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COMMENT

January 14, 2003

Jean Webb
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: CFTC Proposed Rule regarding an Exclusion for Certain Otherwise Regulated Persons From the Definition of the Term "Commodity Pool Operator," 67 Fed. Reg. 65743 (Oct. 28, 2002); CFTC Advanced Notice of Proposed Rulemaking regarding Commodity Pool Operators and Commodity Trading Advisors; Exemption From Requirement To Register as CPOs of Certain Pools and as CTAs Advising Such Pools, 67 Fed. Reg. 68785 (Nov. 13, 2002).

Dear Ms. Webb:

On behalf of General Motors Investment Management Corporation ("GMIMCo"),[1] we appreciate the opportunity to comment on the Commodity Futures Trading Commission's recent proposal to amend CFTC Rule 4.5 ("Rule 4.5 Proposal") and the Commission's advance notice of proposed rulemaking on proposals for Commodity Pool Operator ("CPO") and Commodity Trading Adviser ("CTA") registration exemptions from the National Futures Association and Managed Futures Association ("Advance Notice"). GMIMCo applauds the Commission for providing immediate relief in this area and its stated willingness to obtain additional public comment in the formulation of expanded CPO/CTA registration relief. GMIMCo offers the following comments for the purpose of assisting the Commission in targeting CPO and CTA registration relief in a manner consistent with the congressionally-identified regulatory interests.

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1 GMIMCo is an indirect wholly-owned subsidiary of General Motors Corporation ("GM"). It is registered with the Securities and Exchange Commission ("SEC") as an investment adviser pursuant to the Investment Advisers Act of 1940. GMIMCo provides investment management services, including commodity interest management, to pension plans and other sophisticated investors.

I. CPO/CTA RELIEF SHOULD EXTEND TO PERSONS OPERATING AND ADVISING ECP POOLS THAT LIMIT NON-HEDGING TO "EXCLUDED COMMODITIES."

In the Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, Appendix E, 114 Stat, 2763A-365, (Dec. 21, 2000) ("2000 Act"), Congress found that Eligible Contract Participants ("ECPs") may engage in trading any contract, including futures and related options contracts, in "excluded commodities" under certain conditions and operate completely outside the regulatory apparatus of the CFTC.[2] That congressional determination was grounded in a series of policy judgments enunciated by the President's Working Group on Financial Markets, in its November 1999 report entitled: "Over-the-Counter Derivatives Markets and the Commodity Exchange Act" ("President's Working Group Report").

The President's Working Group Report reached the following unanimous policy conclusions, in which the Commission itself joined. First, the Working Group concluded that the Commodity Exchange Act's ("CEA") regulatory interest diminishes substantially in the context of transactions in "excluded commodities" since those transactions generally "are not susceptible to manipulation." Working Group at 16. Second, the Working Group concluded that the CEA's regulatory interest further diminishes where the parties to the contracts are "sophisticated" parties that "simply do not require the same protections under the CEA as those required by retail investors." Working Group at 16. Third, the Working Group concluded that the CEA's regulatory interest further diminishes where the parties to a contract are otherwise regulated in order to avoid "impos[ing] unnecessary regulatory burdens." Working Group at 1. See also 11, 16.

The 2000 Act's provisions demonstrate that Congress accepted the Working Group's policy rationale. For example, Congress decided in CEA Section 1a(12)(B)(ii) to permit SEC-registered investment advisers, financial institutions and various others to act as "investment manager or fiduciary" for other ECPs in any excluded contracts or transactions and still have those transactions and related activities excluded from the CEA. Thus,

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[2] "Excluded commodities," is defined in Section 1a(13) of the CEA, to mean "(i) an interest rate, exchange rate, currency, security, security index, credit risk or measure, debt or equity instrument, index or measure of inflation, or other macroeconomic index or measure; (ii) any other rate, differential, index, or measure of economic or commercial risk, return, or value that is – (I) not based in substantial part on the value of a narrow group of commodities not described in clause (i), or (II) based solely on 1 or more commodities that have no cash market; (iii) any economic or commercial index based on prices, rates, values, or levels that are not within the control of any party to the relevant contract, agreement, or transaction; or (iv) an occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or level of a commodity not described in clause (i)) that is – (I) beyond the control of the parties to the relevant contract, agreement, or transaction, and (II) associated with a financial, commercial, or economic consequence."

Congress concluded that when a registered investment adviser or financial institution, for example, acts as a manager or fiduciary for ERISA plans or other sophisticated investors in excluded transactions in excluded commodities, the CEA's provisions, including its provisions relating to commodity pools, do not apply in any way. Finally, Congress also signaled that it understood the regulatory relief it was enacting was not the only relief that would be appropriate under the CEA. Congress directed the Commission to study and report to Congress on additional regulatory relief that should be afforded to persons registered under the CEA, including CPOs. Section 125 of the 2000 Act. In addition, the CFTC itself is on record as supporting the limitation of customers to ECPs as a valid basis for relaxing regulatory constraints. CFTC Letter No. 01-20 (March 26, 2001).

Such relief would remove the incentive for registered investment advisers and financial institutions operating ECP entities to shift their participation from CFTC-regulated commodity interests to instruments that are completely excluded from the CEA under the multiple statutory exclusions Congress enacted in 2000. See CEA Sections 2(c), 2(d), and 2(g). If such persons shift from commodity interest trading to transactions which are completely excluded from the CEA, significant trading activity (and related brokerage) would be removed from the reach of the Commission's oversight and regulation. Removing that trading activity from organized exchanges also would sharply undermine the public interest in promoting liquid trading facilities as found by Congress in the 2000 Act's reformulation of the public interests served by the CEA. See Section 3 of the CEA.

Consistent with these authorities, we believe the Commission should consider excluding from CFTC registration the operators of entities that are ECPs and limit their commodity interest activities to "excluded commodities." That exclusion would be well grounded in the policies embodied in the provisions of the 2000 Act and would foster trading on those regulated markets that promotes the public interests of the CEA without sacrificing in any material way any regulatory protections the CEA would otherwise afford.

One avenue to accomplish this exclusion is to amend Rule 4.5 (or adopt another rule) to exclude from the CPO definition SEC-registered investment advisers, financial institutions and other persons listed in CEA Section 1a(12)(B)(ii) that operate ECPs that limit trading to excluded commodities. Under Rule 4.5, the Commission could deem that ECP entities that limit trading to excluded commodities are not pools (similar to the approach in Rule 4.5(a)(4)(i)-(v) where defined benefit and certain other ERISA plans are deemed not to be pools). Excluding such ECP entities from the pool definition, (and, accordingly, excluding their otherwise - regulated operators from the CPO definition) would properly eliminate the need for such ECP entities to comply with any of the Rule 4.5 operating criteria (including any notional test that may be adopted by the CFTC). Such CFTC relief would promote generally recognized statutory purposes and effectuate policy judgments the Commission already has made in the 1999 Working Group Report and Congress has codified in the 2000 Act.

II. THE NOTIONAL VALUE APPROACH.

The CFTC proposed to amend Rule 4.5 to include as an alternative to the "5% test" a limitation based on the notional value of non-hedge positions. This "notional test" would provide that, with respect to non-hedged commodity interest positions, a qualifying entity may represent that the aggregate notional value of such positions does not exceed the liquidation value of the qualifying entity's portfolio. The Advance Notice provides no-action relief that is conditioned, among other things, on a similar notional test whereby the aggregate notional value of each pool's commodity interest positions does not exceed 50% of the liquidation value of the pool's entire portfolio, after taking into account unrealized profits and unrealized losses on the positions.

Under both the Rule 4.5 Proposal and the Advance Notice, the "notional value" would be determined by multiplying the size of the futures contract, in contract units, by the current market price per unit, and by multiplying the size of the option contract, in contract units, by the strike price. To the extent the Commission determines to condition CPO or CTA registration relief on a notional test, we suggest the following modifications and clarifications:

A. Amend Rule 4.5 to permit proportionate use of *both* the 5% and notional tests. As proposed, Rule 4.5 would require a *choice* between the 5% and notional test. The examples in the Rule 4.5 Proposal show that these tests work differently depending on what kinds of contracts are held. Accordingly, if a portfolio holds different kinds of contracts, an eligible person should be able to use a proportionate combination of the tests. For example, using the examples in the CFTC proposals, a $ 20 million portfolio with positions in both S&P 500 and T-Note futures contracts should be able to hold 48 S&P 500 contracts (where the aggregate notional value equals approximately $ 10 million) and 284 T-Note contracts (where the amount of initial margin for this amount of contracts equals approximately $ 500,000 (or 5% of $ 10 million)).[3]

B. Clarify that the "aggregate notional value" applies on a net basis. Both the Rule 4.5 Proposal and the Advance Notice no-action relief rely on the "aggregate notional value" of a pool's non-hedged or entire commodity interest positions. Unless the term "aggregate notional value" means the *net* notional value of the positions being measured, this approach will limit the ability to use futures unnecessarily. We also urge the Commission to recognize that the net notional value may involve different considerations depending on the kind of contract involved. For example, while the net

[3] Although self-evident, the final CFTC rules should define "contract unit" to mean the number of contracts multiplied by the multiplier.

notional value of equities contracts typically will involve a straightforward netting of USD equivalent notional market values, the net notional value of other kinds of contracts will involve additional considerations, such as including duration adjustments in calculating the net notional value of fixed income contracts. We urge the Commission to consider, in connection with its larger CPO/CTA exemption analysis, permitting other possible measures of futures exposure, such as a value-at-risk ("VAR") approach.

C. Add a notional test to the NFA proposal. The same reasons that prompted the Commission to propose an alternative to the 5% test in Rule 4.5 apply to the 5% test in the NFA proposal. Accordingly, should the Commission determine to adopt the NFA proposal, it should include a notional test alternative comparable to whatever the Commission ultimately adopts in Rule 4.5.

III. THE QUALIFYING ENTITIES IN RULE 4.5 SHOULD BE EXPANDED AND CLARIFIED.

1. ERISA Pension Trusts

Although CFTC staff has issued various no-action letters providing CPO and CTA registration relief to fiduciaries of pension trusts,[4] Rule 4.5 does not list as a Rule 4.5 qualifying entity a pension trust holding assets of ERISA plan qualifying entities (unless the trust also is a bank collective trust), creating uncertainty whether separate no-action relief is required for those trusts who have not yet obtained their own no-action relief. We suggest that the Commission resolve any remaining uncertainty on this issue by explicitly including trusts holding ERISA plan assets as qualifying entities, and to the extent trusts are limited to assets of ERISA plans that are not pools, non-pools.

2. Foreign Pension Plans And Foreign Pension Trusts

Rule 4.5 currently does not address foreign pension plans or trusts holding assets of foreign pension plans. Various pension plans established in foreign countries, often by employers affiliated with US-based corporations, are not eligible for relief under Rule 4.5 because they are not ERISA-regulated plans. Throughout the years, the CFTC staff has granted no-action relief to fiduciaries for various foreign pension plans based on analogies to Rule 4.5.[5] In addition, on other regulatory fronts, both Congress and the CFTC have recognized the lesser need for regulatory oversight of activities with respect to foreign pension plans. See, *e.g.*, CEA §1(a)(12)(vi) (defining an ECP to include foreign pension

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[4] See, *e.g.*, CFTC Letters 97-94;93-91; and 94-52.

[5] See, *e.g.*, CFTC Letters 01-08; 96-60,; 93-4; and 90-3.

plans), Rule 4.7, defining a "Qualified Eligible Person" to include a "Non-United States Person," and a "Non-United States Person" to include foreign pension plans. The CFTC should consider expanding the entities eligible for treatment under Rule 4.5 to include foreign pension plans, thereby eliminating another area of uncertainty in the futures community.

3. Private SEC-Registered Investment Companies

Rule 4.5 does not explicitly address operators of private SEC-registered investment companies insofar as the literal language of Rule 4.5(a)(1) only permits the investment company itself to claim the CPO exclusion. It is not unusual for a limited partnership or limited liability company to register under the Investment Company Act of 1940 ("1940 Act") as an investment company while remaining exempt from registration under the Securities Act of 1933. In those situations the limited partnership or limited liability company is subject to the 1940 Act and therefore otherwise regulated by the SEC. Although we believe there is a valid basis for arguing that Rule 4.5 permits relief for the operator of *any* SEC-registered investment company, we urge the Commission to modify Rule 4.5 to exclude explicitly from CPO registration a general partner, manager, or managing member of a private SEC-registered investment company.

4. The NFA/MFA Proposals Should Accommodate Pension Entities

Neither the NFA proposal nor the MFA proposal appears designed to accommodate the unique nature of pension entities. Adoption of either the NFA or MFA proposal without including pension plans and confirming the inclusion of pension trusts could have the anomalous result of providing CPO/CTA registration relief to hedge fund operators, for example, with fewer limitations than the limitations imposed on operators of pension plan fiduciaries under Rule 4.5, even though those pension plan fiduciaries are otherwise regulated to a greater degree than hedge fund operators. In crafting CPO and CTA exemptive relief, we urge the Commission to ensure that any greater regulatory relief provided to others also be designed in a manner that extends such relief to pension plan and pension trust fiduciaries.

As currently proposed, the MFA proposal may not accommodate pension plans because some pension plans may not be exempt from registration under the Securities Act of 1933 and because pension plan participants and beneficiaries typically are not accredited investors or Qualified Eligible Persons and therefore may not meet the MFA investor criteria. Likewise, a number of other countries have rigorous regulatory protections in place for pension plans. In the context of the NFA proposal, for example, clarifications to CFTC Rule 4.13 should be made so that any accredited investor limitation does not preclude a pension trust holding a single pension plan from qualifying for relief. In either proposal, changes should be made so that disclosure to pension plan participants is not required because participants in certain cases can number in the hundreds of thousands, making disclosure impracticable.

IV. FUND OF FUND INVESTMENTS.

It is currently unclear whether the Rule 4.5 5% limitation must apply to investments in separately managed funds that have the authority to use commodity interests. This uncertainty operates as a potential limitation on investments in separately managed funds, where it can be difficult, if not impossible, for an individual investor, such as the entities described above, to obtain the information necessary to monitor the commodity interest trading by those separately managed funds. Accordingly, we urge the Commission to clarify that both the 5% test and the notional test (whether in Rule 4.5 or elsewhere) apply only to direct futures and options positions established by the investing entity.

V. CONCLUSION

The most certain avenue for providing CPO/CTA registration relief that is consistent with Congressional intent is to target relief to operators of, and advisors to, ECP entities that limit their activities to excluded commodities. To the extent the Commission takes a different or additional approach, we support the proposal to amend Rule 4.5 and the NFA/MFA proposals subject to the comments above. In the event the Commission or its staff has any questions about the matters discussed in this letter, we would be happy to discuss these matters at your convenience.

Sincerely,

Maureen A. Donley-Hoopes

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