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CFTC

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Office of the
Secretariat

May 21, 2012

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

Re: Compliance with Registration Requirements Under Amended Rule 4.5

Dear Mr. Stawick:

As a result of recent amendments to Rule 4.5 under the Commodity Exchange Act (“CEA”),¹ investment advisers to certain registered investment companies (“registered funds”) will be required to register with the Commodity Futures Trading Commission (“Commission” or “CFTC”) as commodity pool operators (“CPOs”). The Investment Company Institute² respectfully requests that the Commission extend the compliance date for CPO registration in the case of registered funds using swaps, as well as provide urgently needed guidance on certain implementation issues.³ Other trade

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

² 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 \$13.4 trillion and serve over 90 million shareholders.

³ ICI strongly objects to the Rule 4.5 amendments and, together with the U.S. Chamber of Commerce, has filed a complaint in federal district court seeking that those amendments be set aside. *See* Complaint, *Investment Company Institute, et al. v. CFTC*, Case No. 1:12-cv-00612 (D.D.C. Apr. 17, 2012). Notwithstanding this legal challenge, ICI is committed to assisting its members’ efforts to comply with the amended regulation in the event the rule is upheld. ICI’s request for extension in this letter is without prejudice to its ability to seek further relief should it become necessary, including a request for a stay from the Court.

associations have requested similar relief from the Commission, including with regard to amended Rule 4.13 under the CEA, and ICI fully supports those requests.⁴

I. Extension of Registration Compliance Date for Registered Funds Using Swaps

In the section of the Adopting Release discussing implementation of the Rule 4.5 amendments, the Commission acknowledges that “a short implementation period is not practicable” in part because of the CFTC’s “ongoing efforts to further define the term ‘swap’ and the margin requirements for swap positions.”⁵ The Adopting Release goes on to state:

The Commission believes that *11 months is an adequate amount of time* to enable compliance by existing registered investment companies. Recognizing that the definition of swap is not yet finalized, the Commission has decided that compliance with the amendments to § 4.5 for purposes of registration only will occur on the later of either December 31, 2012 or within 60 days following the adoption of final rules defining the term “swap” and establishing margin requirements for such instruments.⁶

We thank the Commission for recognizing that registered funds and their advisers need an adequate amount of time in which to come into compliance with the new registration requirements. For a registered fund and its adviser, this means assessing the fund’s portfolio in light of the trading and marketing thresholds in amended Rule 4.5, determining if the fund adviser needs to register as a CPO with the CFTC *and*, if necessary, becoming registered with the CFTC as well as becoming a member of the National Futures Association (“NFA”). As the Associations Letter explains, “registration is in and of itself a lengthy process, as it requires the registration of Associated Persons, the proof of proficiency tests and the submission of fingerprint cards.”⁷ The submission and processing of fingerprint cards alone, according to the Associations, can often take several weeks. For registered funds and advisers

⁴ Letter from Managed Funds Association, Investment Adviser Association and Alternative Investment Management Association, dated April 30, 2012 (“Associations Letter”); Letter from Asset Management Group, Securities Industry and Financial Markets Association, dated May 3, 2012 (“SIFMA AMG Letter”).

⁵ Adopting Release, *supra* note 1, at 11260.

⁶ *Id.* (emphasis added). The reference to “11 months” roughly approximates the time between the Commission’s vote to approve the Rule 4.5 amendments (*i.e.*, February 8, 2012) and December 31, 2012.

⁷ Associations Letter, *supra* note 4, at 3-4. For advisers that are part of a larger financial services firm, it may take some time simply to identify all persons who may need to register as associated persons. Once that has been done, it will take additional time for those persons to take—and pass—the relevant proficiency examination.

unfamiliar with the CFTC registration process and the NFA membership process, it is possible that even an 11-month compliance period may prove to be very challenging.⁸

Unfortunately, the Adopting Release provides registered funds that use swaps with a compliance period that falls short of the 11-month period that the Commission believes is “adequate.” In fact, advisers to these registered funds could have as little as 60 days (or 2 months) from the adoption of final rules defining the term “swap” and establishing margin requirements for such instruments (“Final Swap and Margin Rules”) to assess the fund’s portfolio in light of the trading and marketing thresholds (including with respect to swaps positions), determine if the fund adviser needs to register as a CPO with the CFTC *and*, if necessary, complete all steps in the CFTC registration/NFA membership processes, as discussed above.⁹

It is unclear whether the Commission intended this outcome. In discussing the inclusion of swaps in the trading threshold under amended Rule 4.5, the Adopting Release notes:

[I]t is the Commission’s intention to establish the compliance date of the inclusion of swaps within the [trading] threshold calculation as 60 days after the final rules regarding the definition of “swap” and the delineation of the margin requirement for such instruments are effective. The Commission believes that such compliance date will provide entities with *sufficient time to assess the impact of such rules on their portfolios and to make the determination as to whether registration with the Commission is required*.¹⁰

This statement fails to account for the time that advisers to registered funds would need to complete all steps necessary to become registered with the CFTC and become a member of the NFA. On this basis, therefore, it seems clear that registered funds and their advisers need additional time, beyond what is currently provided, to meet their registration obligations under amended Rule 4.5. Accordingly, we request that the Commission extend the compliance date for CPO registration in the

⁸ See *id.* at 5 (observing that “for an operator that needs to register with the Commission the process will also likely entail seeking internal approval for rebudgeting and additional resources, including staff, for the legal and compliance departments”).

⁹ Even if the Commission were to adopt the Final Swap and Margin Rules in short order, registered funds that use swaps would only have until December 31, 2012 (a period considerably less than 11 months) to come into compliance with the new registration requirements.

¹⁰ Adopting Release, *supra* note 1, at 11258 (emphasis added).

case of registered funds using swaps until 11 months after the Commission's approval of the Final Swap and Margin Rules.¹¹

II. Urgently Needed Guidance on Implementation Issues

As discussed in the SIFMA AMG letter, several trade associations, including ICI, have identified several issues relating to implementation of amended Rules 4.5 and 4.13(a)(3) where further guidance is needed. Such guidance is critical to enabling advisers to registered funds and other market participants to assess the impact of the new rules and satisfy their compliance obligations. On April 5, 2012, the trade associations submitted questions and proposed answers on these issues to the CFTC staff, with the understanding that the staff would respond by April 24.¹² We very much appreciate the staff's efforts in trying to resolve these open questions and provide all market participants with the answers they need to move forward. Nevertheless, we are concerned that any further delay in the publication of these answers (which, as of the date of this letter, have not yet been issued) could impede firms' ability to satisfy their obligations under the amended rules.

The SIFMA AMG letter asks that the CFTC respond as soon as possible to four of these questions, which are extremely time sensitive. The relevant questions seek clarification with regard to the compliance date for amended Rule 4.5, including with respect to registered funds launched after the April 24, 2012 effective date; application of amended Rules 4.5 and 4.13 to funds-of-funds; and conforming changes to Rule 4.13(a)(3) resulting from the Commission's rescission of Rule 4.13(a)(4) under the CEA.¹³ ICI and its members fully concur with this request. We further request that the CFTC also respond as soon as possible to Question 4 in the ICI FAQs, which asks for guidance on how to calculate compliance with the net notional test under amended Rules 4.5 and 4.13.

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¹¹ This extension is roughly equivalent in length to those requested by the other trade associations. *See* Associations Letter, *supra* note 4, at 8 (requesting extension of compliance date for amended Rule 4.13(a)(3) until ten months from the publication of final rules on the definition of swaps and establishing margin requirements for swaps); SIFMA AMG Letter, *supra* note 4, at 4-5 (requesting extension of compliance date for amended Rules 4.5 and 4.13(a)(3) until a minimum of ten months from the effective date of the last rulemaking further defining the term "swap" and establishing margin requirements for such instruments).

¹² List of Amended Regulation 4.5 and 4.13 Issues to Submit to the Commodity Futures Trading Commission by the Investment Company Institute on Behalf of Its Members as FAQs (April 5, 2012) ("ICI FAQs"); Frequently Asked Questions for the Managed Funds Association, Investment Adviser Association and the Asset Management Group of the Securities Industry and Financial Markets Association (April 5, 2012).

¹³ SIFMA AMG Letter, *supra* note 4, at 5-10.

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ICI appreciates the Commission's consideration of the requests outlined in this letter. 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. You also may contact our counsel at K&L Gates LLP: Cary J. Meer at 202/ 778-9107 or Lawrence B. Patent at 202/ 778-9219.

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