April 24, 2012

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

Re: Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators

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**") with comments to the CFTC's proposed amendments to its rules (the "**Proposed Rules**")[1] regarding the requirements applicable to investment companies registered under the Investment Company Act of 1940 (the "**Investment Company Act**") whose investment advisers will be subject to registration as commodity pool operators ("**CPOs**") due to recent amendments to CFTC Rule 4.5.[2]

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

[1] Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators, 77 Fed. Reg. 11345 (Feb. 24, 2012) (the "**Harmonization Release**"), *available at* http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-3388a.pdf.

[2] The AMG previously submitted comment letters to the CFTC regarding proposed amendments to the CPO registration requirements for registered investment companies on October 18, 2010 (the "**October 2010 Letter**"), April 12, 2011 (the "**April 2011 Letter**"), and August 4, 2011 (the "**August 2011 Letter**"), and submitted remarks for the CFTC roundtable held on July 6, 2011 (the "**July 2011 Remarks**").

(collectively, "**Commodity Interests**") as part of their investment strategies. Because the recent amendments to CFTC Rule 4.5 effectively reinstate the registration requirement for CPOs of RICs that invest in Commodity Interests above certain enumerated thresholds, the advisers to many RICs will be required to register as CPOs and comply with disclosure duties and other requirements applicable generally to CPOs under Part 4 of the CFTC's rules.

The Commission's stated goal of harmonizing CPO requirements with Securities and Exchange Commission ("**SEC**") requirements applicable to RICs is one which we strongly endorse. However, we believe that the Proposed Rules fall far short of achieving this objective, with the result that RICs will be subject to CFTC regulatory requirements that conflict with their existing obligations under the federal securities laws; mandate additional, unnecessary and potentially confusing forms of disclosure and reporting to investors; and demand costly systems and infrastructure changes. As we demonstrate below, the additional regulatory overlay imposed by the CPO requirements would provide no identifiable improvement to the already comprehensive investor protections provided by the Investment Company Act and other federal securities laws applicable to RICs. In fact, the putative beneficiaries of these requirements – investors in the RICs to be regulated under the newly applicable CPO requirements – will in fact be adversely impacted, as the increased costs imposed upon RICs are passed on to the millions of American households for whom RICs have long served as the investment vehicle of choice.

The Proposed Rules are unlikely to materially alleviate the substantial additional regulatory and compliance burdens and costs to RICs. As the cost-benefit justification in the release adopting changes to CFTC Rule 4.5[3] is premised in part upon the Proposed Rules achieving harmonization with the SEC's requirements, the AMG does not believe that the CFTC has adequately justified the burdens that the changes to CFTC Rule 4.5 have imposed upon the RIC industry.

The Proposed Rules also do not address the full range of inconsistencies between CFTC requirements for CPOs and the requirements applicable to RICs under the securities laws and SEC rules. In addressing these inconsistencies, the Harmonization Release suggests changes to the regulatory disclosures, reports and processes required of RICs under SEC rules or guidance that would assist RICs in complying with the CPO rules. However, the coordinated effort necessary to achieve such harmonization apparently has not been achieved, and the SEC has not issued any relief or guidance concerning the permissibility of these changes

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

under SEC rules.[4] Consequently, compliance with one agency's requirements may jeopardize a registrant's compliance with the other agency's requirements, an untenable conflict that requires a coordinated resolution by the CFTC and the SEC before the CFTC's proposals should be finalized.

Summary of Recommendations

- Relief should be provided so that the timing and method for filing, updating and amending Disclosure Documents by registered CPOs of RICs is consistent with the requirements under the securities laws and SEC rules.

- The CFTC should recognize the comprehensive disclosure that RICs are already required to provide to investors under the securities laws and SEC rules and should not require RICs that are commodity pools to provide duplicative, inconsistent, unnecessary or potentially misleading information in Disclosure Documents.

- RICs that are commodity pools should not be required to comply with the Account Statement and Annual Report requirements under CFTC rules, and instead should be permitted to fulfill their reporting obligations to investors by complying with the requirements of the securities laws and SEC rules.

- RICs should be exempted from the requirement to provide investors with access to trading information.

- RICs that are commodity pools should be permitted to maintain books and records with any person.

- For RICs that invest through wholly owned controlled foreign corporations ("**CFCs**"), the CPO of the CFC should not be required to separately comply with the disclosure and reporting requirements under the Part 4 rules.

- The CFTC should extend relief relating to recordkeeping and document delivery and acknowledgment to CPOs of privately offered pools.

[4] It is possible that SEC rulemaking may be required for some of the changes (*i.e.*, SEC no-action relief might not be sufficient). For example, the SEC has authority to provide orders granting exemptive relief under the Investment Company Act, but not under the Securities Act of 1933 (the "**Securities Act**") or the Securities Exchange Act of 1934 (the "**Exchange Act**"), which require a rulemaking process for exemptions. No-action relief may not be sufficient in all cases, such as requirements that may be enforced through private rights of action.

- The harmonization amendments should take into account the significant differences between open-end RICs and closed-end RICs and tailor the requirements for such vehicles under the CFTC rules accordingly.

I. Background Concerning Requirements Applicable to Open-End and Closed-End RICs

We provide in this section a brief overview of regulatory requirements applicable to RICs. These requirements, which have evolved over the more than 70 year history of the Investment Company Act, provide the regulatory foundation for a $13 trillion industry.[5] The Proposed Rules are in many instances inconsistent with these requirements or their underlying policies and, importantly, generally do not distinguish between open-end RICs and closed-end RICs, despite many fundamental differences in the ways that these types of funds are structured, offered and operated. In addition, the Proposed Rules do not take into account the differences between RICs that are Securities Act registrants and those that are not.

Open-End RICs. Open-end RICs generally create and redeem shares on a daily basis. Investors obtain liquidity for shares of open-end RICs other than exchange traded funds ("**ETFs**") by submitting them to the fund for redemption.[6]

Open-end RICs are required to register with the SEC under the Investment Company Act by filing Form N-1A or Form N-3, which require detailed information about the RIC.[7] Among other things, Form N-1A and Form N-3 require an open-end RIC to file a statutory prospectus and statement of additional information ("**SAI**") which must provide detailed information about the RIC, including performance data, fees and expenses, principal investment characteristics and risks, portfolio holdings, financial highlights, fundamental investment characteristics, the RIC's investment advisers, portfolio managers, and other management and control persons, taxation, distribution arrangements,

[5] According to the Investment Company Institute, as of the end of 2010, total net assets invested in RICs (including mutual funds, closed-end funds, exchange-traded funds and unit investment trusts) were $13.104 trillion. Investment Company Institute, 2011 Investment Company Fact Book, *available at* http://www.icifactbook.org/fb_ch1.html.

[6] Most ETFs are classified as open-end RICs under the Investment Company Act but are purchased and sold by retail investors on an exchange. Only broker-dealers and other financial institutions that act as "authorized participants" are able to create and redeem ETF shares directly with the fund, generally in baskets of 50,000 or 100,000 shares.

[7] Form N-1A is the registration form for most open-end RICs. Form N-3 is the registration form for insurance company separate accounts offering variable annuity contracts.

capital structure, conflicts of interest and brokerage practices, all in accordance with specific disclosure instructions.

Most, but not all, open-end RICs also register their shares under the Securities Act. Under Section 5(a)(2) of the Securities Act, when an issuer is conducting a public offering, the sale of its securities generally must be accompanied or preceded by a statutory prospectus for the securities that meets the requirements of Section 10(a) of the Securities Act. This requirement applies to most open-end RICs because they continuously offer shares to the public. However, in 2009 the SEC adopted Rule 498 under the Securities Act (the "**summary prospectus rule**"), pursuant to which an open-end RIC that uses Form N-1A is permitted to satisfy its prospectus delivery obligation by delivering only a brief (typically eight- to ten-page) "summary prospectus." The summary prospectus rule was designed to provide key data in a simplified form standardized across all open-end RICs, in order to foster investor understanding and the ability to readily compare funds based on their most salient characteristics.[8] Following the adoption of the summary prospectus rule, the mutual fund industry expended considerable cost and resources to overhaul its prospectus delivery practices in order to employ the streamlined summary prospectus for open-end RICs. As a result, the standard practice for open-end RICs is to deliver only the summary prospectus on or before the time of confirmation of the sale of shares (which may be up to three days after the trade date).[9]

Open-end RICs are required to amend their registration statements annually in order to update financial and other information, but have four months from the end of their fiscal year in order to complete the update.[10] Consequently, an annual registration statement amendment may be filed up to 16 months from

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[8] A summary prospectus must include the following information, and only the following information, from the RIC's statutory prospectus, which is required by Items 2 through 8 of Form N-1A: (i) investment objectives/goals, (ii) costs (including a fee table and example), (iii) principal investment strategies, risks and past performance, (iv) investment advisers and portfolio managers, (v) brief purchase and sale information, (vi) tax information and (vii) compensation of financial intermediaries.

[9] RICs that rely on the summary prospectus rule (and their distributors, as applicable) are also required to provide hard copies of the statutory prospectus/SAI upon request.

[10] Specifically, Rule 8b-16 requires an open-end RIC to amend its registration statement to update the information therein not more than 120 days after the close of each fiscal year. Open-end RICs whose shares are registered under the Securities Act are required under Section 10(a)(3) of the Securities Act and Rule 485 thereunder to amend their registration statements at least every sixteen months in order to update financial and other information. Taken together, these provisions require an annual update of the registration statement, but provide four months from the end of the fiscal year in order to do so.

the date of the RIC's prior fiscal year end. Under Rule 485, if the amended registration statement contains material changes other than updates to financial statements, information about management of the RIC and certain other limited information, it must be filed with the SEC at least 60 days prior to the effective date in order to permit the SEC staff to review and provide comments.[11] If the material changes consist only of updates to financial statements, information about management of the RIC and certain other limited information, the amended registration statement may be filed with immediate effectiveness, and no advance filing is required.[12]

Between annual updates, an open-end RIC whose shares are registered under the Securities Act may file a supplement pursuant to Rule 497 under the Securities Act to reflect subsequent changes. This supplemental information often is appended as a "sticker" to the prospectus, SAI or summary prospectus.[13] In some cases, the supplement may be included in a regular mailing to investors, although such distribution is not a general requirement of the SEC rules. For example, an open-end RIC may opt not to mail a supplement to existing investors if the RIC relies on the summary prospectus rule and the supplement relates to information found only in the statutory prospectus; in that case, the supplement would be updating information that was not, and was not required to be, delivered directly to the investor in the first place. The flexibility provided by the SEC rules reflects an understanding that a RIC might file supplemental material under Rule 497 for any number of reasons, and the RIC and its adviser are in the best position to determine the manner, timing, scope and means of distribution of such information to investors. Such determinations will be informed by numerous considerations, including the potential for liability under the securities laws for material misstatements or omissions.

In addition to updating the registration statement, open-end RICs are required under the Investment Company Act to furnish semi-annual and annual financial statements to shareholders, as well as to file quarterly, semiannual and annual reports with the SEC, all of which are publicly available to investors.[14] In addition, daily performance information for open-end RICs is widely available

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[11] Rule 485(a) under the Investment Company Act.

[12] Rule 485(b) under the Investment Company Act.

[13] If a supplement filed under Rule 497 affects information in the summary prospectus, the summary prospectus may be "stickered" or alternatively may be restated in its entirety.

[14] *See* Investment Company Act § 30; Rules 30e-1, 30b1-1 and 30b1-5 under the Investment Company Act.

from many public sources, including daily newspapers throughout the country as well as thousands of internet websites[15] and other public media.

Closed-End RICs. Unlike open-end RICs, most closed-end RICs do not continuously offer their shares. Instead, they conduct a one-time public offering and thereafter are listed and trade on an exchange. Investors therefore can obtain liquidity by selling their shares in the market rather than redeeming them, as in the case of open-end RICs.

Closed-end RICs are required to register with the SEC under the Investment Company Act by filing Form N-2, which contains detailed information about the RIC similar to the information required by Form N-1A. Unlike open-end RICs, however, closed-end RICs are not required under the Investment Company Act to update their registration statements, provided that they provide specified information in their annual report to shareholders.[16]

While most closed-end RICs do not continuously offer their shares, there are exceptions. Certain closed-end RICs, for example, continuously offer their

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[15] Open-end RICs typically update performance information on their websites daily. Performance information that is provided on an open-end RIC's website must comply with Rule 482 under the Securities Act, which generally applies to advertisements or other sales material for any RIC that is currently offering shares registered under the Securities Act. Rule 482(g) requires performance information in an advertisement to be "as of the most recent practicable date considering the type of investment company and the media through which the data will be conveyed." An advertisement containing total return quotations will be considered to have complied with this requirement if either (i) the total return quotations are current to the most recent calendar quarter ended prior to the submission of the advertisement for publication, and total return quotations current to the most recent month ended seven business days prior to the date of use are provided at a toll-free number or website location disclosed in the advertisement, or (ii) the total return quotations are current to the most recent month ended seven business days prior to the date of use of the advertisement. Rule 482 also establishes specific requirements relating to methods of calculation and presentation of performance information. For example, Rule 482(d)(3) and (5) require an advertisement (including a website) to include an open-end RIC's average annual total return for one, five, and ten year periods. Performance information for a RIC also must comply with the anti-fraud provisions of Rule 156 under the Securities Act and Rule 34b-1 under the Investment Company Act.

[16] Rule 8b-16 requires a closed-end RIC that does not amend its registration statement to include the following information in its annual report: material changes to the RIC's investment objectives or policies; material changes in the principal risk factors associated with an investment in the RIC; changes in the RIC's charter or by-laws that would delay or prevent a change of control of the RIC (unless such changes have been approved by shareholders); changes to portfolio managers and information about a new portfolio manager's experience; and information regarding the RIC's dividend reinvestment plan, if any. Although a closed-end RIC is permitted by Rule 8b-16 to amend its Investment Company Act registration statement within 120 days after the close of each fiscal year instead of providing the foregoing information in its annual report, it is not market practice to do so.

shares and, rather than being listed on an exchange, provide liquidity to investors by periodically conducting tender offers to redeem shares.[17] These closed-end RICs may be publicly offered, in which case their shares must be registered under the Securities Act and they must update their registration statements annually. Alternatively, they may be privately offered, in which case they are not required to register under the Securities Act (even though they are registered under the Investment Company Act). Between annual updates, a closed-end RIC whose shares are registered under the Securities Act and that is conducting an offering may file a supplement pursuant to Rule 497 to reflect subsequent changes, and may append this supplemental information as a "sticker" to the prospectus or SAI (similar to open-end RICs that publicly offer shares).

Although most closed-end RICs are not required to update their registration statements, they are required to provide substantial updated information to investors. Closed-end RICs, like open-end RICs, must furnish semi-annual and annual financial statements to shareholders and file quarterly, semiannual and annual reports with the SEC, all of which are publicly available to investors.[18] In addition, for closed-end RICs that are publicly offered or traded, performance information generally is available from numerous sources, including major newspapers. Moreover, because many closed-end RICs are listed on a securities exchange and registered under the Exchange Act, they will be required to notify the market of significant events, and such events will also be described in reports to shareholders.

II. The Harmonization Proposals

As the preceding discussion reflects, RICs operate under a comprehensive, carefully calibrated disclosure regime under SEC rules. Given this regime, application of the CFTC's disclosure and reporting requirements to RICs inevitably yields conflicting and duplicative duties, inconsistent timeframes, differences in content, and added complexity for investors. The Proposed Rules do not address many of the substantive conflicts, inconsistencies and overlaps in the CFTC's disclosure requirements for registered CPOs and the SEC's requirements discussed above for RICs. We highlight these conflicts and related problems and provide our recommendation for resolving them below.

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[17] Such closed-end RICs are commonly referred to as "interval funds" because they conduct tender offers at specified intervals. These funds are contemplated by Rule 23c-3 under the Investment Company Act, which offers procedures for conducting tender offers that are designed specifically for closed-end interval funds.

[18] See Investment Company Act § 30; Rules 30e-1, 30b1-1 and 30b1-5 under the Investment Company Act.

A. Disclosure Document Requirements

The Proposed Rules do not provide adequate relief from (i) CFTC requirements relating to the timing and process for filing, updating and amending Disclosure Documents that conflict with SEC rules for RIC registration statements and (ii) content requirements for Disclosure Documents that conflict with the SEC's requirements for RICs.[19] As the discussion below reflects, these CFTC requirements may significantly complicate the current disclosure process for RICs, adding substantial costs and complexity to an already highly detailed and comprehensive regime.

1. Filing, Updating and Amending Disclosure Documents

Periodic and interim updates. CFTC Rule 4.26(a)(1) requires all information in a Disclosure Document to be "current as of the date of the Document," except that performance information may be "current as of a date not more than three months prior to the date of the Document." CFTC Rule 4.26(c)(1) requires a CPO to notify all pool participants of material inaccuracies or omissions and update its Disclosure Document accordingly within 21 days of knowing or having reason to know of the "defect." CFTC Rule 4.26(a)(2) prohibits the use of a Disclosure Document dated more than nine months prior to the date of its use (which would be extended to twelve months under the Proposed Rules). As explained below, each of these rules conflicts with the requirements for RICs (both open-end and closed-end) under SEC rules, but the Proposed Rules offer no means of resolving these conflicts.

CFTC Rule 4.26(a)(1) would require RICs to update their prospectus and SAI multiple times each year in order to update performance and other information. RICs, however, are required by SEC rules only to update their registration statements annually, and most closed-end RICs are not required to update their registration statements at all. The CFTC requirement, while potentially useful to investors in commodity pools that are not already subject to the carefully tailored requirements of SEC rules and to reporting of daily performance data in multiple general media sources, would require costly changes to the reporting systems of RICs and additional new reports to their investors. The release provides no rationale for imposing the updating requirements of Rule

[19] The Proposed Rules appear to contemplate that RICs would comply with CFTC requirements by modifying their prospectus and SAI required by SEC rules, and their procedures for providing such documents to investors, in order to comply with the CFTC's Disclosure Document requirements. The comments in this letter are therefore based on the same assumption, although as we have noted above, we believe that an intra-agency resolution of these issues should be achieved prior to the issuance of final rules in this area.

4.26(a)(1) on RICs, nor does it address the substantial costs that these updates would impose.

Similarly, CFTC Rule 4.26(c)(1) would require RICs to continuously notify shareholders of changes to the prospectus and SAI.[20] As described in Part I above, RICs are permitted to file supplements pursuant to Rule 497 without regard to whether such information is material, and mailings may or may not be made to investors. Under CFTC Rule 4.26(c)(1), RICs that file supplements under Rule 497 (for example, to notify investors of personnel changes) may be required to send such supplements to investors within a 21-day period, despite the lack of such a requirement under SEC rules. Instead, RICs and their advisers should be able to determine the appropriate manner, timing, scope and means for providing supplemental information to investors. In addition, RICs that do not normally supplement their prospectus because they are not Securities Act registrants or are not currently offering shares would be required to do so in order to comply with the CFTC requirements.

Moreover, CFTC Rule 4.26(d)(2) requires all amendments to a Disclosure Document to be filed with the NFA within 21 days of the date upon which the CPO first knows or has reason to know of a "defect" requiring amendment. A RIC would likely file a supplement to its prospectus under Rule 497 with the NFA at the same time as it files the supplement with the SEC. However, even though a Rule 497 supplement becomes immediately effective when filed with the SEC, the NFA would presumably have 21 days in order to review the amendment and potentially comment. If the NFA required changes to the amendment, the RIC presumably would need to re-file the supplement with the SEC under Rule 497 and re-distribute it to investors in order to comply with the CFTC's requirements.

CFTC Rule 4.26(a)(2) would require RICs to update their prospectus and SAI on a timeframe that is inconsistent with the requirements of the securities laws and SEC rules. As noted above, Rule 8b-16 under the Investment Company Act and Section 10(a)(3) of the Securities Act and Rule 485 thereunder effectively require RICs that are currently offering shares to update their registration statements annually, and provide 120 days from the end of a RIC's fiscal year in order to do so. This 120-day window is essential because of the time required to update the registration statement, including the preparation and auditing of a

[20] Proposed amendments to CFTC Rule 4.12(c)(2)(i)(B) would provide relief from the Disclosure Document delivery and acknowledgment requirements of CFTC Rule 4.21 provided that a RIC's CPO makes the Disclosure Document available on a website and causes the Disclosure Document to be kept current in accordance with the requirements of CFTC Rule 4.26(a). It would appear, however, that the CPO would still be required under CFTC Rule 4.26(c) to notify investors in the RIC of amendments to the Disclosure Document required by CFTC Rule 4.26(c)(1).

RIC's financial statements, collecting and updating other information for the registration statement, and formatting, printing and distributing final documents. For closed-end RICs that are not conducting a public offering, CFTC Rule 4.26(a)(2) would require the registration statement to be updated even though that is not required under the Securities Act or the Investment Company Act rules.

The legal conflicts and operational burdens that would result from the application of the foregoing CFTC rules to RICs would be substantial. Many RICs belong to large fund families that may include dozens, if not hundreds of funds. Significant economies of scale exist because the advisers to these fund families are able to operate multiple funds on similar timetables and comply with similar filing and disclosure requirements. Complying with the CFTC rules described above would not only impose significant new burdens on the RICs that are subject to such rules, but also impede the ability of advisers to efficiently manage other funds that are not subject to CFTC requirements. These costs are not balanced by corresponding benefits, especially given the extensive financial reporting, performance data and other information available to RIC investors, as discussed in Part I above.

In order to harmonize the CFTC's requirements with those of the Securities Act and Investment Company Act and existing industry practice, we believe that the CFTC rules should provide that a RIC whose registration statement has been timely updated under SEC rules, or whose registration statement is not required to be updated, will be deemed to have complied with the requirements of CFTC Rule 4.26(a)(1) and (2) and CFTC Rule 4.26(c)(1).

NFA pre-clearance. CFTC Rule 4.26(d)(1) requires a Disclosure Document to be filed with and cleared by the NFA at least 21 days in advance. This requirement conflicts with the SEC filing and review process and would create substantial and unnecessary burdens.

As discussed in Part I above, open-end RICs that are Securities Act registrants are required to update their registration statements annually pursuant to Rule 485. If a RIC makes certain material changes, it must file a version of the amended registration statement with the SEC pursuant to Rule 485(a) at least 60 days prior to the date upon which the amendment is to become effective, in order for the SEC to complete its review of the amended statement (this filing is commonly referred to as an "A-filing"). An A-filing will often omit certain information that is not available at the time it is made, such as financial and performance information for the prior fiscal year that has not yet been finalized. The SEC often does not provide comments on an A-filing until 45 days or more after it has been made. The RIC usually responds to the SEC's comments to the A-filing by filing another amendment to the registration statement pursuant to Rule 485(b), which typically becomes effective immediately upon filing (this filing is commonly referred to as a "B-filing"). As noted in Part I, if there are no

material changes to the registration statement in a RIC's annual amendment or if the material changes consist only of updates to financial statements, information about management of the RIC and certain other limited information, no advance filing or SEC review, and therefore no A-filing, is required. In that case, the RIC is required only to make a B-filing, which can become effective immediately upon filing.

Requiring a RIC to file its prospectus and SAI for review by the NFA under CFTC Rule 4.26(d)(1) would not coincide with the SEC's review timeline, and may therefore cause unnecessary delay and disruption to RICs and their investors. For example, assume that a RIC does an A-filing with the SEC 60 days before the date on which its amended registration statement is required to become effective. The SEC may provide comments on the A-filing 15 days before the B-filing needs to be made. Even if the RIC were able to update its registration statement on the same day that it received SEC comments and file it with the NFA immediately, the 21-day advance filing requirement of CFTC Rule 4.26(d)(2) would not be met.

If the RIC submitted a B-filing of its amended registration statement to the NFA for review at the same time as it was filed and became immediately effective with the SEC, the NFA presumably could revert with comments 21 days later. If the NFA required material changes, the RIC might be required to file yet another registration statement amendment with the SEC under Rule 485(a) (that is, an A-filing). This could potentially trigger a 60-day period for the SEC to review and provide comments. In the most extreme case, the RIC would be required to stop selling shares during this period, which would be highly disruptive to the RIC as well as to investors, particularly those who purchase shares periodically as part of a dividend reinvestment plan or other investment program.

Rather than force RICs to comply with the incompatible filing and review processes of both the SEC and the NFA, we believe that the CFTC should not impose the NFA review requirement on RICs. However, if the CFTC nevertheless elects to require RICs to file with the NFA, we believe that the scope of the NFA review should be limited solely to the information that is required by CFTC rules. In any case, the CFTC, NFA and SEC should coordinate their policies and processes for reviewing documents, in order to avoid conflicting comments and prevent multiple filings and back-and-forth between the agencies during the review process.

2. Content of Disclosure Documents

In general. As discussed in our April 2011 and August 2011 Letters, many of the CFTC's requirements relating to the content of Disclosure Documents differ from, but address disclosure topics already fully covered by, the SEC's requirements for RICs. The cumulative effect of adding CFTC-required

disclosures to SEC-required disclosures is far more likely to reduce the clarity and impact of each such disclosure than to enhance investor understanding. For this reason, we believe that RICs generally should be permitted to comply only with SEC requirements relating to the content of their disclosure.

The current disclosure forms and rules for RICs reflect many years of effort and cooperation between the SEC and the fund industry to develop disclosure materials that strike an appropriate balance between the sometimes conflicting goals of clarity and conciseness of information, on the one hand, and comprehensiveness of information, on the other hand. Although, in our view, RICs should be required to comply only with SEC disclosure requirements, we also believe that, to the extent that RICs are required to provide CFTC-required disclosures as well, such information should be required to be provided only in the RIC's SAI, rather than in its statutory prospectus or summary prospectus. Allowing CFTC-required information to be provided in the SAI would ensure that there is no direct disruption of the statutory prospectus and summary prospectus regime, which is critical to ensuring that investors receive clear, concise information on which to base their investment decisions.

Importantly, the summary prospectus rule *explicitly prohibits* the inclusion of information in a summary prospectus other than the information required by Items 2 through 8 of Form N-1A. We therefore request, at a minimum, that the CFTC confirm that an open-end RIC will not be required to include in its summary prospectus any information required under the Part 4 Rules.

Performance reporting. Proposed CFTC Rule 4.12(c)(2)(i)(D)(2)(ii) would permit a RIC to present the performance information required under CFTC Rules 4.25(c)(2)-(4) in its SAI. As discussed in our August 2011 and April 2011 Letters, however, the performance reporting requirements for registered CPOs call for the presentation of performance information that is not consistent with the SEC's restrictions on the inclusion of past performance information. Under CFTC Rules 4.24(n) and 4.25(c)(2) and (a)(3), if an offered pool has less than three years of actual performance, the CPO must disclose past performance information regarding each other pool and account operated by the CPO. With respect to RICs, the SEC has stated that if past performance of other funds or accounts is included in a RIC's prospectus, such other funds or accounts are required to have been "managed with investment objectives, policies and strategies substantially similar" to those of the RIC, and the relative sizes of the RIC and the other funds or accounts must be comparable.[21] Thus, to the extent that the CFTC requires disclosure of performance information of other

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[21] Growth Stock Outlook Trust, Inc., SEC No-Action Letter, 1986 SEC No-Act. LEXIS 2026 (Apr.15, 1986); Nicholas-Applegate Mutual Funds, SEC No-Action Letter, 1996 SEC No-Act. KEXIS 674 (Aug. 6, 1996).

commodity pools that are not "substantially similar," compliance with both sets of requirements will not be possible.[22]

The proposed relief does not address this fundamental conflict. While the Harmonization Release suggests that the SEC might consider no-action relief on the issue, no such relief has been issued nor, so far as we are aware, has the CFTC commenced any initiative to assure that the SEC will defer to CFTC requirements in this area.[23] The AMG believes that the CFTC and SEC should coordinate to determine the past performance information that will be required of dual registrants. Until such requirements have been approved by both the SEC and the CFTC with the benefit of industry input, we do not believe that the CFTC's past performance disclosure requirements for CPOs should be applied to RICs.[24]

Break-even point, fee disclosure, rates of return and draw-downs (losses). As discussed in our August 2011 and April 2011 Letters, CFTC rules require a Disclosure Document to include numerous disclosures relating to fees and investment returns that differ from, but address disclosure topics already fully

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[22] As noted in our August 2011 Letter, pursuant to NASD Rule 2210, the NASD historically did not permit the presentation of related performance information in sales literature or advertisements for RICs. It is unclear how FINRA would apply NASD Rule 2210 if a RIC were required under the Part 4 Rules to disclose past performance information regarding other pools and accounts.

[23] We do not believe that it is practicable to require each RIC to seek no-action relief from the SEC on this matter; such an approach would be manifestly inefficient, both for the SEC and for the requestors, and would impair RICs' ability to maintain full regulatory compliance. A no-action letter benefits only the direct recipient, and this conflict demands a regulatory solution that applies to all affected parties. While we welcome the opportunity to work with the agencies to find a workable solution, this process should take place prior to the adoption of final rules to assure an orderly, timely resolution of the issue.

[24] We note further that requiring a RIC to include performance information about other funds managed by the same CPO/adviser could require a RIC to include the performance of many funds with strategies that are completely unrelated and uncorrelated. While we believe that there is a significant risk of investor confusion whenever a pool's Disclosure Document is required to include performance information for other pools that have different strategies, we believe this risk may be even greater for RICs than for the traditional managed futures funds to which the CFTC disclosure requirements historically applied. This is because the diversity of strategies that a single RIC adviser might offer is so broad that it is much more likely the prospectus or SAI for a recently formed RIC would be required to include information about other funds that have very different investment strategies and are, therefore, utterly irrelevant to an investor in the particular RIC. For example, a large-cap equity fund that happens to be a commodity pool could be required to include disclosure about the performance of a fixed income fund that also happens to be a commodity pool (and vice versa), simply because the two funds have the same adviser – even though the funds pursue entirely different strategies, hold entirely different investments and are managed by different portfolio managers. Disclosure of this other fund does not seem logical and would not likely be helpful to an investor.

covered by, the SEC's requirements for RICs.[25] The Harmonization Release does not contemplate any relief for RICs from the substantive disclosure requirements of the CFTC rules relating to fees and investment returns.

For example, the Harmonization Release would provide no relief for RICs from the fee disclosure requirements of CFTC Rule 4.24(i). RICs therefore would be required to disclose "brokerage fees and commissions, including interest income paid to futures commission merchants, and any fees incurred to maintain an open position in retail forex transactions" as part of a "break-even" table. In 2003, the SEC considered whether a similar requirement for RICs to disclose brokerage fees paid would be useful for investors. Specifically, in a 2003 concept release, the SEC asked whether mutual funds should be required to disclose brokerage commissions and fees in their expense ratios or fee tables,[26] but did not adopt such a requirement for RICs. As commenters to the 2003 SEC concept release stated, disclosing brokerage fees and commissions in a fee or expense table is potentially misleading and would be confusing for investors.[27] The AMG believes that requiring disclosure of brokerage fees and commissions, including in

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[25] The August 2011 Letter notes in particular the following:

CFTC Rules 4.24(d)(5) and 4.10(j) require a Disclosure Document to state the amount of profit that must be realized in the first year of a participant's investment in order to recoup fees and expenses. Item 3 of Form N-1A requires an example that shows the expenses that an investor would bear on a $10,000 investment over 1-, 3-, 5- and 10-year periods, assuming that the investor receives a 5% return each year and the RIC's operating expenses remain the same.

CFTC Rule 4.25(a)(1)(i) requires pool performance to be calculated net of fees, expenses or allocations to the CPO. Item 4(b)(2) of Form N-1A requires certain performance disclosures to be made net of fees, but without reflecting the sales loads and account fees that a RIC investor may bear.

CFTC Rule 4.25(a)(1)(i)(H) requires annual returns for the most recent five calendar years and year-to-date, computed on a compounded monthly basis. Items 4(b)(2)(ii) and (iii) of Form N-1A require disclosure of annual total returns for each of the last ten calendar years (or the life of the RIC, if shorter) and year-to-date (if the RIC's fiscal year is other than a calendar year).

CFTC Rules 4.25(a)(1)(F) and (G) require disclosure of the largest monthly draw-down (loss) and worst peak-to-valley draw-down in the last five years and year-to-date. Item 4(b)(2)(iii) of Form N-1A requires disclosure of the highest and lowest returns for a quarter during the last ten calendar years (or over the life of the fund, if shorter).

[26] Securities and Exchange Commission, Concept Release: Request for Comments on Measures to Improve Disclosure of Mutual Fund Transaction Costs (Dec. 19, 2003), *available at* http://www.sec.gov/rules/concept/33-8349.htm.

[27] *See, e.g.,* Investment Company Institute, Comment Letter to the Securities and Exchange Commission on Concept Release: Request for Comments on Measures to Improve Disclosure of Mutual Fund Transaction Costs (Feb. 23, 2004), *available at* http://www.sec.gov/rules/concept/s72903/ici022304.htm.

the manner required under CFTC rules, would be unhelpful and potentially confusing for RIC investors for the same reasons that were described by industry participants in 2003, including that:

- Measuring brokerage fees and commissions is subjective, and may be misleading if not accompanied by sufficient explanation.

- Transaction costs tend to vary from year-to-year, and their effects on future costs and returns are uncertain.[28] Volatility in transaction costs, which may or may not be related to fund management, could create significant confusion with respect to future fund expenses if they are required to be included in the break-even table.

- Brokerage fees and commissions may be the primary type of transaction cost for some types of funds, while other types of transaction costs (including implicit costs such as spreads, market impact costs and opportunity costs, which may not be susceptible to reliable measurement) may be more relevant for other types of funds. Therefore, including brokerage fees and commissions in the break-even table would not necessarily facilitate appropriate comparisons of funds by investors.

Capital subscriptions. As noted in our August 2011 Letter, CFTC Rule 4.25(a)(1)(i)(D) requires a CPO's Disclosure Document to include aggregate gross capital subscriptions for a pool. Unlike private pools for which these CFTC rules were designed, shares of open-end RICs are issued, held and redeemed through omnibus accounts. As a result, disclosing aggregate gross capital subscriptions is not practicable for open-end RICs. For example, if an investor purchases 1,000 shares of a RIC in an omnibus account and on the same day another investor redeems 1,000 shares from the same omnibus account of the same RIC, the transactions are netted at the omnibus account level and the RIC does not see any capital inflow – despite gross capital subscriptions of 1,000 shares on that day. The Harmonization Release does not contemplate any

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[28] This concern is exacerbated by the fact that CFTC Rule 4.24(i)(1) would require a RIC to disclose not only previously incurred fees, but also anticipated fees – specifically, "each fee, commission and other expense which the commodity pool operator knows or should know has been incurred by the pool for its preceding fiscal year and is expected to be incurred by the pool in its current fiscal year, including fees or other expenses incurred in connection with the pool's participation in investee pools and funds." CFTC Rule 4.24(i)(2)(xii) would further require a RIC to disclose any "costs or fees included in the spread between bid and asked prices for retail forex transactions." It is unclear how the CPO of a RIC, or of any other type of pool, would be able to obtain this information. CFTC Rule 4.24(i)(2)(xiii) requires disclosure of any "[a]ny other direct or indirect cost." It is unclear whether this might include implicit costs such as spreads, market impact costs and opportunity costs, which may not be known to the RIC or susceptible to reliable measurement.

exemption for RICs from this disclosure requirement, but such an exemption is necessary for open-end RICs.

Risk disclosure. CFTC Rule 4.24(b) requires a Disclosure Document to include a "Risk Disclosure Statement." CFTC Rule 4.24(b)(1) requires the Risk Disclosure Statement to state that restrictions on redemptions may affect an investor's ability to withdraw from a pool, and recently adopted CFTC Rule 4.24(b)(5) mandates prescribed statements about the risks of swaps, including increased liquidity risk which may result in a suspension of redemptions. As discussed in the August 2011 Letter, such disclosures are misleading, both for open-end RICs, which are required to invest most of their assets in liquid instruments and may not suspend the right to redeem shares except in emergency situations,[29] and for closed-end RICs, which generally do not permit investors to redeem shares. Consequently, an exemption from this requirement is needed for RICs in order to avoid requiring them to include potentially misleading disclosures in the prospectus. Moreover, RICs are already subject to comprehensive risk disclosure requirements pursuant to SEC rules, including requirements to disclose risks relating to the particular investments and strategies of the RIC.

Legends. Proposed CFTC Rule 4.12(c)(2)(i)(D)(2)(i) would permit a RIC to use one of the following legends (or similar language) in its Disclosure Document, in lieu of the legend that would otherwise be required by CFTC Rule 4.24(a):

- *Example A*: The Securities and Exchange Commission and the Commodity Futures Trading Commission have not approved or disapproved these securities or this pool, or passed upon the adequacy or accuracy of this prospectus. Any representation to the contrary is a criminal offense.

- *Example B*: The Securities and Exchange Commission and the Commodity Futures Trading Commission have not approved or disapproved these securities or this pool, or determined if this prospectus is truthful or complete. Any representation to the contrary is a criminal offense.

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[29] *See* 1940 Act § 22(e) (prohibiting suspension of redemption rights except "1. for any period (A) during which the New York Stock Exchange is closed other than customary week-end and holiday closings or (B) during which trading on the New York Stock Exchange is restricted; 2. for any period during which an emergency exists as a result of which (A) disposal by the company of securities owned by it is not reasonably practicable or (B) it is not reasonably practicable for such company fairly to determine the value of its net assets; or 3. for such other periods as the [SEC] may by order permit for the protection of security holders of the company."

For most RIC investors, however, the term "pool" is unfamiliar and potentially confusing. We respectfully request confirmation that a RIC may use the term "fund" instead.

3. Delivery and Acknowledgment of Disclosure Documents

The proposed amendments to CFTC Rule 4.12(c) would extend to RICs certain relief previously available to exchange-traded commodity pools with respect to the Disclosure Document delivery and acknowledgment requirements of CFTC Rule 4.21. Specifically, proposed CFTC Rules 4.12(c)(2)(i)(A)-(C) would exempt a RIC[30] from the Disclosure Document delivery and acknowledgment requirements of CFTC Rule 4.21, provided that the CPO (*i.e.*, the RIC's investment adviser): (A) causes the RIC's Disclosure Document to be readily accessible on a website maintained by the CPO, (B) causes the Disclosure Document to be kept current in accordance with the requirements of CFTC Rule 4.26(a), and (C) informs prospective pool participants with whom it has contact of the internet address of such website and directs any broker, dealer or other selling agent for the RIC to so inform prospective pool participants.

With regard to the requirement that the website be maintained by the CPO, we note that RIC websites are often maintained by the distributor for the RIC, rather than the RIC's CPO/adviser. We therefore request confirmation that the distributor for a RIC is permitted to maintain the website for purposes of compliance with the CFTC's rule. We further request confirmation that the website to which prospective investors are required to be directed may be the main website for the RIC's fund family or for the adviser or distributor of the RIC, so long as the website page with the Disclosure Document for the applicable pool is readily accessible from the main website.

With regard to the requirement that a RIC keep its Disclosure Document current in accordance with the requirements of CFTC Rule 4.26(a), as noted above[31] we believe that the CFTC rules should provide that a RIC whose registration statement has been timely updated under SEC rules, or whose registration statement is not required to be updated, will be deemed to have complied with the requirements of CFTC Rule 4.26(a).

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[30] This relief would not depend on whether the RIC's securities are registered under the Securities Act.

[31] See "1. Filing, Updating and Amending Disclosure Documents—Periodic and interim updates" above.

Subject to the foregoing, we believe that RICs generally should be able to fulfill the proposed conditions for the exemption from Disclosure Document delivery and acknowledgment requirements. However, for RICs that are not publicly offered (which means they are generally restricted to "accredited investors" under the Securities Act, or other sophisticated investors), the website may need to be password-protected in order to avoid violating the SEC's rules against general solicitation. The AMG respectfully requests confirmation that a password-protected website will be acceptable under such circumstances.[32]

Listed closed-end RICs that are not conducting an offering normally do not post their prospectus and SAI on a website, nor are such documents kept current. However, as noted above, closed-end RICs must furnish semi-annual and annual financial statements to shareholders, as well as file quarterly, semiannual and annual reports with the SEC, which are publicly available to investors,[33] and performance information is generally available from numerous sources for closed-end RICs that are publicly offered and/or traded. Accordingly, we believe that a listed closed-end RIC that is not conducting an offering should be exempted generally from the Disclosure Document delivery and acknowledgment requirements of CFTC Rule 4.21.

B. Account Statements and Annual Reports

CFTC Rules 4.22 and 4.26(b) require a registered CPO to distribute monthly Account Statements and Annual Reports containing specified information to participants, and to attach the most recent of such materials to the pool's Disclosure Document. The proposed amendments would permit RICs to post such materials on a website in lieu of distributing them directly to investors and attaching them to the Disclosure Document. The amendments would not,

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[32] As discussed in Part III below, we further request that similar relief be provided to any CPO of a privately offered commodity pool, so long as (i) such pool has an investment adviser registered with the SEC and (ii) the CPO either (A) is registered and able to rely on CFTC Rule 4.7 or (B) would have been able to rely on the exemption from CPO registration provided by CFTC Rule 4.13(a)(4) if such exemption had not been rescinded.

[33] See Investment Company Act § 30; Rules 30e-1, 30b1-1 and 30b1-5 under the Investment Company Act.

however, provide a general exemption for RICs from the requirement to prepare monthly Account Statements and Annual Reports.[34]

We do not believe that any sound regulatory policy or investor protection concern exists for requiring that RICs comply with the CFTC's monthly Account Statement requirement. Unlike participants in conventional commodity pools, investors in open-end RICs have ready access to daily performance information for their investment, reflected in the daily calculation of net asset value per share. The key purpose of the Account Statement is thereby achieved on a more current and efficient basis. Applying the Account Statement requirement to RICs would require a large number of additional reports to be produced at significant additional cost to investors who already have ample performance data at hand. Moreover, as discussed above, RICs are already required by the Investment Company Act to furnish semi-annual and annual financial statements to investors, as well as to file quarterly, semi-annual and annual reports with the SEC, which are publicly available to investors. It would require extensive additional reporting procedures and significant additional cost to RICs, and thus to their investors, to compile and report data on a more frequent basis. Consequently, the AMG believes that requiring Account Statements would serve to create substantial costs without any corresponding benefit, and the CFTC should provide relief to RICs from these requirements.

Further, absent relief, RICs would be required by CFTC Rule 4.22 to include information in their Account Statements and Annual Reports that is not currently required under SEC rules, such as itemized disclosure of the total amount of brokerage commissions (discussed above) and the total amount of fees

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[34] CFTC Rule 4.22 requires monthly Account Statements and Annual Reports containing prescribed information to be delivered to pool participants. CFTC Rule 4.26(b) requires the Disclosure Document for a pool either to have attached the most recent monthly Account Statement and Annual Report for the pool or, in lieu thereof, to provide performance information current as of a date not more than sixty days prior to the date on which the Disclosure Document is distributed and covering the period since the most recent performance information in the Disclosure Document. Proposed CFTC Rule 4.12(c)(2)(ii) would exempt the CPO of any RIC (or of any Securities Act registrant) from the distribution requirements of CFTC Rule 4.22, provided that the Account Statements are readily accessible on a website maintained by the CPO. Proposed CFTC Rule 4.12(c)(2)(i)(D)(1) would similarly exempt the CPO of a Securities Act registrant (which includes most RICs) from the requirement of CFTC Rule 4.26(b) to attach the Account Statements and Annual Report to the Disclosure Document if such materials are readily accessible on a website maintained by the CPO. As currently proposed, the relief from CFTC Rule 4.26(b) would not be available for certain unlisted RICs that are privately offered and therefore not required to register under the Securities Act. Although it is our view that RICs should be excluded from the CFTC's Account Statement and Annual Report requirements altogether, if such requirements are in fact imposed upon RICs, then all RICs should be provided relief from CFTC Rule 4.26(b), regardless of their Securities Act registration status.

for Commodity Interests and other investment transactions.[35] This will require RICs, at significant expense, to change their internal accounting and financial reporting systems in order to prepare financial statements that meet the CFTC requirements. Moreover, Rule 30b2-1(b) under the Investment Company Act requires that a RIC file with the SEC a copy of every periodic or interim report or similar communication containing financial statements that is sent to investors. This would apparently mean that Account Statements, even though prepared solely in order to comply with CFTC requirements, would also need to be filed with the SEC, imposing another additional burden upon RICs.

C. Investor Access and Selective Disclosure

Under CFTC Rule 4.23, investors in a commodity pool must be given access upon request to numerous types of books and records, including those that would reveal trading information.[36] As discussed in our August 2011 Letter, the SEC has expressed serious concerns regarding selective disclosure, noting, for example, that selective disclosure "can facilitate fraud and have severe, adverse ramifications for a fund's investors if someone uses that portfolio information to trade against the fund, or otherwise uses the information in a way that could harm the fund," and that selective disclosure may also violate an adviser's fiduciary duties.[37] The SEC has adopted rules that require RICs to disclose their policies and procedures regarding selective disclosure, including the narrow circumstances under which such disclosure can be made, the persons to whom such disclosure may be made, and procedures to ensure that disclosure is in the "best interest of fund shareholders."[38] CFTC Rule 4.23 could require disclosure of such information in contravention of fund policies and/or force advisers to RICs to publicly disclose such information after every investor request. The AMG,

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[35] It may not be possible for a RIC to determine the fees for certain Commodity Interest transactions, such as swaps that are entered into on a principal basis and therefore involve a spread rather than an explicit fee or commission.

[36] Under CFTC Rule 4.23(a)(1), a pool participant is required to be given access to the following trading information upon request: "An itemized daily record of each commodity interest transaction of the pool, showing the transaction date, quantity, commodity interest, and, as applicable, price or premium, delivery month or expiration date, whether a put or a call, strike price, underlying contract for future delivery or underlying physical, the futures commission merchant and/or retail foreign exchange dealer carrying the account and the introducing broker, if any, whether the commodity interest was purchased, sold (including, in the case of a retail forex transaction, offset), exercised, expired (including, in the case of a retail forex transaction, whether it was rolled forward), and the gain or loss realized."

[37] Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Holdings, 69 Fed. Reg. 22300 (Apr. 23, 2004), *available at* http://www.sec.gov/rules/final/33-8408.pdf.

[38] *Id.*

therefore, believes that RICs should be exempted from the provisions of CFTC Rule 4.23 that would require disclosure that conflicts with a RIC's SEC-mandated selective disclosure policies. Further, as discussed in Part III below, we strongly recommend that the CFTC consider eliminating this requirement not only in respect of RICs, but in respect of any CPO of a privately offered commodity pool, so long as (i) such private pool has an investment adviser registered with the SEC and (ii) the CPO either (A) is registered and able to rely on CFTC Rule 4.7 or (B) would have been able to rely on the exemption from CPO registration provided by CFTC Rule 4.13(a)(4) if such exemption had not been rescinded.

D. Recordkeeping

The proposed amendments to CFTC Rule 4.12(c) would extend existing relief provided under CFTC Rule 4.12(c)(iii) to permit the CPO of a RIC to maintain books and records at the RIC's "administrator, distributor or custodian, or a bank or registered broker or dealer acting in a similar capacity with respect to the pool" (CFTC Rule 4.12(c)(iii)(A)), provided that notice is filed with the NFA regarding the location of such books and records, certain representations are made by the CPO and by the person keeping such books and records (including that the original books and records will be provided to the CFTC for inspection within 48 or 72 hours of the CFTC's request), and the location of the books and records is provided in the Disclosure Document (CFTC Rules 4.12(c)(iii)(B) and (C)).

Given the substantial requirements of CFTC Rules 4.12(c)(iii)(B) and (C) and similar SEC requirements that are already designed to ensure the security and accessibility of books and records, the relief provided by CFTC Rule 4.12(c)(iii) should be expanded to include *any* service providers who maintain books and records for RICs, rather than only those currently specified in CFTC Rule 4.12(c)(iii)(A), as long as the location of these records is identified by the RIC's adviser/CPO, including in its Form ADV filed with the SEC.

As discussed in the August 2011 Letter, CFTC Rule 4.23(a)(4) requires a CPO to keep a ledger of all pool participants. For RICs, however, investors normally hold their shares in omnibus accounts or through intermediaries. In addition, a transfer agent, rather than the RIC or its adviser, typically keeps such records of investors. The AMG therefore requests that CFTC Rule 4.12(c)(iii) be amended to make clear that all RICs may continue this practice.[39]

[39] In addition, if the CFTC were to grant relief from the requirement to prepare Account Statements under Rule 4.22, relief should also be provided from the recordkeeping requirements of CFTC Rules 4.23(a)(10), (11) and (12), which require a CPO to maintain a monthly Statement of Financial Condition and Statement of Income (Loss), and a manually signed copy of the most recent Account Statement and Annual Report.

As discussed in Part III below, we further request that similar relief be provided to any CPO of a privately offered commodity pool, so long as (i) such commodity pool has an investment adviser registered with the SEC and (ii) the CPO either (A) is registered and able to rely on CFTC Rule 4.7 or (B) would have been able to rely on the exemption from CPO registration provided by CFTC Rule 4.13(a)(4) if such exemption had not been rescinded.

E. Use of Controlled Foreign Corporations

As the CFTC is aware, for tax reasons, many RICs invest in Commodity Interests through a wholly-owned CFC. The AMG believes that the CPO of a CFC that is wholly owned by a RIC should be exempt from the detailed disclosure and reporting requirements for registered CPOs under the Part 4 rules. Information about the investment activities and holdings of the CFC already will be provided by the RIC to its investors. If the CPO of the CFC were subject to separate disclosure and reporting requirements, the only recipients would be the adviser and/or the board of directors of the RIC.[40] We therefore believe that it would be redundant to require separate compliance at the CFC level, and request that the CFTC provide relief from such requirements.

III. Relief for CPOs of Non-RIC Funds

Due to the CFTC's rescission of the exemption from CPO registration formerly available to operators of privately offered commodity pools under CFTC Rule 4.13(a)(4), the CPOs of many private pools will be required to register with the CFTC. We respectfully request that the CFTC provide relief from the recordkeeping and investor access requirements of CFTC Rule 4.23 and the document delivery and acknowledgment requirements of CFTC Rule 4.21, in each case similar to the relief requested above for RICs, to any CPO of a privately offered commodity pool, so long as (i) such private pool has an investment adviser registered with the SEC and (ii) the CPO either (A) is registered and able to rely on CFTC Rule 4.7 or (B) would have been able to rely on the exemption from CPO registration provided by CFTC Rule 4.13(a)(4) if such exemption had not been rescinded (a "**Private Pool CPO**").

A Private Pool CPO described above would still be subject to the requirement to register as a CPO with the CFTC and, if so registered, would be required to comply with most of the requirements associated with CPO registration, including disclosure and reporting requirements (including the

[40] We do not believe that CFTC guidance to date requires that such information be provided directly to RIC investors, nor do we believe that such a requirement would provide any benefit, as it would be duplicative of information provided for the RIC itself.

requirement to provide Account Statements and audited Annual Reports to pool participants), NFA compliance rules and audits, and the filing of Form CPO-PQR on a quarterly or annual basis, as applicable. However, we request that Private Pool CPOs be permitted to maintain books and records with service providers, be excluded from the investor access requirements, and be permitted to distribute reports to investors via website posting, each as discussed further below.

Recordkeeping. The proposed amendments to CFTC Rule 4.12(c) would permit the CPO of a RIC that is a commodity pool (or of any non-RIC pool that is a Securities Act registrant) to maintain books and records with the pool's "administrator, distributor or custodian, or a bank or registered broker or dealer acting in a similar capacity with respect to the pool," subject to certain conditions. These amendments represent an extension of the relief currently available under CFTC Rule 4.12(c)(iii) to CPOs of pools registered under the Securities Act and the Exchange Act. As discussed in Part II.D. above, we believe that the CFTC should (i) expand the proposed relief to provide that in addition to the persons currently specified in the rule, any other service providers may maintain books and records for a RIC (subject to compliance with the requirements of CFTC Rules 4.12(c)(iii)(B) and (C)) and (ii) make clear that the transfer agent of a RIC, rather than its CPO, is permitted to keep the ledger of pool participants required by CFTC Rule 4.23(a)(4).

We believe that the CFTC should provide similar relief to Private Pool CPOs in respect of any privately offered commodity pools, so long as (i) such private pool has an investment adviser registered with the SEC and (ii) the CPO either (A) is registered and able to rely on CFTC Rule 4.7 or (B) would have been able to rely on the exemption from CPO registration provided by CFTC Rule 4.13(a)(4) if such exemption had not been rescinded. Specifically, (i) a Private Pool CPO should be permitted to maintain the books and records for a private pool with any service provider, provided that the Private Pool CPO complies with the requirements of CFTC Rules 4.12(c)(iii)(B) and (C), and (ii) the administrator of such private pool, rather than the Private Pool CPO, should be permitted to keep the ledger of pool participants required by CFTC Rule 4.23(a)(4).

This relief would provide substantial operational benefits and savings of unnecessary cost to many private fund advisers that have been relying on the CFTC Rule 4.13(a)(4) exemption with respect to their funds. Currently, books and records pertaining to these funds are often kept by administrators, brokers and other service providers. Absent relief, the advisers to the such funds would be required to significantly modify their current practices to conform to CFTC requirements once they are no longer permitted to rely on the CFTC Rule 4.13(a)(4) exemption and are required to register as CPOs with the CFTC. The relief described above would afford greater flexibility to such funds to continue with their current practices. Because the relief would be conditioned upon the CPO being a registered investment adviser and complying with the requirements

of CFTC Rules 4.12(c)(iii)(B) and (C), the CFTC and SEC[41] will have ready access to books and records for examination and other appropriate regulatory purposes, and investors will have access to information about the location of books and records through the Private Pool RIA Form ADV and, if applicable, the CPO's Disclosure Document.

Investor access and selective disclosure. As discussed above, we are deeply concerned by the provisions of CFTC Rule 4.23(a)(1) that require a registered CPO to disclose trading information regarding a pool to an investor upon request. Our concerns extend to private funds, as well as RICs. The SEC has stated that an "investment adviser that discloses the fund's portfolio securities may only do so consistent with the antifraud provisions of the federal securities laws and the fund's or adviser's fiduciary duties."[42] Although this statement was made in the context of registered funds, the antifraud provisions of the securities laws extend to private funds as well, and all investment advisers have fiduciary duties to their clients. We strongly recommend that privately offered commodity pools also be exempted from CFTC Rule 4.23(a)(1), so long as (i) such private pool has an investment adviser registered with the SEC and (ii) the CPO either (A) is registered and able to rely on CFTC Rule 4.7 or (B) would have been able to rely on the exemption from CPO registration provided by CFTC Rule 4.13(a)(4) if such exemption had not been rescinded.

Document delivery and acknowledgment. The proposed amendments to CFTC Rule 4.12(c) would permit the CPO of a RIC that is a commodity pool (or of any non-RIC pool that is a Securities Act registrant) to provide Disclosure Documents, Account Statements and Annual Reports to investors by posting such materials on a website, without requiring any signed acknowledgment from investors.

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[41] Investment advisers registered under the Advisers Act are subject to the books and records requirements of Section 204 of the Advisers Act and Rule 204-2 thereunder. These provisions require registered investment advisers to maintain extensive books and records, in some cases for as long as three years after the termination of the enterprise. Under Section 204(b)(2) of the Advisers Act (added by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010), the records and reports of any private fund to which a registered investment adviser provides investment advice are deemed to be the records and reports of the adviser. A registered investment adviser is also required to disclose the location of its books and records annually in its Form ADV. These comprehensive books and records requirements under the Advisers Act, together with the CFTC requirements to which Private Pool CPOs would remain subject even if the relief requested herein is granted, render the imposition of any further CFTC requirements unnecessary.

[42] Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Holdings, 69 Fed. Reg. 22300 (Apr. 23, 2004), *available at* http://www.sec.gov/rules/final/33-8408.pdf.

We believe that this relief should be extended as well to private commodity pools, so long as (i) such private pool has an investment adviser registered with the SEC and (ii) the CPO either (A) is registered and able to rely on CFTC Rule 4.7 or (B) would have been able to rely on the exemption from CPO registration provided by CFTC Rule 4.13(a)(4) if such exemption had not been rescinded. Absent relief, many private fund advisers would be required to significantly modify their current practices to conform to CFTC requirements once they are no longer permitted to rely on the CFTC Rule 4.13(a)(4) exemption and are required to register as CPOs with the CFTC. The requirement to comply with the CFTC's document delivery and acknowledgment requirements would result in a cumbersome process for advisers to these funds with very little benefit to investors. Given that under the proposed rules website posting would be permitted for the CPOs of RICs and Securities Act registrants (such as commodity pool ETFs) whose pools are offered to retail investors, we see no reason not to extend the same relief to Private Pool CPOs whose pools are limited to sophisticated investors.

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The AMG appreciates the opportunity to comment on the Harmonization Release and the related matters discussed in this letter, and stands ready to provide any additional information or assistance concerning these topics that the CFTC or CFTC staff might find useful.

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

Sincerely,

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

cc: Hon. Gary Gensler, Chairman, Commodity Futures Trading Commission
Hon. Jill E. Sommers, Commissioner, Commodity Futures Trading Commission
Hon. Bart Chilton, Commissioner, Commodity Futures Trading Commission
Hon. Scott O'Malia, Commissioner, Commodity Futures Trading Commission
Hon. Mark Wetjen, Commissioner, Commodity Futures Trading Commission
Hon. Mary L Schapiro, Chairman, Securities and Exchange Commission
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Frank N. Fisanich, Chief Counsel, Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission
Eileen P. Rominger, Director, Division of Investment Management, Securities and Exchange Commission
Robert E. Plaze, Deputy Director, Division of Investment Management, Securities and Exchange Commission
Douglas J. Scheidt, Associate Director and Chief Counsel, Division of Investment Management, Securities and Exchange Commission
Diane C. Blizzard, Associate Director, Division of Investment Management, Securities and Exchange Commission