

## COMMENT LETTER

April 11, 2014

# ICI Files Comment Letter on NFA Capital and Customer Protection Proposal (pdf)

April 11, 2014 VIA ELECTRONIC MAIL Ms. Mary McHenry Associate Director Compliance National Futures Association 300 S. Riverside Plaza, #1800 Chicago, Illinois 60606-6615 Re: Notice to Members I-14-03: CPO/CTA Capital Requirement and Customer Protection Measures Dear Ms. McHenry: The Investment Company Institute ("ICI")<sup>1</sup> is pleased to have the opportunity to respond to the National Futures Association's ("NFA") notice to members requesting comment regarding a commodity pool operator ("CPO")/commodity trading advisor ("CTA") capital requirement and customer protection measures ("NTM").<sup>2</sup> The NTM requests input on a number of specific questions regarding a possible capital requirement for CPOs and CTAs, and proposes several potential customer protection measures for CPOs, to address risks NFA associates with customer assets held by CPOs. While we agree that it is important to protect CPO and CTA customer assets, we believe strongly that the comprehensive regulation to which CPOs and CTAs of registered investment companies ("registered funds") are subject under the Investment Company Act of 1940 ("Investment Company Act") and the Investment Advisers Act of 1940 ("Investment Advisers Act") makes it unnecessary to impose a capital requirement on such CPOs and CTAs. For similar reasons, we believe the customer protection measures NFA proposes are unnecessary for, or in some cases due to the substi-

<sup>1</sup> The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$16.8 trillion and serve over 90 million shareholders.

<sup>2</sup> See NFA Notice to Members I-14-03, available at <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=4377>.

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tuted compliance relief granted by the Commodity Futures Trading Commission ("CFTC"), inapplicable to, registered fund CPOs and CTAs. I. CPO/CTA Capital Requirement In the NTM, NFA explains that it is looking at ways to strengthen the regulatory requirements for CPOs to provide greater protection for customer assets. Many different entities serve as CPOs and CTAs, including advisers to registered funds. As discussed in detail below, registered fund CPOs and CTAs are subject to stringent regulatory requirements under the Investment Company Act and the Investment Advisers Act that distinguish them from other CPOs and CTAs, and make a capital requirement unnecessary.<sup>3</sup> In particular, the registered fund adviser, which also is registered with the SEC under the Investment Advisers Act,<sup>4</sup> may not maintain custody of the registered fund's portfolio assets. Instead, under the Investment Company Act, fund portfolio assets must be held in a custody arrangement meeting the requirements of Section 17(f) of the

Investment Company Act and related rules. Nearly all registered funds use a U.S. bank custodian for domestic securities, although the Investment Company Act permits other limited custodial arrangements, including the use of futures commission merchants (“FCMs”) for swaps and futures, subject to strict conditions.<sup>5</sup> Additional Investment Company Act requirements serve, among other purposes, to protect the integrity of fund assets. In particular, the Investment Company Act contains strict prohibitions against transactions between a fund and its affiliated persons, including its adviser, which would generally 3 While our letter focuses on CPOs and CTAs to registered funds, we note that some of our registered investment adviser members that serve as CPOs and CTAs to registered funds also serve as CPOs and CTAs to private funds and separate accounts. They too are subject to many protections under the federal securities laws which make the NFA’s proposed requirements unnecessary. We therefore support the letter submitted by the Investment Adviser Association. See Letter from Karen L. Barr, General Counsel, Investment Adviser Association, to Ms. Mary McHenry, Associate Director, Compliance, National Futures Association, dated April 11, 2014 (“IAA Letter”). 4 Under the Investment Advisers Act, the adviser is subject to a variety of requirements, in addition to those to which the registered fund is subject under the Investment Company Act. As discussed below, and in further detail in the IAA Letter, those requirements include, among others, the obligation to establish and maintain a compliance program, a separate custody rule, and disclosure obligations. See id. 5 In addition to Section 17, the Investment Company Act contains six separate custody rules for the different types of possible custody arrangements: Rule 17f-1 (broker-dealer custody); Rule 17f-2 (self custody subject to strict conditions); Rule 17f-4 (securities depositories); Rule 17f-5 (foreign banks); Rule 17f-6 (futures commission merchants); and Rule 17f-7 (foreign securities depositories). Foreign securities are required to be held in the custody of a foreign bank or securities depository. The SEC staff also has issued a series of no-action letters granting limited no-action relief, subject to strict conditions, permitting registered funds and their custodians to maintain cash and/or certain securities in the custody of derivatives clearing organizations or FCMs in connection with meeting margin requirements for certain derivative transactions. See, e.g., LCH.Clearnet Limited and LCH.Clearnet LLC, SEC No-Action Letter (Dec. 26, 2013), available at <http://www.sec.gov/divisions/investment/noaction/2013/lch-clearnet-122613.htm>. Ms. Mary McHenry April 11, 2014 Page 3 prohibit purchases and sales of securities and other property between a fund and its adviser,<sup>6</sup> and the adviser borrowing money from, or loaning money to, the registered fund.<sup>7</sup> The Investment Company Act also prohibits joint transactions, in which the registered fund and the affiliate are acting together in any transaction that is “joint” in nature.<sup>8</sup> As you are aware, the SEC and its staff have, under only very limited conditions, provided exemptive or no-action relief from these provisions.<sup>9</sup> Requirements with respect to compliance programs provide a further layer of protection against misappropriation of client assets. Specifically, registered funds and their advisers are subject to requirements under the Investment Company Act and the Investment Advisers Act to have written compliance programs administered by chief compliance officers (“CCOs”).<sup>10</sup> Fund compliance programs must be approved by the fund board, including a majority of the independent directors; be reasonably designed to prevent, detect, and correct violations of the federal securities laws; and be reviewed and tested at least annually for their adequacy and effectiveness. The fund CCO is responsible for administering the fund’s compliance program. At least annually, the CCO must meet separately with, and provide a written report directly to, the fund’s independent directors. That report provides an overview of the operation of the compliance program at the fund, adviser, and principal service providers, and details any material compliance matter that occurred since the last report. The fund board oversees the compliance program and is vested with the authority to take corrective action, up to and including discharging the

adviser or other service providers. NFA also explains that it is considering imposing a capital requirement on CPO/CTA members to ensure that CPOs and CTAs have sufficient assets to operate as a going concern.<sup>11</sup> These concerns are not justified with respect to registered fund CPOs and CTAs. A registered fund's investment adviser, acting as agent, manages the fund's portfolio pursuant to a written contract with the fund that is subject to oversight and annual approval by the fund's board of directors, including a majority of independent directors.<sup>12</sup> The adviser manages the fund in accord with the fund's investment objectives.

6 See Section 17(a)(1) and (2) of the Investment Company Act. 7 See Section 17(a)(3) and (4) of the Investment Company Act. 8 See Section 17(d) of the Investment Company Act. 9 See, e.g., The Chase Manhattan Bank, SEC No-Action Letter (July 24, 2001), available at <http://www.sec.gov/divisions/investment/noaction/chase072401.htm>; See Prohibition of Loans by Commodity Pools to CPOs and Related Entities, NFA Interpretive Notice 9062, available at <http://www.nfa.futures.org/nfamanual/NFAManual.aspx?RuleID=9062&Section=9>. 10 See Rule 38a-1 under the Investment Company Act and Rule 206(4)-7 under the Investment Advisers Act. 11 Presumably, NFA's concern is that CPOs and CTAs pose a higher risk of improperly using pool assets if they have insufficient assets to operate as a going concern. 12 See Section 15(c) of the Investment Company Act. During the annual review of the advisory agreement, the directors consider, among other things: "(1) [t]he nature, extent, and quality of the services to be provided by the investment adviser; Ms. Mary McHenry April 11, 2014 Page 4 and policies as described in its registration statement. Registered fund advisory fees compensate the adviser for managing the fund as a fiduciary and agent and for providing ongoing services that the fund needs to operate.<sup>13</sup> Boards of registered funds, the majority of which consist of independent directors or trustees, regularly monitor the performance and activities of the fund's adviser. If the fund's directors determine, in their business judgment, that the adviser does not have the financial capacity to continue to manage the fund, they may terminate the adviser's advisory contract and, with shareholder approval, contract with another, financially viable, adviser to manage the fund. Under these circumstances, due to the strict custodial and other protections under the Investment Company Act and the Investment Advisers Act, there would be no financial risk posed to the registered fund, the portfolio assets of which would remain protected at an eligible custodian.<sup>14</sup> For the reasons discussed above, we believe strongly that it is unnecessary for NFA to impose a minimum capital requirement on registered fund CPOs and CTAs. We believe the protections of the Investment Company Act and the Investment Advisers Act fully protect the assets of registered funds in the event that a registered fund CPO or CTA is no longer able to operate as a going concern. We therefore do not believe it is necessary to impose minimum capital requirements or other restrictions on registered fund CPOs and CTAs to ensure they have sufficient funds to operate as a going concern. II. Other Customer Protection Measures NFA explains in the NTM that, over the last 18 months, it has focused significant regulatory efforts on implementing protections over customer funds held at FCMs. NFA states that there are risks associated with customer assets held by CPOs, and references recent disciplinary actions taken against CPOs that have involved the improper use of pool assets, explaining that the proposed customer protection measures are intended to address these concerns. We believe that these proposed customer protection measures are unnecessary for registered fund CPOs. We reiterate that registered fund CPOs cannot and do not hold customer assets. As (2) the investment performance of the fund and the investment adviser; (3) the costs of the services to be provided and profits to be realized by the investment adviser and its affiliates . . . ; (4) the extent to which economies of scale would be realized as the fund grows; and (5) whether fee levels reflect these economies of scale for the benefit of fund investors." Disclosure Regarding Approval

of Investment Advisory Contracts by Directors of Investment Companies, 69 Fed. Reg. 39,798, 39,801 (June 30, 2004). The SEC requires a fund to discuss in its registration statement the board's consideration of these five factors, which mirror those articulated in *Gartenberg v. Merrill Lynch Asset Management, Inc.*, 694 F.2d 923 (2d Cir. 1982).<sup>13</sup> As a fiduciary, investment advisers must, among other things, act in the best interest of their clients and place the interests of their clients before their own. *Securities and Exchange Commission v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 84 S. Ct. 275 (1963) (holding that Section 206 of the Investment Advisers Act imposes a fiduciary duty on investment advisers by operation of law).<sup>14</sup> Further, it is important to note that an adviser does not take on the fund's investment risks. The adviser does not own fund assets, and it may not use fund assets to benefit itself or any other client. Investment gains and losses from a fund are solely attributable to that fund, and do not flow through to the adviser. Ms. Mary McHenry April 11, 2014 Page 5 discussed above, the requirements of the Investment Company Act ensure that registered fund assets are maintained only with eligible custodians, subject to strict conditions intended to protect fund shareholders. Furthermore, based on a review of NFA disciplinary actions against CPOs over the past three years involving the improper use of pool assets, it appears that none of them involved a registered fund CPO, and that these actions generally involved outright fraud. NFA has not raised any concerns about registered fund CPOs with respect to misuse of fund assets. We note that the costs of imposing any additional requirements on fund CPOs would be indirectly borne by fund shareholders. We discuss below in further detail NFA's specific proposals and our responses.

A. Independent Third Party Authorization for Disbursement of Pool Funds NFA states that an NFA CPO/CTA Board member has recommended that NFA adopt a rule that would require an independent third party to review and authorize a CPO's disbursement of any pool assets. We believe it is unnecessary for NFA to require independent third-party authorization of registered fund CPO disbursement of pool assets. Registered funds and their shareholders are well protected against the risk of unauthorized disbursement of fund assets by custody and fidelity bond requirements under the Investment Company Act, as well as the control practices employed by registered funds and their custodians. As discussed above, under the Investment Company Act, portfolio assets of a registered fund must be maintained with eligible custodians, subject to strict conditions intended to protect fund shareholders. The contract under which the custodian provides services to the fund limits the purposes for which money may be disbursed by the custodian. For example, the contract typically will provide for payment of fund assets against receipt of portfolio securities purchased (i.e., delivery versus payment), payment of fund expenses for services received, and payment of redemption proceeds for shares redeemed. Payment of fund assets for these purposes must be approved by officers or employees of the adviser specifically named in the custodial contract to approve disbursement of money. Any officer or employee that has the authority to direct the disbursement of the fund's assets is required, under the Investment Company Act, to be bonded by a fidelity insurance company against larceny and embezzlement.<sup>15</sup> Where disbursement of registered fund assets exceeds pre-established dollar thresholds, registered fund custody contracts typically require approval by two persons.<sup>16</sup> In addition, registered funds, typically on a daily or weekly basis, reconcile fund assets as recorded on the fund's accounting system with the custodian bank's records of assets it maintains on behalf of the fund. This reconciliation with the bank custodian's records is an important control mechanism that ensures that the fund's accounting records are accurate, that fund assets as reported on the accounting

<sup>15</sup> See Section 17(g) of the Investment Company Act and Rule 17g-1 thereunder. Such fidelity bonds must be approved annually by the fund's board of directors, including a majority of the independent directors. *Id.*

<sup>16</sup> The registered fund's custody contract must be publicly filed as an exhibit to the fund's SEC registration

statement. See, e.g., Item 28 of SEC Form N-1A. Ms. Mary McHenry April 11, 2014 Page 6

system exist and are maintained at the custodian, and that they are not subject to unauthorized use or misappropriation. Moreover, it would be impractical for registered funds to implement a third-party approval system. For example, because in the ordinary course of a registered fund's business there is a high volume of disbursements made to multiple payees on a recurring basis, some of which are time sensitive, it would be highly impractical and costly to require an independent third party to approve each disbursement of fund assets. In fact, it would require that the independent third party be readily available throughout the business day to review and authorize each disbursement made to the fund's transfer agent to finance redemption proceeds, which are generally processed within an abbreviated timeframe; recurring disbursements to settle portfolio trades and move required collateral; and periodic disbursements to pay fund expenses involving multiple payees (e.g., each third-party distributor that sells the fund's shares). Furthermore, the costs of such a system would outweigh any benefit, given the comprehensive protections applicable to registered funds and their shareholders under the Investment Company Act and rules, and registered fund shareholders ultimately would bear such unnecessary costs.

B. NAV Valuation and Monthly or Quarterly Reporting

NFA requests input on several questions regarding how CPOs prepare pool account statements and calculate pool net asset value ("NAV"). As a preliminary matter, we note that the CFTC has granted substituted compliance relief to registered fund CPOs with respect to, among other things, account statements required under CFTC Regulation 4.22(a) and (b).<sup>17</sup> Registered fund CPOs, therefore, are not subject to these provisions, and additional customer protections related to them likewise would be inapplicable. Nonetheless, to assist in enhancing NFA's understanding of registered fund CPOs' operations, we provide the following information regarding registered fund regulation, and processes, in this area.

NAV Valuation

The Investment Company Act requires registered funds to calculate their NAVs by using the market value for securities for which market quotations are readily available, and assigning a fair value to all other securities, as determined in good faith by the fund's board of directors.<sup>18</sup> The Investment Company Act generally requires open-end registered funds, which generally must offer and redeem their shares on a daily basis, to compute their NAVs at least once daily, Monday through Friday, at a

<sup>17</sup> See CFTC Regulation 4.12(c)(3)(ii).

Under this relief, registered fund CPOs are exempt from the reporting and distribution requirements of Regulation 4.22(a) and (b) if they cause the fund's NAV to be available to fund shareholders, and cause the fund to clearly disclose that the fund's NAV will be readily accessible on a website maintained by the registered fund CPO or its designee, or otherwise made available to fund shareholders and the means through which the information will be made available, and the Internet address of the website, if applicable.

<sup>18</sup> See Section 2(a)(42) of the Investment Company Act.

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specific time or times as determined by their boards, according to pricing methodologies established and overseen by the board.<sup>19</sup> Because accurate pricing is a critical component of an open-end registered fund's compliance program, this is a significant area of focus in SEC on-site examinations of registered funds. All transactions in open-end registered funds are conducted on a "forward priced" basis, at the next computed NAV after receipt of the purchase or redemption order. The open-end registered fund's NAV typically is made publicly available on the fund's or intermediary's website, as well as through third-party vendors.

Financial Reporting

Registered funds are required, under the Investment Company Act, to deliver annual reports to shareholders containing financial statements that are prepared in accordance with Generally Accepted Accounting Principles ("GAAP") and audited by an independent public accountant.<sup>20</sup> That independent public accountant must be registered with the Public Company Accounting Oversight Board ("PCAOB"). Among other things, the audit provides assurance that the fund's assets exist, that the fund

has clear title to the assets, that the assets are valued consistent with GAAP, and that the NAV per share is properly stated. The SEC also requires the delivery of semi-annual reports to shareholders containing unaudited financial statements.<sup>21</sup> These annual and semi-annual reports, which include a schedule of the fund's investments, financial statements, and other information, must be transmitted to shareholders and filed with the SEC not more than 60 days after period end.<sup>22</sup> The Investment Company Act also contains requirements for funds to establish internal control over financial reporting and for the independent accountant to report on the fund's internal controls. Internal control over financial reporting ("ICFR") is the process designed by management and effected by the fund's board, management, and other personnel to provide reasonable assurance regarding the reliability of financial reporting and preparation of financial statements in accordance with GAAP.<sup>23</sup> ICFR includes those policies and procedures that: (1) pertain to the maintenance of records<sup>19</sup> See id.; Rule 22c-1 under the Investment Company Act. Valuation policies generally serve to: 1) define the roles of various parties involved in the valuation process; 2) describe the ways that the fund will monitor for situations that might require fair valuation; 3) describe valuation methodologies that a fund's board has approved for particular types of securities; and 4) describe the methods by which the fund will review and test fair valuations to evaluate whether its valuation procedures are working as intended. <sup>20</sup> See Rule 30e-1 under the Investment Company Act, Item 27(b) of SEC Form N-1A and Item 24(4) of SEC Form N-2. <sup>21</sup> See Rule 30e-1 under the Investment Company Act, Item 27(c) of Form N-1A and Item 24(5) of Form N-2. <sup>22</sup> See Rules 30e-1 and 30b2-1 under the Investment Company Act. <sup>23</sup> See Rule 30a-3 under the Investment Company Act.

Ms. Mary McHenry April 11, 2014 Page 8 that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the registered fund; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with GAAP, and that receipts and expenditures of the registered fund are being made only in accordance with authorization of management and directors of the fund; and (3) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of the fund's assets that could have a material effect on the financial statements. Registered funds must file annually with the SEC a report prepared by the registered fund's independent public accountant on the fund's system of internal accounting controls. The accountant's report is based on the review, study, and evaluation of the registered fund's accounting system, internal accounting controls, and procedures for safeguarding securities made during the audit of the financial statements.<sup>24</sup> The fund's principal executive officer ("PEO") and principal financial officer ("PFO") must certify the accuracy of the fund's financial statements and the system of ICFR quarterly as required the Sarbanes-Oxley Act of 2002 and SEC rules. In particular, the PEO and PFO must certify the accuracy and completeness of the financial statements and other information included in the semi-annual and annual reports provided to shareholders that are filed publicly with the SEC,<sup>25</sup> and the schedule of investments and other information filed publicly with the SEC after the conclusion of the fund's first and third fiscal quarters.<sup>26</sup> As part of these quarterly filings the PEO and PFO certify the system of ICFR and the fund's disclosure controls and procedures. <sup>27</sup> C. Performance Results NFA requests input on several questions regarding pool performance results. The CFTC has provided substituted compliance relief to registered fund CPOs with respect to performance reporting under CFTC Regulations 4.24 and 4.25.<sup>28</sup> Registered fund CPOs, therefore, are not subject to these <sup>24</sup> See Item 77B of SEC Form N-SAR. Form N-SAR, including the independent accountant's report on internal control, is publicly available. <sup>25</sup> These shareholder reports, along with certain other required information, are filed publicly with the SEC on SEC Form N-CSR. <sup>26</sup> These schedules of investments are filed publicly on SEC Form N-Q. <sup>27</sup> See Rule 30a-2 under the Investment Company Act, SEC Form N-CSR, and

SEC Form N-Q. Disclosure controls and procedures are controls and other procedures designed to ensure that information required to be disclosed by the fund on Form N-CSR and Form N-Q is recorded, processed, summarized, and reported within the time periods specified in the SEC's rules and forms. 28 See CFTC Regulation 4.12(c)(3)(i). Under this relief, registered fund CPOs are exempt from the requirements of CFTC Regulations 4.24 and 4.25 (as well as 4.21 and 4.26), provided that: (1) a registered CPO of a fund with less than a three- year operating history discloses the performance of all accounts and pools that are managed by the CPO and that have investment objectives, policies, and strategies substantially similar to those of the offered pool; and (2) the disclosure provided with respect to the offered fund complies with the provisions of the Investment Company Act, the Securities Act of 1933. Ms. Mary McHenry April 11, 2014 Page 9 provisions, and additional customer protections related to them likewise would be inapplicable. Nonetheless, to assist in enhancing NFA's understanding of registered fund CPOs' operations, we provide the following information regarding registered fund regulation, and processes, in this area. Registered funds are subject to detailed requirements under the federal securities laws regarding their calculation and presentation of performance information. For example, registered funds must calculate their average annual total return pursuant to an SEC-prescribed formula that ensures comparability. That formula compares the ending redeemable value to an initial \$1,000 investment in the fund over specified periods (i.e., 1, 5, and 10 years) and assumes reinvestment of all distributions.<sup>29</sup> In addition, certain registered fund performance information is audited, or is reviewed by the fund's independent public accountant. For example, total return information included in the registered fund's financial highlights table in the fund prospectus and in the fund's annual shareholder report (i.e., the individual annual total returns for each of the five most recent fiscal years) is audited by the independent accountant. While average annual total return information for the 1, 5, and 10 year periods included in Management's Discussion of Fund Performance in the annual shareholder report is not audited (because it is not a part of the financial statements), it is reviewed by independent auditor to confirm its accuracy.<sup>30</sup> Furthermore, as NFA is aware, registered fund promotional materials are subject to requirements for preparation, review and approval under the rules of FINRA.<sup>31</sup>

**D. Verification of Pool Assets** NFA explains that it currently requires depositories with accounts holding customer segregated funds for an FCM to report the balances in those accounts to NFA on a daily basis. NFA compares the reported information to the customer segregated funds balances reported by the FCM and reconciles any material discrepancies. The purpose of this reporting and reconciliation system presumably is to ("Securities Act"), the Securities Exchange Act of 1934, the regulations promulgated thereunder, and any guidance issued by the SEC or any division thereof. 29 See Item 26 of SEC Form N-1A. Registered funds are also subject to many other SEC rules on advertising and performance including, among others, Rule 482 under the Securities Act (advertisements subject to strict content requirements that are treated as prospectuses for liability purposes of Section 5 of the Securities Act); Rule 135a under the Securities Act (generic advertising); Rule 156 under the Securities Act (advertising standards); Rule 34b-1 under the Investment Company Act (rules applicable to supplemental sales materials). 30 See PCAOB Auditing Standards, Other Information in Documents Containing Audited Financial Statements, AU Section 550. 31 See Letters from Karrie McMillan, General Counsel, to Mr. Daniel A. Driscoll, Executive Vice President, Chief Operating Officer, and Mr. Thomas W. Sexton, III, Senior Vice President, General Counsel and Secretary, dated December 28, 2012, and April 29, 2013 (requesting that NFA confirm that substituted compliance by registered broker-dealers with the FINRA oversight regime for fund promotional materials would satisfy NFA's regulatory requirements). Ms. Mary McHenry April 11, 2014 Page 10 ensure that assets reported by an FCM exist and are accurately valued. NFA explains that it is considering a

similar system for pool assets. As discussed above, registered fund portfolio assets are maintained by qualified custodians subject to the protections of the Investment Company Act. Those assets can be disbursed from the custodian only for specified purposes as authorized by specified officers and employees of the adviser who are insured by a fidelity bond. Also as discussed above, registered funds are subject to strict requirements under the Investment Company Act regarding how they value their assets, and the registered fund's assets are subject to daily or weekly reconciliation, and are verified on an annual basis by an independent public account as part of an audit of the registered fund's financial statements. Based on the protections applicable to registered funds under the Investment Company Act and rules, and the periodic reconciliation to custodian bank records, we believe it is unnecessary for NFA to require a verification system for registered fund assets, as it currently requires for FCMs. We note that NFA has not raised any concerns about registered fund CPOs with respect to verification of pool assets.

E. Inactive Members NFA explains that it has several hundred inactive (i.e., those that do not engage in commodity interest trading) CPO and CTA members. It is evaluating whether it is appropriate for inactive CPOs and CTAs to be NFA members. We believe strongly that NFA should permit inactive firms or those firms that are temporarily able to rely on an exclusion or exemption from CPO or CTA registration to remain NFA members. For example, due to the recent amendments to Regulation 4.5 and the rescission of Regulation 4.13(a)(4), many firms have had to register as CPOs and, similarly, others have had to register as CTAs.<sup>32</sup> Commodities trading in the pools managed by these CPOs and CTAs may fluctuate, at times making them eligible for an exemption or exclusion from CPO or CTA registration, while at other times requiring them to be registered. It would not be prudent or efficient, however, for these CPOs and CTAs to withdraw their registrations temporarily in favor of an exemption or exclusion, if they thereafter expected to be subject to registration, especially given that the Commodity Exchange Act does not provide a grace period for a CPO or CTA to register once it is no longer to rely on an exclusion or exemption. Nor would such a policy be efficient for NFA, which would be required to devote resources to registering and withdrawing the same firm multiple times for no discernible benefit. \* \* \* \*<sup>32</sup> We note that the delay in the CFTC issuing fund of funds guidance has created further uncertainty in this regard. See CFTC Letter No. 12-38 (Nov. 29, 2012). Ms. Mary McHenry April 11, 2014 Page 11 We appreciate the opportunity to comment on the NTM. If you have questions or require further information, please contact me at 202/218-3563, Sarah A. Bessin at 202/326-5835, or Rachel H. Graham at 202/326-5819. Sincerely, /s/ Dorothy M. Donohue Dorothy M. Donohue Acting General Counsel cc: Daniel A. Driscoll, Executive Vice President and Chief Operating Officer Thomas W. Sexton, III, Senior Vice President, General Counsel and Secretary Regina G. Thoele, Senior Vice President, Compliance Carol Wooding, Associate General Counsel National Futures Association The Honorable Mark Wetjen The Honorable Bart Chilton The Honorable Scott D. O'Malia Commodity Futures Trading Commission Gary Barnett, Director Amanda Olear, Associate Director Michael Ehrstein, Attorney-Advisor Division of Swap Dealer and Intermediary Oversight Commodity Futures Trading Commission Norm Champ, Director Douglas Scheidt, Associate Director and Chief Counsel Susan Nash, Associate Director and Deputy for Disclosure Policy Division of Investment Management Securities and Exchange Commission