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May 30, 2012

David A. Stawick
Secretary
Commodity Futures Trading Commission
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Regulation 4.5 Harmonization

Dear Mr. Stawick:

The Committee on Investment Management Regulation of the New York City Bar Association (the "Committee") is composed of lawyers with diverse perspectives on investment management issues, including members of law firms and counsel to financial services firms, investment company complexes and investment advisers. A list of our current members is attached as Annex A.

This letter responds to the request for comment of the Commodity Futures Trading Commission (the "Commission" or the "CFTC"), *Harmonization of Compliance Obligations for*

Registered Investment Companies Required to Register as Commodity Pool Operators[1] (the "Proposing Release"), which proposes amendments to Commission regulations applicable to investment companies registered under the Investment Company Act of 1940 (the "1940 Act") whose advisers will be subject to registration as commodity pool operators due to changes to Regulation 4.5 recently adopted by the Commission. The proposed rules provide exemptive provisions that would be available to advisers of such investment companies ("RICs" or "Funds") that are required to register as CPOs. The Committee appreciates the opportunity to comment on the Commission's proposals.

As a threshold matter, we recommend that the Securities and Exchange Commission (the "SEC") and the CFTC engage in a more transparent and coordinated process to address the critical details of harmonizing the two regulatory frameworks. Harmonization rules are necessary in order to meet the shared SEC and CFTC objectives of investor protection and to avoid any unintended disruption of RIC operations that may occur in the commodities market and as a consequence of the new CFTC registration requirements, all to the detriment of the investing public. We believe that both agencies have a responsibility to assure that these objectives are achieved.

There are numerous examples of cooperation in assessing and defining areas of overlap between regulatory agencies with input from the regulated industry that have achieved the regulatory objective of each agency. The coordinated effort to propose and finalize Form PF[2] is a recent example. The adoption of Form PF demonstrates that a single disclosure regime can achieve the objectives of both the SEC and the CFTC. Developing an integrated disclosure document for RICs advised by registered CPOs that is focused on the informational needs of investors in such Funds, as well as disclosure filing and review, reporting, and recordkeeping requirements and procedures designed to effectively and efficiently provide both regulators with the information they need to conduct the appropriate oversight, should be the goal of a collaborative effort. As the Commission stated in the release adopting the amendments to Regulation 4.5:

> [I]t is not the Commission's intention to burden registered investment companies beyond what is required to provide the Commission with adequate information it finds necessary to effectively oversee the registered investment company's derivatives trading activities. Through this harmonization, the Commission intends to minimize the burden of the amendments to § 4.5.[3]

Our comments are intended to assist and encourage the Commission and the SEC to work together to achieve this laudable objective.

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[1] 77 Fed. Reg. 11345 (Feb. 24, 2012).

[2] Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF, 76 Fed. Reg. 71128 (Nov. 16, 2011).

[3] *See* Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations, 77 Fed. Reg. 11252 (Feb. 24, 2012); correction notice published at 77 Fed. Reg. 17328 (Mar. 26, 2012) (collectively, "Adopting Release") , p. 11,255.

A. The Commission Should Extend the Comment Period on the Proposed Rules and Coordinate its Efforts With the Securities and Exchange Commission.

Given the number of issues to be addressed, we urge that the Commission consider extending the comment period on the proposed rules to provide the industry with additional time to consider and suggest revisions and/or alternative approaches that might achieve the Commission's objectives while reducing the burden on RICs. While this letter focuses on certain issues raised by the proposed rules, we are aware that there are a number of other implementation issues that we expect will be the subject of comment by others. Identifying and adequately addressing these issues continues to be a challenge for many who will be affected by the proposed rules. Additional time to evaluate and make suggestions to the Commission would insure that the burdens and possible impracticalities of complying with the proposed rules are well understood before they are finalized.

Even more importantly, we urge that, in any final rule, the Commission extend the time period before compliance is required to permit investment advisers and RICs to adapt their operations to meet the new dual regulatory environment. As discussed below, the legal and operational issues that will need to be understood and adapted to dual regulatory schemes with differing requirements will be a complex and time consuming task. The Commission should consider allowing at least a year following finalization of any proposed rules as the date for compliance with those rules.

An extension of the comment period will also provide the Commission and the SEC with an opportunity to assess the information Funds already provide to the SEC and investors and carefully consider what more, if anything, it believes is necessary. We believe such an examination will demonstrate that the Commission's regulatory objectives would be met by accepting the disclosure documents that Funds already file with the SEC. Those documents contain disclosure that is clear, concise, and useful to investors; the proposed rules would impose reporting requirements on Funds and their advisers that may duplicate disclosures that are currently provided in response to SEC-mandated disclosure requirements. This could lead to investor confusion and undermine core SEC policy objectives.

In this regard, the Commission's approach may undermine a core SEC objective of requiring RICs to prepare disclosure documents that provide information that is readily comparable by investors. The SEC has pursued this objective by, for example (i) standardizing the content and placement of certain key disclosures in the summary prospectus, and (ii) strictly regulating and standardizing the types of performance data that funds are required and allowed to include in fund prospectuses and shareholder reports.[4] This has been a long-standing SEC objective. For example, in reproposing the amendments to Form N-1A that require the prospectus of an open-end RIC to contain a standardized fee table and "Example of Fund Expenses" in 1987, the SEC stated that the table was "prompted by the [SEC's] concern that the wide variety of sales loads and other fund distribution arrangements could, unless uniformly presented, confuse investors" and that the fee table "was intended to present fund investors with

[4] *See, e.g.*, Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, SEC Rel. No. 33-89998 (Jan. 13, 2009) (adopting the mutual fund "summary prospectus").

expense disclosure that could be understood easily **and would facilitate comparison of expenses among funds**."[5]

These objectives may be undercut by the Commission's requirement that a commodity pool disclose a break-even point – that is, the trading profit the pool must realize in the first year of a participant's investment in order for the participant to recoup all fees and expenses as well as its initial investment. Addressing a similar concern, the SEC requires a Fund to provide an "Example of Fund Expenses" that shows the dollar amount of expenses an investor will pay after 1, 3, 5 and 10 years of investment assuming a 5% rate of return at an assumed level of assets.

We believe that the SEC's objective of providing comparable disclosures may be undermined to the extent that certain RICs are required to provide the break-even point disclosure in addition to the Example of Fund Expenses. While the Commission has explained why it believes that its break-even expense approach addresses issues that the Example of Fund Expenses does not, we question whether it is really in the interests of investors to be faced with different disclosures solely because of the applicability of Rule 4.5.

In addition, the proposed approach could impose disclosure requirements on RICs that are inconsistent with the 1940 Act. For example, commodity pools must include disclosure to the effect that commodity interest trading may "quickly lead to large losses" and "restrictions on redemptions" may affect an investor's "ability to withdraw" from the pool. This disclosure implies that a RIC may suspend or restrict redemptions because of investment losses.

Open-end RICs, however, are generally prohibited from suspending shareholder redemptions under Section 22(e) of the 1940 Act 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 RIC.

This is not an exhaustive list of the areas where the proposed rules do not adequately harmonize the two disclosure and regulatory frameworks. Thus, where the CFTC believes that current filings with the SEC do not address specific information needs of the CFTC, it should propose focused requirements designed to obtain such information in a manner that is harmonized with SEC requirements and policy objectives.

B. The Commission Should Consider a More Tailored Approach for RICs.

Turning to the proposed rules, we urge the Commission to recognize that, just as there are RICs whose use of derivatives and swaps can be measured along a broad spectrum as to amounts and purposes, there can be a variety of degrees to which such Funds should be subjected to dual (and often conflicting) disclosure regimes imposed by the Commission and SEC. We suggest that the Commission adopt a measured information and disclosure regime.

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[5] *See* Consolidated Disclosure of Mutual Fund Expenses, SEC Rel. No. 33-6730 (August 18, 1987) (emphasis added).

The Commission should also adopt a regime that is consistent with the rationale for its decision to significantly limit the scope of the exemption that Regulation 4.5 had provided to advisers to RICs. For one, it concluded that "significant exposure to the derivatives markets … should subject an entity to the Commission's oversight,"[6] most crucially "[i]n order to ensure that the Commission can adequately oversee the commodities and derivatives markets and assess market risk associated with pooled investment vehicles."[7] As a separate rationale, the Proposing Release states "that entities that are offering services substantially identical to those of a registered CPO should be subject to substantially identical regulatory obligations." The Commission adopted a marketing restriction and provided useful guidance as to the factors that would suggest that a Fund's investment program was consistent with the policy underlying the exemption provided by Regulation 4.5. The factors include "whether the fund's primary investment objective is tied to a commodity index," and "whether the futures/options/swaps transactions engaged in by the fund will directly or indirectly be its primary source of potential gains and losses."[8]

We urge that the Commission carefully address the two concerns outlined above separately, rather than linking them together. The Commission should require that each Fund that does not qualify for exclusion from CPO registration under its Regulation 4.5 submit to the Commission such information as is necessary for it to track and oversee the markets under its jurisdiction. In this context, the Commission should require only such information as, together with the Fund's public regulatory filings with the SEC, will enable the Commission to achieve its market oversight mission.

A Fund should be subject to a disclosure regime established by the Commission for CPOs when necessary to achieve the Commission's objective of preventing regulatory arbitrage. This regime should be appropriately harmonized with the Fund's prospectus and marketing materials prepared pursuant to the 1940 Act and the Securities Act of 1933 so as to add the minimum number of new disclosure requirements to the already extensive disclosure regime mandated by the SEC.

We recommend that an investment vehicle that has as its primary investment objective seeking a speculative return from derivatives should be subject to a disclosure regime crafted by the Commission. We do not believe that this regime should apply to a RIC that utilizes derivatives for portfolio construction and diversification purposes, such as to derive non-speculative exposure to non-correlated financial assets as part – but not as the primary focus -- of a diversified portfolio. To state it another way, we do not believe that the Commission's disclosure regime should apply simply because a Fund's use of derivatives is for other than "bona fide" hedging purposes as defined by the Commission. We believe that the marketing factors identified above appropriately state circumstances that could give rise to such obligations, i.e., whether the Fund has, or promotes, a "primary investment objective" and "primary source" of investment return from Commission-regulated derivatives.

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[6] *See supra,* Adopting Release, p. 11,256.

[7] *See supra*, Adopting Release, p. 11,254.

[8] *See, supra*, Adopting Release, p. 11,259

We believe that in developing this regime, the Commission should place greater weight on the highly regulated environment applicable to RICs under the 1940 Act. For example, Section 18 of the 1940 Act and SEC regulations adopted thereunder impose significant limitations on leverage by a Fund and the risks that may be borne by such a Fund from speculative activity. In establishing disclosure requirements subject to harmonization with those of the SEC, the Commission should take into account that its regulatory concern for disclosure is reduced by limits imposed by the 1940 Act on RICs – except where the Commission finds evidence that a RIC has crossed a line, either in its investment activity or its marketing, from solely SEC to solely CFTC areas of concern for investor disclosure. The Commission should establish a marketing or investment threshold separate from its Regulation 4.5 regulatory threshold. It should only require a RIC that crosses such a threshold to provide the full panoply of disclosures appropriate for a commodity pool. Even when a RIC seeks a speculative return from derivatives, the Commission and the SEC should jointly propose an agreed-upon disclosure regime.

Typical RICs have different investment objectives from typical commodity pools, even if they use derivatives for a portion of their market exposure. Investor disclosures should focus attention on the Fund's actual investment approach, not the risks that might warrant disclosure if a secondary or tertiary activity should somehow become predominant. For example, commodity pool disclosure requirements include extensive prior performance disclosure, including, for new Funds, performance by affiliated accounts. While the Commission's regulations reflect its view of the relevance to investors of this disclosure, the SEC has taken a different view. (It should be noted that a negotiated swap transaction may extend over a much longer term than an exchange-traded option and, in its oversight of accounts that are heavily swap-based, the Commission may well consider other disclosures about such activity beyond past performance to be important to investors.)

The SEC has regarded disclosure of the performance of other accounts with skepticism. Whatever the historic reasons for this difference in approach, we believe that the Commission should defer to the SEC's approach in addressing performance presentations by RICs. One of the SEC's key policies in developing rules concerning performance presentations for RICs is to assure comparability of performance among RICs in order to reduce investor confusion. Requiring RIC disclosure documents to include additional performance disclosure information should be undertaken after appropriate consultations to assure that each agency's investor protection objectives are met. We therefore recommend that the Commission work with the SEC to develop a set of harmonization rules that place emphasis on the purposes of CFTC-mandated disclosures and defer imposition of particular requirements unless those purposes are implicated and not addressed by the SEC-imposed disclosure requirements applicable to RICs.

C. The Commission Should Be Mindful of the Costs that the Proposed Rules Will Impose on RICs.

We believe that a more targeted approach would reduce costs and better achieve the purposes of the Paperwork Reduction Act. We are concerned that the Commission's analysis of costs and benefits pursuant to Section 15(a) of the Commodity Exchange Act posited only generalized benefits involving protection of market participants. As discussed above, we believe that these concerns can be addressed by more focused disclosure requirements, and "indirect" benefits to market participants that, as we point out above, can be achieved by requiring disclosures specific to market oversight concerns. In evaluating the costs that will be imposed by

the proposed rules, the Commission merely asserted that a limited amount of time would be required to develop the necessary additional disclosures. The Commission did not take into account numerous other areas of effective compliance, such as (1) development of systems to capture and manipulate past performance data, (2) portfolio management systems to avoid investments in derivatives as alternatives, even when warranted by market efficiencies, to reduce the costs of duplicative regulation, (3) additional compliance systems underlying certifications required by the Sarbanes-Oxley Act, and (4) additional outside accounting, administrative and legal costs. We urge that the Commission collect data that would enable it to develop an accurate understanding of the costs that would be incurred by market participants as a result of the proposed rules before finalizing them.

Further, the Commission has not taken into account the potential costs to investors and RICs that could result from delays in National Futures Association ("NFA") processing of new disclosures by such Funds on forms unfamiliar to NFA and Commission staff members, and the possible need for individualized SEC staff no-action or other relief to permit changes to longstanding SEC disclosure practices. Without sufficient staff attention to these relatively uncritical disclosures – especially during periods where market events or legislative requirements may impose significant burdens on Commission and SEC staff alike – RICs may find that as a result of these delays, their registrations with the SEC or the Commission will lapse, precluding additional sales. This could adversely affect RICs and their investors since a fundamental feature that benefits RIC investors is the continuous offering and redemption of their shares. The interference with continual sales of a RIC's securities may result in the disruption of the normal operating processes of implementing their investment strategies and their ability to meet redemption requests (as opposed to drawing on credit lines or liquidating portfolio securities, increasing costs to remaining investors). In particular, the Commission proposes that its disclosure documents be filed twelve months from the date of the document; however, SEC practice allows Funds whose updates are declared effective earlier than the last possible date for effectiveness to delay a subsequent filing beyond twelve months, i.e., until the last possible date in the subsequent cycle of sixteen months after the audited financial statements date.

In addition, the Commission notes in the proposing release that there is no reliable information regarding the use of derivatives by RICs[9] making it impossible to accurately assess the costs and burdens of complying with a second regulatory scheme. There was no analysis of whether market participants would benefit from the disclosure nor of what benefits would be provided to shareholders of RICs who already receive disclosure under SEC regulations. Cost benefit analysis should take into account the need for coordination by dual registrants of the CFTC and the SEC. Each dual registrant will need to add an additional compliance matrix to its existing compliance regime, along with the new registration and reporting requirements, and consider the impact on its existing programs. There should be an evaluation of the impact that the proposed harmonization requirements will have on the existing compliance regime as part of the cost benefit analysis.

[9] *See supra,* Proposal, p. 11,349.

D. The Proposed Rules Should Not Change the Governance and Contractual Framework Applicable to RICs.

There are significant differences in the legal framework governing the operation of commodity pools and RICs. Commodity pools do not contract with their commodity pool operators (“CPOs”) to serve as such and the CPO’s duties to the pool are set forth in the pool’s organizational documents. The CPO has fiduciary duties to the pool by virtue of the functions it performs for the pool (as general partner of a partnership or as manager of a commodity pool ETF). RICs are managed by investment advisers pursuant to a contract and the adviser’s fiduciary duties to the RIC are derived from the 1940 Act (and state law), not only the RIC’s organizational documents.[10] The impact the rules have on RICs and their investment advisers and the costs of reconciling these disparate governance schemes should be considered before the rules are finalized. The costs to the shareholders of RICs of potentially seeking shareholder approval to reconcile these matters will be burdensome and costly.

The Commission has proposed “to add an alternative criterion under [CFTC] § 4.12(c) that will permit [RICs] to claim the disclosure, reporting and recordkeeping relief currently available to ETFs.”[11] That relief permits ETFs to maintain books and records at locations other than the CPO’s main office if, among other things, the CPO files with the NFA a statement from each person who will be keeping required records in lieu of the CPO subject to certain conditions with respect to those records. The exemption appears to require that the recordkeeper agree to make such required books and records available to pool participants in accordance with CFTC § 4.23. The 1940 Act and the rules thereunder do not require a RIC to make its books and records available to its shareholders. Shareholder access to a RIC’s books and records is governed by state law and the RIC’s organizational documents. We suggest the Commission clarify that the record access is limited to those records relating to those required by the CFTC rules and related to derivatives subject to Commission jurisdiction.

E. The Proposed Disclosure Regime Should Avoid Duplicative or Additional Disclosures that May Confuse Investors.

As discussed above, we believe that the disclosure regime that will be imposed on RICs by the proposed rules will be confusing to investors by virtue of subjecting RICs to two disclosure regimes that require different disclosures addressing the same issues. The harmonization rules will likely result in RIC disclosure documents including disclosure that may not be relevant and, for most Funds not pursuing a “managed futures strategy”, not addressing the principal investment strategy that is material to the typical RIC shareholder. The performance information relating to other accounts managed by the RIC’s investment adviser and additional expense information required by Commission rules is unlikely to provide prospective or existing shareholders of a RIC with meaningful information on which to make an investment decision.

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[10] Some funds are managed under a separate administration agreement under which the manager delegated its existing duties to administer the RIC to another entity. This raises another level of complexity.

[11] *See supra,* Proposal, p. 11, 346.

We respectfully request that the Commission reconsider the need for the past performance, break even and expense disclosure requirements as proposed.[12] The Commission should consider whether a requirement for a description of the Fund and its adviser's experience and capabilities would be sufficient for Funds that are not pursuing a "managed futures strategy". Most importantly, as discussed above, we recommend that the Commission and the SEC work together to develop a single set of disclosures that will address both agencies' investor protection issues.

We also suggest that the Commission clarify the proposed rules as to placement of any required disclosures so as not to deprive RIC shareholders of the benefits they derive from the use of the summary prospectus. In particular, we request the Commission to make it clear that delivery of a summary prospectus to RIC shareholders is sufficient to satisfy the disclosure delivery requirements of Rule 4.21, provided that other CFTC-mandated disclosures are available on the RIC's website.

F. Other Aspects of Harmonization.

1. CPO Status.

Under the exemptive relief granted to ETFs, independent trustees of commodity pool ETFs do not have to register as CPOs, but they are required to file notices of exemption from registration as a CPO with the NFA. The harmonization proposal is silent on whether independent trustees of RICs would be required to file such notices. We suggest that the final rules make clear that, with respect to RICs, no such filing is necessary.

2. Transition and Grace Periods.

Today, most RICs have the authority to enter into futures contracts, commodity options and swaps within the limits established under the 1940 Act and its rules. These Funds rely upon current Regulation 4.5 and therefore are not managed by a registered CPO or advised by a registered CTA, nor are they subject to the CFTC regulatory regime applicable to commodity pools. Funds enter into commodities transactions for a variety of purposes, such as hedging, providing efficient portfolio management, or for temporary "defensive" purposes designed to generate income on what otherwise would be idle cash held when attractive investment opportunities are not available. Commodities holdings vary by Fund and a Fund will, consistent with its investment objective, vary the percentage of its assets invested in commodities.

Compliance with amended Regulation 4.5 may have the unintended consequence of forcing existing Funds currently holding commodities in excess of the "de minimis" threshold to reduce such instruments immediately or within 60 days following the effective date of the harmonization proposal[13] so as not to run afoul of the commodity pool regime requirements. Given the number of existing RICs that hold commodities and the dollar amount of their

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[12] *See supra*, Proposal, p 11,367.

[13] For the purpose of registration only, Fund compliance with amended Rule 4.5 must occur on the later of either December 31, 2012 or within 60 days following the adoption of the final definition of the term "swap." However, Fund compliance with the balance of amended Rule 4.5 and the other applicable Part 4 rules must occur no later than 60 days following the effectiveness of the harmonization proposal.

commodities holdings, the very short time period they have in which to effect such sale, termination or unwinding activities, could result in unforeseen and/or adverse effects on the commodities markets.

RICs may be put in a position that they must abandon their commodities holdings because it is doubtful that they can fully comply with all of the requirements of the commodity pool regime (apart from CPO registration) within 60 days following the effective date of the harmonization proposal. As a practical matter, revising existing Fund practices to meet all CFTC recordkeeping, reporting, disclosure and compliance requirements may be difficult to accomplish in such a brief time period. For example, crafting and adopting a new commodities compliance manual that will appropriately mesh with a Fund's existing securities compliance manual can be expected to take longer than two months, as will setting up new records and investor reporting systems. Devising an amended Fund registration statement deemed satisfactory by both regulators (even assuming that a workable harmonization of CFTC and SEC rules has occurred) will definitely exceed two months, in part because the staffs of the NFA and the SEC will likely be overwhelmed by the number of filings that would have to be made within a short period of time. Indeed, finalizing an acceptable registration statement will take considerably longer, if, for example, the grant of individual SEC no-action relief is required for a Fund to include CFTC-mandated past performance disclosures.[14]

An existing Fund that currently holds no commodities, or holds commodities below the "de minimis" threshold amount, will also face the issues discussed above, only in reverse. Operating under current Regulation 4.5, such a Fund is free to transact in commodities within the 1940 Act limits solely on the basis of its investment objectives and strategies, without regard to other regulatory requirements or timing concerns. However, in order to comply with new Regulation 4.5, such Funds will be forced to revise many of their existing operations and practices to meet CFTC recordkeeping, reporting, disclosure and compliance requirements prior to engaging in commodities transactions in excess of the "de minimis" threshold amount. An existing Fund, therefore, either will be precluded entirely from entering into additional commodities transactions, no matter how appropriate, or will be forced to wait months following the decision to enter into additional commodities transactions before fully implementing its investment objectives and strategies. Such a Fund may also be required to amend its registration statement to make CFTC-mandated disclosures, at significant out of-pocket, competitive and opportunity costs to its investors.

We respectfully suggest that a grace period of at least twelve months (rather than the proposed sixty days) would address the concerns discussed above without doing violence to the Commission's goal of implementing amended Regulation 4.5. The grace period would enable any existing Fund to fully comply with all required elements of the CFTC's requirements in a thoughtful, planned manner and to avoid precipitous investment decisions made solely on the basis of arbitrary time constraints. Therefore, we recommend that any existing Fund desiring to enter into commodities transactions in excess of the "de minimis" threshold be able to rely upon a twelve month grace period in which to comply with all applicable provisions of amended

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[14] See *supra* , Proposal , p. 11,347, footnote 26.

Regulation 4.5 and other CFTC regulations. (We would be happy to assist the Commission in developing such thresholds.)

The grace period would commence on the day that a Fund files with the CTFC a written notification of intent to transact in commodities above the "de minimis" threshold or the date of effectiveness of the adoption of the harmonization regulations, if at that time the Fund exceeds applicable Rule 4.5 limits. Thereafter, the Fund could execute all commodities transactions in a manner consistent with its authority, investment decisions and the 1940 Act limitations while simultaneously undertaking all revisions and additions to recordkeeping, reporting, disclosure and compliance systems and procedures required by CFTC regulations. We believe that the grace period would permit all of the CFTC's stated goals to be accomplished without causing any of the serious negative effects discussed above, and will allow Funds to transition to compliance with applicable Commission regulations. We therefore urge the Commission to adopt a twelve-month grace period for existing Funds.

Advisers to RICs that were previously able to rely on Regulation 4.5 will need to register as CPOs (and perhaps as CTAs) as a result of losing the exemption. Some advisers may elect to register even if their activities on behalf of RICs might otherwise fall within the revised Regulation 4.5 exemption, because of concern that investing activities at any given point of time may result in the adviser being outside the parameters of the exemption. Registration with the CFTC through the NFA and NFA membership require additional time, completing of appropriate forms and will require certain advisory personnel to take examinations. Registrations must be updated annually along with membership, and fees paid. New CFTC and NFA requirements and processes will need to be built into the existing compliance programs required for investment advisers and RICs under SEC rules. Thus, such registration will impose additional costs on these investment advisers, which are already subject to regulation under the Investment Advisers Act of 1940, in addition to the provisions of the 1940 Act that tightly regulate the relationships that such investment advisers have with the Funds that they manage.

We therefore suggest that the Commission reconsider whether registered investment advisers that invest in the futures and swaps markets need to simultaneously register with the CFTC through the NFA. As part of this evaluation, the CFTC and the SEC should work together to harmonize the disclosure requirements applicable to registered investment advisers. For example, Form ADV, the Advisers Act registration form, could be adapted for advisers engaging in futures markets activities to require reporting and disclosure of their activities to the CFTC and NFA. Similarly Rule 13f-1 and the recently adopted Rule 13h-1 under the Securities Exchange Act of 1934 could be expanded to require reporting to both the SEC and the CFTC of futures trading that is deemed to be important to both agencies and to the financial markets.

The Committee appreciates the opportunity to comment on the proposed rules. If we can be of any further assistance in this regard, please do not hesitate to contact Kenneth J. Berman at (202) 383-8050 or kjberman@debevoise.com.

Very truly yours,

/s/Kenneth J. Berman

Kenneth J. Berman
Chair,
Committee on Investment Management Regulation

cc. The Honorable Gary Gensler, Chairman, CFTC
The Honorable Jill E. Sommers, Commissioner, CFTC
The Honorable Bart Chilton, Commissioner, CFTC
The Honorable Scott D. O'Malia, Commissioner, CFTC
The Honorable Mark P. Wetjen, Commissioner, CFTC

The Honorable Mary L. Schapiro, Chairman, SEC
The Honorable Elisse B. Walter, Commissioner, SEC
The Honorable Luis A. Aguilar, Commissioner, SEC
The Honorable Troy A. Paredes, Commissioner, SEC
The Honorable Daniel M. Gallagher, Commissioner, SEC

Annex A
The Committee on Investment Management Regulation

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