

April 10, 2013

VIA ELECTRONIC MAIL

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

Mr. Thomas W. Sexton, III
Senior Vice President,
General Counsel and Secretary

National Futures Association
300 S. Riverside Plaza, #1800
Chicago, Illinois 60606-6615

Re: Application of NFA Compliance Rule 2-46 to Subsidiaries
of Registered Investment Companies

Dear Mr. Driscoll and Mr. Sexton:

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 National Futures Association (“NFA”) provide confirmation³ regarding the application

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.

³ As a result of the Commodity Futures Trading Commission’s (“CFTC”) amendments to Regulation 4.5 under the Commodity Exchange Act (“CEA”), many registered investment advisers that advise registered investment companies must register as commodity pool operators (“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.

of NFA Compliance Rule 2-46 to CPOs of registered investment companies (“registered funds”) that trade in commodity interests through wholly-owned subsidiaries (known as controlled foreign corporations or “CFCs”). Specifically, ICI and AMG request that NFA confirm that CPOs to registered funds that consolidate the CFC with the registered fund for financial reporting purposes may defer the reporting obligation under Compliance Rule 2-46 for the CFC until the first applicable reporting period ending after the compliance date of the CFTC’s final harmonization rule (“Compliance Date”).⁴ The requested confirmation 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”). The request is also consistent with a similar request ICI has made to the CFTC’s Division of Swap Dealer and Intermediary Oversight requesting confirmation 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.⁵

We appreciate NFA’s prompt response to our request, as many registered fund CPOs could otherwise be required to comply with Rule 2-46 for their CFCs with respect to the first quarter of this year.

Discussion

NFA agreed in discussions with ICI, as memorialized in a letter from ICI dated December 28, 2012,⁶ that reporting under Compliance Rule 2-46 by CPOs of registered funds that were required to register as CPOs as a result of the CFTC’s recent amendments to Regulation 4.5 should be deferred until the Compliance Date. The December ICI Letter, however, did not explicitly address whether re-

⁴ The staff of the CFTC’s Division of Swap Dealer and Intermediary Oversight Division 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 *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). 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).

⁵ Letter from Karrie McMillan, General Counsel, Investment Company Institute, to Mr. Gary Barnett, Director, Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, dated April 10, 2013.

⁶ 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 December 28, 2012 (“December ICI Letter”). We note that, 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. While these registered fund CPOs would be subject to Rule 2-46 with respect to their private funds, the requested relief would apply to the reporting obligations of these registered fund CPOs with respect to their CFCs.

porting would also be deferred for any CFCs of such registered funds. For the reasons discussed below, we request that NFA confirm that CPOs to registered funds that consolidate their CFC with the registered fund for financial reporting purposes may defer the reporting obligation under Compliance Rule 2-46 for the CFC until the first applicable reporting period ending after the Compliance Date, consistent with how these registered funds prepare their audited financial statements.⁷

Compliance Rule 2-46 addresses the quarterly reporting obligations to NFA of a CPO that is an NFA member. NFA recently amended Compliance Rule 2-46 to provide that a CPO member that has any reporting obligation under Regulation 4.27 under the CEA must satisfy its reporting obligation under Compliance Rule 2-46 for each pool it operates by filing with NFA applicable schedules of CFTC Form CPO-PQR. Small and mid-size CPOs must also include a schedule of investments with their quarterly filings, although the threshold under the schedule of investments is revised from 10% of the pool's net asset value at the end of the quarterly reporting period to 5% to conform to CFTC requirements. The amendments make certain other changes to the reporting obligation including, among other things, revising the quarterly filing deadline with NFA from 45 days after the end of each quarterly reporting period to 60 days after the end of each of the first three quarters of the year, and requiring that a year-end report be filed with NFA within 90 days of the calendar year end. The amendments also add a requirement for NFA members that are CTAs and that are subject to a reporting obligation under Regulation 4.27, to file with NFA CFTC Form CTA-PR, along with certain additional information, on a quarterly basis. These quarterly CTA filings are required to be submitted within 45 days after the end of each of the first three quarters of the year, with a year-end report required within 45 days of the calendar year end.

In most cases, registered funds that trade through 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.⁸ More recently, the SEC staff has required registered funds to consolidate wholly-owned subsidiaries when that subsidiary is an exten-

⁷ Our request under Compliance Rule 2-46 also extends to quarterly commodity trading advisor ("CTA") filings under amended Compliance Rule 2-46 with respect to such CFCs, as the same issues are raised with respect to both reporting obligations. We also request that the confirmation extend to CPOs and CTAs that are in the process of converting from separate financial reporting to consolidated financial reporting for the registered funds and CFCs they operate/advise. In particular, we request that the confirmation also 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 See FASB Accounting Standards Codification 946-810-45; *Fidelity Investments*, SEC No-Action Letter (April 29, 2008).

sion of the parent investment company's operations.⁹

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 Compliance Rule 2-46 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 Compliance Rule 2-46, 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 Compliance Rule 2-46 for these CFCs until the next applicable reporting period following the Compliance Date.¹⁰ As of that date, registered fund CPOs will be required to also report under Compliance Rule 2-46 for the registered funds that own such CFCs, and would provide Compliance Rule 2-46 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.

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⁹ 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.

¹⁰ To illustrate the timing under our request, if the Compliance Date is August 1, 2013, a quarterly NFA-PQR filer would file its first NFA-PQR with respect to the quarter ending September 30, 2013.

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We sincerely appreciate the willingness of the NFA 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,
Asset Management Group
Securities Industry and Financial Markets Association

cc: Gary Barnett, Director
Amanda Olear, Special Counsel
Michael Ehrstein, Attorney-Advisor
Division of Swap Dealer and Intermediary Oversight
Commodity Futures Trading Commission

Jaime Eichen, Chief Accountant
Division of Investment Management
Securities and Exchange Commission