

COMMENT LETTER

December 28, 2012

Application of NFA Rules to Registered Investment Companies Unable to Rely on CFTC Rule 4.5 and their Advisers (pdf)

December 28, 2012 Mr. Daniel A. Driscoll Executive Vice President, Chief Operating Officer Mr. Thomas W. Sexton, III Senior Vice President, General Counsel and Secretary National Futures Association 300 S. Riverside Plaza, #1800 Chicago, Illinois 60606-6615 Re: NFA Regulations as Applied to Registered Investment Companies and Their Advisers Dear Mr. Driscoll and Mr. Sexton: The Investment Company Institute ("ICI")¹ is writing this letter as a follow-up to your conversation with Sarah Bessin and Rachel Graham of ICI, and Cary Meer and Lawrence Patent of K&L Gates LLP, on August 14, 2012, and our more recent conversation on December 20, 2012, relating to the requirements applicable to registered investment advisers that advise registered investment companies ("funds") and must register as commodity pool operators ("CPOs") as a result of the amendments to Commodity Futures Trading Commission ("Commission" or "CFTC") Regulation 4.5.2 In the interim, certain other issues have arisen. We seek confirmation of the views set forth in this letter, which is divided into two parts. 1 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 \$13.8 trillion and serve over 90 million shareholders. 2 Although ICI has judicially challenged amended Regulation 4.5, see Complaint, Investment Company Institute, et al. v. CFTC, Case No. 1:12-cv-00612 (D.D.C. Apr. 17, 2012), it is committed to assisting its members' efforts to comply with the amended regulation. Daniel A. Driscoll Thomas W. Sexton, III December 28, 2012 Page 2 The August and December conversations included a discussion of the date on which firms required to register as CPOs or commodity trading advisors ("CTAs") with respect to funds that cannot comply with amended CFTC Regulation 4.5 would become subject to certain Bylaws, rules and regulations of the National Futures Association ("NFA"). Several of these issues are addressed in Part I of this letter. Part II raises for your consideration certain additional issues raised by ICI members concerning the interplay of NFA's rules governing communications with similar requirements of the Financial Industry Regulatory Authority ("FINRA"). Part I. As you know, investment advisers that advise funds that cannot comply with amended CFTC Regulation 4.5 must be registered as CPOs as of January 1, 2013. Sub-advisers to such funds will also be required to register as CTAs as of January 1, 2013.

However, the CFTC stated when it adopted the amendments to Regulation 4.5 that “[e]ntities required to register due to the amendments to § 4.5 shall be subject to the Commission’s recordkeeping, reporting, and disclosure requirements pursuant to 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.”³ In the August and December conversations, you agreed that compliance with certain NFA requirements applicable to these CPOs and CTAs⁴ should likewise be deferred because they relate to subjects the CFTC may address in its harmonization rulemaking.⁵ This letter sets forth our understanding of those particular NFA rules, compliance with which should be deferred until, as applicable, the compliance date of either (1) CFTC’s harmonization rulemaking, or (2) any NFA rules that are amended to conform with the CFTC’s harmonized requirements (“Compliance Date”).⁶ The specific NFA rules at issue, and our reasoning, are set forth below:

3 Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed. Reg. 11252 (February 24, 2012); correction notice published at 77 Fed. Reg. 17328 (March 26, 2012) (“4.5 Adopting Release”).

4 To the extent that these CPOs and CTAs also advise controlled foreign corporations (“CFCs”) owned by these funds, compliance with the CFTC’s part 4 regulations is effectively deferred because the CFCs will be treated as “master funds.” See Division of Swap Dealer and Intermediary Oversight Responds to Frequently Asked Questions – CPO/CTA: Amendments to Compliance Obligations (August 14, 2012, as amended) (“FAQ”) (answer to questions 2 and 3 under the heading “Wholly Owned Subsidiaries”). Therefore, compliance with the NFA’s rules specified in this letter should be similarly deferred with respect to these CFCs.

5 Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators, 77 Fed. Reg. 11345 (Feb. 24, 2012) (“Harmonization Proposal”).

6 NFA’s implementing rules may be submitted (1) for CFTC approval or (2) pursuant to the “ten-day” procedure, where rules are permitted to take effect without formal CFTC review.

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1. Compliance Rule 2-10. This rule requires CPOs and CTAs to keep adequate books and records. As recordkeeping is one of the specific subjects of the CFTC’s harmonization efforts, compliance with applicable Securities and Exchange Commission (“SEC”) books and records requirements⁷ will be deemed to constitute compliance with Compliance Rule 2-10 until the Compliance Date.

2. Compliance Rule 2-13. This rule requires that CPO and CTA Disclosure Documents include a break-even analysis that provides a tabular presentation of fees and expenses; “up-front” fees and organizational and offering expenses must also be disclosed (see also Interpretive Notices 9006 and 9023). As the presentation of performance, fees and expenses is expected to be addressed in the CFTC’s harmonization rulemaking, compliance with Compliance Rule 2-13 should be deferred until the Compliance Date.

3. Compliance Rule 2-29. Compliance Rule 2-29 relates to communications with the public and promotional material. In particular, it requires that (1) rate of return figures must be calculated in a manner consistent with CFTC Regulation 4.25(a)(7) for commodity pools; (2) special disclaimers accompany hypothetical results; (3) statements of opinion be clearly identified as such; (4) any radio or television advertisement or any other audio or video advertisement distributed through media accessible by the public, if the advertisement makes any specific trading recommendation or refers to or describes the extent of any profit obtained in the past or that can be achieved in the future, be submitted to NFA’s Promotional Material Review Team for its review and approval at least 10 days prior to first use or such shorter period as NFA may allow in particular circumstances; (5) special provisions be followed for promotional material relating to security futures products; and (6) certain procedures be followed for approval of promotional material, supervision thereof, and records relating thereto. (See also Interpretive Notices 9039 regarding radio and television advertisements,

9043 regarding security fu- tures products and 9063 as it relates to using social networking tools to promote an adviser's business.) As the CFTC's harmonization efforts are expected to cover presentation of performance and other is- sues relating to the marketing of funds, as well as related recordkeeping requirements, compliance with applicable SEC requirements⁸ will be deemed to constitute compliance with the requirements listed above (to the extent applicable to fund CPOs) until the Compliance Date. To the extent a fund's prin- cipal underwriter or another broker-dealer is responsible for the functions addressed in Compliance Rule 2-29, see Part II below. 7 See Rule 204-2 under the Investment Advisers Act of 1940; Rules 31a-1, 31a-2, and 31a-3 under the Investment Company Act of 1940. 8 See, e.g., Item 26 of Investment Company Act Form N-1A (regarding calculation of performance data). Daniel A. Driscoll Thomas W. Sexton, III December 28, 2012 Page 4 We recognize that compliance with the more general anti-fraud requirements contained in Compliance Rule 2-29(a) and (b)(1) and (2), and in CFTC Regulation 4.41, will not be deferred.⁹ 4. Compliance Rule 2-34. This rule contains requirements relating to CTA performance reporting and disclosures. As these requirements relate to presentation of performance information, which is expected to be a subject of harmonization, compliance should be deferred until the Com- pliance Date. 5. Compliance Rule 2-35. Compliance Rule 2-35 relates to the contents and delivery of CPO and CTA Disclosure Documents. As the preparation of these documents and their delivery are to be addressed in harmonization, compliance with SEC requirements for the content and delivery of fund prospectuses and statements of additional information will be deemed to satisfy Compliance Rule 2-35 until the Compliance Date. 6. Compliance Rule 2-46. As reporting under the CFTC's Part 4 regulations, including without limitation reporting under CFTC Regulation 4.27, is a principal focus of harmonization, compliance with CPO and CTA reporting to NFA also should be deferred until the Compliance Date. Part II. The next item relates to the interplay of the NFA's compliance rules with FINRA's requirements. 1. NFA Requirements - Review/Approval/Supervision of Promotional Material. Fund promotional material is typically prepared by the fund's principal underwriter or by one or more bro- ker-dealers that may or may not be affiliated with the adviser to the fund and not by the adviser itself. Thus, fund promotional materials are prepared, reviewed and approved for use in accordance with pro- cedures established pursuant to rules of FINRA, NFA's self-regulatory counterpart in the securities in- dustry, and consistent with advertising and communications standards established by the SEC and FI- NRA. Pending further NFA review of how the SEC and FINRA rules addressing these topics compare with the NFA rules, NFA will deem compliance by a fund's principal underwriter or by another bro- ker-dealer with FINRA's review, approval, filing, recordkeeping, and supervision requirements with respect to fund promotional materials (including, without limitation, radio and television advertise- 9 NFA Compliance Rule 2-29(a) prohibits communications that operate as a fraud or deceit, employ or are part of a high-pressure approach or make any statement that futures trading is appropriate for all persons. NFA Compliance Rule 2- 29(b)(1) and (2) preclude NFA members from using promotional materials that are likely to deceive the public or contain a material misstatement of fact or that the members or associates know omit a fact if the omission makes the promotional material misleading. CFTC Regulation 4.41(a)(1) and (2) prohibits a CPO or CTA from advertising in a manner that em- ploys a device, scheme or artifice to defraud or involves any transaction, practice or course of business which operates as a fraud or deceit. Daniel A. Driscoll Thomas W. Sexton, III December 28, 2012 Page 5 ments, emails that are promotional in nature and websites) to satisfy a fund CPO's or CTA's obligation to comply with NFA Compliance Rules 2-9, 2-29 and related interpretive notices,¹⁰ as applicable. We intend to provide you with more information concerning the regulation of the content and review of fund promotional materials under SEC and FINRA rules in the new year. * * * * Unless you advise me otherwise in writing, this letter will

confirm that (1) compliance with the items set forth in Part I of this letter is deferred or substituted compliance with SEC rules is permitted, as described in Part I, and (2) substituted compliance with FINRA rules as described in Part II of this letter is acceptable for the items set forth in Part II. We sincerely appreciate the willingness of NFA staff to address the industry's concerns. If you have questions or require further information, please contact me at 202/326-5815, Sarah A. Bessin at 202/326-5835 or Rachel H. Graham at 202/326-5819. Sincerely, /s. Karrie McMillan General Counsel cc: Gary Barnett, Director Amanda Olear, Special Counsel Michael Ehrstein, Attorney-Advisor Division of Swap Dealer and Intermediary Oversight Commodity Futures Trading Commission Thomas A. Pappas, Vice President and Director, Advertising Regulation, FINRA Joseph P. Savage, Vice President and Counsel, Investment Company Regulation, FINRA Cary J. Meer, K&L Gates LLP Lawrence B. Patent, K&L Gates LLP 10 See, e.g., Interpretive Notice 9037, which addresses supervision of email and websites.

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