

April 10, 2013

VIA ELECTRONIC MAIL

Mr. Gary Barnett
Director
Division of Swap Dealer and Intermediary Oversight
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Request for Confirmation and No-Action Relief Regarding Application of Certain Reporting Obligations under Part 4 of the CFTC's Regulations to Subsidiaries of Registered Investment Companies

Dear Mr. Barnett:

The Investment Company Institute (“ICI”)¹ and the Asset Management Group of the Securities Industry and Financial Markets Association (“AMG”),² on behalf of our members, respectfully request that the Division of Swap Dealer and Intermediary Oversight (“Division”) provide confirmation and no-action relief regarding the application of certain of the reporting obligations under Part 4 of the Commodity Futures Trading Commission’s (“CFTC”) regulations to commodity pool operators (“CPOs”) of registered investment companies (“registered funds”) that trade in commodity interests through wholly-owned subsidiaries (known as controlled foreign corporations or “CFCs”) that are con-

¹ The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds, and unit investment trusts. 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 \$14.7 trillion and serve over 90 million shareholders.

² The AMG’s members represent U.S. asset management firms whose combined assets under management exceed \$20 trillion. The clients of AMG member firms include, among others, registered investment companies, endowments, state and local government pension funds, private sector Employee Retirement Income Security Act of 1974 pension funds and private funds such as hedge funds and private equity funds.

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solidated with the registered fund for financial reporting purposes.³ First, we request that the Division confirm that registered fund CPOs may defer their reporting obligations under Regulation 4.27 under the CEA for their consolidated CFCs until the first applicable reporting period ending after the compliance date of the CFTC's final harmonization rule ("Compliance Date").⁴ Second, we request that the Division provide no-action relief that would permit a CPO of a registered fund that trades in commodity interests through a CFC and that files with the National Futures Association ("NFA") an annual report for the CFC under Regulation 4.22 under the CEA, to include in that report the audited financial statements of the registered fund that consolidate the CFC, in lieu of separate financial statements of the CFC. Consistent with the timing confirmation requested above, we also request that the Division confirm that the filing of such an annual report would not apply for periods prior to the fiscal year of the registered fund that ends after the Compliance Date. In both cases, the requested confirmation or relief is consistent with how these registered funds prepare their audited financial statements under U.S. GAAP and the Investment Company Act of 1940 ("Investment Company Act").⁵

We appreciate the Division's prompt response to our request, as many registered fund CPOs would otherwise be required to comply with Regulation 4.27 for their CFCs with respect to the first quarter of this year and, depending on a CFC's fiscal year, any applicable filing obligations under Regulation 4.22 could be triggered within the next several months.

³ As a result of the CFTC's amendments to Regulation 4.5 under the Commodity Exchange Act ("CEA"), many registered investment advisers that advise registered investment companies must register as CPOs. Although ICI has judicially challenged amended Regulation 4.5, *see* Complaint, *Investment Company Institute, et al. v. CFTC*, Case No. 1:12-cv-00612 (D.D.C. Apr. 17, 2012), it is committed to assisting its members' efforts to comply with the amended regulation. At the same time the CFTC amended Regulation 4.5, it also rescinded Regulation 4.13(a)(4), which provided an exemption from registration for CPOs of private funds. Some registered fund CPOs also advise private funds for which they no longer can claim a CPO exemption, or with respect to which they already act as registered CPOs. These registered fund CPOs comply with Regulation 4.27 with respect to their private funds according to the compliance dates specified by the CFTC as applicable to all CPOs, as these obligations are not deferred pending the CFTC's harmonization rule. *See Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations*, 77 Fed. Reg. 11252 (February 24, 2012); correction notice published at 77 Fed. Reg. 17328 (March 26, 2012) ("Amendment Release"). The requested relief would, however, apply to the reporting obligations of these registered fund CPOs with respect to their CFCs.

⁴ The Division staff has confirmed that the effective date of the harmonization rule will be 60 days after it is published in the Federal Register, and the compliance date will be another 60 days following the effective date. *See* Amendment Release, *supra* note 3.

⁵ The request is also consistent with a similar request ICI has made to the NFA requesting confirmation that registered fund CPOs that consolidate the CFC with the registered fund for financial reporting purposes may defer the reporting obligation under NFA Compliance Rule 2-46 for the CFC until the first applicable reporting period ending after the Compliance Date. *See* Letter from Karrie McMillan, General Counsel, Investment Company Institute, to Mr. Daniel A. Driscoll, Executive Vice President, Chief Operating Officer, and Mr. Thomas W. Sexton, III, Senior Vice President, General Counsel and Secretary, National Futures Association, dated April 10, 2013.

Request for Confirmation under Regulation 4.27

While the CFTC has confirmed that CPOs to registered funds that were required to register as a result of the amendments to Regulation 4.5 under the CEA may defer compliance with reporting obligations under Regulation 4.27 under the CEA for their registered funds until after the Compliance Date, it is unclear whether this deferral would also apply to these registered funds' CFCs.⁶ We request that the Division confirm that CPOs of registered funds that consolidate their CFCs for financial reporting purposes may delay reporting under Regulation 4.27 for these CFCs until the next applicable reporting period following the Compliance Date, when reporting may be provided on a consolidated basis, consistent with how these registered funds prepare their audited financial statements.⁷

For tax purposes, some registered funds trade in commodity interests through wholly-owned subsidiaries known as CFCs.⁸ In most cases, registered funds that trade through such CFCs consolidate the financial statements of the CFC into the registered fund's financial statements for financial reporting purposes. Consolidation results in the financial statements disclosing the CFC's investments as if the registered fund held them directly. This practice is permitted by U.S. GAAP and has been explicitly permitted by the Securities and Exchange Commission ("SEC") staff for SEC reporting purposes.⁹ More recently, the SEC staff has required registered funds to consolidate wholly-owned subsidiaries when that subsidiary is an extension of the parent investment company's operations.¹⁰

⁶ Amendment Release, *supra* note 3, at 11252 ("Entities required to register due to the amendments to § 4.5 shall be subject to the Commission's recordkeeping, reporting, and disclosure requirements pursuant to part 4 of the Commission's regulations within 60 days following the effectiveness of a final rule implementing the Commission's proposed harmonization effort pursuant to the concurrent proposed rulemaking.") The CFTC has clarified that this delay applies to a registered CPO's reporting obligations under Regulation 4.27 with respect to registered funds, stating that this language "suspends compliance with Rule 4.27 for registered investment companies, pending a final harmonization rule." *Investment Company Institute, et al. v. CFTC*, *supra* note 3 (Defendant CFTC's Reply to Plaintiff's Supplemental Response (Oct. 25, 2012), at 3).

⁷ Our request under Regulation 4.27 extends to both filings with respect to such CFCs on Form CPO-PQR and Form CTA-PR, as the same issues are raised with respect to both reporting obligations. We also request that the relief extend to CPOs and CTAs that are in the process of converting from separate financial reporting to consolidated financial reporting for the registered fund and CFCs they operate/advise. In particular, the relief should apply to CPOs and CTAs that operate/advise at least one registered fund that consolidates its CFC for financial reporting purposes, provided that the remaining registered funds' next audited annual financial statements consolidate their CFCs for financial reporting purposes.

⁸ Amendment Release, *supra* note 3, at 11260.

⁹ See FASB Accounting Standards Codification 946-810-45; *Fidelity Investments*, SEC No-Action Letter (April 29, 2008).

¹⁰ See AICPA Investment Companies Expert Panel Meeting Minutes (September 13, 2012) available at http://www.aicpa.org/InterestAreas/FRC/IndustryInsights/DownloadableDocuments/INV/INV_EP_Minutes/2012/INV_EP_September13_2012_Meeting.pdf.

Registered fund complexes that consolidate their funds' CFCs have established financial reporting systems that combine the assets, liabilities, income, and expenses of the registered fund and the CFC for reporting purposes. For CPOs of such registered funds, complying with Regulation 4.27 only with respect to the CFC prior to the Compliance Date would require the CPO to engage in a manual process to isolate the CFC's data. Such a manual process may increase the likelihood of error. Alternatively, the CPO may implement systems changes to isolate the CFC's data. However, such systems changes would be in place for only a limited period of time (*i.e.*, until the Compliance Date, at which time the registered fund could then comply with the reporting requirement on a consolidated basis). Following the Compliance Date, when the registered fund is required to comply with Regulation 4.27, additional systems changes would then be required to revert back to reporting on a consolidated basis.

We therefore request confirmation that CPOs of registered funds that consolidate their CFCs for financial reporting purposes may delay reporting under Regulation 4.27 for these CFCs until the next applicable reporting period following the Compliance Date.¹¹ As of that date, registered fund CPOs will be required to also report under Regulation 4.27 for the registered funds that own such CFCs, and would provide Regulation 4.27 reporting for each registered fund and its CFC on a consolidated basis, which is consistent with how these registered funds provide financial information in their audited financial statements, as included in annual reports provided to shareholders and filed with the SEC.

Request for No-Action Relief under Regulation 4.22

We also request that the Division provide no-action relief to permit CPOs of registered funds that consolidate their CFCs for financial reporting purposes to file with the NFA an annual report for the CFC, to the extent required by Regulation 4.22, that contains audited consolidated financial statements of the registered fund, in lieu of separate financial statements of the CFC. We request that the Division permit registered fund CPOs to file the CFC's first such annual report with respect to the fiscal year of the registered fund that ends after the Compliance Date.¹² Preparing the annual report in this manner would be consistent with how these registered funds provide financial information in their audited financial statements, as included in annual reports provided to shareholders and filed with the SEC, as discussed below.

Regulation 4.22(c) states that, "[e]xcept as provided in paragraph . . . (c)(8) of this section, each commodity pool operator registered or required to be registered under the Act must distribute an Annual Report to each participant in each pool that it operates, and must electronically submit a copy of the Report and key financial balances from the Report to the National Futures Association pursuant to

¹¹ To illustrate the timing under our request, if the Compliance Date is August 1, 2013, a quarterly Form CPO-PQR filer would file its first Form CPO-PQR with respect to the quarter ending September 30, 2013.

¹² To illustrate the timing, if the Compliance Date is August 1, 2013, and a registered fund's fiscal year end is September 30, the first such annual report would be for the fiscal year ending September 30, 2013.

the electronic filing procedures of the National Futures Association, within 90 calendar days after the end of the pool's fiscal year . . ." Pursuant to Regulation 4.22(c)(8), CFCs are not required to provide an annual report, either to the registered funds that own them or those funds' shareholders.¹³ This request would apply, however, to the extent that a CPO to a CFC might still have an obligation to file an annual report containing separate financial statements of the CFC with the NFA.¹⁴

Registered funds are required under the Investment Company Act to provide shareholders with semi-annual and annual reports, and file those reports with the SEC.¹⁵ Annual reports to shareholders must contain audited financial statements prepared in accordance with U.S. GAAP.¹⁶ As discussed above, most registered funds that own CFCs prepare their audited financial statements on a consolidated basis. In those cases, the registered fund would not prepare separately audited financial statements for the CFC. Preparing separate audited financial statements for the CFC would require registered funds to incur unnecessary and redundant costs associated with preparing financial statements for the CFC, as well as costs associated with an audit of the CFC's financial statements. It would be costly and inefficient, and would provide no additional benefit, for the CFTC to require the CPO to such a CFC to file an annual report with the NFA that includes separate audited financial statements of the CFC, as the registered fund's audited consolidated financial statements would include all required financial information for the registered fund, including the holdings, gains and losses, and other financial statement amounts attributable to the CFC.

For these reasons, we request that the Division provide no-action relief to permit registered fund CPOs that consolidate their CFCs for financial reporting purposes to file with the NFA an annual report for the CFC that contains audited consolidated financial statements of the registered fund. We also request that the Division permit such CPOs to file the CFC's first annual report with respect to the fiscal year of the registered fund that ends after the Compliance Date. Filing in this manner would be consistent with how registered funds that consolidate their CFCs prepare their financial statements for purposes of U.S. GAAP and SEC regulations.

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¹³ Regulation 4.22(c)(8) states that for purposes of the annual report distribution requirement, the term "participant" of a pool does not include a commodity pool operated by the same or an affiliated CPO. *See also* Division of Swap Dealer and Intermediary Oversight Responds to Frequently Asked Questions – CPO/CTA: Amendments to Compliance Obligations, *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/faq_cpocta.pdf.

¹⁴ In addition, under Regulation 4.7(b)(3), a CPO relying on that regulation with respect to an "exempt pool" must file with the NFA an annual report meeting certain requirements within 90 calendar days after the end of the pool's fiscal year. CPOs of funds of funds, however, whether relying on Regulation 4.22 or Regulation 4.7(b)(3), have up to 180 days to file the annual report. *See* Regulation 4.22(f)(2) under the CEA.

¹⁵ *See* Rules 30e-1 and 30b2-1 under the Investment Company Act.

¹⁶ *See* Rules 3-18 and 4-01 of Regulation S-X.

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We sincerely appreciate the willingness of CFTC staff to address the industry's concerns. 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 at the ICI, or Tim Cameron at 212/313-1389 or Matt Nevins at 212/313-1176 at AMG.

Sincerely,

/s/ Karrie McMillan

Karrie McMillan
General Counsel

/s/ Timothy W. Cameron

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

/s/ Matthew J. Nevins

Matthew J. Nevins, Esq.
Managing Director and Associate General Counsel,
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cc: Amanda Olear, Special Counsel
Michael Ehrstein, Attorney-Advisor
Division of Swap Dealer and Intermediary Oversight
Commodity Futures Trading Commission

Daniel A. Driscoll, Executive Vice President, Chief Operating Officer
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