for Rearranging Funds' Registration Statements

	Hours per fund*	Dollars per hour*
Rearranging registration statements	15	$215

*Weighted average. Each fund adviser's estimate was weighted by the ratio of the number of funds at the adviser to the total number of funds that responded to the question. Hours per fund estimates were rounded to the nearest half-hour. Dollars per hour estimates were rounded to the nearest dollar.

Figure 12
ICI Respondents' Estimated Monetary Cost* for Rearranging Funds' Registration Statements

Rearranging registration statements	$1,777,000

* Calculated from Figure 11 as (# of hours) x ($ per hour) x (# of funds = 551). Rounded to the nearest $100.

[25] Nearly 85 percent of affected funds make use of the summary prospectus to mail to shareholders. Therefore, as long as the format and content of the Summary Prospectus is unchanged for the affected funds (*see* April 2012 Letter, Section V.D.), these funds will not experience an increase in printing and mailing costs for the Summary Prospectus. For the 15 percent of funds that mail a statutory prospectus to shareholders, we were unable to estimate the increase in printing and mailing costs these funds would incur from the additional CFTC-required disclosure.

4.3.2 Review and Filing with National Futures Association

Rule 4.26(d)(1) under the CEA generally requires CPOs to file their commodity pool disclosure documents and any subsequent amendments with the National Futures Association ("NFA") electronically not less than 21 calendar days prior to the date the pool operator first intends to deliver such document to a prospective participant in the pool. We understand that the NFA reviews all disclosure documents and all changes and supplements to existing disclosure documents, and that a commodity pool operator may not use a disclosure document (including any updated or supplemented disclosure document) without express approval of the NFA.

These filing and review requirements would be new requirements for many fund advisers that must register as CPOs, and would impose costs potentially including, among others, staff training time, the expense of new software, changes to information technology systems, and staff and outside counsel expense associated with responding to NFA comments, attempting to reconcile conflicting comments with the SEC staff if necessary, and revising documents.

Figures 13 and 14 reflect survey participants' estimates of the burdens and costs of this requirement. Fund advisers expect they would spend 29-1/2 hours per fund at a cost of $199 per hour, on average, initially to complete the review process and set up processes and systems to file the documents with the NFA (Figure 13). Each year thereafter, fund advisers expect they would spend 15-1/2 hours per fund at a cost of $195 per hour to review and file documents with the NFA. We estimate that the review and filing process would cost at least $3.2 million initially and at least $1.7 million annually thereafter for the 551 affected funds (Figure 14). *For the industry as a whole, these costs could be at least $7.4 million initially and $3.9 million on an annual ongoing basis.*

Figure 13

ICI Respondents' Estimated Burden to File with National Futures Association

	Hours per fund*	Dollars per hour*
Initial compliance	29.5	$199
Annual ongoing compliance	15.5	$195

*Weighted average. Each fund adviser's estimate was weighted by the ratio of the number of funds at the adviser to the total number of funds that responded to the question. Hours per fund estimates were rounded to the nearest half-hour. Dollars per hour estimates were rounded to the nearest dollar.

Figure 14
ICI Respondents' Estimated Monetary Cost* to Review and File with National Futures Association

Initial compliance	$3,234,600
Annual ongoing compliance	$1,665,400

* Calculated from Figure 13 as (# of hours) x ($ per hour) x (# of funds = 551). Rounded to the nearest $100.

We believe these figures could significantly underestimate actual burdens and costs. The wording of the question to survey participants suggested we only were asking about the time and dollar costs of mechanically filing the documents, rather than the time and costs associated with the review process as well.

4.4 Financial Reporting Requirements

Rule 4.22 under the CEA requires that CPOs of pools with net assets of more than $500,000 at the beginning of the pool's fiscal year deliver to pool participants a certified monthly report ("Account Statement") not more than 30 days after period end that includes an unaudited statement of operations and a statement of changes in net assets. The vast majority of affected funds would meet the rule's $500,000 threshold.[26] Most of the information required in the Account Statement is included in funds' semi-annual and annual shareholder reports as required by the SEC.

While the CFTC has proposed to permit registered investment companies to satisfy the delivery requirement for the monthly Account Statements by making them available on the fund's Internet website, respondents to our survey indicated that the obligation to create such statements would nonetheless involve considerable burdens and costs. Based on survey responses, we estimate initial costs would be $7.2 million and annual ongoing costs would be $4.7 million to produce the monthly Account Statements for only the 551 affected funds that responded to our survey. *For the industry as a whole, these costs could be as high as $16.6 million initially and $10.8 million on an annual ongoing basis.*

[26] Less than 0.4 percent of funds for which ICI maintains data have assets of $500,000 or less.

4.4.1 Initial Costs to Produce Monthly Account Statements

One of the most burdensome requirements in creating the monthly Account Statements for funds is to break out brokerage commissions on portfolio trades and show this item as a separate expense in the monthly statement of operations. For equity securities, futures, and other exchange-traded securities, where market practice clearly distinguishes commissions as trade costs separate from the purchase/sale price, these costs are readily identifiable and they are captured within the accounting records of the funds.[27] Generally accepted accounting principles and tax law applicable to funds permit brokerage commissions to be included in the cost basis of the purchased securities and deducted from proceeds of sales, and thereby reflected in the gains and losses on investment securities. For purposes of complying with the monthly Account Statement requirement to separately report brokerage commissions, advisers may maintain their accounting and tax records as they do today, and on a monthly basis, reclassify brokerage commissions incurred during the period from gain/loss accounts into a brokerage commission expense account. Alternatively, advisers may create and keep separate records that characterize brokerage commissions on portfolio trades as expense in order to support the monthly Account Statement requirement.

Fund advisers expect to spend 42 hours per fund at a cost of $171 per hour, on average, to set up processes and systems to characterize brokerage commissions as an expense on the monthly Account Statements (Figure 15). The total initial cost is estimated to be $3.9 million for only the 551 affected funds that responded to the survey (Figure 16). *For the industry as a whole, this initial cost could be as high as $9 million.* Thereafter, fund advisers expect they would spend 2 hours per fund per month at a cost per hour of $140 to produce estimates of brokerage commissions for the Account Statement (Figure 17, line 1). Annual total costs for only the 551 affected funds that responded to the survey are estimated to be $1.9 million (Figure 18, line 1). *For the industry as a whole, these annual ongoing costs could be as high as $4.4 million.*

[27] Fixed income securities typically trade on a bid-ask spread basis without any explicit brokerage commission. We have not included any estimate of costs associated with measuring and reporting any implicit brokerage commission (in the form of a bid-ask spread) on fixed income trades because we believe they are not within the scope of Rule 4.22. Measuring and reporting any implicit brokerage commission, however, would require substantial time, cost, and investment from the adviser and its service providers.

Figure 15
ICI Respondents' Estimated Initial Burden for Characterizing Brokerage Commissions as an Expense on Account Statements

	Hours per fund*	Dollars per hour*
Initial compliance	42	$171

*Weighted average. Each fund adviser's estimate was weighted by the ratio of the number of funds at the adviser to the total number of funds that responded to the question. Hours per fund estimates were rounded to the nearest half-hour. Dollars per hour estimates were rounded to the nearest dollar.

Figure 16
ICI Respondents' Estimated Monetary Initial Cost* for Characterizing Brokerage Commissions as an Expense on Account Statements

Initial compliance	$3,957,300

* Estimated monetary initial cost calculated from Figure 15 as (# of hours) x ($ per hour) x (# of funds = 551). Rounded to the nearest $100.

Several large fund advisers noted on the survey that they would incur additional initial costs due to the timing of the monthly Account Statement, which would be required to be posted on a fund's website by 30 days after month-end. Funds' semi-annual and annual shareholder reports are required to be filed with the SEC by 60 days after period-end. Fund advisers that manage many funds often have systems that are highly automated and integrated. Changes to these systems can be costly. For some advisers, shortening the period to produce the financial information in 30 days from its current 60-day cycle would require a substantial investment in information technology. Because the occurrence of this cost depends on the individual adviser's systems, we only considered the costs for the advisers that noted the timing would be a problem. *These advisers would expect to spend $3.2 million to make changes to their processes and systems due to the 30-day timing of the monthly Account Statements. For the industry as a whole, this initial cost could be significantly higher.*

4.4.2 Ongoing Annual Costs to Produce Monthly Account Statements

In addition to breaking out brokerage commissions on the monthly Account Statements, funds would need to prepare a monthly statement of operations and a statement of change in net assets. Funds already provide these statements to shareholders in their semi-annual and annual reports, but under CFTC regulations would be required to provide them an additional ten times each year. Fund advisers expect they would spend 3 hours per fund per statement at a cost of $130 per hour (Figure 17, line 2), on average, to produce this information at a total annual cost of $2.1 million (Figure 18, line 2) for only the 551 affected funds that responded to the survey. *For the industry as a whole, this cost could be as high as $4.8 million.*

Funds would also be required to incur the additional cost of providing the affirmation required by Rule 4.22(h) on a monthly basis, and would also incur costs to post and maintain them on a monthly basis on the website where the fund's documents are available. These burdens and costs are shown in Figures 17 and 18. For the industry as a whole, these costs also would be higher than shown.

Figure 17

ICI Respondents' Estimated Burden for Monthly Account Statements per Fund per Statement

	Time per fund*	Dollars per hour*
(1) Brokerage commissions	2 hours	$140
(2) Financial statement preparation	3 hours	$130
(3) Certification	25 minutes	$142
(4) Web posting	20 minutes	$119

*Weighted average. Each fund adviser's estimate was weighted by the ratio of the number of funds at the adviser to the total number of funds that responded to the question. Time per fund estimates for brokerage commissions and financial statement preparation were rounded to the nearest half hour. Time per fund estimates for certification and web posting were rounded to nearest 5 minutes. Dollars per hour estimates were rounded to the nearest dollar.

Figure 18
ICI Respondents' Estimated Annual Ongoing Monetary Cost for Account Statements

(1) Brokerage commissions[1]	$1,851,400
(2) Financial statement preparation[2]	$2,148,900
(3) Certification[1]	$391,200
(4) Web posting[1]	$262,300
Total	**$4,653,800**

[1] Calculated from Figure 17 as (time per fund per statement) x ($ per hour) x (12 statements per year) x (# of funds = 551). Rounded to the nearest $100.
[2] Calculated as above, except using 10 statements per year as funds already prepare this information for their semi-annual and annual shareholder reports.

5. Total Monetary Costs to Funds and Their Advisers With No Benefits to Investors

We believe the Harmonization Proposal falls far short of its stated intent to "minimize the burden of the amendments to § 4.5,"[28] and places unnecessary costs on fund advisers subject to CFTC regulations under Part 4 and their funds for disclosure and financial reporting. The CFTC-required disclosure does not provide substantively different information from what is currently provided by these funds in their SEC disclosure documents. Nevertheless, the CFTC requirements are different in format and scope and would result in needless burdens and costs on fund advisers and their funds to comply with these disclosures. In addition, we do not believe investors would be well served by redundant and voluminous disclosure.

Based on responses to our survey, we estimate that for only the 551 funds whose advisers responded to our survey and anticipate these funds would be subject to CFTC regulations, the total cost of complying with the requirements on an initial basis would be $21.7 million and $10.9 million on an annual ongoing basis thereafter (Figure 19). For the industry as a whole, these costs could be as

[28] Rule 4.5 Adopting Release, *supra* note 1, at 11255.

high as $50 million initially and $25 million on an annual ongoing basis. As measured over multiple years, these ongoing costs would be extraordinarily high.[29]

In addition, all fund advisers will need to evaluate all of their long-term mutual funds (including funds of funds), exchange-traded funds registered under the ICA, and closed-end funds to determine if the funds meet the exclusion based on the trading tests and marketing test. Based on responses to our survey, we estimate that the cost to program and automate the trading tests and make initial determinations for the marketing tests would cost at least $14.4 million. For each year thereafter, we estimate advisers would spend $8.3 million monitor funds proximities to the trading test thresholds, take actions for funds that exceed or are close to the thresholds and to confirm the continuing accuracy of the marketing test determinations.

In sum, the entire cost to the industry to apply the trading and marketing tests and comply with the disclosure and reporting requirements could be as high as $65 million initially and $33.8 million on an annual ongoing basis.[30]

We have been unable to ascertain any benefits of the Harmonization Proposal – *i.e.,* the disclosure and reporting obligations proposed to be imposed on funds and advisers as a result of the recently adopted amendments to Rule 4.5. Funds and their advisers are already required to provide extensive disclosure and reporting to the SEC and to fund investors. The vast majority of the information required under Part 4 is already provided to the SEC, although in some cases the information differs in format, scope, and/or placement from the Part 4 requirements. We cannot discern, and the CFTC has not explained, the benefits – conferred to the Commission or fund investors – of requiring funds to provide similar information in a different format from that which they already provide.

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[29] Indeed, as Congress scores legislation, these ongoing costs could amount to $250 million over a 10-year period. If we consider the present value of the ongoing costs in perpetuity and discounted at the 20-year risk-free rate, these ongoing costs would amount to $800 million.

[30] Again, considering the present value of the ongoing costs in perpetuity and discounted at the 20-year risk-free rate, these ongoing costs would amount to over $1 billion.

Figure 19
Estimated Monetary Costs to Apply Tests and Provide Disclosure under the Harmonization Proposal

	Initial compliance	Annual ongoing compliance
Cost to apply tests		
(1) Application of trading tests[1]	$13,781,700	$7,990,200
(2) Application of marketing tests[2]	$602,700	$350,400
(3) Total	$14,384,400	$8,340,600
Cost for required CFTC disclosure		
(4) Disclosure for Rule 4.24[2]	$5,838,600	$2,419,200
(5) Disclosure for Rule 4.25[2]	$2,251,400	$1,177,800
(6) Prior performance disclosure[3]	$1,432,600	$944,700
(7) Rearranging registration statements[2]	$1,777,000	-------------
(8) Filing with NFA[2]	$3,234,600	$1,665,400
(9) Account statements[2,4]	$7,157,300	$4,653,800
(10) Total	$21,691,500	$10,860,900
(11) Grand Total (sum of lines 3 and 10)	**$36,075,900**	**$19,201,500**

[1] Estimated for the universe of long-term mutual funds (including funds of funds), exchange-traded funds, and closed-ended funds (# of funds = 9,816).
[2] Estimated only for the 551 funds in our sample whose advisers would be required to register as a CPO.
[3] Estimated only for the 159 funds in our sample that have less than a three-year operating history.
[4] Initial cost is the estimated cost for characterizing brokerage commissions as an expense on the account statements and the expected cost to change systems from a 60-day cycle to a 30-day cycle.

Indeed, we are concerned that the Harmonization Proposal would, in fact, be detrimental to investors. Over the past 30 years, the SEC has focused on making fund disclosure clear and concise, and

therefore more useful to investors.[31] It has also required that certain key information be presented in a standardized manner that promotes comparison across funds.[32] As discussed in more detail in our April 2012 Letter, compliance with Part 4 as required by the Harmonization Proposal would, among other things: add length to a fund's prospectus; incorporate a number of disclosures that are essentially inapplicable to funds and are likely to confuse investors; result in longer disclosures that draw attention away from the more focused, fund-specific disclosures currently required by the SEC; and require redundant presentations of certain information, which may add to investor confusion. These changes would also impair the ability of investors, including potential investors in both affected and unaffected funds, to compare affected funds to those funds that would not be required to comply with Part 4. Finally, the Harmonization Proposal calls into question the viability of the summary prospectus for affected funds. Based on the positive feedback ICI members have received on the summary prospectus,[33] we believe this would be a significant loss for investors.

[31] *See, e.g.,* Registration Form Used by Open-End Management Investment Companies, SEC Release Nos. 33-6479 and IC-13436 (Aug. 12, 1983), 48 Fed. Reg. 37928, 37929 (Aug. 22, 1983) (stating that "mutual fund prospectuses are not effective disclosure documents for most investors because they are too long and complex" and therefore adopting a two-part disclosure form to "shorten and simplify" the prospectus).

[32] Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, SEC Release Nos. 33-8998 and IC-28584 (Jan. 13, 2009), 74 Fed. Reg. 4546, 4549 (Jan. 26, 2009).

[33] *See* April 2012 Letter, note 25.

INVESTMENT COMPANY INSTITUTE

Appendix B

Questions for Investment Advisers to Registered Investment Companies Regarding the Impact of the CFTC Harmonization Proposal[1]

March 20, 2012

The following survey is intended to help us assess the impact on advisers to registered investment companies ("funds") that must register as Commodity Pool Operators ("CPOs") as a result of amendments to CFTC Rule 4.5. The questions primarily relate to the CFTC disclosure obligations placed upon CPOs. These obligations are listed in Appendices D and E and described briefly throughout the survey. We have also included for your convenience a glossary of terms in Appendix F.

Please respond to as many questions as you can; even partial answers are valuable. **Broad participation in this survey is critical to our analysis.**

1. Please input responses directly into this document. **Please email the completed document to Shelly Antoniewicz at shelly@ici.org by April 5, 2012.** Responses may also include a description of any factors that may result in higher or lower cost estimates.

2. For the hours and dollar cost estimates, please aggregate across all Affected Funds in your complex. We understand that these estimates may be difficult to assess at this stage; please provide your best estimate.

3. When estimating costs, please include costs that would be borne directly by your affiliated service providers and the fund complex, or indirectly through increased expenses charged by your unaffiliated service providers. Please include payroll costs associated with employee time.

4. Where there may be discrepancies between SEC and CFTC requirements, assume that the regulators will provide necessary relief (i.e., do not include time or costs associated with applying for no-action relief or other guidance).

There will be a member call on Thursday, March 22 from 2 pm to 3 pm (EDT) to discuss any questions regarding the survey. In advance of the call, please email questions to Rachel Graham at rgraham@ici.org (202-326-5819), Sarah Bessin at sarah.bessin@ici.org (202-326-5835), or Shelly Antoniewicz at shelly@ici.org (202-326-5910).

[1] http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister020912.pdf ("Harmonization Proposal").

Individual responses will remain confidential. Data will be aggregated to obtain summary statistics that may be used in responding to the CFTC proposal.

I. Are you currently registered as a CPO with the CFTC?

Yes: ______ No: ______

II. Registered Investment Companies Impacted by CFTC Rule 4.5

The following questions relate to determining whether you may need to register as a CPO with the CFTC.

A. **Trading Tests:** Under recent final amendments to Rule 4.5, the adviser to a fund will **not** have to register as a CPO **if** the fund meets **one** of the two following conditions:

• 5% Margin Test: The fund's aggregate initial margin and premiums required to establish positions in commodity futures, commodity options contracts, or swaps[2] (exclusive of (1) trading for "bona fide hedging"[3] which is defined narrowly by the CFTC and (2) the amount by which an option is in-the-money[4]) does not exceed five percent of the liquidation value (i.e., NAV) of the fund's portfolio after taking into account unrealized profits and losses on such positions, **OR**

• Net Notional Test: The aggregate net notional value of positions in commodity futures, commodity option contracts, or swaps (exclusive of trading for bona fide hedging purposes) does not exceed 100 percent of the liquidation value of the fund's portfolio after taking into account unrealized profits and losses on any such positions.[5]

1. **How many of your funds do you estimate would be unable to meet at least one of the two trading tests?** Please provide their aggregate total net assets as well.

# of funds: ________

Total net assets: ________

---

[2] See Appendix A for a list of instruments that would be captured by Rule 4.5 and assumptions for margin requirements on swaps. For purposes of this survey, please use the table on margin requirements in Appendix A when calculating initial margin for a fund's swaps positions.

[3] See Appendix B for a description of "bona fide hedging."

[4] As defined in Rule 190.01(x).

[5] See Appendix C for a description of how to calculate the net notional test.

2. **What would be the costs in hours and dollars of initially applying these trading tests to all of your funds?** Please include, in your estimates, costs for time spent by staff in legal (including outside legal fees) and fund administration (including accounting, risk management, compliance and information technology). Please also include costs associated with reporting to the funds' Board of Directors/Trustees on this testing.

Initial Costs

Hours: _____________

Dollars: _____________

3. **What would be the costs in hours and dollars of applying these trading tests on an ongoing basis to funds that initially meet the CFTC Rule 4.5 exclusion?** Please include, in your estimates, costs for time spent by staff in legal (including outside legal fees) and fund administration (including accounting, risk management, compliance, and information technology). Please also include costs associated with reporting to the funds' Board of Directors/Trustees on this testing.

Ongoing Costs

Hours: _______________

Dollars: _______________

B. **Marketing Test:** Even if a fund may qualify for the exclusion under Rule 4.5 on the basis of the trading tests, the CFTC may still require registration on the basis of newly adopted marketing restrictions. In order to qualify for exclusion, funds may not market themselves to the public as a vehicle for trading in the commodity futures, commodity options, or swaps markets. Below is a list of factors the CFTC states are indicative of "marketing" a fund as a vehicle for investing in commodity interests.

• Name of the fund;

• Fund's primary investment objective is tied to a commodity index;

• Fund makes use of a controlled foreign corporation for its derivatives trading;

• Fund's marketing materials, including its prospectus or disclosure document, refer to the benefits of the use of derivatives in a portfolio or make comparisons to a derivatives index;

• During the course of normal trading activities, the fund or entity on its behalf has a net short speculative position to any commodity through a direct or indirect investment in other derivatives;

• Futures/options/swaps transactions engaged in by the fund or on behalf of the fund will directly or indirectly be its primary source of potential gains and losses; and

• Fund is explicitly offering a managed futures strategy.

4. **Not including the funds accounted for in Part II, Question #1, how many of your funds do you estimate would be unable to meet the marketing test under Rule 4.5?** Please provide their aggregate total net assets as well.

    # of funds: ________

    Total net assets: ________

5. **What would be the costs in hours and dollars to make these initial determinations for all of your funds?** Please include, in your estimates, costs for time spent by staff in legal (including outside legal fees) and fund administration (including accounting, risk management, compliance, and information technology). Please also include costs associated with reporting to the funds' Board of Directors/Trustees on these determinations.

    Initial Costs

    Hours: _____________

    Dollars: _____________

6. **What would be the costs in hours and dollars to make these determinations on an ongoing basis for funds that initially meet the CFTC Rule 4.5 exclusion?** Please include, in your estimates, costs for time spent by staff in legal (including outside legal fees) and fund administration (including accounting, risk management, compliance, and information technology). Please also include costs associated with reporting to the funds' Board of Directors/Trustees on these determinations.

Ongoing Costs

Hours: _______________

Dollars: _______________

III. Disclosure Requirements under Part 4

Registration as a CPO imposes disclosure requirements under Part 4 of the CFTC's regulations. These requirements are a focus of the CFTC's pending Harmonization Proposal. In the questions below, we concentrate on §4.24 (general disclosures) and §4.25 (performance disclosures) as these requirements will account for the bulk of the changes investment advisers will need to make to their funds' registrations statements to comply with the disclosure requirements under the CFTC's regulations.

A. General Disclosures Required by §4.24

The disclosures required by §4.24[6] of the CFTC's regulations are listed in Appendix D, which compares those requirements with SEC disclosure requirements in Form N-1A (mutual funds and exchange-traded funds) and Form N-2 (closed-end funds).

We have grouped the §4.24 disclosure items into the broad categories described below (in ascending order of difficulty):

- Existing Information[7]: Item is already included in fund's registration statement.
- Standardized: Item, if applicable, requires the inclusion of specified standardized language based on certain characteristics of your fund(s).

[6] The full text of §4.24 is available at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=bd20b966639c6298d6b0a81574f6268e&rgn=div8&view=text&node=17:1.0.1.1.4.2.7.5&idno=17.

[7] We do not ask for cost estimates on this category.

• New, But Likely Not Difficult[8]: Item, if applicable, requires the inclusion of information not currently found in the fund's prospectus, but we believe the information should be relatively easy to gather and provide.

• New Drafting Required: Item, if applicable, requires the drafting of additional disclosure language. Some investigation and/or legal analysis may be required before drafting.

• New Drafting and Ongoing Maintenance: Item, if applicable, requires the gathering of information, drafting of additional disclosure language (including legal analysis), and regular updating.

• New Calculations/Evaluations, Drafting, and Potential Maintenance: Item, if applicable, requires new calculations or evaluations of fund's practices prior to the drafting of additional disclosures (including legal analysis) and may require regular updating.

In the following questions, "Affected Funds" refers to those funds captured in Part II, Question #1 and Question #4. "Line #" directs you to the line number in Appendix D where the requirement is found. Please include, in your estimates, costs for time spent by staff in legal (including outside legal fees) and fund administration (including accounting, risk management, and compliance) for gathering relevant information, drafting, formatting, and approving the disclosure, as well as costs associated with reporting to the Affected Funds' Board of Directors/Trustees as appropriate.

7. What would be the total initial and annual ongoing costs in hours and dollars of assessing the applicability of and preparing the "Standardized" disclosures listed below for all of your Affected Funds?

- Cautionary statement, line #1
- Risk disclosure statement, lines #2–5

	Initial Costs	Annual Ongoing Costs
Hours:	______________	______________________
Dollars:	______________	______________________

[8] Some information may be contained in other SEC disclosure documents, including the Statement of Additional Information or the adviser's Form ADV.

8. **What would be the total initial and annual ongoing costs in hours and dollars of assessing the applicability of and preparing the "New, But Likely Not Difficult" disclosures listed below for all of your Affected Funds**?

- Information required in the forepart of the disclosure document, lines #7–9
- Trading for own account, line #39
- Transferability and redemption, lines #45–46
- Inception of trading and other information, lines #51–55
- Reporting to pool participants, line #62

	Initial Costs	Annual Ongoing Costs
Hours:	______________	_____________________
Dollars:	______________	_____________________

9. **What would be the total initial and annual ongoing costs in hours and dollars of assessing the applicability of and preparing the "New Drafting Required" disclosures listed below for all of your Affected Funds**?

- Persons to be identified, lines #12–18
- Business background, lines #19–20
- Principal risk factors, line #21
- Description of calculations of fees paid by fund, lines #27–30
- Conflicts of interest, lines #33–35

	Initial Costs	Annual Ongoing Costs
Hours:	______________	_____________________
Dollars:	______________	_____________________

10. What would be the total initial and annual ongoing costs in hours and dollars of assessing the applicability of and preparing the "New Drafting and Ongoing Maintenance" disclosures listed below for all of your Affected Funds?

- Investment program and use of proceeds, lines #22–26
- Related party transactions, line #36
- Litigation, lines #37–38
- Ownership in pool, lines #56–61

	Initial Costs	Annual Ongoing Costs
Hours:	______________	______________________
Dollars:	______________	______________________

11. What would be the total initial and annual ongoing costs in hours and dollars of assessing the applicability of and preparing the "New Analysis and Drafting" disclosures listed below for all of your Affected Funds?

- Break-even point, line #11
- Tabular presentation of how break-even point is calculated, line #32

	Initial Costs	Annual Ongoing Costs
Hours:	______________	______________________
Dollars:	______________	______________________

B. Performance Disclosures Required by §4.25

The disclosures required by §4.25[9] of the CFTC's regulations are listed in Appendix E, which compares those requirements with SEC disclosure requirements in Form N-1A (mutual funds and exchange-traded funds) and Form N-2 (closed-end funds).

In the following questions, "Affected Funds" refers to those funds captured in Part II, Question #1 and Question #4. "Line #" directs you to the line number in Appendix E where the requirement is found. Please include, in your estimates, costs for time spent by staff in legal (including outside legal fees) and fund administration (including accounting and other areas responsible for performance calculations) for gathering relevant information, drafting, formatting, and approving the disclosure, as well as costs associated with reporting to the Affected Funds' Board of Directors/Trustees as appropriate.

12. **How many of your Affected Funds have been in operation for three years or more?** Please provide their total net assets as well.

    # of funds: _________

    Total net assets: _________

13. **How many of your Affected Funds have been in operation less than three years?** Please provide their total net assets as well.

    # of funds: _________

    Total net assets: _________

14. **For all of your Affected Funds what would be the total initial and annual ongoing costs in hours and dollars to provide the disclosures required by §4.25(a)(1)(i)(A)–(H) and §4.25(a)(2)? See lines #2–15 in Appendix E.**

	Initial Costs	Annual Ongoing Costs
Hours:	______________	______________________
Dollars:	______________	______________________

[9] The full text of §4.25 is available at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=bd20b966639c6298d6b0a81574f6268e&rgn=div8&view=text&node=17:1.0.1.1.4.2.7.6&idno=17

15. For ONLY your Affected Funds that have been in operation less than three years, what would be the total initial and annual ongoing costs in hours and dollars to provide the prior performance disclosure of other "pools and accounts" operated by the CPO as required under §4.25(c)(2)–(5)? See lines #16–21 in Appendix E.

	Initial Costs	Annual Ongoing Costs
Hours:	______________	______________________
Dollars:	______________	______________________

IV. Reporting and Recordkeeping Requirements under Part 4

Registration as a CPO also imposes reporting and recordkeeping requirements under Part 4 of the CFTC's regulations.

A. **Financial Reporting Requirements:** §4.22[10] of the CFTC's regulations would require funds to produce a certified monthly report to shareholders (Account Statement) consisting of a statement of operations and a statement of changes in net assets. (If the fund has $500,000 or less in net assets at the beginning of the fund's fiscal year, reports are required on a quarterly basis). Most of the information required in the Account Statement is included in funds' semi-annual and annual shareholder reports as required by the SEC.

Listed below are some key differences between the Account Statement that would be required under §4.22 and SEC-required shareholder reports.

• Account Statement includes brokerage commissions on portfolio trades as an expense in the statement of operations. For SEC-registered funds, brokerage commissions are embedded in the cost basis of the security and captured in the gains and losses of the security. They are not shown as a separate expense in the statement of operations or the expense ratio. The Account Statement also includes the total amount of other fees for commodity interest and other investment transactions during the reporting period.

• Account Statement must be provided to shareholders (proposed relief allows this requirement to be met by posting the Account Statement on the fund's website) not more than 30 days after month end. Funds have 60 days after the end of the reporting period to file their shareholder reports with the SEC and send them to shareholders.

[10] The full text of §4.22 is available at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=bd20b966639c6298d6b0a81574f6268e&rgn=div8&view=text&node=17:1.0.1.1.4.2.7.3&idno=17.

•Account Statements must be prepared 12 times per year versus two times per year for SEC-required shareholder reports.

•Account Statements must be certified using CFTC language (see CFTC §4.22(h)) or, under the Harmonization Proposal, funds may opt to use the SEC's certification language. The SEC's certification language is more extensive.

16. **What would be the initial and annual ongoing costs (i.e., cost for each Account Statement 12 times per year) in hours and dollars to characterize brokerage commissions on portfolio trades as an expense for the Affected Funds?** Whether provided internally or through unaffiliated vendors, please include, in your estimates, costs for time spent by staff in legal (including outside legal fees), fund administration (including accounting, risk management, compliance, and information technology for changes to programming, systems, and records), as well as costs associated with reporting to the Affected Funds' Board of Directors/Trustees as appropriate.

	Initial Costs	Annual Ongoing Costs
Hours:	______________	_____________________
Dollars:	______________	_____________________

17. **EXCLUDING the costs for compiling the brokerage commissions captured in the preceding question, what would be the cost in hours and dollars of preparing the rest of the financial information for the Account Statements 12 times (four times for funds with $500,000 or less in assets) per year (including costs associated with reporting to the Affected Funds' Board of Directors/Trustees)?**

Hours: _______

Dollars: _______

18. **Please estimate the costs for posting the monthly Account Statement to the funds' website over the course of a year.**

Hours: _______

Dollars: _______

19. **What would be the costs associated with certifying the monthly Account Statements with the CFTC language over the course of a year?** We have assumed that CPOs will not want to use the more extensive SEC language.

    Hours: _______

    Dollars: _______

20. **Are there any additional costs due to the shorter period to prepare and deliver the Account Statements 30 days after month end versus the shareholder reports which are due 60 days after period end? If so, please estimate and describe the nature of these costs?**

    Describe Costs:

    Hours: _______

    Dollars: _______

B. **Recordkeeping Requirements**

The Harmonization Proposal would provide relief for the maintenance of a fund's books and records with third party service providers similar to the exemptive relief that the CFTC has provided to commodity ETFs. Commodity ETF relief was limited to administrator, distributor or custodian, or a bank or registered broker or dealer acting in a similar capacity with respect to the pool. Under this definition, professional records maintenance and storage companies would not be eligible for the proposed relief.

21. **Do you have third party service providers for you Affected Funds' books and records that would not qualify for relief under the Harmonization Proposal?**

Yes: ______ No: ______

   a. **If so, what would you expect to do to be in compliance (e.g., hire a different recordkeeper, take the maintenance of the books and records in-house, etc.)?**

      Describe:

b. **What type of costs would be associated with making this change?** If possible, please provide estimates for hours and dollars.

Describe Costs:

Hours: _______

Dollars: _______

V. Prospectus Organization, Printing, Delivery, and Electronic Filing with National Futures Association

22. How many of your Affected Funds currently make use of the Summary Prospectus?

# of funds: ________

23. For your Affected Funds, approximately how many Summary Prospectuses do you mail in the funds' fiscal year?

# of Summary Prospectuses mailed: _______

24. For your Affected Funds that do not make use of the Summary Prospectus, how many statutory prospectuses do you mail in the funds' fiscal year?

# of statutory prospectuses mailed: _______

25. Do your Affected Funds currently have multi-fund statutory prospectuses?

Yes: ______ No: ______

If yes, and assuming the regulators provide the necessary flexibility, would you be likely to

a. **Leave your prospectus groupings as is,**

Yes: ______ No: ______

b. **Regroup your funds as a result of the amendments to Rule 4.5 (e.g., separate funds that may need to include CPO-related disclosure from those that would not or those funds that have a three-year operating history from those that do not), or**

   Yes: ______ No: ______

c. **Create single fund prospectuses?**

   Yes: ______ No: ______

26. **In light of your answer to the previous question, approximately how many TOTAL pages do you expect to add to your funds' statutory prospectuses.** For example, you currently have five funds (two of which would now be subject to additional CFTC disclosure) in one 100 page statutory prospectus and will now create five single fund prospectuses with 30 pages each before adding the CFTC required disclosure for the two affected funds. The 100 pages have become a total of 150 pages just from the regrouping. The CFTC-required disclosure would add, say, 10 pages to each of the Affected Funds statutory prospectus for a total of 20 more pages. In the end, 100 pages became 170 pages from regrouping and adding CFTC-required disclosure. The TOTAL number of additional pages in this example is 70 pages.

    Total # of additional pages: ____________

27. **What would be the costs in hours and dollars of rearranging your Affected Funds' registration statements both in terms of grouping and organizing content to comply with §4.24 and §4.25?** Please include in your estimate time spent by staff in legal (including outside legal fees) and fund administration including information technology to capture costs associated with any necessary changes to content management software. As noted above, for purposes of this survey please assume the SEC has granted the relief necessary to make a reorganized registration statement compliant for SEC purposes.

    Hours: _______

    Dollars: _______

28. What would be the initial and annual ongoing costs in hours and dollars to file the registration statements along with any updates and the annual reports for all your Affected Funds with the National Futures Association? Please include time to train staff, new software expense, changes to IT systems, etc.

	Initial Costs	Annual Ongoing Costs
Hours:	______________	______________________
Dollars:	______________	______________________

VI. Expected Future Use of Commodity Futures, Commodity Options, and Swaps

29. Listed below are various options on expected future use of commodity futures, commodity options, and swaps. Please check all that apply.

a. Do you expect to reduce usage for any of your funds that currently are <u>below the thresholds</u> in the Rule 4.5 trading tests to avoid inadvertently triggering the trading tests?

Yes: ______ No: ______ Maybe: _______

If yes or maybe, please describe:

(i) The extent to which you would likely do so.

Describe:

(ii) How many funds and what type of funds?

# of funds: _________

Types of funds:

(iii) How that might affect the funds in terms of expenses and performance?

Describe:

b. Do you expect to reduce usage for any of your funds that would <u>exceed the thresholds</u> in the trading tests so that you would not have to register as a CPO?

Yes: ______ No: ______ Maybe: _______

If yes or maybe, please describe

(i) How many funds and what type of funds?

# of funds: _________

Types of funds:

(ii) What other strategies/instruments would you use instead?

Describe:

(iii) How that might affect the funds in terms of expenses and performance?

Describe:

c. Do you expect to liquidate any of your funds that would <u>exceed the thresholds</u> in the trading tests?

Yes: ______ No: ______ Maybe: _______

If yes or maybe,

(i) How many funds and what are their total net assets?

# of funds: ________

Total net assets: ________

THANK YOU FOR COMPLETING THE SURVEY!

Appendix C

This chart is intended to compare related disclosures across §4.24 and Forms N-1A and N-2. As discussed in more detail in our April 2012 letter, in the instances where there is no related disclosure in the SEC forms, it is frequently the case that the CFTC-required disclosure is not applicable to registered investment companies.

	Disclosure Required by §4.24 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
1	(a) *Cautionary Statement.* The following Cautionary Statement must be prominently displayed on the cover page of the Disclosure Document. THE COMMODITY FUTURES TRADING COMMISSION HAS NOT PASSED UPON THE MERITS OF PARTICIPATING IN THIS POOL NOR HAS THE COMMISSION PASSED ON THE ADEQUACY OR ACCURACY OF THIS DISCLOSURE DOCUMENT.	Item 1(a)(4) requires funds to include the legend required by Rule 481(b) under the 1933 Act.	Item 1(h) requires funds to include the legend required by Rule 481(b) under the 1933 Act.
2	(b) *Risk Disclosure Statement.* (1) The following Risk Disclosure Statement must be prominently displayed immediately following any disclosures required to appear on the cover page of the Disclosure Document as provided by the Commission, by any applicable federal or state securities laws and regulations or by any applicable laws of non-United States jurisdictions. RISK DISCLOSURE STATEMENT YOU SHOULD CAREFULLY CONSIDER WHETHER YOUR FINANCIAL CONDITION PERMITS YOU TO PARTICIPATE IN A COMMODITY POOL. IN SO DOING, YOU SHOULD BE AWARE THAT COMMODITY INTEREST TRADING CAN QUICKLY LEAD TO LARGE LOSSES AS WELL AS GAINS. SUCH TRADING LOSSES CAN SHARPLY REDUCE THE NET ASSET VALUE OF THE POOL AND CONSEQUENTLY THE VALUE OF YOUR INTEREST IN THE POOL. IN ADDITION, RESTRICTIONS ON REDEMPTIONS MAY AFFECT YOUR ABILITY TO WITHDRAW YOUR PARTICIPATION IN THE POOL. FURTHER, COMMODITY POOLS MAY BE SUBJECT TO SUBSTANTIAL CHARGES FOR MANAGEMENT, AND ADVISORY AND BROKERAGE FEES. IT MAY BE NECESSARY FOR THOSE POOLS THAT ARE SUBJECT TO THESE CHARGES TO MAKE SUBSTANTIAL TRADING PROFITS TO AVOID DEPLETION OR EXHAUSTION OF THEIR ASSETS. THIS DISCLOSURE DOCUMENT CONTAINS A COMPLETE DESCRIPTION OF EACH EXPENSE	Items 4 and 9 require disclosure of principal risk factors. There are no equivalent standardized statements regarding risk.	Item 8(3)(a) requires disclosure of principal risk factors. Item 8(3)(b) has a separate requirement for leverage disclosure. There are no equivalent standardized statements regarding risk.

	Disclosure Required by §4.24 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
	TO BE CHARGED THIS POOL AT PAGE (insert page number) AND A STATEMENT OF THE PERCENTAGE RETURN NECESSARY TO BREAK EVEN, THAT IS, TO RECOVER THE AMOUNT OF YOUR INITIAL INVESTMENT, AT PAGE (insert page number). THIS BRIEF STATEMENT CANNOT DISCLOSE ALL THE RISKS AND OTHER FACTORS NECESSARY TO EVALUATE YOUR PARTICIPATION IN THIS COMMODITY POOL. THEREFORE, BEFORE YOU DECIDE TO PARTICIPATE IN THIS COMMODITY POOL, YOU SHOULD CAREFULLY STUDY THIS DISCLOSURE DOCUMENT, INCLUDING A DESCRIPTION OF THE PRINCIPAL RISK FACTORS OF THIS INVESTMENT, AT PAGE (insert page number).		
3	(2) If the pool may trade foreign futures or options contracts, the Risk Disclosure Statement must further state: YOU SHOULD ALSO BE AWARE THAT THIS COMMODITY POOL MAY TRADE FOREIGN FUTURES OR OPTIONS CONTRACTS. TRANSACTIONS ON MARKETS LOCATED OUTSIDE THE UNITED STATES, INCLUDING MARKETS FORMALLY LINKED TO A UNITED STATES MARKET, MAY BE SUBJECT TO REGULATIONS WHICH OFFER DIFFERENT OR DIMINISHED PROTECTION TO THE POOL AND ITS PARTICIPANTS. FURTHER, UNITED STATES REGULATORY AUTHORITIES MAY BE UNABLE TO COMPEL THE ENFORCEMENT OF THE RULES OF REGULATORY AUTHORITIES OR MARKETS IN NON-UNITED STATES JURISDICTIONS WHERE TRANSACTIONS FOR THE POOL MAY BE EFFECTED.	Items 4 and 9 require disclosure of principal risk factors. There are no equivalent standardized statements regarding risk.	Item 8(3)(a) requires disclosure of principal risk factors. Item 8(3)(b) has a separate requirement for leverage disclosure. There are no equivalent standardized statements regarding risk.
4	(3) If the potential liability of a participant in the pool is greater than the amount of the participant's contribution for the purchase of an interest in the pool and the profits earned thereon, whether distributed or not, the commodity pool operator must make the following additional statement in the Risk Disclosure Statement, to be prominently disclosed as the last paragraph thereof: ALSO, BEFORE YOU DECIDE TO PARTICIPATE IN THIS POOL, YOU SHOULD NOTE THAT YOUR POTENTIAL LIABILITY AS A PARTICIPANT IN THIS POOL FOR TRADING LOSSES AND OTHER EXPENSES OF THE POOL IS NOT LIMITED TO THE AMOUNT OF YOUR CONTRIBUTION FOR THE PURCHASE OF AN INTEREST IN THE POOL AND ANY PROFITS EARNED	Items 4 and 9 require disclosure of principal risk factors. There are no equivalent standardized statements regarding risk.	Item 8(3)(a) requires disclosure of principal risk factors. Item 8(3)(b) has a separate requirement for leverage disclosure. There are no equivalent standardized statements regarding risk.

	Disclosure Required by §4.24 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
	THEREON. A COMPLETE DESCRIPTION OF THE LIABILITY OF A PARTICIPANT IN THIS POOL IS EXPLAINED MORE FULLY IN THIS DISCLOSURE DOCUMENT.		
5	(4) If the pool may engage in retail Forex transactions, the Risk Disclosure Statement must further state: YOU SHOULD ALSO BE AWARE THAT THIS COMMODITY POOL MAY ENGAGE IN OFF-EXCHANGE FOREIGN CURRENCY TRADING. SUCH TRADING IS NOT CONDUCTED IN THE INTERBANK MARKET. THE FUNDS THAT THE POOL USES FOR OFF-EXCHANGE FOREIGN CURRENCY TRADING WILL NOT RECEIVE THE SAME PROTECTIONS AS FUNDS USED TO MARGIN OR GUARANTEE EXCHANGE-TRADED FUTURES AND OPTION CONTRACTS. IF THE POOL DEPOSITS SUCH FUNDS WITH A COUNTERPARTY AND THAT COUNTERPARTY BECOMES INSOLVENT, THE POOL'S CLAIM FOR AMOUNTS DEPOSITED OR PROFITS EARNED ON TRANSACTIONS WITH THE COUNTERPARTY MAY NOT BE TREATED AS A COMMODITY CUSTOMER CLAIM FOR PURPOSES OF SUBCHAPTER IV OF CHAPTER 7 OF THE BANKRUPTCY CODE AND THE REGULATIONS THEREUNDER. THE POOL MAY BE A GENERAL CREDITOR AND ITS CLAIM MAY BE PAID, ALONG WITH THE CLAIMS OF OTHER GENERAL CREDITORS, FROM ANY MONIES STILL AVAILABLE AFTER PRIORITY CLAIMS ARE PAID. EVEN POOL FUNDS THAT THE COUNTERPARTY KEEPS SEPARATE FROM ITS OWN FUNDS MAY NOT BE SAFE FROM THE CLAIMS OF PRIORITY AND OTHER GENERAL CREDITORS.	Items 4 and 9 require disclosure of principal risk factors. There are no equivalent standardized statements regarding risk.	Item 8(3)(a) requires disclosure of principal risk factors. Item 8(3)(b) has a separate requirement for leverage disclosure. There are no equivalent standardized statements regarding risk.
6	(5) If the pool may engage in swaps, the Risk Disclosure Statement must further state: SWAPS TRANSACTIONS, LIKE OTHER FINANCIAL TRANSACTIONS, INVOLVE A VARIETY OF SIGNIFICANT RISKS. THE SPECIFIC RISKS PRESENTED BY A PARTICULAR SWAP TRANSACTION NECESSARILY DEPEND UPON THE TERMS OF THE TRANSACTION AND YOUR CIRCUMSTANCES. IN GENERAL, HOWEVER, ALL SWAPS TRANSACTIONS INVOLVE SOME COMBINATION OF MARKET RISK, CREDIT RISK, COUNTERPARTY CREDIT RISK, FUNDING RISK, LIQUIDITY RISK, AND OPERATIONAL RISK. HIGHLY CUSTOMIZED SWAPS TRANSACTIONS IN PARTICULAR MAY INCREASE LIQUIDITY RISK, WHICH MAY RESULT IN A SUSPENSION OF REDEMPTIONS. HIGHLY LEVERAGED TRANSACTIONS MAY EXPERIENCE SUBSTANTIAL GAINS OR LOSSES IN VALUE AS A RESULT OF RELATIVELY SMALL CHANGES IN THE VALUE OR LEVEL OF AN UNDERLYING OR RELATED MARKET FACTOR.	Items 4 and 9 require disclosure of principal risk factors. There are no equivalent standardized statements regarding risk.	Item 8(3)(a) requires disclosure of principal risk factors. Item 8(3)(b) has a separate requirement for leverage disclosure. There are no equivalent standardized statements regarding risk.

	Disclosure Required by §4.24 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
	IN EVALUATING THE RISKS AND CONTRACTUAL OBLIGATIONS ASSOCIATED WITH A PARTICULAR SWAP TRANSACTION, IT IS IMPORTANT TO CONSIDER THAT A SWAP TRANSACTION MAY BE MODIFIED OR TERMINATED ONLY BY MUTUAL CONSENT OF THE ORIGINAL PARTIES AND SUBJECT TO AGREEMENT ON INDIVIDUALLY NEGOTIATED TERMS. THEREFORE, IT MAY NOT BE POSSIBLE FOR THE COMMODITY POOL OPERATOR TO MODIFY, TERMINATE, OR OFFSET THE POOL'S OBLIGATIONS OR THE POOL'S EXPOSURE TO THE RISKS ASSOCIATED WITH A TRANSACTION PRIOR TO ITS SCHEDULED TERMINATION DATE.		
7	(c) *Table of contents.* A table of contents showing, by subject matter, the location of the disclosures made in the Disclosure Document must appear immediately following the Risk Disclosure Statement.	Rule 481(c) under the 1933 Act requires table of contents for prospectus to be included on either the outside front, inside front, or outside back cover page of the prospectus. Any prospectus delivered electronically must include the table of contents immediately following the cover page.	Rule 481(c) under the 1933 Act requires table of contents for prospectus to be included on either the outside front, inside front, or outside back cover page of the prospectus. Any prospectus delivered electronically must include the table of contents immediately following the cover page.
8	(d) *Information required in the forepart of the Disclosure Document.* (1) The name, address of the main business office, main business telephone number and form of organization of the pool. If the mailing address of the main business office is a post office box number or is not within the United States, its territories or possessions, the pool operator must state where the pool's books and records will be kept and made available for inspection;	Item 1(a) (cover page) requires the name of the fund. Item 1(b) (back cover page) requires the telephone number for the fund. Item 15(a) requires the form of organization. Address is required on the facing sheet.	Item 1 (outside front cover) requires the disclosure of the fund name and the fund type (e.g., bond fund, balanced fund, business development company, etc.). Item 8(a) requires disclosure regarding the fund's form of organization.
9	(2) The name, address of the main business office, main business telephone number and form of organization of the commodity pool operator. If the mailing address of the main business office is a post office box number or is not within the United States, its territories or possessions, the pool operator must state where its books and records will be kept and made available for inspection;	Item 5(a) requires the name of the adviser. Item 10(a)(1)(i) requires the name and address of the adviser, but not the telephone number or the form of organization, or where the books and records are kept. Much of this information is required in Part 1A of Form ADV, including the adviser's principal office and place of business (Item 1); adviser's place and form of organization (Item 3); each entity that maintains the adviser's books and records, including the location of the entity, and a description of the books and records maintained at that location (Item	Item 9(1)(b) requires the name and principal address of the adviser, but not the telephone number or the form of organization, or where the books and records are kept. Much of this information is required in Part 1A of Form ADV, including the adviser's principal office and place of business (Item 1); adviser's place and form of organization (Item 3); each entity that maintains the adviser's books and records, including the location of the entity, and a description of the books and records maintained at that location (Item 1(K) and Section 1.K of Schedule D).

	Disclosure Required by §4.24 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
		1(K) and Section 1.K of Schedule D).	
10	(3) As applicable, a statement that the pool is: (i) Privately offered pursuant to section 4(2) of the Securities Act of 1933, as amended (15 U.S.C. 77d(2)), or pursuant to Regulation D thereunder (17 CFR 230.501 *et seq.*); (ii) A multi-advisor pool as defined in §4.10(d)(2); (iii) A principal-protected pool as defined in §4.10(d)(3); or (iv) Continuously offered. If the pool is not continuously offered, the closing date of the offering must be disclosed.	(i) None, but Regulation D – Rule 502(d) requires comparable disclosure. (ii) None (iii) None (iv) Item 25(a)(2) requires each principal underwriter distributing securities of the Fund to state whether the offering is continuous.	(i) None, but Regulation D – Rule 502(d) requires this disclosure. Item 5(1)(d) requires a description of the nature of the distribution of the fund's securities. (ii) None (iii) None (iv) Item 5(1)(d) requires a description of the nature of the distribution of the fund's securities.
11	(4) The date when the commodity pool operator first intends to use the Disclosure Document; and	Item 1(a)(3) (cover page) requires the date of the prospectus.	Item 1 (outside cover front) requires the date of the prospectus and the date of the SAI.
12	(5) The break-even point per unit of initial investment, as specified in §4.10(j)	None, *but see* lines 28-29 re information provided on fees and expenses.	None, *but see* lines 28-29 re information provided on fees and expenses.
13	(e) *Persons to be identified.* The names of the following persons:		
14	(1) Each principal of the pool operator;	Items 5 and 10 together require the name and address of each adviser, including sub-advisers, but not principals thereof. Form ADV requires control person information including direct and indirect owners and executive officers (Item 10 and Schedule A and Schedule B).	Item 9(1)(b) requires the name and address of each adviser, including sub-advisers, but not principals thereof. Form ADV requires control person information including direct and indirect owners and executive officers (Item 10 and Schedule A and Schedule B).
15	(2) The pool's trading manager, if any, and each principal thereof;	Items 5 and 10 together require the name and address of each adviser, including sub-advisers, but not principals thereof.	Item 9(1)(b) requires information regarding the name and address of each adviser, including sub-advisers, but not principals thereof.

	Disclosure Required by §4.24 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
16	(3) Each major investee pool, the operator of such investee pool, and each principal of the operator thereof;	Item 9(b) requires a description of the fund's principal investment strategies, including the particular type or types of securities in which the fund principally invests or will invest, and Item 4(a) requires a summary of these strategies. Item 16(b) requires a description of investment strategies that are not principal strategies. To the extent a fund is investing a substantial amount in another fund*, it would be captured in this disclosure. Information about principals is not required. *Rule 4.10(d)(5) defines major investee pool as one "that is allocated or intended to be allocated at least ten percent of the net asset value of the pool."	Item 8(2) requires the registrant to describe the investment objectives and policies of the registrant that will constitute its principal portfolio emphasis. To the extent a fund is investing a substantial amount in another fund*, it would be captured in this disclosure. Information about principals is not required. *Rule 4.10(d)(5) defines major investee pool as one "that is allocated or intended to be allocated at least ten percent of the net asset value of the pool."
17	(4) Each major commodity trading advisor and each principal thereof;	Items 5 and 10 together require the name and address of each adviser, including sub-advisers, but not principals thereof. Form ADV requires control person information including direct and indirect owners and executive officers (Item 10 and Schedule A and Schedule B).	Item 9(1)(b) requires the name and address of each adviser, including sub-advisers, but not principals thereof. Form ADV requires control person information including direct and indirect owners and executive officers (Item 10 and Schedule A and Schedule B).
18	(5) Which of the foregoing persons will make trading decisions for the pool; and	Items 5 and 10 together require the name of each adviser, including sub-advisers, and the names and backgrounds of the portfolio managers.	Item 9(1)(b) requires the name and address of each adviser, including sub-advisers, and the names and backgrounds of the portfolio managers.
19	(6) If known, the futures commission merchant and/or retail foreign exchange dealer through which the pool will execute its trades, and, if applicable, the introducing broker through which the pool will introduce its trades to the futures commission merchant and/or retail foreign exchange dealer.	None.	None.

	Disclosure Required by §4.24 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
20	(f) *Business background.* (1) The business background, for the five years preceding the date of the Disclosure Document, of: (i) The commodity pool operator; (ii) The pool's trading manager, if any; (iii) Each major commodity trading advisor; (iv) The operator of each major investee pool; and (v) Each principal of the persons referred to in this paragraph (f)(1) who participates in making trading or operational decisions for the pool or who supervises persons so engaged.	(i)-(iv) Item 10(a)(1)(i) requires disclosure about each adviser's experience as an investment adviser, but is not limited to the last five years. (v) Items 5(b) and 10(a)(2) together require disclosure about the name, title, business background over the last 5 years and length of service of the portfolio managers who are primarily response for the day-to-day management of the fund's portfolio. There are additional SAI disclosure requirements.	(i)-(iv) Item 9(1)(b) requires disclosure about each adviser's experience as an investment adviser, but is not limited to the last five years. (v) Item 9(1)(c) requires disclosure about the name, title, business background over the last 5 years and length of service of the portfolio managers who are primarily responsible for the day-to-day management of the fund's portfolio. There are additional SAI disclosure requirements.
21	(2) The pool operator must include in the description of the business background of each person identified in §4.24(f)(1) the name and main business of that person's employers, business associations or business ventures and the nature of the duties performed by such person for such employers or in connection with such business associations or business ventures. The location in the Disclosure Document of any required past performance disclosure for such person must be indicated.	See above.	See above.
22	(g) *Principal risk factors.* A discussion of the principal risk factors of participation in the offered pool. This discussion must include, without limitation, risks relating to volatility, leverage, liquidity, counterparty creditworthiness, as applicable to the types of trading programs to be followed, trading structures to be employed and investment activity (including retail forex transactions) expected to be engaged in by the offered pool.	Items 4 and 9 require disclosure of principal risk factors. Item 16(b) requires a discussion of strategies that are not principal strategies, and the risks associated with those strategies.	Item 8(3)(a) requires disclosure of principal risk factors. Item 8(3)(b) has a separate requirement for leverage disclosure.

	Disclosure Required by §4.24 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
23	(h) *Investment program and use of proceeds.* The pool operator must disclose the following: (1) The types of commodity interests and other interests which the pool will trade, including: (i) The approximate percentage of the pool's assets that will be used to trade commodity interests, securities and other types of interests, categorized by type of commodity or market sector, type of security (debt, equity, preferred equity), whether traded or listed on a regulated exchange market, maturity ranges and credit-worthiness, as applicable; (ii) The extent to which such interests are subject to state or federal regulation, regulation by a non-United States jurisdiction or rules of a self-regulatory organization; (iii)(A) The custodian or other entity (*e.g.,* bank or broker-dealer) which will hold such interests; and (B) If such interests will be held or if pool assets will be invested in a non-United States jurisdiction, the jurisdiction in which such interests or assets will be held or invested.	Items 4 and 9 require disclosure regarding principal investment strategies of the fund. Item 16 requires information regarding other investment strategies and fundamental policies, including with respect to the purchase or sale of commodities or commodity contracts, including futures contracts. Item 19(h)(3) requires disclosure of the fund's custodian. There is no requirement to identify each country in which the fund may invest.	Item 8(2) requires the registrant to describe the investment objectives and policies of the registrant that will constitute its principal portfolio emphasis. It does not require funds to disclose specific percentages or the extent to which investments are regulated. Item 17(2)(g) requires the description of any fundamental policies, including with respect to the purchase or sale of commodities or commodity contracts, including future contracts. Item 9(1)(e) requires the disclosure of the name and principal business address of the custodian(s). There is no requirement to identify each country in which the fund may invest.
24	(2) A description of the trading and investment programs and policies that will be followed by the offered pool, including the method chosen by the pool operator concerning how futures commission merchants and/or retail foreign exchange dealers carrying the pool's accounts shall treat offsetting positions pursuant to §1.46 of this chapter, if the method is other than to close out all offsetting positions or to close out offsetting positions on other than a first-in, first-out basis, and any material restrictions or limitations on trading required by the pool's organizational documents or otherwise. This description must include, if applicable, an explanation of the systems used to select commodity trading advisors, investee pools and types of investment activity to which pool assets will be committed;	Items 4, 9, and 16 require disclosure concerning investment strategies, but do not require the level of detail that the CFTC appears to require with respect to the treatment of offsetting positions, organizational document restrictions on fund investments, or the "systems" used to select CTAs and investee pools.	Items 8(2) and 17(2) require disclosure concerning investment strategies, but as with open-end funds do not require the level of detail that the CFTC appears to require with respect to certain activities.

	Disclosure Required by §4.24 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
25	(3)(i) A summary description of the pool's major commodity trading advisors, including their respective percentage allocations of pool assets, a description of the nature and operation of the trading programs such advisors will follow, including the types of interests traded pursuant to such programs, and each advisor's historical experience trading such program including material information as to volatility, leverage and rates of return and the length of time during which the advisor has traded such program;	Items 4, 9, and 10 require disclosure concerning security selection process and the investment adviser's experience. However, the CFTC appears to require additional disclosure not necessarily required by the SEC, including the percentage allocations among CTAs, and information regarding the volatility, leverage, rates of return of the trading strategies employed.	Items 8(2) and 17(2) require disclosure concerning security selection process and the investment adviser's experience. However, the CFTC appears to require additional disclosure not necessarily required by the SEC, including the percentage allocations among CTAs, and information regarding the volatility, leverage, rates of return of the trading strategies employed.
26	(ii) A summary description of the pool's major investee pools or funds, including their respective percentage allocations of pool assets and a description of the nature and operation of such investee pools and funds, including for each investee pool or fund the types of interests traded, material information as to volatility, leverage and rates of return for such investee pool or fund and the period of its operation; and	Item 9(b) requires a description of the fund's principal investment strategies, including the particular type or types of securities in which the fund principally invests or will invest, and Item 4(a) requires a summary of these strategies. Item 16(b) requires a description of investment strategies that are not principal strategies. To the extent a fund is investing a substantial amount in another fund*, it would be captured in this disclosure. Details such as volatility, leverage and rates of return would likely not be described. *Rule 4.10(d)(5) defines major investee pool as one "that is allocated or intended to be allocated at least ten percent of the net asset value of the pool."	Item 8(2) requires the registrant to describe the investment objectives and policies of the registrant that will constitute its principal portfolio emphasis. To the extent a fund is investing a substantial amount in another fund*, it would be captured in this disclosure. Details such as volatility, leverage and rates of return would likely not be described. *Rule 4.10(d)(5) defines major investee pool as one "that is allocated or intended to be allocated at least ten percent of the net asset value of the pool."
27	(4)(i) The manner in which the pool will fulfill its margin requirements and the approximate percentage of the pool's assets that will be held in segregation pursuant to the Act and the Commission's regulations thereunder; (ii) If the pool will fulfill its margin requirements with other than cash deposits, the nature of such deposits; and (iii) If assets deposited by the pool as margin or as security deposit generate income, to whom that income will be paid.	None.	None, other than Item 17(2)(e) which only requires a description of any fundamental policy of the registrant not described in the prospectus with respect to (among others) purchases on margin.

	Disclosure Required by §4.24 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
28	(i) *Fees and expenses.* (1) The Disclosure Document must include a complete description of each fee, commission and other expense which the commodity pool operator knows or should know has been incurred by the pool for its preceding fiscal year and is expected to be incurred by the pool in its current fiscal year, including fees or other expenses incurred in connection with the pool's participation in investee pools and funds.	Fee disclosures required by Item 3 (fee table), Item 10 (advisory fee), Item 12 (sales charges and Rule 12b-1 fees), Item 19 (advisory fees, distribution fees and other fees paid to third parties), and Item 21 (brokerage fees). See additional detail below.	Form N-2 requires comparable information as Form N-1A.
29	(2) This description must include, without limitation: (i) Management fees; (ii) Brokerage fees and commissions, including interest income paid to futures commission merchants, and any fees incurred to maintain an open position in retail forex transactions; (iii) Fees and commissions paid in connection with trading advice provided to the pool; (iv) Fees and expenses incurred within investments in investee pools, investee funds and other collective investment vehicles, which fees and expenses must be disclosed separately for each investment tier; (v) Incentive fees; (vi) Any allocation to the commodity pool operator, or any agreement or understanding which provides the commodity pool operator with the right to receive a distribution, where such allocation or distribution is greater than a pro rata share of the pool's profits based on the percentage of capital contributions made by the commodity pool operator; (vii) Commissions or other benefits, including trailing commissions paid or that may be paid or accrue, directly or indirectly, to any person in connection with the solicitation of participations in the pool; (viii) Professional and general administrative fees and expenses, including legal and accounting fees and office supplies expenses; (ix) Organizational and offering expenses;	(i) fee table + Item 19(a) (calculation of advisory fee) (ii) narrative disclosure in Item 3 + Item 21 (brokerage commissions) (iii) Item 19(e) (payment for other investment advice) (iv) Item 3 instructions, annual fund operating expenses, part (f) (v) Performance fees would be included in fee table (Item 3) and narrative advisory fee disclosure (Item 10) (vi) none (vii) fee table (sales loads and 12b-1 fees), Item 8 (fund and related company payments to financial intermediaries), Item 12(a) (sales loads), Item 19(g) (description of 12b-1 plan), Item 25(a)(3) and (c) (commissions and other payments to underwriter), 32(c) (brokerage commissions to principal underwriter) (viii) fee table (other expenses), Item 11(e)(4)(iii)(C) (administrative or other charges imposed on shareholders for frequent purchases and redemptions) (ix) fee table (other expenses) (x) fee table (other expenses) (xi) fee table (other expenses) (xii) none (xiii) Item 19(c)(2) (fund fees and expenses paid by persons other than fund, adviser)	(i) Management fee is included and its definition is provided (See Item 3(7)(a)); See also Item 9(1)(b)(3) which requires a description of the advisory fee). (ii) Item 21 requires narrative and quantitative disclosure regarding brokerage commissions. (iii) "Management Fees" include investment advisory fees. (See Item 3, Instructions 7(a)) (iv) Item 3, Instruction 10 requires AFFE (v) "Management Fees" include investment advisory fees (*including any component thereof based on the performance of the registrant*). (See Item 3, Instructions 7(a)). Also Item 9. (vi) None. (vii) fee table (Item 3) (sales loads). (viii) fee table (Item 3, Instructions 9). Also, Item 27 specifically mentions legal and accounting fees as fees that need to be itemized. (ix) Organizational expenses: "Management fees" include expenses

	Disclosure Required by §4.24 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
	(x) Clearance fees and fees paid to national exchanges and self-regulatory organizations; (xi) For principal-protected pools, any direct or indirect costs to the pool associated with providing the protection feature, as referred to in paragraph (o)(3) of this section; and (xii) Any costs or fees included in the spread between bid and asked prices for retail forex transactions; and (xiii) Any other direct or indirect cost.		incurred within the registrant's own organization. Offering expenses: Item 27 specifically mentions registration fees as an expense that needs to be itemized. (x) None (xi) None (xii) None (xiii) Similar requirement in item 3.
30	(3) Where any fee, commission or other expense is determined by reference to a base amount including, but not limited to, "net assets," "allocation of assets," "gross profits," "net profits," or "net gains," the pool operator must explain how such base amount will be calculated, in a manner consistent with calculation of the break-even point.	Item 10(a)(1)(ii) (requires a description of the compensation of each adviser including how it is calculated); Item 12 (requires a description of sales charges and Rule 12b-1 fees and how they are calculated); Item 19 (requires a description of the method of calculating advisory and other fees), and Item 21 (brokerage fees).	Form N-2 has similar disclosure requirements regarding the manner of calculating certain fees and expenses.
31	(4) Where any fee, commission or other expense is based on an increase in the value of the pool, the pool operator must specify how the increase is calculated, the period of time during which the increase is calculated, the fee, commission or other expense to be charged at the end of that period and the value of the pool at which payment of the fee, commission or other expense commences.	Items 10(a)(1)(ii) and 19(a)(3) require a fund to disclose the method of calculating the advisory fee, which would include the methodology for any performance-based advisory fee.	Items 9 and 20(c) require a fund to disclose the method of calculating the advisory fee, which would include the methodology for any performance-based advisory fee.
32	(5) Where any fee, commission or other expense of the pool has been paid or is to be paid by a person other than the pool, the pool operator must disclose the nature and amount thereof and the person who paid or who is expected to pay it.	Item 3 (disclosure of any expense waivers), Item 19(a)(3) (adviser expense limitation provisions) and Item 19(c)(2) (fund fees and expenses paid by persons other than the fund or adviser).	Item 3, Instruction 10(d) (fee table expense limitation arrangement), Item 20(1)(c)(3) (expense limitation provision), and Item 20(3) (fund fees and expenses paid by persons other than the fund or adviser).
33	(6) The pool operator must provide, in a tabular format, an analysis setting forth how the break-even point for the pool was calculated. The analysis must include all fees, commissions and other expenses of the pool, as set forth in §4.24(i)(2).	Fee table (item 3)	Fee table (item 3)

	Disclosure Required by §4.24 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
34	(j) *Conflicts of interest.* (1) A full description of any actual or potential conflicts of interest regarding any aspect of the pool on the part of: (i) The commodity pool operator; (ii) The pool's trading manager, if any; (iii) Any major commodity trading advisor; (iv) The commodity pool operator of any major investee pool; (v) Any principal of the persons described in paragraphs (j)(1) (i), (ii), (iii) and (iv) of this section; and (vi) Any other person providing services to the pool or soliciting participants for the pool, or acting as a counterparty to the pool's retail forex transactions (as defined in §5.1(m) of this chapter).	Item 8 requires conflict of interest disclosure regarding payments to financial intermediaries. Item 16(f)(vi) requires disclosure about the procedures the fund uses to address conflicts between the interest of fund shareholders and those of the fund's adviser, principal underwriter, or any affiliated person of the foregoing in connection with portfolio holdings disclosure. Item 17(f) requires a description of the procedures that the fund uses when a proxy vote presents a conflict between the interests of fund shareholders and those of the fund's investment adviser, principal underwriter or any affiliated person of the fund, its adviser or principal underwriter. Item 20(a)(4) requires disclosure regarding material conflicts between the investment strategy of the Fund and the investment strategy of other accounts managed by a portfolio manager and material conflicts in allocation of investment opportunities between a fund and other accounts managed by the portfolio manager. Part 2A of the adviser's Form ADV, also provides relevant information, including: disclosure of conflicts of interest for management of accounts with performance-based fees and accounts that are charged another type and how these conflicts are addressed (Part 2A Item 6); disclosure of any relationship or arrangement with certain related persons	Item 18(16) requires a description of the procedures that the fund uses when a proxy vote presents a conflict between the interests of fund shareholders and those of the fund's investment adviser, principal underwriter or any affiliated person of the fund, its adviser or principal underwriter. Item 21(1)(d) requires disclosure regarding material conflicts between the investment strategy of the Fund and the investment strategy of other accounts managed by a portfolio manager and material conflicts in allocation of investment opportunities between a fund and other accounts managed by the portfolio manager. Part 2A of the adviser's Form ADV, also provides relevant information, including: disclosure of conflicts of interest for management of accounts with performance-based fees and accounts that are charged another type and how these conflicts are addressed (Part 2A Item 6); disclosure of any relationship or arrangement with certain related persons that creates a material conflicts of interest with clients and how these conflicts are addressed (Item 10); disclosure of conflicts of interest for any soft dollar arrangements (Item 12); disclosure of conflicts of interest in voting client securities and how they are addressed (Item 17).

	Disclosure Required by §4.24 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
		that creates a material conflicts of interest with clients and how these conflicts are addressed (Item 10); disclosure of conflicts of interest for any soft dollar arrangements (Item 12); disclosure of conflicts of interest in voting client securities and how they are addressed (Item 17).	
35	(2) Any other material conflict involving the pool.	See note in line 34 regarding related disclosures in Form ADV	See note in line 34 regarding related disclosures in Form ADV
36	(3) Included in the description of such conflicts must be any arrangement whereby a person may benefit, directly or indirectly, from the maintenance of the pool's account with the futures commission merchant and/or retail foreign exchange dealer, or from the introduction of the pool's account to a futures commission merchant and/or retail foreign exchange dealer by an introducing broker (such as payment for order flow or soft dollar arrangements) or from an investment of pool assets in investee pools or funds or other investments.	None specifically, but see note in line 34 regarding related disclosures in Form ADV	None specifically, but see note in line 34 regarding related disclosures in Form ADV
37	(k) *Related party transactions.* A full description, including a discussion of the costs thereof to the pool, of any material transactions or arrangements for which there is no publicly disseminated price between the pool and any person affiliated with a person providing services to the pool.	Item 17(c) requires disclosure about any affiliated person of the fund who received aggregate compensation from the fund for the most recently completed fiscal year exceeding $60,000. Item 19(h)(4) requires disclosure about whether an affiliated person of the fund or an affiliated person of an affiliated person acts as custodian, transfer agent, or dividend-paying agent for the fund, and a description of the services that the person performs and the basis for remuneration. Item 21 requires disclosure about a fund's use of an affiliated broker. Item 25(b) requires disclosure about all	Item 18(13) requires disclosure about any affiliated person of the fund who received aggregate compensation from the fund for the most recently completed fiscal year in excess of $60,000. Item 20(8) requires disclosure about whether an affiliated person of the fund, or an affiliated person of an affiliated person of the fund acts as custodian, transfer agent, or dividend-paying agent for the fund, and a description of the services performed by that person and the basis for remuneration. Item 9(1)(g) required that, if the fund

	Disclosure Required by §4.24 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
		commissions and other compensation received by affiliated principal underwriters from the fund during the funds' most recent fiscal year.	pays (or will pay) brokerage commissions to any broker that is an (1) affiliated person of the fund, (2) affiliated person of such person, or (3) affiliated person of an affiliated person of the fund, its investment adviser, or its principal underwriter, the fund must include a statement to that effect.
38	(l) *Litigation.* (1) Subject to the provisions of §4.24(l)(2), any material administrative, civil or criminal action, whether pending or concluded, within five years preceding the date of the Document, against any of the following persons; *Provided, however,* that a concluded action that resulted in an adjudication on the merits in favor of such person need not be disclosed: (i) The commodity pool operator, the pool's trading manager, if any, the pool's major commodity trading advisors, and the operators of the pool's major investee pools; (ii) Any principal of the foregoing; and (iii) The pool's futures commission merchants and/or retail foreign exchange dealers and its introducing brokers, if any.	Item 10(a)(3) requires disclosure regarding any material pending litigation, other than ordinary routine litigation incidental to the business, to which the fund or the fund's adviser or principal underwriter is a party. Legal proceedings are material only to extent they are likely to have a material adverse effect on the fund or the ability of the adviser or principal underwriter to perform its contract. The disclosure should include the name of the court in which the proceedings are pending, date instituted, principal parties involved, description of the factual basis alleged to underlie the proceeding, and the relief sought. Similar information as to any legal proceedings instituted or known to be contemplated by a governmental authority are also to be disclosed. No disclosure requirements with respect to litigation involving FCMs, retail foreign exchange dealers and introducing brokers.	Similar requirement under Form N-2. Item 12 requires the registrant to "describe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant, any subsidiary of the registrant, or the registrant's investment adviser or principal underwriter is a party. Include the name of the court where the case is pending, the date instituted, the principal parties, a description of the factual basis alleged to underlie the proceeding, and the relief sought. Include similar information as to any proceeding instituted by a governmental authority or known to be contemplated by a governmental authority."

	Disclosure Required by §4.24 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
39	(2) With respect to a futures commission merchant and/or retail foreign exchange dealer or an introducing broker, an action will be considered material if: (i) The action would be required to be disclosed in the notes to the futures commission merchant's, retail foreign exchange dealer's or introducing broker's financial statements prepared pursuant to generally accepted accounting principles; (ii) The action was brought by the Commission; *Provided, however,* that a concluded action that did not result in civil monetary penalties exceeding $50,000 need not be disclosed unless it involved allegations of fraud or other willful misconduct; or (iii) The action was brought by any other federal or state regulatory agency, a non-United States regulatory agency or a self-regulatory organization and involved allegations of fraud or other willful misconduct.	See row immediately above.	See row immediately above
40	(m) *Trading for own account.* If the commodity pool operator, the pool's trading manager, any of the pool's commodity trading advisors or any principal thereof trades or intends to trade commodity interests for its own account, the pool operator must disclose whether participants will be permitted to inspect the records of such person's trades and any written policies related to such trading.	None.	None.
41	(n) *Performance disclosures.* Past performance must be disclosed as set forth in §4.25.	(See discussion in §4.25 chart.)	(See discussion in §4.25 chart.)
42	(o) *Principal-protected pools.* If the pool is a principal-protected pool as defined in §4.10(d)(3), the commodity pool operator must:		
43	(1) Describe the nature of the principal protection feature intended to be provided, the manner by which such protection will be achieved, including sources of funding, and what conditions must be satisfied for participants to receive the benefits of such protection;	Item 2 requires a fund to describe its investment objectives or goals, which would include principal protection. Items 4 and 9 require a discussion of the principal strategies employed to achieve the fund's objectives, and the risks associated with those strategies.	Item 8(2) requires a description of the fund's investment objectives and policies, and 8(3) requires disclosure of principal risk factors.
44	(2) Specify when the protection feature becomes operative; and	None.	None.
45	(3) Disclose, in the break-even analysis required by §4.24(i)(6), the costs of purchasing and carrying the assets to fund the principal protection feature or other limitation on risk, expressed as a percentage of the price of a unit of participation.	None.	None.

	Disclosure Required by §4.24 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
46	(p) *Transferability and redemption.* (1) A complete description of any restrictions upon the transferability of a participant's interest in the pool; and	Item 10(b) requires disclosure about any unique or unusual restrictions on the right to retain or dispose of a fund's shares.	Item 10(1) requires a fund to concisely discuss the nature and most significant attributes of the shares offered by the fund.
47	(2) A complete description of the frequency, timing and manner in which a participant may redeem interests in the pool. Such description must specify: (i) How the redemption value of a participant's interest will be calculated; (ii) The conditions under which a participant may redeem its interest, including the cost associated therewith, the terms of any notification required and the time between the request for redemption and payment; (iii) Any restrictions on the redemption of a participant's interest, including any restrictions associated with the pool's investments; and (iv) Any liquidity risks relative to the pool's redemption capabilities.	Item 6(b) requires brief disclosure about the procedures for redeeming shares. Item 10(b) requires disclosure about any unique or unusual restrictions on the right to retain or dispose of a fund's shares. Item 11(a) requires disclosure about how the fund's shares are valued. Item 11(c) requires disclosure of the procedures for redeeming a fund's shares, including: (i) any restrictions on redemptions; (ii) any redemption charges (including how charges will be collected and under what circumstances they will be waived); (iii) if the fund has reserved the right to redeem in kind; (iv) any procedure shareholder can use to sell the fund's shares to the fund or its underwriter through a broker-dealer (noting any charges imposed for such service); (v) circumstances under which the fund may redeem shares automatically without action by the shareholder in accounts below a certain number or value of shares; (vi) circumstances under which the fund may delay honoring a redemption request for a certain time after a shareholder's investment; and (viii) any restrictions on or costs associated with transferring shares held in street name accounts. Item 11(e) requires disclosure about	Item 10(1) requires a fund to concisely discuss the nature and most significant attributes of the shares offered by the fund, including redemption provisions.

	Disclosure Required by §4.24 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
		frequent purchases and redemptions for fund shares, including the risks.	
48	(q) *Liability of pool participants.* The extent to which a participant may be held liable for obligations of the pool in excess of the funds contributed by the participant for the purchase of an interest in the pool.	Item 22(a)(2)(ii) requires a description of each class of capital stock offered by the registrant; this description must include a discussion of the nature and most significant attributes of a stock, including any material obligations or potential liability associated with ownership of the security (not including investment risks).	Item 10(1)(a) requires a description of each class of capital stock offered by the registrant; this description must include a discussion of the nature and most significant attributes of a stock, including any material obligations or potential liability associated with ownership of the security (not including investment risks).
49	(r) *Distribution of profits and taxation.* (1) The pool's policies with respect to the payment of distributions from profits or capital and the frequency of such payments;	Item 11(d) requires disclosure about the fund's dividends and distributions policy, including any options shareholders may have as to the receipt of dividends and distributions.	Item 10(1)(a) requires a description of each class of capital stock offered by the registrant; this description includes a discussion on the nature and most significant attributes of a stock, including, where applicable, dividend rights, policies or limitations.
50	(2) The federal income tax effects of such payments for a participant, including a discussion of the federal income tax laws applicable to the form of organization of the pool and to such payments therefrom; and	Items 7, 11(f) and 24 require tax disclosure regarding investments in a fund.	Items 10(4) and 23 require tax disclosure regarding investments in a fund.
51	(3) If a pool is specifically structured to accomplish certain federal income tax objectives, the commodity pool operator must explain those objectives, the manner in which they will be achieved and any risks relative thereto.	Item 9 requires a statement of the fund's principal investment objectives, how the fund intends to achieve the objectives, and the principal risks.	Item 8(2) requires a description of the fund's investment objectives and policies, and 8(3) requires disclosure of principal risk factors.
52	(s) *Inception of trading and other information.* (1) The minimum aggregate subscriptions that will be necessary for the pool to commence trading commodity interests;	None.	None.

	Disclosure Required by §4.24 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
53	(2) The minimum and maximum aggregate subscriptions that may be contributed to the pool;	Item 6(a) requires disclosure about a fund's minimum initial or subsequent investment requirements.	None.
54	(3) The maximum period of time the pool will hold funds prior to the commencement of trading commodity interests;	None.	None.
55	(4) The disposition of funds received if the pool does not receive the necessary amount to commence trading, including the period of time within which the disposition will be made; and	None.	None.
56	(5) Where the pool operator will deposit funds received prior to the commencement of trading by the pool, and a statement specifying to whom any income from such deposits will be paid.	None.	None.
57	(t) *Ownership in pool.* The extent of any ownership or beneficial interest in the pool held by the following:	Item 17(b)(4) requires disclosure of the dollar range of equity securities beneficially owned by directors in the fund. Item 18(a) requires disclosure about each person who controls the fund. Item 18(b) requires disclosure about each person who owns of record or is known by the fund to own beneficially 5% or more of any class of the fund's outstanding equity securities. Item 20(c) requires disclosure about the dollar range of equity securities in the fund beneficially owned by a portfolio manager.	Item 9(3) requires the form N-2 to identify each person who, as of a specified date no more than 30 days prior to the date of filing the registration statement (or amendment to it), controls the registrant. For the purposes of Item 9(3), "control" means, among others, the beneficial ownership, either directly or through one or more controlled companies, of more than 25 percent of the voting securities of a company.
58	(1) The commodity pool operator;	See above.	See above.
59	(2) The pool's trading manager, if any;	None.	None.
60	(3) The pool's major commodity trading advisors;	None.	None.

	Disclosure Required by §4.24 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
61	(4) The operators of the pool's major investee pools; and	None.	None.
62	(5) Any principal of the foregoing.	None.	None.
63	(u) *Reporting to pool participants.* A statement that the commodity pool operator is required to provide all participants with monthly or quarterly (whichever applies) statements of account and with an annual report containing financial statements certified by an independent public accountant.	Item 1(b)(1) requires a fund to disclose that additional information about the fund's investments is available in its annual and semi-annual reports to shareholders, and that the annual report contains a discussion of the market conditions and investment strategies that significantly affected the fund's performance during its last fiscal year.	Item 1(d) requires a fund to include a statement (on the outside front cover) that explains how to obtain the registrant's annual and semi-annual reports to shareholders. Item 1(d) also requires the registrant to provide a toll-free (or collect) telephone number for investors to call: to request the SAI; to request the registrant's annual report; to report the registrant's semi-annual report; to request other information about the registrant; and to make other shareholder inquiries.
64	(v) *Supplemental information.* If any information, other than that required by Commission rules, the antifraud provisions of the Act, other federal or state laws or regulations, rules of a self-regulatory agency or laws of a non-United States jurisdiction, is provided, such information:		
65	(1) May not be misleading in content or presentation or inconsistent with required disclosures;	General Instruction 3(b) to Form N-1A provides that the prospectus or the SAI may contain more information than called for by Form N-1A, except for the summary prospectus section (Items 2- 8) as long as the information is not incomplete, inaccurate or misleading and does not, because of its nature, quantity, or manner of presentation, obscure or impede understanding of the information required to be included.	General Instructions for Parts A and B of Form N-2 indicate that the prospectus or the SAI may contain more information than called for by Form N-2, provided the information is not incomplete, inaccurate, or misleading.
66	(2) Is subject to the antifraud provisions of the Act and Commission rules and to rules regarding the use of promotional material promulgated by a registered futures association pursuant to section 17(j) of the Act; and	Material misstatements or omissions in fund registration statements are subject to liability under the federal securities laws and SEC rules.	Material misstatements or omissions in fund registration statements are subject to liability under the federal securities laws and SEC rules.

	Disclosure Required by §4.24 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
67	(3) Must be placed as follows, unless otherwise specified by Commission rules, provided that where a two-part document is used pursuant to rules promulgated by a registered futures association pursuant to Section 17(j) of the Act, all supplemental information must be provided in the second part of the two-part document:	See line 65.	See line 65.
68	(i) Supplemental performance information (not including proprietary trading results as defined in §4.25(a)(8), or hypothetical, extracted, pro forma or simulated trading results) must be placed after all specifically required performance information; *Provided, however,* that required volatility disclosure may be included with the related required performance disclosure; (ii) Supplemental non-performance information relating to a required disclosure may be included with the related required disclosure; and (iii) Other supplemental information may be included after all required disclosures; *Provided, however,* that any proprietary trading results as defined in §4.25(a)(8), and any hypothetical, extracted, pro forma or simulated trading results included in the Disclosure Document must appear as the last disclosure therein following all required and non-required disclosures.	(i) None (ii) See line 65. (iii) See line 65.	(i) None (ii) See line 65. (iii) See line 65.
69	(w) *Material information.* Nothing set forth in §§4.21, 4.24, 4.25 or §4.26 shall relieve a commodity pool operator from any obligation under the Act or the regulations thereunder, including the obligation to disclose all material information to existing or prospective pool participants even if the information is not specifically required by such sections.	Material misstatements or omissions in fund registration statements are subject to liability under the federal securities laws and SEC rules.	Material misstatements or omissions in fund registration statements are subject to liability under the federal securities laws and SEC rules.

INVESTMENT COMPANY INSTITUTE

Appendix D

This chart is intended to compare related disclosures across §4.24 and Forms N-1A and N-2. As discussed in more detail in our April 2012 letter, in the instances where there is no related disclosure in the SEC forms, it is frequently the case that the CFTC-required disclosure is not applicable to registered investment companies.

This chart does not describe the 4.25 requirements in order. Rather, the requirements are divided into the following categories:

(I) Performance disclosure required when the offered pool has at least a three-year operating history;
(II) Performance disclosure required when the offered pool has less than a three-year operating history;
(III) Additional requirements with respect to pools and accounts other than the offered pool; and
(IV) General requirements for performance information disclosure.

Note that existing funds with less than three-year operating history must also comply with the requirements set forth in Section I (see line 16).

	Disclosure Required by §4.25 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
	I. PERFORMANCE DISCLOSURE REQUIRED WHEN THE OFFERED POOL HAS AT LEAST A THREE-YEAR OPERATING HISTORY		
1	(b) ***Performance disclosure when the offered pool has at least a three-year operating history.*** The commodity pool operator must disclose the performance of the offered pool, in accordance with paragraphs (a)(1)(i) (A) through (H) and (a)(2) of this §4.25, where: (1) The offered pool has traded commodity interests for three years or more; and (2) For at least such three-year period, seventy-five percent or more of the contributions to the pool were made by persons unaffiliated with the commodity pool operator, the trading manager (if any), the pool's commodity trading advisors, or the principals of any of the foregoing.	No similar requirement in Form N-1A, which does not distinguish between performance disclosure requirements for funds with more or less than three years. See line 16 for special provisions for new funds.	No similar requirement in Form N-2.
2	(a) ***General principles*** —(1) ***Capsule performance information*** —(i) ***For pools.*** Unless otherwise specified, disclosure of the past performance of a pool must include the following information. Amounts shown must be net of any fees, expenses or allocations to the commodity pool operator.	Item 4(b)(2)(ii) requires calendar year performance information to be presented in a bar chart. Such performance information may not reflect sales loads or account fees. (Also see Instruction 1.(a) to Item 4(b)(2) and Item 13). Item 4(b)(2)(iii) requires a fund that has annual returns for at least one calendar year to provide a table showing the	None.

	Disclosure Required by §4.25 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
		fund's (a) average annual total return, (b) average annual total return (after taxes on distributions) and (c) average annual total return (after taxes on distributions and redemptions).	
3	(A) The name of the pool;	Item 1 requires the name of the fund on the cover page.	Item 1 requires the name of the fund on the cover page.
4	(B) A statement as to whether the pool is:		
5	(*1*) Privately offered pursuant to section 4(2) of the Securities Act of 1933, as amended (15 U.S.C. 77d(2)), or pursuant to Regulation D thereunder (17 CFR 230.501 *et seq.*);	None.	None.
6	(*2*) A multi-advisor pool as defined in §4.10(d)(2); and	None.	None.
7	(*3*) A principal-protected pool as defined in §4.10(d)(3);	None.	None.
8	(C) The date of inception of trading;	Funds must disclose the inception date if the performance history is less than 10 years.	None.
9	(D) The aggregate gross capital subscriptions to the pool;	None.	None.
10	(E) The pool's current net asset value;	Not required in the performance presentation, but this is disclosed in the financial highlights table pursuant to Item 13.	Not required in connection with a performance presentation, but this is disclosed in the financial highlights table pursuant to Item 4.
11	(F) The largest monthly draw-down during the most recent five calendar years and year-to-date, expressed as a percentage of the pool's net asset value and indicating the month and year of the draw-down (the capsule must include a definition of "draw-down" that is consistent with §4.10(k));	Item 4(2)(ii) requires that following the bar chart, the fund must disclose its highest and lowest return for a quarter during the 10 years or other period of the bar chart.	None.
12	(G) 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 and indicating the months and year of the draw-down; and	None.	None.

	Disclosure Required by §4.25 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
13	(H) Subject to §4.25(a)(2) for the offered pool, the annual and year-to-date rate of return for the pool for the most recent five calendar years and year-to-date, computed on a compounded monthly basis;	Item 4(b)(2)(ii) requires a fund that has annual returns for at least one calendar year to provide a bar chart showing the fund's annual total returns for each of the last 10 calendar years (or for the life of the fund if less than 10 years). Item 4(b)(2)(iii) requires a fund that has annual returns for at least one calendar year to provide a table showing the fund's (a) average annual total return, (b) average annual total return (after taxes on distributions) and (c) average annual total return (after taxes on distributions and redemptions). Item 13 requires financial highlights information, including annual total return information, for each of the past five fiscal years.	Item 4 requires annual total return information for each of the past five fiscal years as part of the financial highlights table.
14	(2) ***Additional requirements with respect to the offered pool.*** (i) The performance of the offered pool must be identified as such and separately presented first; (ii) The rate of return of the offered pool must be presented on a monthly basis for the [most recent five calendar years and year-to-date or for the life of the pool if less than five years], either in a numerical table or in a bar graph; (iii) A bar graph used to present monthly rates of return for the offered pool: (A) Must show percentage rate of return on the vertical axis and one-month increments on the horizontal axis; (B) Must be scaled in such a way as to clearly show month-to-month differences in rates of return; and (C) Must separately display numerical percentage annual rates of return for the period covered by the bar graph; and	(ii) Item 4(b)(2)(ii) requires a fund that has annual returns for at least one calendar year to provide a bar chart showing the fund's annual total returns for each of the last 10 calendar years (or for the life of the fund if less than 10 years).	None.

	Disclosure Required by §4.25 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
15	(iv) The pool operator must make available upon request to prospective and existing participants all supporting data necessary to calculate monthly rates of return for the offered pool as specified in §4.25(a)(7), for the period specified in §4.25(a)(5).	Rule 31a-1 under the Investment Company Act requires several records that would support performance calculations.	Rule 31a-1 under the Investment Company Act requires several records that would support performance calculations.
	II. PERFORMANCE DISCLOSURE REQUIRED WHEN THE OFFERED POOL HAS LESS THAN A THREE-YEAR OPERATING HISTORY		
16	(c) ***Performance disclosure when the offered pool has less than a three-year operating history***— (1) ***Offered pool performance.*** (i) The commodity pool operator must disclose the performance of the offered pool, in accordance with paragraphs (a)(1)(i)(A) through (H) and (a)(2) of this §4.25; or (ii) If the offered pool has no operating history, the pool operator must prominently display the following statement: THIS POOL HAS NOT COMMENCED TRADING AND DOES NOT HAVE ANY PERFORMANCE HISTORY.	(i) No similar requirement in Form N-1A, which does not distinguish between funds with more or less than three years. (ii) A fund with no operating history would disclose this fact and that performance information will be presented in the prospectus after the fund has at least one calendar year of performance per Item 4(b)(2)(i) and (ii).	(i) None. (ii) If the Registrant's securities have no history of public trading, a prominent statement to that effect and a statement describing the tendency of closed-end fund shares to trade frequently at a discount from net asset value and the risk of loss this creates for investors purchasing shares in the initial public offering must appear on the outside front cover of the registrant's Form N-2. (See Instruction i of Item 1)
17	(2) ***Other performance of commodity pool operator***. (i)(A) Except as provided in §4.25(a)(8) [which limits the ability of pool operators to show the performance results of proprietary trading pools], the commodity pool operator must disclose, for the [most recent five calendar years and year-to-date or for the life of the pool if less than five years], the performance of each other pool operated by the pool operator (and by the trading manager if the offered pool has a trading manager) in accordance with paragraphs (a)(1)(i) (C) through (H) and (a)(3) of this §4.25, and the performance of each other account traded by the pool operator (and by the trading manager if the offered pool has a trading manager) in accordance with paragraphs (a)(1)(ii) (C) through (G) of this §4.25. If the trading manager has been delegated complete authority for the offered pool's trading, and the trading manager's performance is not materially different from that of the pool operator, the performance of the other pools operated by and accounts traded by the pool operator is not required to be disclosed.	None.	None.

	Disclosure Required by §4.25 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
18	(B) In addition, 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. (ii) If neither the pool operator or trading manager (if any), nor any of its trading principals has operated any other pools or traded any other accounts, the pool operator must prominently display the following statement: NEITHER THIS POOL OPERATOR (TRADING MANAGER, IF APPLICABLE) NOR ANY OF ITS TRADING PRINCIPALS HAS PREVIOUSLY OPERATED ANY OTHER POOLS OR TRADED ANY OTHER ACCOUNTS. If the commodity pool operator or trading manager, if applicable, is a sole proprietorship, reference to its trading principals may be deleted from the prescribed statement.	(B) None. (ii) None.	(B) None. (ii) None.
19	(3) ***Major commodity trading advisor performance.*** (i) The commodity pool operator must disclose the performance of any accounts (including pools) directed by a major commodity trading advisor in accordance with paragraphs (a)(1)(ii)(C) through (G) of this §4.25. (ii) If a major commodity trading advisor has not previously traded accounts, the pool operator must prominently display the following statement: (name of the major commodity trading advisor), A COMMODITY TRADING ADVISOR THAT HAS DISCRETIONARY TRADING AUTHORITY OVER (percentage of the pool's funds available for commodity interest trading allocated to that trading advisor) PERCENT OF THE POOL'S COMMODITY INTEREST TRADING HAS NOT PREVIOUSLY DIRECTED ANY ACCOUNTS.	(i) None. (ii) None.	(i) None. (ii) None.

	Disclosure Required by §4.25 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
20	(4) ***Major investee pool performance***. (i) The commodity pool operator must disclose the performance of any major investee pool. (ii) If a major investee pool has not commenced trading, the pool operator must prominently display the following statement: (name of the major investee pool), AN INVESTEE POOL THAT IS ALLOCATED (percentage of the pool assets allocated to that investee pool) PERCENT OF THE POOL'S ASSETS HAS NOT COMMENCED TRADING.	(i) None. (ii) None.	(i) None. (ii) None.
21	(5) ***With respect to commodity trading advisors and investee pools for which performance is not required to be disclosed*** pursuant to §4.25(c)(3) and (4), the pool operator must provide a summary description of the performance history of each of such advisors and pools including the following information, provided that where the pool operator uses a two-part document pursuant to the rules promulgated by a registered futures association pursuant to Section 17(j) of the Act, such summary description may be provided in the second part of the two-part document: (i) Monthly return parameters (highs and lows); (ii) Historical volatility and degree of leverage; and (iii) Any material differences between the performance of such advisors and pools as compared to that of the offered pool's major trading advisors and major investee pools.	(i) None. (ii) None. (iii) None.	(i) None. (ii) None. (iii) None.
III. ADDITIONAL REQUIREMENTS WITH RESPECT TO PERFORMANCE DISCLOSURE FOR OTHER POOLS AND ACCOUNTS			
22	(3) ***Additional requirements with respect to pools other than the offered pool.*** With respect to pools other than the offered pool for which past performance is required to be presented under this section: (i) Performance data for pools of the same class as the offered pool must be presented following the performance of the offered pool, on a pool-by-pool basis. (ii) Pools of a different class than the offered pool must be presented less prominently and, unless such presentation would be misleading, may be	No similar requirements.	No similar requirements.

	Disclosure Required by §4.25 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
	presented in composite form; *Provided, however,* that: (A) The Disclosure Document must disclose how the composite was developed; (B) Pools of different classes or pools with materially different rates of return may not be presented in the same composite. (iii) For the purpose of §4.25(a)(3)(ii), the following, without limitation, shall be considered pools of different classes: Pools privately offered pursuant to section 4(2) of the Securities Act of 1933, as amended (15 U.S.C. 77d(2)), or pursuant to Regulation D thereunder (17 CFR 230.501 *et seq.*), and public offerings; and principal-protected and non-principal-protected pools. 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. (iv) Material differences among the pools for which past performance is disclosed, including, without limitation, differences in leverage and use of different trading programs, must be described.		
23	(ii) ***For accounts.*** Disclosure of the past performance of an account required under this §4.25 must include the following capsule performance information:	None.	None.
24	(A) The name of the commodity trading advisor or other person trading the account and the name of the trading program;	None.	None.
25	(B) The date on which the commodity trading advisor or other person trading the account began trading client accounts and the date when client funds began being traded pursuant to the trading program;	None.	None.
26	(C) The number of accounts directed by the commodity trading advisor or other person trading the account pursuant to the trading program specified, as of the date of the Disclosure Document;	None.	None.
27	(D)(*1*) The total assets under the management of the commodity trading advisor or other person trading the account, as of the date of the Disclosure Document; and	None.	None.

	Disclosure Required by §4.25 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
28	(*2*) The total assets traded pursuant to the trading program specified, as of the date of the Disclosure Document;	None.	None.
29	(E) The largest monthly draw-down for the trading program specified during the most recent five calendar years and year-to-date expressed as a percentage of client funds, and indicating the month and year of the draw-down;	None.	None.
30	(F) The worst peak-to-valley draw-down for the trading program specified during the most recent five calendar years and year-to-date, expressed as a percentage of net asset value and indicating the months and year of the draw-down; and	None.	None.
31	(G) The annual and year-to-date rate-of-return for the program specified, computed on a compounded monthly basis.	None.	None.
32	(H) Partially-funded accounts directed by a commodity trading advisor may be presented in accordance with §4.35(a)(7).	None.	None.
33	(4) ***Additional requirements with respect to accounts.*** (i) Unless such presentation would be misleading, past performance of accounts required to be presented under this section may be presented in composite form on a program-by-program basis using the format set forth in §4.25(a)(1)(ii). (ii) Accounts that differ materially with respect to rates of return may not be presented in the same composite. (iii) The commodity pool operator must disclose all material differences among accounts included in a composite.	(i) None. (ii) None. (iii) None.	None (ii) N/A (iii) N/A
IV. GENERAL REQUIREMENTS FOR PERFORMANCE INFORMATION DISCLOSURE			
34	(5) ***Time period for required performance.*** All required performance information must be presented for the most recent five calendar years and year-to-date or for the life of the pool, account or trading program, if less than five years.	Item 4(b)(2)(ii) requires a fund that has annual returns for at least one calendar year to provide a bar chart showing the fund's annual total returns for each of the last 10 calendar years (or for the life of the fund if less than 10 years). Item 4(b)(2)(iii) requires a fund that has annual returns for at least one calendar year to provide a table showing the	Instruction 3 to Item 4.1 requires the registrant to present the Financial Highlights information in comparative columns for each of the last ten fiscal years of the registrant. Instruction 8 to Item 4.1 requires the financial highlights for at least the latest five fiscal years to be audited and to

	Disclosure Required by §4.25 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
		fund's (a) average annual total return, (b) average annual total return (after taxes on distributions) and (c) average annual total return (after taxes on distributions and redemptions). The financial highlights table also requires annual total returns for each of the last five fiscal years.	state so.
35	(6) ***Trading programs***. If the offered pool will use any of the trading programs for which past performance is required to be presented, the Disclosure Document must so indicate.	None.	None.
36	(7) ***Calculation of, and recordkeeping concerning, performance information.*** (i) All performance information presented in a Disclosure Document, including performance information contained in any capsule and performance information not specifically required by Commission rules, must be current as of a date not more than three months preceding the date of the Document, and must be supported by the following amounts, calculated on an accrual basis of accounting in accordance with generally accepted accounting principles, as specified below or by a method otherwise approved by the Commission. (A) The beginning net asset value for the period, which shall be the same as the previous period's ending net asset value; (B) All additions, whether voluntary or involuntary, during the period; (C) All withdrawals and redemptions, whether voluntary or involuntary, during the period; (D) The net performance for the period, which shall represent the change in the net asset value net of additions, withdrawals, and redemptions; (E) The ending net asset value for the period, which shall represent the beginning net asset value plus or minus additions, withdrawals, redemptions and net performance; (F) The rate of return for the period, which shall be calculated by dividing the net performance by the beginning net asset value or by a method otherwise	Item 26 provides detailed instructions for the calculation of performance data. Rule 31a-1 under the Investment Company Act requires several records that would support performance calculations.	None. Rule 31a-1 under the Investment Company Act requires several records that would support performance calculations.

	Disclosure Required by §4.25 subpart B (for CPOs)	Related Disclosure in N-1A	Related Disclosure in N-2
	approved by the Commission; and (G) The number of units outstanding at the end of the period, if applicable. (ii) All supporting documents necessary to substantiate the computation of such amounts must be maintained in accordance with §1.31.		
37	(8) ***Proprietary trading results.*** (i) Proprietary trading results may not be included in a Disclosure Document unless such performance is prominently labeled as proprietary and is set forth separately after all disclosures in accordance with §4.24(v), together with a discussion of any differences between such performance and the performance of the offered pool, including, but not limited to, differences in costs, leverage and trading methodology. (ii) For the purposes of §4.24(v) and this §4.25(a), proprietary trading results means the performance of any pool or account in which fifty percent or more of the beneficial interest is owned or controlled by: (A) The commodity pool operator, trading manager (if any), commodity trading advisor or any principal thereof; (B) An affiliate or family member of the commodity pool operator, trading manager (if any) or commodity trading advisor; or (C) Any person providing services to the pool.	None.	None.
38	(9) ***Required legend.*** Any past performance presentation, whether or not required by Commission rules, must be preceded by the following statement, prominently displayed: PAST PERFORMANCE IS NOT NECESSARILY INDICATIVE OF FUTURE RESULTS.	Item 4(b)(2)(1) states that a fund must provide a statement to the effect that the fund's past performance (before and after taxes) is not necessarily an indication of how the fund will perform in the future.	None.