

COMMENT LETTER

August 28, 2013

ICI Letter to CFTC Staff Seeks Clarification of Final Harmonization Rules for Registered Fund Advisers That Are Commodity Pool Operators (pdf)

August 28, 2013 Via Electronic Mail Mr. Gary Barnett Director Division of Swap Dealer and Intermediary Oversight Commodity Futures Trading Commission Three Lafayette Centre 1155 21st Street, NW Washington, DC 20581 Re: Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators

Dear Mr. Barnett, The Investment Company Institute ("ICI") submits this letter to confirm guidance provided by, and to seek additional clarification from, the staff of the Division of Swap Dealer and Intermediary Oversight ("DSIO") of the Commodity Futures Trading Commission ("CFTC") in response to questions raised by our member firms with respect to the CFTC's harmonization rules ("Harmonization Rules") for operators of registered investment companies ("Registered Funds") that are subject to registration as commodity pool operators ("CPOs").¹ This guidance was provided in a telephone conversation on August 21, 2013 among representatives of the DSIO staff (Amanda Olear and Michael Ehrstein), the ICI (Sarah Bessin and Rachel Graham) and K&L Gates LLP (Mark Amorosi and Cary Meer), counsel to the ICI. We respectfully request that the DSIO staff provide a written response that confirms those matters discussed during the August 21, 2013 call and that provides clarification regarding certain additional matters, as summarized below, so that our members have greater certainty about their compliance obligations under the Harmonization Rules.

¹Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators, 78 Fed. Reg. 52308 (Aug. 22, 2013) ("Harmonization Adopting Release"). Mr. Gary Barnett August 28, 2013 Page 2 I. Compliance Dates a. Disclosure Documents The Harmonization Adopting Release states that Section 4.12(c)(3)(i) will become effective on September 23, 2013. It further states that publication of the Harmonization Rules triggers the conditional compliance date that was established in the adopting release for the CFTC's amendments to Regulation 4.5. That release states in relevant part: Entities required to register due to the amendments to § 4.5 shall be subject to the Commission's recordkeeping, reporting, and disclosure requirements set forth in part 4 of the Commission's regulations within 60 days following the effectiveness of a final rule implementing the Commission's proposed harmonization effort pursuant to the concurrent proposed rulemaking.² In addition, the Harmonization Adopting Release states that: Compliance will be required with the conditions adopted herein in § 4.12(c)(3)(i) for open-end funds beginning when a fund files with the SEC an initial registration statement on form N-1A or, for an existing fund, its first post-effective

amendment that is an annual update to an effective registration statement on form N-1A. For CPOs of closed-end funds, compliance will be required when the closed-end RIC files an initial registration statement with the SEC, or, for existing closed-end RICs, when the closed-end RIC is required to update its registration statement.³ We request confirmation from the DSIO staff that the foregoing statements from the Harmonization Adopting Release and the Regulation 4.5 Adopting Release, when read together, mean that (1) for open-end Registered Funds, any initial registration statement, or post-effective amendment that is an annual update to an existing registration statement, that is filed on or after November 22, 2013 (but not before) must comply with the conditions of Regulation 4.12(c)(3)(i); and (2) for closed- end Registered Funds, any initial registration statement, or post-effective amendment that is required to update an existing registration statement, that is filed on or after November 22, 2013 (but not before) must comply with the conditions of Regulation 4.12(c)(3)(i).⁴

² Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed. Reg. 11252, 11260 (Feb. 24, 2012) (“Regulation 4.5 Adopting Release”); see also Harmonization Adopting Release at 52308. ³ Harmonization Adopting Release at 52322. ⁴ The compliance date for Regulation 4.12(c)(3)(i) was calculated by adding the 60-day conditional compliance period to the September 23, 2013 effective date for this provision. Mr. Gary Barnett August 28, 2013 Page 3

b. Exemptions Relating to Periodic Financial Statements; Filing of Claim for Exemption The Harmonization Adopting Release states that Regulation 4.12 (with the exception of Regulation 4.12(c)(3)(i)) will become effective upon publication in the Federal Register, which occurred on August 22, 2013.⁵ This includes the exemptions set forth in Regulation 4.12(c)(3)(ii) and (iii), as well as the requirement to file a notice with the National Futures Association (“NFA”) pursuant to Regulation 4.12(d). The Harmonization Adopting Release further states that publication of the Harmonization Rules triggers the 60-day conditional compliance date set forth in the Regulation 4.5 Adopting Release. We understand, based on our conversation, and request confirmation from the DSIO staff, that Registered Fund CPOs seeking to rely on Regulation 4.12(c)(3)(ii) and (iii) must comply with the conditions of those exemptions and file the notice required by Regulation 4.12(d) on or before October 21, 2013.

c. Recordkeeping The Harmonization Adopting Release states that amended Regulation 4.23 will become effective on September 23, 2013.⁶ It further states that publication of the Harmonization Rules triggers the 60-day conditional compliance date in the Regulation 4.5 Adopting Release. We accordingly request confirmation from the DSIO staff that Registered Fund CPOs must comply with the recordkeeping requirements under amended Regulation 4.23 on or before November 22, 2013. During our telephone conversation, we also noted that existing Registered Fund CPOs that currently maintain their records with third-party recordkeepers would technically be unable to meet the condition under Regulation 4.12(d)(2)(i) that a CPO file a claim of exemption from the “main office” recordkeeping requirements under Regulation 4.23 with the NFA “before the date the commodity pool first enters into a commodity interest transaction.” The same is true with respect to Regulations 4.7(b)(5)(i) and 4.23(c)(1), which require a Registered Fund CPO that does not maintain its books and records at its main business office to file a statement containing information regarding the location of its books and records “[a]t the time it registers with the Commission or delegates its recordkeeping obligations....” We understand, based on our conversation, and request confirmation from the DSIO staff, that Registered Fund CPOs will be deemed to have complied with the notice requirements under Regulations 4.12(d)(2), 4.7(b)(5) and 4.23(c)(1), as applicable, if they file such notice on or before November 22, 2013. ⁵ Harmonization Adopting Release at 52308. ⁶ Id. Mr. Gary Barnett August 28, 2013 Page 4

d. Form CPO-PQR The Harmonization Adopting Release states that Registered Fund CPOs must begin to comply with Regulation 4.27, which implements CFTC Form CPO-PQR, “60 days following the effective date of the

[Harmonization Rules].”⁷ Based on our telephone conversation, we understand, and request confirmation from the DSIO staff, that Registered Fund CPOs will be required to file their first Form CPO-PQR with respect to the quarter ending December 31, 2013. II. Content of Annual Reports The Harmonization Adopting Release states that, under the “substituted compliance” regime, Registered Fund CPOs may satisfy the CFTC’s monthly account statement requirements in Regulation 4.22 by, among other things, furnishing semi-annual and annual reports to investors “as required by the SEC.”⁸ It further states that “the CPO of a [Registered Fund] will be required to file the financial statements with the [NFA] that it prepares pursuant to its obligations with respect to the SEC.” However, the text of amended Regulation 4.12(c) does not provide a specific exemption for Registered Fund CPOs from the annual report content and other requirements of Regulation 4.22(c)-(i). We understand, based on our conversation, and request confirmation from the DSIO staff, that: (1) the annual financial statements that Registered Funds furnish to shareholders and file with the SEC as part of their filings on Form N-CSR⁹ in accordance with the requirements under the federal securities laws will satisfy the requirements under Regulation 4.22(c)-(i), and (2) the filing of such annual financial statements with the NFA within 90 days after the end of the fiscal year will satisfy the requirements of Regulation 4.22(c).¹⁰ We also respectfully request that the CFTC or DSIO staff provide more definitive legal relief to Registered Fund CPOs from the requirements of Regulation 4.22(c)-(i) consistent with the foregoing, for example, through further amendments to the CFTC’s part 4 regulations or no-action relief. ⁷ Harmonization Adopting Release at 52322. ⁸ Id. at 52320. ⁹ Form N-CSR contains other information, in addition to annual financial statements, and we understand that the CFTC and the NFA staff do not require the other information included in Form N-CSR. Moreover, Registered Funds often file one Form N-CSR with information about multiple funds with the same fiscal year end date. If a Registered Fund CPO were required to file the entire Form N-CSR, it might be required to file information with NFA with respect to Registered Funds that do not trigger CPO registration. ¹⁰ We further understand that Registered Fund CPOs will not be required to file their Registered Funds’ semi-annual reports with the NFA. Mr. Gary Barnett August 28, 2013 Page 5 III. Monthly Account Statements Amended Regulation 4.12(c)(3)(ii) provides that Registered Fund CPOs will be exempt “from the Account Statement distribution requirement of [Regulation] 4.22(a) and (b), provided, however, that the pool operator: (A) Causes the current net asset value per share to be available to participants; (B) Causes the pool to clearly disclose: (1) That the information will be readily accessible on an Internet Web site maintained by the pool operator or its designee or otherwise made available to participants and the means through which the information will be made available”¹¹ We understand, based on our conversation, and request confirmation from the DSIO staff, that: (1) Registered Fund CPOs claiming the relief under Regulation 4.12(c)(3)(ii) will be exempt from both the requirements to prepare and distribute Account Statements under Regulation 4.22(a) and (b); and (2) Registered Fund CPOs may satisfy the condition in paragraph (B)(1) by posting Registered Fund net asset values (“NAVs”) on an Internet Website or making such NAVs available by other means (e.g., making them available upon request), provided that the means by which the Registered Fund NAVs are made available is disclosed to investors. IV. Recordkeeping a. Disclosure Regarding the Location of Books and Records Amended Regulation 4.23(c)(1)(iv)(D) requires a CPO that does not maintain its books and records at its main business office to “disclose in [its] Disclosure Document the location of its books and records” Based on our telephone conversation, we understand, and request confirmation from the DSIO staff, that Registered Fund CPOs may satisfy the disclosure requirement of Regulation 4.23(c)(1)(iv)(D) by disclosing the location of their books and records in their registration statements as required by Item 33 of Form N-1A (for open-end Registered Funds) and Item 32 of Form N-2 (for closed-end Registered Funds). ¹¹

Harmonization Adopting Release at 52334 (emphasis added). Mr. Gary Barnett August 28, 2013 Page 6 b. Permissible Third-Party Recordkeepers Amended Regulation 4.23 states that CPOs are permitted to maintain their books and records only with certain third-party recordkeepers: the pool's administrator, distributor or custodian, or a bank or registered broker or dealer acting in a similar capacity with respect to the pool. However, the Harmonization Adopting Release states that the CFTC "has ... determined to amend § 4.23 to permit all CPOs to use third-party service providers to maintain their books and records,"¹² which indicates a broader scope of relief and is more consistent with existing industry practice for Registered Funds. As the CFTC acknowledges in the Harmonization Adopting Release, many Registered Fund CPOs currently maintain their books and records with third-party recordkeepers that are not explicitly listed in amended Regulation 4.23, including professional records maintenance companies and storage companies and sub-advisers or Commodity Trading Advisors ("CTAs").¹³ These Registered Fund CPOs would face an enormous burden if they were forced to transfer their books and records to the third-party recordkeepers that are permissible under amended Regulation 4.23 before the November 22, 2013 compliance date. Based on our telephone conversation, we understand, and request confirmation from the DSIO staff, that the CFTC intends to further amend Regulation 4.23 to permit Registered Fund CPOs to maintain required books and records with a broader list of third-party service providers, including with sub-advisers and CTAs to Registered Funds and professional records storage companies, and that this further amendment will be effective prior to the November 22, 2013 compliance date. We also request that, in the event that this further amendment has not been promulgated and made effective by November 22, 2013, the DSIO staff provide temporary no-action relief to Registered Fund CPOs until such time as Regulation 4.23 is further amended as outlined above.

c. Required Records Although the Harmonization Rules exempt Registered Fund CPOs from many substantive compliance obligations under part 4 of the CFTC's regulations, they do not contain corresponding exemptions from the list of required books and records under Regulation 4.23. For example, Registered Fund CPOs are exempt from the Account Statement preparation and distribution requirements under Regulation 4.22(a) and (b). However, the language of Regulation 4.23 could be read to technically require the Registered Fund CPO to maintain books and records relevant to Account Statements, including the monthly statements of financial condition, statements of income, and signed account statements and annual reports called for by paragraphs (a)(10), (11) and (12) of Regulation 4.23. Similarly, Registered Fund CPOs are not required to disclose the performance of their own proprietary accounts or of the proprietary accounts of their principals, but Regulation 4.23(b)(2)(i) and (ii) could 12 Id. at 52311. 13 The Investment Company Act of 1940 and the rules thereunder permit Registered Funds to maintain their books and records with these third-party recordkeepers. Mr. Gary Barnett August 28, 2013 Page 7 be read to technically require Registered Fund CPOs to maintain confirmations of commodity interest transactions for their own accounts and for their principals. Based on our telephone conversation, we understand, and request confirmation from the DSIO staff, that the CFTC intends to reconcile such inconsistencies and that Registered Fund CPOs are not required to maintain any books and records under Regulation 4.23 relating to compliance obligations to which they are not subject by virtue of the Harmonization Rules. We also respectfully request that the CFTC or DSIO staff provide more definitive legal relief from Regulation 4.23 consistent with the foregoing, for example, through further amendments to the CFTC's part 4 regulations or no-action relief. * * *

The ICI appreciates the opportunity to speak with the DSIO staff and clarify the extent of the relief provided to Registered Fund CPOs under the Harmonization Rules. If you have questions or require further information, please contact me at 202/326-5815, Sarah A. Bessin at 202/326-5835 or Rachel Graham at 202/326-5819. You also may contact our counsel at K&L Gates LLP

(Mark Amorosi at 202/778-9351 or Cary Meer at 202/778-9107). Sincerely, /s/ Karrie McMillan General Counsel cc: Amanda Olear, Associate Director Michael Ehrstein, Attorney-Advisor Division of Swap Dealer and Intermediary Oversight Commodity Futures Trading Commission Daniel A. Driscoll, Executive Vice President, Chief Operating Officer Thomas W. Sexton, III, Senior Vice President, General Counsel and Secretary Carol Wooding, Associate General Counsel Maria McHenry, Associate Director, Compliance National Futures Association

Copyright © by the Investment Company Institute. All rights reserved. Information may be abridged and therefore incomplete. Communications from the Institute do not constitute, and should not be considered a substitute for, legal advice.