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May 3, 2012

Via Electronic Mail: secretary@cftc.gov

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

Re: Amendment to Commodity Pool Operator Exemption under Rule 4.13 and Exclusion under Rule 4.5

Dear Mr. Stawick:

The Asset Management Group (the "**AMG**") of the Securities Industry and Financial Markets Association ("**SIFMA**") respectfully requests that the Commodity Futures Trading Commission (the "**CFTC**") grant commodity pool operators ("**CPOs**") an extension of time for compliance with the CFTC's recent amendments to CFTC Rules 4.5 and 4.13 (the "**Final CPO Amendments**") and clarify certain critical implementation issues raised by these rules as soon as possible.[1]

The AMG's members represent U.S. asset management firms whose combined assets under management exceed $20 trillion. Many AMG member firms advise investment companies registered under the Investment Company Act ("**RICs**") and private pools that may invest in commodity futures, commodity options and swaps (collectively, "**Commodity Interests**") as part of their investment strategies.

[1] Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed. Reg. 11252 (Feb. 24, 2012), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-02-24/pdf/2012-3390.pdf (the "**Adopting Release**").

In brief, we request that the CFTC take action to:

- Extend to all CPOs of private pools the period until at least December 31, 2012 to comply with the Rule 4.13 amendments, to eliminate the artificial distinction between pools for which a Rule 4.13(a)(4) filing was made prior to April 24, 2012 and other private pools and to afford needed time for compliance.

- Provide funds that use swaps a minimum of ten months following the effective date of the Final Swap Rules to assess their status in light of the new definitions, margin requirements and commodity pool rules, modify their operations as necessary for compliance with the new rules, and comply with related regulatory mandates.

- Provide urgently needed clarity concerning questions relating to the immediate and short-term impact of the recent amendments to the applicability of Rules 4.5 and 4.13.

We discuss each of these requests below.

I. Extension of Compliance Date for Rule 4.13 Changes

The AMG fully supports the requests for extensions of time for compliance with the amendments to Rule 4.13 made in the letter submitted to the CFTC on April 30, 2012 by the Managed Funds Association ("**MFA**"), Investment Advisers Association ("**IAA**"), and Alternative Investment Management Association ("**AIMA**" and collectively with the MFA and IAA, the "**Other Trade Associations**"). The AMG strongly agrees that the Final CPO Amendments do not afford market participants sufficient time to modify their operations to conform to the Rule 4.13 amendments. While the CFTC has accorded CPOs that were relying upon the Rule 4.13(a)(4) exemption as of April 24, 2012 more than eight months—until at least December 31, 2012—to comply with the rescission of that exemption, all other CPOs were afforded only the minimal 60 day-period following publication of the amendments in the Federal Register.

We agree with the Other Trade Associations that the operator of a private pool formed after April 24, 2012, regardless of whether the operator was relying on Rule 4.13(a)(4) before that date, should be given the benefit of delayed compliance with the new CPO rules until at least December 31, 2012. For multiple practical reasons,[2] private pools often take considerable time to launch. When the Final CPO Amendments were adopted, the AMG's member firms had

[2] These reasons may include, for example, the need to obtain internal approvals, resource constraints, lining up funding, and other practical necessities of launching a new fund.

private pools (that would have otherwise relied on Rule 4.13(a)(4)) in various stages of production; some of these pools were unable to launch prior to April 24, 2012. We do not believe that the burdens of complying with the Final CPO Amendments are materially greater for CPOs with respect to pools formed prior to April 24, 2012 than for those formed after that date, and we are unable to identify any sound regulatory or investor protection basis for the large disparity in the compliance periods for these two categories. We believe that using the Rule 4.13(a)(4) notice filing date as a dividing line between CPOs that are subject to compliance with the Final CPO Amendments as of April 24, 2012 and those that may defer compliance until December 31, 2012 could result in unnecessary competitive inequalities and disruption in the market. The disparity in compliance dates for operators of new private pools and operators of private pools that filed for a Rule 4.13(a)(4) exemption prior to April 24, 2012 will result in a significant detriment to the CPOs of new private pools, who will need to immediately operate under a regulatory regime with substantially greater regulatory requirements, compliance costs, and disclosure complexity for participants than CPOs allowed to defer compliance until December 31, 2012.

We urge the CFTC to eliminate this needless disparity in the compliance timeframes for CPOs of private pools. All operators of private pools should be permitted to rely on the Rule 4.13(a)(4) exemption until the same date, which is no earlier than December 31, 2012.

We also submit that the timing of resolution of several key issues relating to implementation of the Final CPO Amendments should be taken into account in setting the compliance deadline. These considerations may require that additional time be provided for CPOs of private pools to come into compliance. As highlighted by the Other Trade Associations in their April 30 letter and described in more detail below, a host of open questions have been submitted to the CFTC by the AMG, MFA, IAA and other commenters regarding application of the Final CPO Amendments, including how the rules should be applied to funds-of-funds. For CPOs of private pools, the answers to these questions are needed in order to comply with the Final CPO Amendments. We therefore urge the CFTC to assure that CPOs have the benefit of clear guidance on these issues from the CFTC and sufficient time in which to conform to that guidance.

Even if the CFTC is unwilling to grant this requested extension for private pools created after April 24, 2012, we request that the CFTC clarify that exempt CPOs that have made a Rule 4.13(a)(4) filing prior to April 24, 2012 are able to continue relying on the Rule 4.13(a)(4) exemption with respect to private pools that they create after April 24, 2012. The AMG, along with MFA and IAA, submitted a list of "Frequently Asked Questions" and requested responses to the CFTC on April 5, 2012 (the "**Rule 4.13 Questions**"), including confirmation of this interpretation.[3]

[3] The following is the text of the question and requested response:

(…continued)

II. Extension of Date Swaps Must be Considered in CPO Registration Analysis

As the Commission knows, the Dodd-Frank Act amendments to the Commodity Exchange Act incorporating swaps within the "commodity pool" definition will cause the operators of many funds previously outside the CPO regulatory regime to determine whether CPO registration will be required. This evaluation and compliance with registration requirements for the CPO and its associated persons, development of compliance systems to address all applicable CFTC requirements, and related operational changes will require a substantial investment of time and resources. The AMG agrees with the Other Trade Associations' request for a ten-month extension for operators of private pools that may need to register as CPOs as a result of the use of swaps to comply with CPO registration. However, it is our understanding that operators of private pools that use swaps will have to assess whether swap activity by these pools will require them to register as CPOs starting on the later of December 31, 2012 or 60 days after the effective date of the final rulemaking further defining the term "swap" and establishing margin requirements for such instruments (the "**Related Final**

(continued…)

"**Question 5**: A private fund is launched after April 24, 2012. The adviser of that private fund is not registered as a CPO and has claimed exemptions for other, preexisting private funds under Rules 4.13(a)(4) prior to April 24. The new fund would not qualify under Rule 4.13(a)(3) as revised but would qualify under Rule 4.13(a)(4). The Adopting Release states on page 11252 that "CPOs claiming exemption under § 4.13(a)(4) shall be required to comply with the rescission of § 4.13(a)(4) by December 31, 2012; however, compliance shall be required for all other CPOs on April 24, 2012." On page 11280 of the Adopting Release, the Commission goes on to say that "[t]his [11 month compliance] timeline reflects the Commission's belief that entities currently claiming relief under § 4.13(a)(4) should be capable of becoming registered and complying with the Commission's regulations within 11 months following the issuance of the final rule." The Adopting Release, however, continues on page 11280 to state that, "For entities that are formed after the effective date of the rescission, the Commission expects the CPOs of such entities to comply with the Commission's regulations upon formation and commencement of operations." In each of these references, we believe that "entities" should refer to the CPOs of the pools and not the pools themselves. Causing CPOs that currently rely on the Rule 4.13(a)(4) exemption to register just for new pools created after April 24 would cause undue hardship in these circumstances. For example, the CPO may be attempting to launch new feeder or a parallel fund to an existing fund, and it will be disruptive to the overall group of funds involved if inconsistent regulatory regimes must be followed until the end of the year for related funds, or the launch of the new funds must be delayed until year's end. It would make little sense to provide an 11 month transition period for CPOs with existing Rule 4.13(a)(4) pools and then take it away just because the CPO determined to launch a new pool after April 24.

Please confirm: The CPO of the private fund launched after April 24, 2012 may claim relief under Rule 4.13(a)(4) for this new fund as the CPO has relied, prior to April 24, on Rule 4.13(a)(4) for other pools. This result is consistent with the Commission's statements in the Adopting Release."

Swap Rules").[4] We strongly believe that 60 days is insufficient time for our member firms to analyze the Related Final Swap Rules, educate individuals at all levels (and across departments) of their organizations on the implications of these rules on CPO analysis (not to mention the implications of these rules for all other purposes, such as trading, clearing, documentation, reporting, position limits and other matters), build and implement systems for tracking compliance based on the Related Final Swap Rules, analyze portfolios, and register and comply with the new CPO obligations.

We do not believe that the 60-day period following the effective date of the Related Final Swap Rules is sufficient for market participants to conduct the internal assessments and implement necessary training programs, develop new compliance systems, and complete all of the needed registration steps and ancillary compliance measures needed to comply with the new CPO rules.[5] We believe that a minimum of ten months following the adoption of all of the Related Final Swap Rules (measured from the effective date of the last of the Related Final Swap Rule to be adopted) should be provided for application of the new CPO rules to CPOs operating pools that use swaps.

The AMG requests that this same treatment be applied to the operators of RICs that use swaps when assessing CPO registration requirements for Rule 4.5 purposes. The same considerations apply to RIC advisers as apply to operators of private funds that use swaps. Swaps should, therefore, not be included in the CPO registration analysis for purposes of either Rule 4.5 or Rule 4.13 until ten months from the effective date of the last of the Related Final Swap Rules that is adopted.

III. Urgent Need for Clarity on Certain Questions Presented to the CFTC

As mentioned above, the AMG, MFA and IAA presented the Rule 4.13 Questions to the CFTC on April 5, 2012. On the same date, the Investment Company Institute ("**ICI**") submitted a "List of Amended Regulation 4.5 and 4.13 Issues" on behalf of its members (the "**ICI Questions**", and together with the Rule 4.13 Questions, the "**Trade Association Questions**"). As indicated in the

[4] This compliance date is not completely clear to us from the Adopting Release; the AMG, along with the MFA and IAA, has separately asked the CFTC to confirm that this is the correct compliance date. See Question 1 in the Rule 4.13 Questions. We also note that the Department of the Treasury's proposed exemption for foreign exchange forwards and swaps has yet to be finalized and, until a final exemptive order has been issued, our members will not be able to determine their total swaps activity for purposes of compliance with CPO registration requirements.

[5] For clarity, our request for an extension of time to include swaps in the analysis for CPO registration purposes applies to private pools currently relying on an exemption under Rule 4.13(a)(3) or Rule 4.13(a)(4) and to private pools created after April 24, 2012.

ICI Questions, the AMG fully concurred in the requests and proposed responses set forth in the ICI Questions.

While all of the Trade Association Questions are of great importance to the AMG and its members, certain of these questions are extremely time sensitive and require prompt responses because they either currently impact member firms as a result of the April 24, 2012 effective date of the Final CPO Amendments or significantly impact the analysis that our member firms need to conduct in the limited remaining time to implement the new rules. It is, therefore, imperative that the CFTC act expeditiously to provide guidance to the industry on these open questions, even if this requires that the CFTC respond to the most urgent questions first and later turn to the balance of the Trade Association Questions. We see no impediment to the CFTC providing piecemeal responses, in the interests of meeting immediate needs for guidance, to the numerous requests for clarification of the Final CPO Amendments submitted by the AMG, ICI, MFA, IAA and other market participants.

With this approach in mind, in addition to the requests in Part I and Part II of this letter, the AMG requests that the CFTC provide responses to the following Trade Association Questions as soon as possible:

(1) Rule 4.5 Compliance Dates

The first two ICI Questions ask for clarification around the compliance dates for CPO registration for operators of RICs that do not meet the criteria for an exclusion under amended Rule 4.5 and requested the following responses:

> "Q1 (relationship to swap-related rulemakings): The release adopting amendments to Regulation 4.5 under the Commodity Exchange Act ("CEA") states (at page 11260) that compliance with amended Regulation 4.5 ("Final Regulation") for purposes of registration as a commodity pool operator ("CPO") only will be required on the later of: (i) December 31, 2012 or (ii) 60 days following the adoption of final rules defining the term "swap" and establishing margin requirements for such instruments. In another part of the Adopting Release on page 11252, the Commission does not reference the adoption of rules establishing margin requirements but references the effective date of the final rules defining the term swap. Please confirm that the date of compliance with amended Regulation 4.5 ("Registration Compliance Date") for purposes of registration as a CPO is the later of: (i) December 31, 2012 or (ii) 60 days following the effective date of final rules defining the term "swap" and establishing margin requirements for uncleared swaps.
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> Requested Response 1: The registration compliance date is the later of: (i) December 31, 2012 or (ii) 60 days following the effective date of final

rules defining the term "swap" and establishing margin requirements for uncleared swaps.

Q2 (new registered funds): What is the compliance date for CPO registration of advisers to new investment companies registered under the Investment Company Act of 1940 ("registered funds") launched after the April 24, 2012 effective date but prior to the Registration Compliance Date. Please confirm that the compliance date for the adviser CPOs of these registered funds will be the Registration Compliance Date.

Explanation: We believe that adviser CPOs to registered funds launched after the April 24 effective date (but prior to the Registration Compliance Date) should not have to register until the Registration Compliance Date. We believe that this is the correct result because:

- The Adopting Release did not provide registered fund advisers with public notice that they could be subject to a compliance date earlier than the Registration Compliance Date.

- The Commission has not yet adopted a final definition of "swap," margin levels for uncleared swaps have not yet been determined, and the Department of Treasury has not yet issued a final determination with respect to foreign exchange swaps and forwards. Until the definition of "swap" is final and these determinations are made, it is not possible for the adviser to any registered fund—whether that fund exists now or is launched after the effective date-- to determine whether the registered fund can comply with the trading tests under Regulation 4.5. Accordingly, advisers to all registered funds should get the benefit of the same timeframe to get into compliance.

- The registration process, including registration of associated persons and principals with the National Futures Association ("NFA"), as well as associated licensing requirements, takes time. Registered fund advisers will likely not be able to timely register as CPOs if they wish to launch a new registered fund shortly after April 24. A difference in compliance dates for advisers to new registered funds and existing registered funds could result in competitive inequalities in the market as advisers to existing registered funds will have the benefit of the registration compliance date.

Requested Response 2: The compliance date for registration of adviser CPOs to new registered funds launched after the April 24 effective date (but prior to the Registration Compliance Date) is the later of: (i) December 31, 2012 or (ii) 60 days following the effective date of final

rules defining the term "swap" and establishing margin requirements for uncleared swaps."

The first question was asked because of inconsistencies in the language in the Adopting Release and seeks confirmation of the industry's current interpretation of the specific "Registration Compliance Date" (as defined in the ICI's Q1). As RIC managers need to plan for compliance with the Final CPO Amendments within the time provided for implementation, it is essential that the CFTC explicitly confirm this "Registration Compliance Date" as soon as possible.

The second question essentially outlines the considerations, discussed in Part I of this letter, for operators of newly formed private pools. In the case of operators of RICs, however, the Adopting Release appears to be relatively clear on its face that compliance with registration will not be required for CPOs of RICs formed after April 24, 2012 but before the "Registration Compliance Date," until the "Registration Compliance Date." We understand that this question was asked for the sake of clarity and to dispel any misperceptions that may exist in the market. It would be very helpful to have confirmation on this point as soon as possible so operators of RICs can properly manage the timeline for any new funds that invest in commodity interests that they may be bringing to market this year.

(2) Funds-of-Funds

Question 5 of the ICI Questions cited the need for guidance to operators of funds-of-funds on whether such funds would cause them to register as CPOs under the Final CPO Amendments.[6] The Adopting Release rescinded Appendix A to Part 4 of the CFTC's regulations, which previously had provided guidance on whether funds-of-funds could rely on the exemption under Rule 4.13(a)(3). Without this guidance, it is impossible to know from the Adopting Release whether funds-of-funds that are RICs or private pools would be able to fall within amended Rules 4.5 or 4.13. In other words, without this guidance, it is impossible for operators of RICs or private pools that are structured as funds-of-funds to determine with certainty whether these funds will be required to have a registered CPO.

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[6] The following is the text of question 5 of the ICI Questions and the requested response:

"Q5 (funds-of-funds and sub-advised funds): Please confirm that, until such time as the Commission or its staff adopts guidance for advisers that operate funds-of-funds and seek to rely on amended Regulations 4.5 or 4.13(a)(3), those advisers may rely on the guidance currently contained in Appendix A to Part 4 of the Commission's regulations regarding whether a pool operator that operates a fund-of-funds must register as a CPO.

Requested Response 5: Until such time as the Commission or its staff adopts guidance for advisers that operate funds-of-funds and seek to rely on amended Regulations 4.5 or 4.13(a)(3), those advisers may rely on the guidance currently contained in Appendix A to Part 4 of the Commission's regulations regarding whether an adviser that operates a fund-of-funds must register as a CPO."

Although we understand that the CFTC staff has informally suggested that participants rely on rescinded Appendix A until further guidance is issued, the lack of definitive guidance imposes a hardship on advisers to RICs and private pools who need to plan for implementation of the Final CPO Amendments. Accordingly, we request that the CFTC: (i) issue guidance on funds-of-funds' ability to rely on the exclusion in amended Rule 4.5 and the exemption in amended Rule 4.13 as soon as possible, and (ii) consider deferred registration compliance dates for operators of funds-of-funds because of the delayed release of this guidance and the shorter time period that such operators would have to implement the Final CPO Amendments as a result.

(3) Conforming Changes to Rule 4.13(a)(3)

Question 6 of the Rule 4.13 Questions pointed out what we believe is a drafting oversight in the Final CPO Amendments. The question and requested response stated as follows:

> "**Question 6**: Rule 4.13(a)(3)(iii)(E) indicates that "[a] person eligible to participate in a pool for which the pool operator can claim exemption from registration under paragraph (a)(4) of this section" is also an eligible investor in a Rule 4.13(a)(3) pool. As a result of the rescission of paragraph (a)(4), this cross-reference will no longer be clear.
>
> **Please confirm**: On and after April 24, 2012, all of the persons listed in to-be-rescinded Rule 4.13(a)(4)(ii) remain eligible investors in a Rule 4.13(a)(3) pool."

As April 24, 2012 has now come and gone, certain private pools with investors that were eligible under Rule 4.13(a)(4)(ii) may no longer be eligible for an exemption under Rule 4.13(a)(3) because they have participants who are non-United States Persons or other participants within Rule 4.13(a)(4)(ii). This is because, without additional guidance, the provision of Rule 4.13(a)(3) cross-referencing the list of eligible participants in Rule 4.13(a)(4) could now be viewed as having no effect. This is a particular concern for private pools with investors that are non-United States Persons (as defined in Rule 4.7(a)(2)(xi)) that could have previously relied on Rule 4.13(a)(4). For the operators of these pools that had filed a Rule 4.13(a)(4) exemption prior to April 24, 2012, the exemption will disappear on the registration compliance date for Rule 4.13(a)(4) pool operators, and without further clarification by the CFTC, the Rule 4.13(a)(3) exemption may be unavailable for certain of these pools, even if their use of commodity futures, commodity options and swaps is within the thresholds of the exemption.

Absent the relief requested in Part I of this letter, the result could be even more immediate and draconian for operators of such private pools formed after April 24, 2012. As a technical matter, such pool operators may no longer be able

to rely on Rule 4.13(a)(3), even if in compliance with the thresholds stated therein. It is illogical that U.S. operators of foreign pools sold to non-United States Persons would be required to register as CPOs with respect to those pools when they would be eligible to rely on the Rule 4.13(a)(3) exemption for an otherwise equivalent domestic pool. It is crucial that the CFTC act expeditiously to remedy this situation by providing the response requested above and correcting Rule 4.13(a)(3) accordingly.[7]

* * *

The AMG appreciates the CFTC's consideration of these requests, and stands ready to provide any additional information or assistance concerning these topics that the CFTC or CFTC staff might find useful.

Should you have any questions, please do not hesitate to call the undersigned at 212-313-1389.

Sincerely,

Timothy W. Cameron, Esq.
Managing Director, Asset Management Group
Securities Industry and Financial Markets Association

cc: Hon. Gary Gensler, Chairman, Commodity Futures Trading Commission
Hon. Jill E. Sommers, Commissioner, Commodity Futures Trading Commission
Hon. Bart Chilton, Commissioner, Commodity Futures Trading Commission
Hon. Scott O'Malia, Commissioner, Commodity Futures Trading Commission
Hon. Mark Wetjen, Commissioner, Commodity Futures Trading Commission
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[7] The AMG also questions whether there is any need for the CFTC to require CPO registration of foreign pools at all, but at a minimum, the drafting issue we have identified should be fixed to allow foreign pools with non-United States Person investors to avail themselves of Rule 4.13(a)(3).

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