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Invested in America

August 4, 2011

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

Re: CFTC Staff Roundtable on Proposed Changes to Registration and Compliance Regime for CPOs & CTAs (the "**Roundtable**")

Dear Mr. Stawick:

The Asset Management Group (the "**AMG**") of the Securities Industry and Financial Markets Association ("**SIFMA**") appreciates the opportunity to provide additional comments to the Commodity Futures Trading Commission (the "**CFTC**" or the "**Commission**") regarding the Commission's February 11, 2011 Notice of Proposed Rulemaking (the "**Notice**").[1] The Notice contemplates (i) amendments to CFTC Rule 4.5 ("**Rule 4.5**") that would (a) reinstate pre-2003 requirements applicable to investment companies registered under the Investment Company Act of 1940, as amended (the "**1940 Act**") that rely on the Rule 4.5 exclusion from the definition of "commodity pool operator" ("**CPO**") and (b) expand such criteria to include trading restrictions relating to swaps (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) (the "**Rule 4.13 Proposal**" and, together with the Rule 4.5 Proposal, the "**Rule 4.5/4.13 Proposals**") and (iii) certain other rules proposed by the Commission in the Notice (together 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 1940 Act-registered investment companies ("**RICs**") and privately offered pooled investment vehicles advised by registered investment advisers ("**Private Funds**") that may invest in commodity futures, commodity options and swaps (collectively, "**commodity instruments**") as part of their respective investment strategies.

The AMG submitted a comment letter regarding the Notice on April 12, 2011 (the "**April Letter**")[2] and also submitted a comment letter on October 18, 2010 regarding

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

[2] *See* April Letter (Apr. 12, 2011), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=42187.

the National Futures Association's ("**NFA**") Petition to Amend Commission Rule 4.5 (the "**October Letter**").[3] Representatives of AMG member firms participated in the Commission's July 6, 2011 Roundtable. The AMG also submitted written summary remarks in connection with the Roundtable (the "**Summary Remarks**").[4]

As discussed at the Roundtable and in the Summary Remarks, as well as in the April Letter and the October Letter, the AMG believes that the Rule 4.5/4.13 Proposals should not be adopted because they would result in significant regulatory burdens and costs, which ultimately will be borne by investors, on otherwise regulated entities, without a corresponding benefit to investors, the markets or the general public. As discussed in the April Letter, RICs currently excluded under Rule 4.5 and most advisers to Private Funds currently exempt under Rule 4.13(a)(3) or (4) are already, or soon will be, subject to robust regulatory requirements and oversight by federal regulators.[5]

In this letter, we propose certain modifications to the Rule 4.5 Proposal (which we also recommend incorporating into the Rule 4.13 Proposal) to effect the recommendations made by the AMG at the Roundtable regarding the scope of RICs and Private Funds for which CPO registration should be required if the Commission determines to proceed with the Rule 4.5/4.13 Proposals. Additionally, the AMG believes that the Commission should modify certain of its rules or provide supplemental relief to RICs and Private Funds, to ameliorate the conflicts between Part 4 of the CFTC Rules (the "**Part 4 Rules**") and the requirements applicable to RICs and Private Funds under the federal securities laws. In particular, we highlight six areas in this letter where we believe that the Part 4 Rules would create conflicts with regulatory requirements applicable to RICs and Private Funds, or would compel costly changes in the operations of RICs and Private Funds that would adversely impact investors, without commensurate benefit. These areas are (1) document delivery and acknowledgment, (2) reporting, (3) books and records, (4) investor access, (5) disclosure and (6) data collection. Within each area, this letter highlights relief from specific aspects of the Part 4 Rules that the AMG believes should be provided in order to harmonize the Part 4 Rules with the existing regulation and practices of RICs and Private Funds that may be considered commodity pools.

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

[4] *See* Summary Remarks (July 1, 2011), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=46741.

[5] *See* April Letter. RICs 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. With respect to private funds, the AMG believes that substantially all advisers relying upon an exemption under Rule 4.13(a)(3) or (4) (other than those with less than $150 million in assets under management) are either registered or soon will register with the Securities and Exchange Commission ("**SEC**") under the Investment Advisers Act of 1940, as amended (the "**Advisers Act**"). The Advisers Act subjects registered advisers to stringent regulatory compliance requirements, including requirements relating to disclosure, custody, recordkeeping and reporting. *See, e.g.*, Rules 206(4)-1, 206(4)-2, 206(4)-7 and 204-2 under the Advisers Act.

I. Scope of Rule 4.5/4.13 Proposals

At the Roundtable and in the Summary Remarks, the AMG recommended limiting the scope of the funds and advisers implicated by the Rule 4.5/4.13 Proposals by requiring CPO registration only in connection with those RICs and Private Funds that utilize commodity instruments to take active positions as their primary investment strategy. Appendix A to this letter proposes modifications to CFTC Rule 4.5 that would effect such recommendations, should the Commission determine to proceed with the Rule 4.5 Proposal. If the Commission proceeds with the Rule 4.13 Proposal, the AMG requests that the Commission make corresponding modifications to CFTC Rules 4.13(a)(3) and (4).

II. Harmonization

1. Document Delivery and Acknowledgment

CFTC Rule 4.21(a) requires a pool's disclosure document ("**Disclosure Document**") to be delivered to a prospective pool participant no later than the time that a subscription agreement for the pool is delivered. CFTC Rule 4.21(b) prohibits a CPO from accepting or receiving funds or other property from a prospective pool participant unless the CPO first receives a signed acknowledgment of receipt of the pool's disclosure document from the prospective participant.

These requirements conflict with the universal practices of RICs, which (i) are not required to deliver a prospectus to investors until the time of confirmation (which may be up to three days after the trade date), (ii) are not required to, and do not, use subscription agreements and (iii) are not equipped to require or receive signed acknowledgments. To convert these practices to the delivery and acknowledgment requirements applicable to commodity pools would require huge operational changes and impose very substantial costs upon RICs and their investors, without apparent benefit. Accordingly, the AMG requests that the Commission provide relief to RICs from the requirements to (i) deliver a Disclosure Document before the time of confirmation, (ii) use a subscription agreement with investors[6] or (iii) receive an investor acknowledgment.

The AMG further requests that the Commission amend the CFTC Part 4 Rules to permit CPOs of Private Funds to provide Disclosure Documents and updates via internet posting at any time, and to permit any acknowledgment required by CFTC Rule 4.21(b) to be made electronically without conditions.[7]

2. Reporting

CFTC Rules 4.22(a) and (b) require a registered CPO to furnish monthly or quarterly statements of account to each participant in a pool. Under the 1940 Act, RICs

[6] We note that CFTC Rule 4.21(a) appears to presume, but does not explicitly require the use of a subscription agreement.

[7] We note that in the context of commodity exchange-traded funds ("**commodity ETFs**"), the Commission has provided similar relief from the delivery requirement of CFTC Rule 4.21(a) and the signed acknowledgment requirement of CFTC Rule 4.21(b).

are already required 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.[8] It would create significant costs for RICs and their investors to compile and report data on a more frequent basis. Moreover, RIC performance data is publicly available on a daily basis in multiple media sources, including daily newspapers throughout the country as well as thousands of internet websites and other public media. Consequently, the AMG believes that requiring monthly or quarterly account statements would serve to create substantial costs without any corresponding benefit, and the Commission should provide relief to RICs from these requirements.

3. Books and Records

The recordkeeping requirements of CFTC Rule 4.23 are unnecessarily duplicative of the requirements already applicable to RICs and registered advisers. The 1940 Act requires RICs to maintain extensive books and records, generally for at least six years, and in some cases, permanently.[9] The Advisers Act also requires registered advisers of RICs and Private Funds to maintain books and records, including records of the adviser that relate to the adviser's clients and the advisory activities of the adviser, in some cases for as long as three years after termination of the enterprise.[10]

CFTC Rule 4.23 requires books and records to be maintained at a CPO's main business office. Books and records of a RIC are often kept in multiple locations by the RIC's adviser and its affiliates, or by the RIC's administrator, distributor or a bank or registered broker-dealer that is providing services to the RIC, instead of at the RIC's main offices.[11] The Advisers Act requires advisers of RICs and Private Funds to maintain books and records at an appropriate office, and in some cases the principal office, of the adviser. Registered advisers are also required to disclose annually in Form ADV the location of the adviser's books and records.[12]

Finally, 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, transfer agents (for RICs) or administrators (for Private Funds), rather than the funds or their advisers, typically keep such records of investors.

In view of the foregoing, the AMG requests that the CFTC provide an exemption from CFTC Rule 4.23 to permit RICs and registered advisers to Private Funds, as applicable, to maintain books and records in compliance with the 1940 Act and the

[8] *See* 1940 Act § 30; Rule 30e-1 under the 1940 Act.

[9] *See, e.g.*, Rules 31a-1, 31a-2 and 31a-3 under the 1940 Act.

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

[11] Rule 31a-2 under the 1940 Act also requires RICs to arrange and index the records in a way that permits easy location, access, and retrieval of any particular record. In addition, Rule 31a-3 under the 1940 Act requires RICs to obtain written agreements with those who will prepare or maintain records on its behalf.

[12] *See* Advisers Act § 204; Rule 204-2 under the Advisers Act.

Advisers Act, so long as the location of the books and records is disclosed to pool participants.

4. Investor Access

Under CFTC Rule 4.23, investors in a commodity pool must be given access to numerous types of books and records, including those that would reveal trading information, upon request.[13] The AMG requests that the CFTC exempt RICs from the provisions of CFTC Rule 4.23 that would require disclosure of such information. As noted in section 2 above, RICs 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 RICs make portfolio holdings information available on their website more frequently. Providing information concerning portfolio positions or holdings on a selective basis in response to an investor request would raise significant concerns for RICs. 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. The SEC has adopted rules that require funds to disclose their policies and procedures regarding selective disclosure, including the circumstances under which such disclosure can be made (which, according to the SEC, are limited), the persons to whom such disclosure may be made, and procedures to ensure that disclosure is in the "best interest of fund shareholders."[14]

5. Disclosure

(a) Content Requirements

Past performance information**.** Under CFTC Rule 4.24(n) and CFTC Rules 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.[15] Thus, the disparity

[13] We understand from discussion at the Roundtable that this rule generally is not utilized by investors in commodity pools. For the reasons stated above in the text, we question whether investor access to the records described in CFTC Rule 4.23 should be permitted in any case.

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

[15] 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. LEXIS 674 (Aug. 6, 1996). We note also that pursuant to NASD Rule 2210, the NASD historically did not permit the presentation of related performance information in sales literature or advertisements for mutual funds. It is unclear how FINRA would apply NASD Rule 2210 if a mutual fund were required under the Part 4 Rules to disclose past performance information regarding other pools and accounts.

between the performance disclosure requirements under the Part 4 Rules and those applicable to RICs under the federal securities laws renders compliance with both sets of requirements impracticable, if not impossible.[16]

Due to the foregoing conflicts, the AMG requests that the Commission exempt RICs from the requirement to disclose performance information of other managed pools required under the CFTC Part 4 Rules.

Mandatory risk disclosure**.** CFTC Rule 4.24(b) requires a Disclosure Document to include a "Risk Disclosure Statement." Rule 4.24(b)(1) currently requires the Risk Disclosure Statement to state that restrictions on redemptions may affect an investor's ability to withdraw from a pool. In addition, if the Commission were to adopt the Proposed Rules in their current form, new CFTC Rule 4.24(b)(5) would mandate prescribed statements about the risks of swaps, including the possibility that redemptions may be suspended. Such disclosures would be 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,[17] and for closed-end RICs, which generally do not permit investors to redeem shares.[18] 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.[19]

Given the risk disclosure requirements already applicable to RICs and the inapplicability of the disclosures that are or may be prescribed by Rule 4.24(b), the AMG requests that the Commission exempt RICs from the requirement to include a Risk Disclosure Statement.

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[16] We note also that many privately offered pools rely on the exemption from registration under the 1933 Act afforded by Regulation D thereunder. Regulation D prohibits the offer or sale of securities by any form of general solicitation or general advertising. If performance information for a privately offered pool is required to be included in the disclosure for a publicly offered RIC, there is a risk that it could be viewed as a general solicitation that would jeopardize the validity of the private pool's exemption.

[17] *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."

[18] Under the 1940 Act, closed-end funds, by definition, do not issue "redeemable securities." Closed-end funds generally are listed on a securities exchange; investors obtain liquidity by selling shares on the exchange, rather than redeeming them.

[19] For example, Form N-1A, the registration statement for open-end RICs, states that a RIC's prospectus should "clearly disclose the fundamental characteristics and investment risks of the [RIC], using concise, straightforward, and easy to understand language" and "help investors to evaluate the risks of an investment and to decide whether to invest in a [RIC] by providing a balanced disclosure of positive and negative factors." Item 9 of Form N-1A requires an open-end RIC to "[d]isclose the principal risks of investing in the [RIC], including the risks to which the [RIC]'s particular portfolio as a whole is expected to be subject and the circumstances reasonably likely to affect adversely the [RIC]'s net asset value, yield, or total return."

Break-even analysis, fee disclosure, rates of return and draw-downs (losses). CFTC Rules 4.24 and 4.25 require a Disclosure Document to include numerous disclosures relating to fees and investment returns that 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 seems far more likely to reduce the clarity and impact of each such disclosure than to enhance investor understanding. In particular:

- 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.

    - *Compare*: 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.

    - *Compare*: 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.

    - *Compare*: 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.

    - *Compare*: 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).

The AMG requests that the CFTC, in view the disclosures required by the SEC, exempt RICs from each of the requirements of the Part 4 Rules described above.

Gross capital subscriptions. CFTC Rule 4.25(a)(1)(i)(D) requires a Disclosure Document to include aggregate gross capital subscriptions. Because open-end RICs offer and redeem shares on a daily basis, disclosing the aggregate gross capital subscriptions is neither practicable nor meaningful for investors. The AMG therefore requests that the Commission exempt RICs from the requirement to disclose aggregate gross capital subscriptions.

(b) Form Requirements

Absent an exemption, Section 5(b)(2) of the 1933 Act generally requires any sale of a security to be accompanied or preceded by a "statutory prospectus" meeting the requirements of Section 10(a) of the 1933 Act. With respect to sales of open-end RICs, however, in 2009 the SEC adopted Rule 498, pursuant to which an open-end RIC is permitted to satisfy its prospectus delivery obligation by delivering only a brief (typically eight- to ten-page) "summary prospectus."[20] The summary prospectus is designed to enhance the readability and effectiveness of disclosure and to provide investors the ability to perform side-by-side comparisons of different open-end RICs by assuring that uniform data elements are presented in a prescribed template.[21] Following the adoption of Rule 498, the mutual fund industry expended considerable cost and resources to overhaul its prospectus delivery practices in order to utilize the streamlined summary prospectus. As a result, the standard practice among mutual funds is to deliver only the summary prospectus on or before the time of confirmation of the sale of fund shares (which may be up to three days after the trade date).

Rule 498(b)(2) explicitly prohibits the inclusion of information in the summary prospectus other than the information required by Items 2 through 8 of Form N-1A.[22] If the Rule 4.5 Proposal were adopted as proposed, RICs would become subject to Part 4 disclosure requirements that would be incompatible with the applicable restrictions on information in the summary prospectus and have the effect of diminishing the use of this reader-friendly format. The AMG therefore requests that the Commission provide relief to allow open-end RICs to use a summary prospectus without having to comply with any disclosure requirements of the Part 4 Rules that would not be permitted by Rule 498(b)(2).

(c) Disclosure updates

CFTC Rule 4.26(a)(2) prohibits use of a Disclosure Document dated more than nine months prior to the date of its use. Under Section 10(a)(3) and Rule 485 under the 1933 Act, the statutory prospectus for an open-end RIC generally must be amended at least every twelve months in order to update financial information. An open-end RIC may also make interim updates pursuant to Rule 485 or Rule 497 under the 1933 Act. The Commission should extend the period in CFTC Rule 4.26(a)(2) from nine to twelve months in order to ensure that the process for revising the Disclosure Document / statutory prospectus for a RIC is streamlined and cost effective.

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[20] A summary prospectus must include 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.

[21] Enhanced Disclosure and New Prospectus Delivery Option For Registered Open-End Management Investment Companies, 74 Fed. Reg. 4546, 4547 (Jan. 26, 2009), *available at* http://www.sec.gov/rules/final/2009/33-8998fr.pdf. Reliance upon Rule 498 requires the statutory prospectus to be made accessible via internet or upon request by an investor, which ensures that the full statutory prospectus will be available to investors who desire additional information.

[22] Basic identifying information such as the name of the fund, the share classes to which the summary prospectus relates and the date of the summary prospectus is also permitted.

The AMG further submits that the period should be extended from nine to twelve months for all CPOs, and not only those that rely on the Rule 4.5 exclusion. Extending the period to twelve months would conform the requirement with the common practice of Private Fund sponsors and others to update disclosure materials on an annual basis.

(d) NFA pre-clearance

The AMG also requests that the Commission provide relief from the requirement that the Disclosure Document for a RIC be reviewed by the NFA. Because the SEC already allocates substantial resources to reviewing the registration statements of the hundreds of RICs that are launched each year,[23] additional review by the NFA would not be the best use of the NFA's resources, and any marginal burden on the SEC in reviewing for compliance with the CPO disclosure requirements is likely to be minimal.

6. Data Collection

In the Notice, the Commission proposes that all registered CPOs be required to file Form CPO-PQR and all registered CTAs be required to file Form CTA-PR. If the Proposed Rules are adopted in their current form, the requirement to file Form CPO-PQR would apply to both RICs and private funds.

The Commission has noted that the information proposed under Forms CPO-PQR and CTA-PR is "largely identical" to that separately required under Form PF for private fund advisers.[24] The AMG further notes that RICs are already subject to investment limitations, oversight and reporting requirements, and believes that additional reporting by RICs would be burdensome, duplicative and unnecessary. For both RICs and private funds, information is also available to the Commission through its large trader reporting program and information regarding their advisers is available to the SEC under Form ADV. In view of the substantial information regarding the activities of RICs and private funds that is already available to the Commission, the AMG believes that it is unnecessary for Forms CPO-PQR and CTA-PR to require information beyond what is specified in Schedule A of the proposed forms. In addition, for any entity required to become a CPO under any revised Rule 4.5 or Rule 4.13, information should only be provided on Form CPO-PQR and Form CTA-PR with regard to commodity pools that are over the applicable thresholds that may be adopted in any final changes to Rules 4.5 and 4.13.

* * *

[23] According to data from the Investment Company Institute, the number of mutual funds entering the industry for each of the last five years was 464 (2010), 505 (2009), 708 (2008), 730 (2007) and 665 (2006). Investment Company Institute, 2011 Investment Company Fact Book, at 15, *available at* http://www.ici.org/pdf/2011_factbook.pdf

[24] 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.

The AMG appreciates the opportunity to comment on the Rule 4.5 Proposal and stands ready to provide any additional information or assistance concerning this topic that the Commission or Commission 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

Appendix A

I. Text of Proposed Rule Amendments [additions are underlined]

Part 4 – COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

4.5 Exclusion from the definition of the term "commodity pool operator."

*** * ***

(c)

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(2) The notice of eligibility must contain representations that such person will operate the qualifying entity specified therein in a manner such that the qualifying entity:

(i) Will disclose in writing to each participant, whether existing or prospective, that the qualifying entity is operated by a person who has claimed an exclusion from the definition of the term "commodity pool operator" under the Act and, therefore, who is not subject to registration or regulation as a pool operator under the Act; *Provided*, that such disclosure is made in accordance with the requirements of any other federal or state regulatory authority to which the qualifying entity is subject. The qualifying entity may make such disclosure by including the information in any document that its other federal or state regulator requires to be furnished routinely to participants or, if no such document is furnished routinely, the information may be disclosed in any instrument establishing the entity's investment policies and objectives that the other regulator requires to be made available to the entity's participants; and

(ii) Will submit to such special calls as the Commission may make to require the qualifying entity to demonstrate compliance with the provision of this § 4.5(c);

(iii) Furthermore, if the person is claiming the exclusion ~~is~~in connection with an investment company registered under the Investment Company Act of 1940, then the notice of eligibility must also contain representations that such person will operate the qualifying entity as described in § 4.5(b)(1) in a manner such that the qualifying entity:

(a) Both (i) Will use commodity futures or commodity options contracts, or swaps solely for bona fide hedging purposes within the meaning and intent of § 1.3(z)(1) or for other risk management purposes; *Provided, however*, That in addition, with respect to positions in commodity futures, commodity option contracts, or swaps that may be held by a qualifying entity ~~only~~ which do not come within the meaning and intent of § 1.3(z)(1) or which are not used for risk management purposes, a qualifying entity may represent that the aggregate initial margin and premiums required to establish such positions will not exceed [twenty-five percent ~~of the liquidation~~(25%)] [*note: this figure is recommended as an initial starting point, with the possibility of being adjusted once market data has been analyzed and margin requirements have been established*] of the net asset value of the qualifying entity's portfolio,

after taking into account unrealized profits and unrealized losses on any such contracts it has entered into; and, *Provided further*, That in the case of an option that is in-the-money at the time of purchase, the in-the-money amount as defined in § 190.01(x) may be excluded in computing such ~~5 percent;(b) Will 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 (or otherwise seeking investment exposure to) the~~[twenty-five percent (25%)]; and, *Provided further*, That commodity futures, commodity options or swaps ~~markets;~~contracts used to obtain exposure to a broad-based, long-only index (including by referencing the component parts thereof in a proportionate manner intended to replicate the index) shall be excluded in computing such [twenty-five percent (25%)]; and (ii) Will not be, and has not been, holding itself out in marketing materials as a commodity pool that operates a managed futures strategy as the primary investment strategy of the qualifying entity; or

(b) Either (i) has exposure to commodity futures, commodity options or swaps contracts through investments in other funds that are commodity pools with a commodity pool operator that is registered or should be registered with the Commission; *Provided that* such investments do not exceed [fifty percent (50%)] of the qualifying entity's net assets and such qualifying entity otherwise meets the [twenty-five percent (25%)] test set forth in Section 4.5(c)(2)(iii)(a)(i) above; or (ii) will use commodity futures, commodity options or swaps contracts solely to obtain exposure to a broad-based, long-only index (including by referencing the component parts thereof in a proportionate manner intended to replicate the index).

(iv) For purposes of this paragraph (c):

(a) The term "broad-based long-only index" shall mean any broad-based commodity or security index that references only long positions in the component commodities or securities comprising such index;

(b) The term "managed futures strategy" shall mean employing commodity futures, commodity options and/or swaps to frequently trade in and out of positions (on at least a weekly basis), other than for risk management purposes, on both a long and short basis;

(c) The term "marketing materials" shall not be deemed to include a registered investment company's registration statement; and

(d) A registered investment company shall be entitled to include a wholly-owned subsidiary within its claim for exclusion and, upon doing so, the registered investment company and its wholly-owned subsidiary shall collectively be considered the qualifying entity hereunder; *Provided that*, (i) the registered investment company aggregates all of the wholly-owned subsidiary's commodity futures, commodity options and swaps positions with those of the registered investment company for purposes of the representations in § 4.5(c); (ii) the registered investment company discloses any fees paid or charged by the wholly-owned subsidiary in its

prospectus, and (iii) the registered investment company and wholly-owned subsidiary make all of the wholly-owned subsidiary's books and records available to the Commission for inspection upon request.

Provided further, however, That the making of such representations shall not be deemed a substitute for compliance with any criteria applicable to commodity futures or commodity options trading established by any regulator to which such person or qualifying entity is subject.