April 12, 2011

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

Re: Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations

Dear Mr. Stawick:

The Asset Management Group (the "**AMG**") of the Securities Industry and Financial Markets Association ("**SIFMA**") appreciates the opportunity to provide the Commodity Futures Trading Commission (the "**CFTC**" or the "**Commission**") with our comments on the Notice of Proposed Rulemaking (the "**NPR**") amending the compliance obligations of commodity pool operators ("**CPOs**") and commodity trading advisors ("**CTAs**"),[1] including the (i) Commission's proposed amendments to CFTC Rule 4.5 reinstating trading criteria for exclusion from the definition of CPO (the "**Rule 4.5 Proposal**"); (ii) the Commission's proposed rescission of the exemptions from CPO registration under CFTC Rules 4.13(a)(3) and 4.13(a)(4) (the "**Rule 4.13(a) Proposal**", and collectively with the Rule 4.5 Proposal, the "**Rule 4.5/4.13 Proposals**"); and certain other rules proposed by the Commission in the NPR (collectively with the Rule 4.5/4.13 Proposals, the "**Proposed Rules**").

The AMG's members represent U.S. asset management firms whose combined assets under management exceed $20 trillion. Many AMG member firms sponsor or advise investment companies registered under the Investment Company Act of 1940 (the "**Investment Company Act**") and privately offered pooled investment vehicles and managed accounts. These registered investment companies and privately offered funds and accounts may invest in commodity futures, commodity options and swaps (collectively, "**commodity instruments**") as part of their respective investment strategies.

The AMG respectfully submits that the Proposed Rules, if adopted, would subject registered investment companies, privately offered funds and their registered investment advisers to duplicative and in some cases inconsistent regulatory regimes and impose overly expansive regulation that is not specifically mandated by the Dodd-Frank

[1] Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations, 76 Fed. Reg. 29, 7976 (Feb. 11, 2011) ("**NPR**"), available at http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-2437a.pdf

Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**"). The AMG respectfully requests that the Commission consider the following recommendations prior to adopting the Proposed Rules.

I. Summary of Recommendations:

- The AMG believes that the Proposed Rules should not be adopted because the costs of the Proposed Rules to affected market participants is expected to be significant and far outweigh any perceived benefits. As further discussed below, the Proposed Rules would impose unnecessary, duplicative regulatory requirements on otherwise regulated entities.

- Swaps should be excluded from any CPO registration requirement.

- If the Rule 4.5 Proposal and Rule 4.13 Proposal are to be adopted, the AMG requests a number of clarifications and exemptions be made with respect to these proposed rules, including:

  - certain clarifications and exclusions with respect to the Rule 4.5 Proposal, such as limiting the applicability of the marketing restriction to only those registered investment companies that provide actively managed futures strategies as their primary investment strategy, increasing the 5% initial margin limit, an exemption from CPO registration for funds of funds and expanding the scope of the "bona fide hedging" definition;

  - an exemption for affected funds that use commodity instruments to passively track a commodity index;

  - preservation of the Rule 4.13(a)(3) exemption and, if the Rule 4.13 Proposal is adopted, application of the same carve outs that apply to the Rule 4.5 exclusion to private pools managed by registered investment advisors;

  - clarification that any wholly owned subsidiary of a registered investment company will be entitled to the Rule 4.5 exclusion available to its parent company;

  - harmonization with existing federal securities laws governing affected participants that already address the same issues or that conflict with the requirements of, the CFTC Rules;

  - CPO registration relief for directors and trustees of affected funds; and

  - grandfathering of affected parties relying on Rules 4.5, 4.13(a)(3) or 4.13(a)(4) as of the effective date of the proposed rules from such proposed rules' requirements, as applicable.

- The AMG believes Forms CPO-PQR and CTA-PR represent an unnecessary additional burden in light of the proposed reporting obligations under Form PF.

- The AMG opposes the "one-size-fits-all" swap Risk Disclosure Statement.

- The AMG respectfully urges the Commission not to amend existing CPO/CTA exemptive relief claims notification requirements to require annual certification.

II. The Rule 4.5/4.13 Proposals

a. No changes to Rules 4.5, 4.13(a)(3) or 4.13(a)(4) should be made at this time.

The AMG urges the Commission not to adopt the Rule 4.5 Proposal or the Rule 4.13 Proposal. The AMG believes that the Rule 4.5/4.13 Proposals would impose regulatory requirements on otherwise regulated entities that are (i) unnecessary, duplicative and very burdensome and (ii) not mandated by, or necessary to fulfill the purposes of, the Dodd-Frank Act. The AMG believes that the Rule 4.5/4.13 Proposals would impose significant costs on registered investment companies, private funds, their registered advisers and regulators without providing any clear benefits to market participants.

Registered investment companies currently exempt under Rule 4.5 and most advisers to investment funds currently exempt under Rule 4.13(a)(3) or Rule 4.13(a)(4) (collectively, "**Affected Parties**") are already subject to robust regulatory requirements and oversight by federal regulators. As discussed in the AMG's comment letter dated October 18, 2010 regarding the NFA Petition to Amend Commission Rule 4.5 (the "**AMG October Letter**"),[2] under the Investment Company Act, registered investment companies are already subject to extensive requirements regarding the form and content of disclosure documentation and must comply with recordkeeping, reporting and other requirements that in many cases are similar to CFTC Rules. Among the significant protections imposed under the Investment Company Act are strict asset coverage requirements and leverage restrictions.[3] In addition, the Investment Company Act requires a mutual fund to have a board with a majority of independent directors and imposes strict restrictions against transactions with affiliates.[4] Moreover, the Investment Company Act requires conflict mitigation mechanisms within the investment company structure that address concerns regarding conflicts of interest by CPOs under CFTC regulations.

Advisers to registered investment companies, and most advisers to investment funds currently exempt from CPO registration under Rule 4.13(a)(3) or Rule 4.13(a)(4), are also subject to extensive regulatory requirements and oversight by federal regulators under the Advisers Act of 1940 (the "**Advisers Act**"). The AMG believes that substantially all advisers relying upon the Rule 4.13(a)(3) or Rule 4.13(a)(4) exemption (other than those with less than $150 million in assets under management) are either

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[2] *See* AMG October Letter (Oct. 18, 2010), available at http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26292.

[3] *See, e.g.,* Investment Company Act § 18.

[4] *See, e.g.,* Investment Company Act Release No. 24816 (Jan. 2, 2001), available at http://www.sec.gov/rules/final/34-43786.htm (the "**SEC Independent Directors Release**"); Investment Company Act § 17.

registered or soon will be required to register with the SEC under the Advisers Act.[5] The Advisers Act subjects registered advisers to stringent regulatory compliance requirements, including disclosure, custody, recordkeeping, reporting and other compliance requirements.[6] For example, Rule 204-2 under the Advisers Act requires registered advisers to maintain extensive books and records relating to its advisory business (generally for a period of five years or longer, depending on the type of record), including business records, records of the adviser that relate to the advisory activities of the adviser and records relating to the adviser's compliance program. The Advisers Act also subjects advisers to requirements relating to conflicts of interest, including disclosure requirements.[7] Recent SEC amendments to Form ADV Part 2 have increased the amount of conflicts of interest disclosure and reporting required by registered advisers and such information in now required to be made publicly available through the IARD website. For example, a registered adviser must disclose its relationships with certain affiliates, related conflicts of interest with respect to clients and client transactions and all material risks related to its significant investment strategies. Additionally, the CFTC and SEC's joint proposal regarding Form PF is expected to subject registered advisers to enhanced reporting requirements.[8]

Affected Parties are also subject to stringent anti-fraud provisions under the federal securities laws that are substantially similar to the anti-fraud provisions under the Commodity Exchange Act (the "**CEA**"). Notably, Section 4o of the CEA is a general anti-fraud provision patterned closely to the anti-fraud provisions of the federal securities laws to which registered investment companies and their investment advisers are subject.[9] Courts have generally looked to the federal securities laws for interpretative guidance on the applicability of Section 4o.[10]

In light of these existing channels of regulatory oversight, the AMG believes that CPO registration would create needless, duplicative compliance obligations for Affected Parties seeking to provide commodity instruments exposure to their investors as part of an overall investment program.[11] The AMG believes that enhanced SEC-mandated

[5] Those private fund advisers operating in the U.S. that are not subject to SEC registration will only be those that are responsible for moderate amounts of assets and will, in any event, be subject to state registration requirements.

[6] *See, e.g.,* Rules 206(4)-1, 206(4)-2, 206(4)-7 and 204-2 under the Advisers Act.

[7] *See, e.g.,* Form ADV Part 2.

[8] Advisers Act Proposed Rule 204(b)-1(a).

[9] *Cf.* Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934; Section 17(a)(3) of the Securities Act of 1933 (the "**Securities Act**"); Section 206 of the Advisers Act.

[10] *See, e.g.,* CTFC v. Savage, 611 F.2d 270 (9th Cir. 1979).

[11] In its August 2003 decision to eliminate the 5% Limit and the Marketing Restriction from Commission Rule 4.5, the CFTC agreed that the "otherwise regulated nature" of the qualifying entities, including registered investment companies, specified in Commission Rule 4.5 would provide adequate customer protection. *See* Additional Registration and Other Regulatory Relief for Commodity Pool Operators and Commodity Trading Advisors; Past Performance Issues, CFTC Final Rule Release, 68 Fed. Reg. 47221 (Aug. 8, 2003), available at http://www.cftc.gov/foia/fedreg03/foi030808a.htm (the "**Final Rule Release**"); Additional Registration and Other Regulatory Relief for Commodity Pool Operators and Commodity Trading Advisors, CFTC Proposed Rule Release, 68 Fed. Reg. 12622 (Mar. 17, 2003), available at http://www.cftc.gov/foia/fedreg03/foi030317b.htm (the "**2003 Proposed Rule Release**"). The NFA also (…continued)

disclosure and reporting by Affected Parties (to the extent necessary and consistent with existing applicable federal securities laws) would likely be as effective as CPO registration in addressing the Commission's regulatory oversight concerns without the imposition of costly, duplicative and sometimes inconsistent regulatory requirements on otherwise regulated entities. In the spirit of regulatory harmonization between the CFTC and SEC, any disclosure deficiencies and regulatory gaps could be addressed via additional reporting requirements under the Investment Company Act or the Advisers Act, thereby decreasing unnecessary burdens of compliance on Affected Parties.

b. The Rule 4.5/4.13 Proposals are neither mandated by the Dodd-Frank Act nor necessary to achieving its purposes.

The AMG respectfully notes that neither the Rule 4.5 Proposal nor the Rule 4.13 Proposal is mandated by the Dodd-Frank Act. The Commission states in the NPR that its purpose in amending these existing CPO regulations is to, "consistent with the tenor of the Dodd-Frank Act . . . . bring the Commission's CPO . . . regulatory structure into alignment with the stated purposes of the Dodd-Frank Act." However, the Commission does not indicate any specific statutory requirement in the Dodd-Frank Act mandating either the Rule 4.5 Proposal or the Rule 4.13 Proposal, and the AMG does not believe that the Rule 4.5/4.13 Proposals are necessary to achieve the purposes of the Dodd-Frank Act. Following the Commission's adoption of Rules 4.5, 4.13(a)(3) and 4.13(a)(4) in 2003, Congress reviewed the CEA (including in connection with the adoption of the Dodd-Frank Act), but in no instance determined to require registration of pool operators operating in accordance with these rules.

With respect to the Rule 4.13 Proposal, the Commission states that its purpose in rescinding Rules 4.13(a)(3) and 4.13(a)(4) is to "promote transparency" with respect to market participants and to impose additional registration requirements so that pool operators currently relying upon such exemptions cannot engage in regulatory arbitrage and avoid oversight by either the CFTC or the SEC. Rather, the Commission's intent was to ensure that such pool operators would be subject to similar regulatory obligations as investment advisers that will now be required to register as advisers under the Dodd-Frank Act. The AMG believes that the Rule 4.13 Proposal does not meaningfully further the goals of transparency or reducing regulatory arbitrage. As a preliminary matter, the Commission's existing Form 40 large trader reporting requirements, combined with the Commission's proposed "real-time" reporting regime for swaps, already provides and will continue to provide extensive transparency, permitting the Commission to monitor large positions and to detect market activities relating to systemic risk. Furthermore, most advisers relying upon the Rule 4.13(a)(3) or Rule 4.13(a)(4) exemption are registered investment advisers already subject to stringent disclosure, reporting, recordkeeping and other compliance requirements under the Advisers Act as well as the regulations promulgated under Title IV of the Dodd-Frank Act aimed at increasing transparency and accountability. As previously discussed, registered advisers are subject to the enhanced reporting requirements under recently amended Form ADV Part 2 and

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agreed in its comment letter to the 2003 Proposed Rule that the elimination of the 5% Limit would "reduce participant costs—thereby increasing participant returns—by eliminating the costs of duplicative regulation…." NFA Comment Letter to the CFTC 2003 Proposed Rule Release (May 1, 2003), *available at* http://www.cftc.gov/files/foia/comment03/foicf0306c018.pdf.

would also be subject to the reporting requirements mandated by the CFTC and SEC's joint proposal regarding Form PF. Since these pool operators are already subject to federal registration and reporting requirements, they should not also be required to register as a CPO because there is no evidence that such persons engage in regulatory arbitrage.

III. Treatment of Swaps

a. Swaps should be excluded from the Rule 4.5 Proposal and any CPO registration requirement.

The AMG respectfully requests that the Rule 4.5 Proposal not be expanded to include "swaps," notwithstanding the expanded definitions of "commodity pool" and "commodity pool operator" under the Dodd-Frank Act.[12] The broad inclusion of "swaps" within the Rule 4.5 Proposal would encompass a host of transactions (*e.g.,* physical commodity swaps, interest rate swaps, equity swaps on broad-based indices, index credit swaps, etc.). Furthermore, if the Commission decides to retain the Rule 4.13(a)(3) and/or 4.13(a)(4) exemptions, the AMG believes that the Commission should not amend the conditions of either of these exemptions to require registration of entities that use swaps. The AMG respectfully notes that the inclusion of swaps in any CPO registration requirement is not mandated by the Dodd-Frank Act. In passing the Dodd-Frank Act, Congress directed the Commission to regulate and subject to strict oversight market participants whose swap activities could pose systemic risk to the financial markets. Under this mandate, the Commission must adopt rules regulating the activities of major swap participants (*i.e.,* certain market participants holding "substantial positions" in swaps).[13] The Dodd-Frank Act did not suggest that CPO registration requirements should be tightened with respect to operations of pools that do not hold substantial swap positions.

Furthermore, the Commission is currently engaged in swap-related rulemaking pursuant to the Dodd-Frank Act which will establish a wide-sweeping new regulatory regime for swaps, which the AMG believes obviates the necessity of including swaps in any CPO registration requirement. Title VII of the Dodd-Frank Act establishes a framework under which market participants will be subject to mandatory clearing of swaps through central clearinghouses, "real-time" reporting of swaps transactions to a swap data repository (or, as applicable, to the CFTC or SEC) and mandatory exchange trading of swaps on a designated contract market or swap execution facility. These and other rules promulgated by the CFTC under the Dodd-Frank Act will establish an extensive reporting framework with respect to swaps trading by market participants which the AMG believes adequately addresses the CFTC's concerns with respect to increased transparency and accountability of swaps participants. As discussed above, the otherwise regulated nature of registered investment companies and registered investment

[12] *See* CEA § 1a(11), as amended by the Dodd-Frank Act.

[13] The definition of "major swap participant" encompasses certain market participants who hold a "substantial position" in swaps. The CFTC is mandated under the Dodd-Frank Act to provide a definition of "substantial position" that is "prudent for the effective monitoring, management and oversight" of entities that are systemically important or can significantly impact the financial system of the United States. Dodd-Frank Act §§ 712(d)(1), 721(c); CEA. § 1a(33)(B).

advisers to private funds further obviates the need for such inclusion with respect to such market participants.

b. If swaps are included within the Rule 4.5 Proposal or any CPO registration requirement, such inclusion should be deferred until swap-related rulemaking under the Dodd-Frank Act has been completed.

Currently, there are substantial uncertainties with respect to swap rulemaking by the Commission which, until resolved, prevent a complete understanding of the application and implications of including swaps within any CPO registration requirement. For example, at this time the term "swap" has not yet been fully clarified. As of the date of this letter, neither the CFTC nor the SEC has yet proposed rules with respect to the definition of "swap" as required by Section 712(d) of the Dodd-Frank Act. Whether foreign exchange swaps and forwards are considered to be "swaps" and therefore subject to the Proposed Rules has also not yet been determined.[14] Moreover, it is unclear at this time what types of swaps will be subject to mandatory clearing or what levels of initial margin will be required for cleared and un-cleared swaps. If swaps are to be included within the Rule 4.5 Proposal or any CPO registration requirement, the AMG believes that these and other uncertainties and issues must first be resolved before the full implications and application of such inclusion on Affected Parties can be understood, evaluated and commented upon.

IV. Rule 4.5 Proposal Recommendations

The Commission proposes to amend CFTC Rule 4.5 to reinstate the pre-2003 operating criteria proposed in the August 18, 2010 petition (the "**NFA Petition**") by the National Futures Association (the "**NFA**")[15] and to expand such criteria to include trading restrictions applicable to swaps. Under the Rule 4.5 Proposal, a registered investment company claiming the exclusion will be required to represent that it (i) will use commodity instruments solely for bona fide hedging purposes within the meaning of CFTC Rule 1.3(z)(1), or, in cases of non-hedging purposes, limit the aggregate initial margin and premiums on such positions to 5% of the liquidation value of the investment company's portfolio (net of all unrealized profits and losses) (the "**5% Limit**") and (ii) will not be marketed to the public as a commodity pool or a vehicle for trading in (or otherwise seeking investment exposure to) the commodities markets (the "**Marketing Restriction**").

As discussed above and in the AMG October Letter, the AMG believes that the proposed amendments to CFTC Rule 4.5 should not be adopted because they would impose significant regulatory burdens and costs on otherwise regulated registered investment companies without a corresponding benefit to investors, the commodities

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[14] On October 28, 2010, the Treasury issued a notice and request for comments on whether to exclude foreign exchange swaps and forwards, or both, from the definition of "swap" under the CEA. Determination of Foreign Exchange Swaps and Forwards, 75 Fed. Reg. 208, 66426 (Oct. 28, 2010), available at http://edocket.access.gpo.gov/2010/pdf/2010-27274.pdf. As of the date of this letter, the Treasury has not yet made any final determination.

[15] The NFA Petition, which amended a petition initially submitted in June 2010 by the NFA, can be found at http://www.nfa.futures.org/news/newsPetition.asp?ArticleID=3630.

markets or the general public.[16] However, if the Rule 4.5 Proposal is adopted, the AMG respectfully requests that the applicability of the Rule 4.5 Proposal be limited to only those registered investment companies that offer actively managed futures strategies as their primary investment strategy. The overly broad language of the Rule 4.5 Proposal as currently drafted would apply to all registered investment companies, including those that are not actively managed futures funds or marketed as such, even though no contention has been made by the NFA that current comprehensive regulation under the federal securities laws is inadequate to protect investors. The AMG requests that the Rule 4.5 Proposal be specifically tailored to those registered investment companies that offer actively managed futures strategies as their primary investment strategy and the Commission clarify that other registered investment companies, such as those which invest in commodity instruments for cash management or risk management purposes, are not subject to the Rule 4.5 Proposal. This result can be achieved by adopting the following recommendations.

a. Scope of the 5% Limit.

In response to the Commission's query,[17] the AMG believes that the 5% Limit is not an appropriate threshold, and should be increased to a higher threshold to be determined after the completion of mandatory Dodd-Frank rulemaking by the Commission. The 5% Limit was originally adopted by the Commission in 1985 based upon recommendations by the Senate Committee on Agriculture, Nutrition, and Forestry and the Commission's own review of initial hedge margins and premiums for commodity transactions at the time.[18] Over twenty-five years later, the landscape of markets in commodity instruments has changed dramatically along with margin requirements in the wake of the 2008 financial crisis, and the AMG believes that further inquiry is appropriate to determine whether 5% (or, as the AMG believes, a higher amount) is the appropriate measurement for determining those funds that may be engaging in active speculative participation in the commodities markets. The AMG believes in the necessity of re-examining this threshold and urges the Commission to conduct an updated review. Moreover, the AMG notes that the proposed inclusion of swaps in the 5% Limit makes any evaluation and determination premature at this time. As discussed above, uncertainties and timing issues with respect to swaps rulemaking by the Commission currently prevent a complete understanding of the implications of including swaps within the 5% Limit. The AMG believes that the imposition of the 5% Limit should be delayed and revisited when more information becomes available and the full implications of the 5% Limit can be evaluated and commented upon.

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[16] Furthermore, the AMG opposes any revision to the Rule 4.5 Proposal that would broaden the proposal's scope to capture "otherwise regulated" persons in addition to registered investment companies (*e.g.,* insurance companies, ERISA plans, etc.).

[17] NPR, *supra* note 1 at 7984.

[18] *See* 50 Fed. Reg. 15868, 1985 WL 104440 (F.R.) (Apr. 23, 1985). In the adopting release, the Commission concluded that the initial margin limitation "generally should not pose any serious or regular impediments to the use of commodity interests," noting that with respect to certain futures contracts traded on the Chicago Board of Trade, initial hedge margins represented approximately 2.2-2.7% of the contract's market value based on that day's settlement price. *Id.* at 15878.

b. Scope of the Marketing Restriction.

The Marketing Restriction requires a registered investment company claiming the exclusion to represent that it will not be marketed to the public as a commodity pool or "a vehicle for trading in *(or otherwise seeking investment exposure in)* the commodity futures, commodity options or swaps markets" (emphasis added).[19] The Marketing Restriction would thus reinstate the pre-2003 Marketing Restriction that was eliminated by the CFTC in 2003, and further add "(or otherwise seeking investment exposure in)" to the text of the pre-2003 condition.[20]

As discussed in the AMG October Letter, the AMG believes that the broad language of the Marketing Restriction creates significant regulatory uncertainty and imposes restrictions on registered investment companies beyond the scope of what is intended. The Marketing Restriction is so broad on its face that registered investment companies that utilize commodity instruments may not be able to satisfy such restriction given their disclosure obligations to investors under the federal securities laws. Under a literal reading of the restriction, a registered investment company providing any amount of commodity instruments exposure would be subject to registration as a CPO for any oral, written or electronic statements to the public that it trades in or provides investment exposure to commodities instruments. Even a registered investment company trading commodity instruments within the 5% Limit could nevertheless potentially be required to register as a CPO, essentially eviscerating the 5% Limit. Therefore, the AMG respectfully requests the Commission specifically clarify that the Marketing Restriction (i) does not apply to any fund disclosure obligations required under the federal securities laws, including disclosure required in the Registration Statement and Prospectus required under Form N1-A and the Statement of Additional Information and (ii) applies only to those registered investment companies that provide actively managed futures strategies as their primary investment strategy.

The AMG respectfully requests that the phrase, "(or otherwise seeking investment exposure in)", be deleted from the Marketing Restriction. This phrase was not in the text of the pre-2003 condition and was apparently proposed by the NFA to address the parent-subsidiary investment structures discussed in the NFA Petition. As discussed further below, these parent-subsidiary investment structures are consistent with the "otherwise regulated nature" of the CFTC Rule 4.5 exclusion, and therefore do not indicate any need for the reinstatement of the 5% Limit and the Marketing Restriction for registered investment companies.[21] This phrase would inappropriately capture indirect investment in commodity instruments, by funds investing in other funds or in other instruments, such as notes, which we do not believe are subject to the CFTC's jurisdiction. It could also inappropriately apply to asset allocation funds or funds-of-funds that do not use commodity instruments themselves. Therefore, the AMG believes that this phrase should be deleted.

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[19] *See* NFA Petition, *supra* note 15.

[20] Prior to the 2003 changes, the Marketing Restriction required that a registered investment company relying upon the Rule 4.5 exclusion represent that it "[w]ill not be, and has not been, marketing participations to the public as or in a commodity pool or otherwise as or in a vehicle for trading in the commodity futures or commodity options markets." 17 C.F.R. § 4.5 (2003).

[21] *See* AMG October Letter (Oct. 18, 2010), *supra* note 2.

c. Funds of funds should be exempted from the Rule 4.5 Proposal and from any other CPO registration requirement.

The AMG requests that registered investment companies that do not engage in commodity instruments trading but invest in underlying commodity pools be specifically excluded from the Rule 4.5 Proposal and from CPO registration generally. Such funds include funds of funds, such as "life cycle," target date and asset allocation funds (collectively, "**funds of funds**"). If the Rule 4.5 Proposal is adopted, funds of funds currently relying upon such exemptions may be required to register as CPOs. The AMG respectfully notes that, in accordance with Section 4m(2) of the Commodity Exchange Act, an entity investing in commodity pool interests is investing only in "securities" and is not engaged in the "trading" of commodity instruments. These funds of funds do not have the ability to control or manage the commodity instruments used by the funds that they invest in, which may be or become subject to CFTC jurisdiction themselves. As discussed above, operators of such pools are already adequately regulated as registered advisers under the securities laws. Therefore, the AMG believes that there is no apparent purpose for causing such a fund of funds to be deemed to be a commodity pool and that its operator be subject to CPO registration.[22]

d. *The exemption for bona fide hedging should include economic risk mitigation.*

The AMG requests that the Commission clarify that investment-related hedging transactions are exempt from the 5% Limit as "bona fide hedging". The AMG believes that "bona fide hedging" should be defined without reference to CFTC Rule 1.3(z)(1). The common understanding of "hedging," which generally encompasses a broad range of transactions that offset other specific risks, regardless of whether the hedger is a physical market participant or whether the risk hedged is commercial or financial, is reflected in the Commission's instructions regarding disclosure of hedged positions on Form 40 which refers specifically to security portfolio risk management hedging activities.[23] In relevant part, Form 40 instructs that "activities hedged by the use of futures or options markets . . . would include . . . asset/liability risk management, security portfolio risk management, etc."; traders that may use this form to indicate hedged positions include mutual funds, pension funds, endowments, and managed accounts, as well as producers and manufacturers. We believe that the Commission's current interpretation of "hedging" under this Form should be applied here. Investment-related hedging transactions for the purpose of risk mitigation (such as inflation and foreign exchange movements) is economically appropriate to the reduction of risks in the conduct of a market participant's enterprise.[24] Whether Rule 1.3(z)(1) is otherwise amended to permit

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[22] If the Rule 4.5 Proposal is nevertheless to be adopted, the AMG respectfully requests that funds of funds should, at a minimum, be specifically excluded from the requirements of the Marketing Restriction. The current language of the Marketing Restriction is so broad on its face that it inadvertently captures the marketing activities and disclosure obligations of these funds of funds, subjecting them to burdensome registration requirements with little corresponding regulatory benefit.

[23] *See* CFTC Form 40, Statement of Reporting Trader, Part B, Item 3 and Schedule 1.

[24] Even if "bona fide hedging" is to be defined within the meaning of CFTC Rule 1.3(z)(1), the AMG believes that such a definition should reasonably be interpreted to include investment-related hedging transactions. CFTC Rule 1.3(z)(1) has long been interpreted by the CFTC, and applied by the exchanges, to (…continued)

or exclude portfolio risk-reduction transactions, the AMG believes that such transactions should be excluded under the Rule 4.5 proposal since they are not indicative of whether a registered investment company intends primarily to be in the business of trading in commodity instruments.

e. An exemption from CPO registration should be granted to registered investment companies that use commodity instruments to passively reference a commodity index.

The AMG respectfully requests that registered investment companies investing in commodity instruments to passively track a commodity index or benchmark should be granted a specific exemption from CPO registration. The AMG believes that a distinction should be made between pools that invest in commodity-linked derivatives for passive, diversified asset allocation versus those that actively invest in particular commodities for speculative purposes. Registered investment companies that seek commodity instruments exposure for passive index tracking provide a transparent method of providing small investors an efficient and low-cost means of accessing the commodities markets.[25] Overly expansive regulation would impose compliance costs that, in the AMG's view, do not offer a significant benefit to the investing public. Without this exemption, operators of such pools would incur substantial costs associated with CPO registration and implementation of compliance controls and systems and funds may either pass along these costs to investors or not trade in commodity instruments altogether. The expected result would be more limited availability and higher cost to small investors of an important portfolio diversification product and could result in reduced liquidity in the commodities markets.

Registered investment companies that invest in commodity-linked derivatives offer a convenient, cost-effective and well-established mechanism for investors to diversify their overall investment portfolios with exposure to the commodity markets. As registered investment companies only have limited means of accessing commodities exposure, if the use of commodity instruments became prohibitively expensive as a result of CPO registration, then retail investors would be left with limited ability to access commodities in their overall investment portfolios. Commodity-linked derivatives also allow prudently managed registered investment companies to mitigate economic risk, such as inflation and foreign exchange movements, and increase overall purchasing power. We urge the Commission to accommodate the important benefits that registered investment companies provide to investors seeking diversified exposure to commodities,

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include portfolio risk-reduction transactions. For example, in 1987, the Commission issued interpretive guidance clarifying that balance sheet and other trading strategies, where properly structured to have an overall risk-reducing effect, are no less qualified for hedging treatment than strategies that represent a substitute for transactions or positions in a physical channel. *See* Clarification of Certain Aspects of the Hedging Definition, 52 Fed. Reg. 27195 (July 20, 1987). Futures exchanges have since adopted rules recognizing that the range of risk-reduction transactions appropriately exempt from position limits is broader than the strict commercial concept. *See, e.g.,* CBOT Rules 559A-C; CME Rules 559A-C.

[25] Certain Affected Parties that provide exposure to a commodities index may time the rolling of their commodities instruments so as to avoid unnecessary costs or market distortions associated with the rolling of instruments in the index itself. However, the use of such "roll-timing" strategies should not be deemed to be taking active positions in commodities since the investment object of these funds is to closely track a commodity index.

and the adverse impact that the Rule 4.5 Proposal would have as currently proposed on such investment companies, their clients and the commodities markets generally.

V. Rule 4.13 Proposal Recommendations

As discussed above, the AMG believes that the proposed rescission of CFTC Rules 4.13(a)(3) and (4) should not be adopted because they would impose significant regulatory burdens and costs on otherwise regulated investment advisers and the investment funds they manage. However, if the Rule 4.13 Proposal is nevertheless to be adopted, the AMG respectfully requests that the Commission consider the following recommendations.

a. The Rule 4.13(a)(3) de minimis exemption should continue to be preserved.

The AMG believes that there are additional good reasons to preserve the Rule 4.13(a)(3) exemption. Under a plain textual reading of the CEA, *de minimis* trading of commodity instruments by an investment fund should not cause such fund to fall within the scope of the definition of "commodity pool" because such an entity is not "operated for the purpose" of trading such commodity instruments. For many investment funds, their investments on commodity instruments are merely incidental in order to hedge risks relating to their investment objectives and are not the purpose of the investment vehicle. Similarly, an operator of such pool should not be presumed to be a "commodity pool operator" because it is not engaged in a business "for the purpose of trading in commodity interests." The existing provisions of CFTC Rule 4.13(a)(3) provide flexibility for private funds to diversify their accounts by taking relatively small commodity instrument positions. Without this exemption, operators of pools would incur substantial costs associated with CPO registration and implementation of compliance controls and systems and funds may either be pass along these costs to investors, thereby reducing the potential returns available to investors, or not trade in commodity instruments altogether. This disincentive could reduce liquidity in the commodities markets or increase risks for private funds.

If the Commission determines to modify Rule 4.13(a)(3), the AMG respectfully requests that the Commission preserve Rule 4.13(a)(3) in advance of the Commission's consideration of an alternative *de minimis* exemption. During its January 26, 2011 meeting, the CFTC expressed that it may consider another *de minimis* level exemption in the future, despite the fact that it would like to rescind the exemption entirely at this time.[26] The AMG believes it would be imprudent and inefficient to rescind an existing, workable exemption if the Commission believes that some *de minimis* exemption is appropriate, since this would create uncertainty and impose several transition costs on entities that make use of the *de minimis* exemption. To the extent the CFTC believes that the a *de minimis* exemption is appropriate, it should retain the preexisting rule and refine the exemption as necessary in the future.

[26] Transcript of January 26, 2011 CFTC Open Meeting, at 25:6-25:11.

b. If adopted, the Rule 4.13 Proposal should be modified to contain the same standards as the Rule 4.5 Proposal.

Should the CFTC decide to adopt the Rule 4.13 Proposal, the AMG urges the Commission to, at a minimum, extend the same standards applicable to registered investment companies under the Rule 4.5 Proposal (if and as adopted) to pool operators currently relying upon the Rule 4.13(a)(3) or Rule 4.13(a)(4) exemptions. As discussed above, the AMG believes that substantially all pool operators relying upon these exemptions are advisers registered (or soon to be required to register) with the SEC under the Advisers Act and therefore already subject to stringent regulatory compliance requirements. The AMG believes that the "otherwise regulated" nature of these pool operators calls for their consistent treatment alongside registered investment companies.

Therefore, to the extent a pool operator currently relying upon the Rule 4.13(a)(3) or Rule 4.13(a)(4) exemptions is an adviser registered under the Advisers Act (or an "otherwise regulated" entity (such as a bank)), the AMG proposes that the standards of exclusion from CPO registration applicable to registered investment companies be applied, *mutatis mutandi*, to such pool operators. If the Rule 4.5 Proposal is ultimately adopted, then an exclusion consistent with the Rule 4.5 Proposal (as adopted) should be made available to such pool operators along with similar limitations, including any initial margin limits on use of commodity instruments for non-hedging purposes, marketing restrictions, exemption for funds of funds and "bona fide hedging" exemptions ultimately adopted under the Rule 4.5 Proposal. Additionally, the AMG requests that the same exemption from CPO registration be granted to private funds that invest in commodity instruments to passively track a commodity index or benchmark.

VI. Harmonization With Existing Federal Securities Laws

If the Commission decides to adopt the Rule 4.5/4.13 Proposals, the AMG respectfully requests the Commission to accommodate existing SEC and Financial Industry Regulatory Authority ("**FINRA**") rules governing Affected Parties that already address the same issues or that square directly against the requirements of, the CFTC Rules. In particular, the AMG urges the Commission to enact the following exclusions in order to prevent Affected Parties from being subject to duplicative or inconsistent regulations:

- **Performance information**: The AMG requests that the Commission provide an exemption from the requirement to disclose performance information of other managed pools required by Part 4 of the CFTC Rules, including CFTC Rules 4.24(n) and 4.25.[27] For example, under Rule 4.25 a CPO must disclose past performance information regarding the performance of each other pool operated by the CPO that has less than three years of actual performance. The inclusion of such related performance information in any sales material published or distributed in respect of a mutual fund by a broker-dealer that is a member of

[27] *See* NFA Petition, *supra* note 15.

FINRA is prohibited under NASD Rule 2210.[28] Furthermore, Rule 206(4)-1 of the Advisers Act, which prohibits investment advisers from "cherry picking" disclosure of performance information, is inconsistent with CFTC Rule 4.25(a)(3)'s requirements, including that performance information of comparable pools be more prominently displayed than pools of different classes. The performance disclosure requirements under the Part 4 Regulations and existing federal securities laws are such that it would be difficult, if not impossible, for Affected Parties to comply with both sets of requirements.

- **Disclosure document delivery requirements**: The prospectus delivery requirements under federal securities laws differ from disclosure document delivery requirements under CFTC Rule 4.21 with respect to receipt and timing. For example, under Rule 498 of the Securities Act, registered investment companies are permitted to satisfy their prospectus delivery obligations by delivering only a short summary prospectus to investors so long as specific requirements are met (including that the statutory prospectus is provided on an accessible Internet website) and without any affirmative "signature" acknowledgement. Simultaneous compliance with both sets of regulations would be unnecessarily burdensome to registered investment companies without any clear benefit to investors. In lieu of compliance with CFTC Rule 4.21, the AMG requests that Affected Parties be permitted to make the disclosure document available to investors in accordance with existing prospectus delivery requirements under the federal securities laws, including accessibility via the Internet, without any signed acknowledgment requirement. The AMG notes that in the context of commodity exchange-traded funds ("**commodity ETFs**"), the Commission has provided (and, in the Commission's September 9, 2010 proposal (the "**Proposed Commodity ETF Exemption**"), proposed to codify) relief from the delivery requirement of CFTC Rule 4.21(a) and the signed acknowledgment requirement of CFTC Rule 4.21(b) and believes that such relief should be equally applicable to Affected Parties.[29]

- **Frequency and contents of reporting**: The AMG requests that the Commission provide an exemption from the monthly reporting requirements under CFTC Rules 4.22(a) and (b), which require a registered CPO to furnish monthly or quarterly statements of account to each investor. Under the Investment Company Act, registered investment companies are already required to furnish semi-annual and annual financial statements to shareholders, as well as to file quarterly, semi-annual and annual reports with the SEC, which are publicly available to investors.[30] Imposing additional monthly reporting requirements would subject

[28] *See* NASD Rule 2210; FINRA Interpretive Letter to Michael D. Udoff, Securities Industry Association (Oct. 2, 2003), available at: http://www.finra.org/Industry/Regulation/Guidance/InterpretiveLetters/P002534.

[29] *See* 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, 75 Fed. Reg. 147, 54794 (Sep. 9, 2010), available at http://www.gpo.gov/fdsys/pkg/FR-2010-09-09/pdf/2010-22395.pdf (the "**Proposed Commodity ETF Exemption**").

[30] *See* Investment Company Act § 30; Rule 30e-1 under the Investment Company Act.

Affected Parties to burdensome compliance obligations without any clear benefit to investors. In particular, due to the widely held nature of investment company shares, it would be very expensive for registered investment companies to provide account statements on a monthly basis. At a minimum, the AMG believes that the Proposed Commodity ETF Exemption to provide commodity ETFs with compliance relief from Regulations 4.22(a) and (b) should be applied equally to all Affected Parties.[31]

The AMG also requests that the disclosure document requirements under the CFTC Rules should not apply to Affected Parties. As discussed above, a registered investment company is already subject to extensive requirements to disclose material information to investors (in its Prospectus, Statement of Additional Information and other disclosure documents) under the Investment Company Act and other federal securities laws, including material risks and potential conflicts of interest,[32] which are substantially similar to CFTC Rules.

- **Recordkeeping**: The AMG requests that CFTC rules governing recordkeeping under CFTC Rule 4.23 should not apply to Affected Parties. The Investment Company Act already requires registered investment companies to maintain extensive books and records, generally for at least six years, and in some cases, permanently.[33] The Advisers Act also requires registered investment advisers of Affected Parties to maintain books and records, including records of the adviser that relate to the adviser's clients and the advisory activities of the adviser.[34] The AMG believes that imposing additional CFTC recordkeeping requirements would subject Affected Parties to unnecessary duplicative compliance obligations. At a minimum, the AMG believes that the Commission's proposal to exempt commodity ETFs from the location requirement for books and records under CFTC Rule 4.23 should be equally applicable to Affected Parties.[35] Specifically, the AMG requests that the Commission permit books and records of Affected Parties to be kept at the office of the pool's administrator, distributor or a bank or

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[31] Specifically, the Proposed Commodity ETF Exemption would permit the CPO, in lieu of distributing a monthly account statement to investors, to instead maintain updated account statements on a readily accessible website of the CPO. *See* Proposed Commodity ETF Exemption, *supra* note 29.

[32] Under the requirements of Form N-1A, registered investment companies are required to disclose the fundamental characteristics and investment risks of the fund, including detailed disclosure of fees and expenses, principal investing risks and financial highlights, all in accordance with specific disclosure instructions. Form N-1A requires conflicts-related disclosure including portfolio holdings information, management of fund investments by portfolio managers and payments to broker-dealers and other financial intermediaries. Although Form N-1A does not appear on its face to require conflicts disclosure that is equivalent to Part 4 of the CFTC Rules, the Investment Company Act requires built-in conflicts reduction mechanisms within the investment company structure not required of CPOs under CFTC Rules. For example, the Investment Company Act requires mutual funds to have a majority of independent board of directors, imposes heavy restrictions against transactions with affiliates and requires advisers to registered investment companies to be registered themselves under the Advisers Act, which subjects advisers to additional requirements relating to conflicts of interest, including disclosure requirements. *See, e.g.,* SEC Independent Directors Release, *supra* note 4; Investment Company Act § 17; Form ADV Part 2.

[33] *See, e.g.,* Rules 31a-1, 31a-2 and 31a-3 under the Investment Company Act.

[34] *See* Section 204 of the Adviser Act; Rule 204-2 under the Advisers Act.

[35] *See* Proposed Commodity ETF Exemption, *supra* note 29.

registered broker-dealer that is providing services to the CPO or the pool instead of at the CPO's main offices.

- **Associated Person requirements**: The AMG understands that relevant NFA membership rules require registered CPOs to have at least one "associated person," as defined in 17 C.F.R. §1.3(aa).[36] "Associated persons" generally refer to sales representatives that sell interests in the commodity pool. Where the sales representatives in a CPO's affiliated distribution channel are already registered with the Financial Industry Regulatory Authority, the AMG does not believe that such sales representatives would be required to register as associated persons.[37] If all of the sales representatives of a CPO's affiliated distribution channel are excluded from the definition of "associated person," there is then a question as to who must register as an associated person of the CPO. In such a case, the AMG requests that the CFTC and NFA exempt a registered investment company or adviser to a private pool that is required to register as a CPO from having any associated persons.

- **Access to books and records**: Under CFTC rules, investors in a commodity pool must be given access to certain trading information upon request.[38] Registered investment companies file information about their portfolio holdings with the SEC on Form N-CSR and Form N-Q on a quarterly basis, and shareholder reports containing such information are sent to shareholders on a semi-annual basis. Moreover, many registered investment companies make portfolio holdings information available on their website more frequently. Providing this type of information more frequently and on a selective basis would raise significant concerns for registered investment companies given the SEC's selective disclosure rules, and it could allow certain investors to trade in front of the fund to the disadvantage of other investors. Accordingly, the CFTC should grant relief from this requirement for any adviser to a registered investment company that is required to register as a CPO.

The AMG notes that other disclosure and compliance obligations under federal securities laws and CFTC rules will also generally need to be harmonized (for example, fee disclosure obligations).

VII. Clarification Regarding Wholly Owned Subsidiaries of Registered Investment Companies

The AMG notes that the Rule 4.5/4.13 Proposals may have significant adverse effects on certain registered investment companies that utilize a separate subsidiary structure to invest in commodity-related instruments. These funds were the subject of comment in the NFA Petition where the NFA suggested that the use of such a subsidiary undermined the purpose of the Rule 4.5 exclusion, which is to allow otherwise regulated entities an exemption from duplicative regulation as commodity pools. However, as

[36] *See* NFA Bylaw 301(a)(iii).

[37] *See* CFTC Rule 3.12(h)(1)(ii).

[38] *See* CFTC Rule 4.23.

discussed in the AMG October Letter, these parent-subsidiary investment structures are consistent with the "otherwise regulated nature" of the CFTC Rule 4.5 exclusion.[39] The subsidiary structure is not used to evade regulation under the Investment Company Act but rather to establish an appropriate tax purpose for the registered investment company. Certain registered investment companies have sought and received private letter rulings from the IRS confirming that that the making of investments through a wholly owned subsidiary would result in qualifying income under Subchapter M of the Internal Revenue Code and thus preserve the ability of such funds to meet their tax status qualifications. The IRS typically requires these subsidiaries to follow the guidelines of the SEC with respect to the leverage restrictions under Section 18(f) of the Investment Company Act and related SEC guidance pertaining to asset coverage with respect to investments that would apply if the subsidiary were registered under the Investment Company Act. The AMG also understands that the staff of the SEC's Division of Investment Management requires registered investment companies making investments through a wholly owned subsidiary to cause the combined activities of the parent and subsidiary to comply with key substantive provisions of the Investment Company Act that are applicable to the parent registered investment company. AMG members believe that disclosure regarding the fees paid to trading managers for any subsidiary is typically provided to investors.

These subsidiary structures are important for registered investment companies in order to maintain their tax status and there is no reason for such subsidiaries to be treated as independent commodity pools. Accordingly, the Commission should clarify that, if the Rule 4.5/4.13 Proposals are adopted, such wholly owned subsidiaries are to be deemed to be entitled to an exemption or exclusion from CPO registration.

VIII. CPO Registration Relief for Directors and Trustees

If the Rule 4.5/4.13 Proposals are adopted by the Commission, the AMG believes that there will be a need for substantial exemptive relief or modifications to existing CFTC rules. For example, registered investment companies are generally subject to the overall control of a board of directors or board of trustees, a majority of which are required by the Investment Company Act to be independent and the duties of which are subject to extensive regulation under the Investment Company Act. Advisers to funds relying upon the Rule 4.13(a)(3) or 4.13(a)(4) exemptions will also retain an investment adviser. An investment adviser to a registered investment company is required under the Investment Company Act to be registered with the SEC under the Advisers Act and, as discussed above, many advisers currently relying upon the Rule 4.13(a)(3) or Rule 4.13(a)(4) exemption are now required under the Dodd-Frank Act to be registered with the SEC under the Advisers Act as well.

If the Rule 4.5/4.13 Proposals are adopted, then the AMG believes that it would be appropriate for the advisers to such registered investment companies and advisers relying upon the Rule 4.13(a)(3) or 4.13(a)(4) exemptions to be required to register as CPOs with the Commission because such advisers typically will be the parties responsible for the day-to-day operations of the pool in a manner falling within the definition of CPO. However, it will be necessary for the Commission to promulgate further guidance and exemptive relief to confirm that other parties will not be deemed to

[39] *See* AMG October Letter (Oct. 18, 2010), *supra* note 4.

be acting as a CPO with respect to such Affected Parties. For example, the trustees and directors would not regard themselves as being engaged in promoting the pool by soliciting, accepting or receiving property for the purpose of commodity instrument trading. While the board of directors of a registered investment company has statutory authority under the 1940 Act to hire and to fire a registered investment company's trading advisor, the AMG believes that the duties of a CPO should not be imposed on such persons since that could compromise their independence, which is a central feature of the 1940 Act's governance arrangements. The AMG respectfully requests the Commission clarify that directors and trustees of an Affected Party who do not manage or control the day-to-day operations of the pool are not CPOs required to be registered under CFTC Rules.[40]

IX. Reporting Obligations under Forms CPO-PQR and CTA-PR

The Proposed Rules would require the filing of Forms CPO-PQR and CTA-PR that the Commission believes would permit the Commission to effectively monitor key information relevant to the activities of operators and advisors for commodity pools. The Commission has noted that the information proposed under Form CPO-PQR is "largely identical" to that separately required under Form PF for private fund advisers[41] and has determined to authorize NFA to maintain such filings.

The AMG acknowledges that the Dodd-Frank Act directed the SEC and the Commission to gather further information regarding the activities of advisers to "private funds" as defined under the Dodd-Frank Act. Information designed to capture information relating to private funds has been extensively covered by the Form PF rulemaking that has been jointly proposed by the SEC and the Commission. The AMG believes that Form PF is the appropriate basis for the Commission to consider the information requirements that Congress intended it to gather in accordance with the intentions of Dodd-Frank.[42] However, the AMG does not believe that Commission should pursue additional burdensome and duplicative information requirements. The requirements under Forms CPO-PQR and CTA-PR add additional burdens without a corresponding benefit at a time when investment advisers are already dealing with extensive new regulatory requirements.

Accordingly, the AMG requests that the Commission consider the following modifications to its proposed rule 4.27: (1) If information regarding a private fund is separately disclosed pursuant to a filing on Form PF by the same adviser, any of its related persons or by another person who is the primary adviser to such private fund, a

[40] There is precedence for the CFTC to provide such requested relief. *See, e.g.,* CFTC No-Action Letter No. 10-06 (Mar. 29, 2010); CFTC No-Action Letter No. 09-39 (Jul. 30, 2009); and CFTC No-Action Letter No. 97-73 (Aug. 20, 1997); *see also* the Proposed Commodity ETF Exemption, *supra* note 29.

[41] Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF, SEC Release No. IA-3145 (Jan. 26, 2011), available at http://www.sec.gov/rules/proposed/2011/ia-3145.pdf.

[42] The AMG is also submitting a comment letter to the SEC with respect to Form PF in order to address the substantive concerns of AMG members regarding the timing and contents of Form PF. The AMG respectfully submits that these comments are equally applicable to any similar requirements imposed under Forms CPO-PQR and CTA-PR. *See* AMG Letter to the SEC Re: Securities Industry and Financial Markets Association comments on File No S7-05-11, Release No. IA-3145 (Apr. 12, 2011).

CPO or CTA providing advice to such private fund should not be required to make any filing or provide information with respect to such private fund under Form CPO-PQR or Form CTA-PR. (2) The determination of whether an adviser is a "large fund adviser" that is subject to more substantial reporting requirements under the Rule 4.5/4.13 Proposals should not depend on the assets under management but rather on the aggregate amount of commodity instruments that are being managed by the adviser, since this measurement is more pertinent to the investments that are subject to regulation by the Commission. For example, an adviser to a very large private fund that makes substantial investments in securities with a very limited amount of investments in futures or other commodity instruments should not be subject to the most burdensome level of reporting under Form CPO-PQR.

X. Swap Risk Disclosure Statement

The Proposed Rules would amend the mandatory risk disclosure statement under CFTC Rules 4.24(b) and 4.34(b) for CPOs and CTAs to include a boilerplate description of risks related to swap transactions (the "**Risk Disclosure Statement**"). The AMG believes that the Risk Disclosure Statement is an inappropriate method of describing such risks. As the Commission is aware, the definition of "swap" under the Dodd-Frank Act is expansive and includes: swaps on non-securities (including currency swaps, interest rate swaps, energy and metal swaps, agricultural swaps and commodity swaps), swaps on broad-based securities indices, swaps on government securities and foreign-exchange swaps and forwards (unless the Treasury otherwise exempts such instruments through rulemaking). The Commission will also be proposing additional rules with respect to the definition of "swap" as required by Section 712(d) of the Dodd-Frank Act which may further affect the scope of transactions captured under the term "swap." Thus, the term "swap" encompasses a wide range of instruments with different characteristics that are used for different purposes and which affect different markets. Even swaps with similar characteristics may be used for very different purposes by swap participants, thus containing varying risk characteristics. For example, risks related to limited liquidity and valuation concerns may be inappropriate for swaps that will be subject to mandatory clearing and trading requirements. Therefore, the AMG believes that a "one-size-fits-all" Risk Disclosure Statement is not an appropriate method of highlighting swap transaction risks. The AMG respectfully notes that the Risk Disclosure Statement is also inconsistent with recent SEC guidance directing registered investment companies to improve derivatives risk disclosure by avoiding generic disclosures and tailoring such disclosure to the specific fund's principal investment strategies.[43]

XI. Annual Certification Requirements

The Proposed Rules would amend the existing exemptive claim notification process to require persons claiming exemptive relief from inclusion in the definition of CPO or CTA to confirm their notice of claim of exemption or exclusion on an annual basis. The AMG strongly urges the Commission not to adopt these proposed amendments. The proposed amendments would effectively require exempt CPOs and CTAs to file, on an annual basis, a certification for every single pool for which it is claiming an exemption or exclusion. For large fund advisers, such pools could number in

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[43] *See* SEC Letter to the Investment Company Institute (July 30, 2010), available at http://www.sec.gov/divisions/investment/guidance/ici073010.pdf.

the hundreds, if not thousands. The AMG believes that the significant administrative costs associated with such annual certifications far outweigh any added measure of transparency or regulatory oversight intended by the Commission's proposal.

If periodic certifications are nevertheless to be required, the AMG urges the Commission to consider the following recommendations intended to reduce the administrative costs and burdens of compliance. First, the AMG requests that the annual certifications be required to be made within 90 days following the end of the calendar year, instead of 30 days from the anniversary date of each initial claim for exemptive relief. By conforming the certification deadline in this manner, exempt CPOs and CTAs will be able to consolidate the time and expense of filing such certifications into a single period. In addition, extending the deadline from 30 days to 90 days would give large fund advisers the additional time needed to reasonably comply with the certification deadline. Second, the AMG requests that the Commission provide the annual certification form in a simple, easy-to-use format, such as a check-the-box format, in order to reduce the administrative time and burdens associated with its completion.

XII. Grandfathering of Existing Funds

The Rule 4.5/4.13 Proposals could also create a disruptive change to existing Affected Party operations at a time when Affected Parties and their advisers are already faced with extensive new regulatory developments and compliance burdens. The CFTC eliminated the 5% Limit and the Marketing Restriction and adopted Rules 4.13(a)(3) and 4.13(a)(4) in 2003, and in the intervening years Affected Parties have developed their investment strategies accordingly. Restoring the Rule 4.5 conditions and rescinding the Rule 4.13 exemptions could lead to significant disruptions, with little perceived benefit, in the practices of firms that utilize these strategies. The disruption may be so severe for some Affected Parties that such funds may be forced to sell off existing positions immediately upon the effectiveness of the proposed rules, adversely affecting not only the funds' investors, but also the U.S. commodities markets generally. In order to mitigate these severe consequences, the AMG urges the Commission to exempt Affected Parties relying on Rules 4.5, 4.13(a)(3) or 4.13(a)(4) as of the effective date of the proposed rules from such proposed rules' requirements, as applicable.

XIII. Cost-Benefit Analysis

The AMG believes that the Proposed Rules would result in substantially higher costs and regulatory burdens on Affected Parties and investment advisers without corresponding benefit. These costs and burdens include:

- The duplicative costs of registering with both the SEC and the CFTC and attendant reporting, disclosure, recordkeeping and other requirements. Additionally, the requirements under forms COP-PQR and CTA-PR add additional burdens without a corresponding benefit at a time when investment advisers are already dealing with extensive new regulatory requirements.

- The extensive costs and burdens of annual certification requirements discussed above.

- "Associated persons" of a registered CPO (except as described above) would additionally be required to register with the NFA and become subject to

proficiency examinations and other requirements, resulting in potentially significant cost burdens.[44]

- The costs and burdens associated with the inclusion of swaps in the Rule 4.5 Proposal and any other CPO registration determination, the extent of which is currently unclear and could be significant. Until the uncertainties and timing issues with respect to swaps rulemaking by the Commission are resolved, such cost burdens cannot be accurately estimated.

These and other costs may become so prohibitive for some Affected Parties that such funds may cease trading commodity instruments altogether, or severely limit their use of these strategies, thereby limiting investors' exposure to commodities as an asset class, reducing the liquidity of the commodities markets[45] and restricting efficient fund management strategies. The AMG is deeply concerned that the cost-benefit analysis submitted by the Commission does not adequately quantify or consider many of these costs and agrees with Commissioner Jill E. Sommers that a more "thorough and meaningful cost-benefit analysis" must be conducted.[46]

The NPR states the Commission's intent to solicit comments with respect to many of the Proposed Rules, an indication that the Commission may consider the Proposed Rules as merely as starting point for continued dialogue. We urge the Commission to provide further opportunity for public comment through an additional notice and comment period following the Commission's consideration of all public comments submitted during this current period. Given the extensive costs and compliance obligations that the Proposed Rules will impose on Affected Parties and their advisers, and the existing uncertainties with respect to certain aspects of the Proposed Rules (such as regarding swaps), the AMG sincerely believes that an additional notice and comment period is necessary for adequate evaluation and comment by all affected market participants.

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The AMG thanks the CFTC for the opportunity to comment on the Proposed Rules and for the CFTC's consideration of the AMG's views. The AMG would welcome

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[44] *See, e.g.,* CFTC Rule 3.12.

[45] The CFTC stated in its Final Rule Release that liquidity of the futures and options markets was an important factor in its decision to eliminate the 5% Limit and Marketing Restriction. *See* Final Rule Release, *supra* note 11 ("[T]his relief is intended to encourage and facilitate participation in the commodities markets by additional collective investment vehicles and their advisers, with the added benefit to all market participants of increased liquidity.").

[46] Commissioner Jill E. Sommers, Opening Statement, Meeting on the Twelfth Series of Proposed Rulemakings under the Dodd-Frank Act (Feb. 24, 2011), available at http://www.cftc.gov/PressRoom/SpeechesTestimony/sommerstatement022411.html ("Clearly, when it comes to cost-benefit analysis, the Commission is merely complying with the absolute minimum requirements of the Commodity Exchange Act. That is not in keeping with the spirit of the President's recent Executive Order on "Improving Regulation and Regulatory Review." We owe the American public more than the absolute minimum. As we add layer upon layer of rules, regulations, restrictions and new duties, we should be attempting to quantify the costs of what we are proposing. And we should most certainly attempt to determine whether the costs outweigh the benefits. The public deserves this information and deserves the opportunity to comment on our analysis.")

the opportunity to further discuss our comments with you. 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