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VIA ELECTRONIC MAIL AND FEDERAL EXPRESS

Jean A. Webb, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, D.C. 20581

Re: Advance Notice of Proposed Rulemaking on CPO and CTA Registration Exemptions

Dear Ms. Webb:

Tannenbaum Helpern Syracuse & Hirschtritt LLP ("Tannenbaum") appreciates the opportunity to comment on the No-Action Relief and the two separate proposals submitted by the National Futures Association (the "NFA") and the Mutual Funds Association (the "MFA"), respectively.[1] Tannenbaum represents numerous hedge funds and commodity pools. As such, our letter focuses on our concerns on behalf of the hedge fund and commodity pool industry.

The NFA and MFA proposals would change the commodity pool operator ("CPO") and commodity trading advisor ("CTA") registration rules by exempting pool operators and pool advisers from registration provided that certain criteria is satisfied. In the interim, while Commodity Futures Trading Commission (the "Commission") is considering the two proposals, the CFTC is currently providing temporary relief from CPO and CTA registration (the "No-Action Relief").

[1] Commodity Futures Trading Commission; Commodity Pool Operators and Commodity Trading Advisors; Exemption from Requirement to Register for CPOs of Certain Pools and CTAs Advising Such Pools; advance notice of proposed rulemaking; 67 Fed. Reg. 68785-68790 (November 13, 2002) (referred to in our comment letter as the "ANPR").

We commend the Commission's decision to liberalize the CPO and CTA registration rules for pool operators who offer interests in their pools through private placements to only sophisticated or institutional investors and for advisers that advise such pools, respectively. Essentially, the two proposals and the No-Action Relief are tailored to the dynamics of the hedge fund industry and if registration relief is adopted, relief from the registration rules and the associated obligations of being a registered CPO and/or CTA will likely promote greater participation in the futures market by hedge fund managers.

We are concerned with certain provisions in the No-Action Relief which apply to pool operators engaged in a fund-of funds strategy. Our letter addresses these concerns and provides suggested solutions. Furthermore, we respectfully request the Commission to clarify outstanding issues not addressed in the ANPR which affect the registration process and the practical operations of a CPO and CTA.

Specifically, we address the following: (i) (a) potential problems associated with conditioning the No-Action Relief on sub-pool operators themselves having to file for the No-Action Relief in order for a pool operator engaged in a fund-of-funds strategy to qualify for the No-Action Relief and (b) the necessity of clarifying the 50% liquidation value test as it relates to pool operators of fund-of-funds and (ii) outstanding issues with respect to (a) the registration of individuals connected with the CPO and CTA and (b) the operations of CPOs and CTAs exempt from registration.

I. The No-Action Relief for Pool Operators of Fund of Funds

The No-Action Relief from CPO registration is available for a pool operator engaged in a fund-of-funds strategy provided that its pool satisfies the two conditions for the No-Action Relief[2] and that the manager solely participates indirectly in commodity pools in which the underlying CPOs of the sub-pools have also claimed the No-Action Relief.[3]

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[2] A commodity pool must satisfy two conditions so that the CPO of such pool is exempt from registration. First, participation in the pool is restricted to the following:

- "accredited investors" as defined in Rule 501(a) of the Securities Act of 1933, as amended (the "Securities Act");
- "knowledgeable employees" as defined in Rule 3c-5 under the Investment Company Act of 1940;
- Non-United States persons as defined in CFTC Rule 4.7(a)(1)(iv); or
- insiders of the CPO as described in CFTC Rule 4.7(a)(2)(viii)(A).

Second, the aggregate notional value of a pool's commodity interest positions (entered into for bona fide hedging purposes or otherwise) must not exceed fifty percent (50%) of the liquidation value of the pool's portfolio, after taking into account unrealized profits and unrealized losses on any such positions it has entered into. See 67 Fed. Reg. at 68788-68789.

[3] See 67 Fed. Reg. at 68788, note 15.

A. Requiring Sub-Pool Operators to File for the No-Action Relief May Hinder Relief for Operators of Fund of Funds

Ultimately, the No-Action Relief will likely be of limited value to pool operators of fund-of-funds because the key requirement is that all pool operators of the sub-pools (referred to in the ANPR as the Investee Fund) must also have satisfied the criteria for the No-Action Relief, filed the claim perfecting the No-Action Relief, and made the required one-way disclosure in order for the pool operator of the pool making the investment (referred to in the ANPR as the Investor Fund) to claim the No-Action Relief. This requirement is unduly burdensome in terms of practicality and costs. A pool operator of a fund-of-funds seeking the No-Action Relief would have to expend resources to communicate with its sub-pool operators to determine whether they qualify for the No-Action Relief and then ensure that each sub-pool operator files for the No-Action Relief.

In other provisions of the Commodity Exchange Act, as amended (the "CEA"), the Commission has been cognizant of the fact that sub-pools may be unresponsive to the regulatory burdens imposed on registered pool operators of fund-of-funds.[4] As such, the Commission has been flexible towards accommodating the conventions of the fund-of-funds industry. We believe that to require all sub-pool operators to file for the No-Action Relief runs counter to the Commission's flexible approach towards operators of fund-of-funds.

Another limitation is that the No-Action Relief for pool operators of fund-of-funds is available under only limited circumstances. The unyielding requirement that all sub-pool operators must also have filed for the No-Action Relief may preclude pool operators of fund-of-funds who would otherwise qualify for the No-Action Relief from obtaining this relief. A pool operator of an Investor Pool may be able to mathematically eliminate the possibility of its portfolio exceeding the 50% liquidation value limitation. Nevertheless, the No-Action Relief, as currently drafted, would not permit the pool operator of the Investor Pool to claim the No-Action Relief *unless* all of the Investee Pools comply with the terms for the No-Action Relief. It is possible that among the sub-pools, i.e., the Investee Pools, there is one or more sub-pool engaged in trading futures as it relates to bona fide hedging and not for any speculative purposes.[5] As it stands, this Investee Pool is exempted from registration as a CPO under Rule 4.13 of the CEA. It is likely that such a pool operator is comfortable with its Rule 4.13 status and does not feel an urgency to file for the No-Action Relief. Consequently, the pool operator of the Investor Pool would be precluded from the No-Action Relief despite the fact that the pool

[4] See CFTC Rule 4.22(f)(2) under the CEA. In light of the unresponsiveness of sub-pool operators, the Commission permits pool operators of fund-of-funds to file a claim for an extension of time to file a pool's annual report when the CPO cannot obtain the information its accountant requires about the sub-pools in a timely manner for the pool's Annual Report. See Commodity Futures Trading Commission; Extension of Time to File Annual Reports for Commodity Pools; final rules. 65 Fed. Reg. 81333-81335 (December 26, 2000).

[5] See CFTC Rule 1.3(z)(1) under the CEA.

operator of the Investor Pool is in material compliance with the terms for the No-Action Relief.

Likewise, the same argument can be made for sub-pool operators that operate pursuant to relief under Rules 4.7 or 4.12 of the CEA. It is possible for such sub-pool operators to qualify for the No-Action Relief and yet decide to maintain their status as registered CPOs operating pursuant to 4.7 or 4.12 relief. Even though both the Investee Fund and the Investor Fund are in material compliance with the terms of the No-Action Relief, the fact that among the Investee Funds, one Investee Fund's decision to forgo the No-Action Relief would preempt the pool operator of the Investor Fund to obtain the No-Action Relief is an unreasonable result.

We respectfully request the Commission to amend the current requirement that a sub-pool operator itself must have filed for the No-Action Relief so that as long as the sub-pool operator is (i) a registered CPO; (ii) registered and has subsequently filed for relief under Rules 4.7, 4.12, or 4.13 of the CEA; or (iii) otherwise exempt from registration under Rule 4.5 (or proposed Rule 4.9 if adopted) of the CEA, the No-Action Relief is granted to the pool operator of the Investor Fund *provided* that the pool operator of the Investor Fund satisfies all other criteria for the No-Action Relief. We believe that sub-pool operators that are registered, operate pursuant to relief under Rules 4.7, 4.12, or 4.13, or exempt from registration under Rule 4.5 (or proposed Rule 4.9 if adopted) are already subject to the oversight of the Commission and the NFA. We see no reason why requiring sub-pool operators to file for the No-Action Relief would promote the integrity of the futures market place. The burden to qualify for the No-Action Relief should fall solely on the pool operator of the Investor Fund.

B. Foreign Sub-Pools

The requirement that all sub-pool operators must also have filed for the No-Action Relief also raises the question about the treatment of non-U.S. pool operators. We respectfully request the Commission to consider the issue whether non-U.S. pool operators engaged in foreign futures are included as a condition for the No-Action Relief. Hedge funds operate on an international scale. Sometimes U.S. pools that are fund-of-funds invest in non-U.S. pools. In general, non-U.S. pool operators are outside the scope of U.S. regulatory jurisdiction because such non-U.S. pool operators invest in only non-U.S. futures markets.[6] It would be incongruous to require non-U.S. pool operators to be included as a condition for the No-Action Relief when such non-U.S. pool operators are not required to register with the CFTC and the NFA.

[6] It is noted that under certain circumstances, non-U.S. pool operators who engage in only the non-U.S. futures market file notice with the NFA. For example, in situations when such a non-U.S. pool operator operates a pool that accepts U.S. investors, the non-U.S. pool operator is to file a 30.5 notice with the NFA. See Part 30 of the CFTC Rules under the CEA.

Accordingly, we respectfully request that the Commission exclude non-U.S. pool operators from the requirement that sub-pool operators must also have filed for the No-Action Relief as a condition for the No-Action Relief.

C. 50% Liquidation Value Test Needs Further Clarification

Another outstanding issue with respect to fund-of-funds is that under the No-Action Relief, a pool operator of a fund-of-funds that also directly trades commodity interests may claim the No-Action Relief as long as the portion of its fund-of-funds pool that trades commodity interests directly does not exceed 50% of the liquidation value of the portfolio.[7] If the notional value of that portion of the pool that directly trades commodity interests is greater than the 50% limit, the No-Action Relief is still available if the operator of the fund-of-funds knows that the notional value of all of the pool's commodity interest positions (i.e., those invested through sub-pools and those held directly by the pool) do not exceed the 50% limit.[8]

We respectfully request the Commission to clarify the following questions with respect to the calculation to determine the 50% limitation as it relates to pool operators of fund-of-funds:

•Are all commodity interests (both U.S. futures and non-U.S. futures products) included in the calculation? We respectfully urge the Commission to limit this computation to U.S. products only because of the uncertainties that might exist in non-U.S. markets as to valuation, accounting standards and the like.

•Alternatively, are non-U.S. futures products "carved out" from the 50% liquidation value calculation? We would respectfully urge that such a carve out should take place.

•If a pool operator is to look to the notional value of all of the pool's commodity interest positions (i.e., those invested through sub-pools and those held directly by the pool), are non-U.S. sub-pools comprised of foreign futures "carved out" from the 50% liquidation value calculation?

II. Outstanding Issues

If CPOs and CTAs of pools that limit participation to certain sophisticated investors are exempt from registration, their exemption status raises issues as to the individuals of the CPO or CTA and as to the operations of the CPO or CTA. We wish to alert the Commission to these issues and respectfully request the Commission to consider and resolve the questions we set forth.

[7] See 67 Fed. Reg. at 68788, note 15.
[8] See 67 Fed. Reg. at 68788, note 15.

A. Registration of Individuals Associated with the CPO and CTA

Pursuant to Section 4k of the CEA, persons engaged in the act of solicitation on behalf of a CPO or a CTA must register as Associated Persons of the CPO or the CTA.[9] In light of this general rule, the questions are:

•Do individuals of a CPO or CTA exempt from registration whose activities fall within the definition of Associated Person still have to register as Associated Persons and take the Series 3 examination, or in the alternative, register with the Commission and the NFA in another capacity?[10]

•Do individuals who are not employees of a CPO or a CTA exempt from registration but who engage in solicitation on behalf of such a CPO or CTA still have to register as Associated Persons and take the Series 3 examination?[11]

B. CPO/CTA Operations

•Does the exemption from registration mean that CPOs and/or CTAs are completely exempt from all reporting and recordkeeping requirements imposed on CPOs and CTAs other than what is proposed by the NFA[12] and the MFA[13], respectively?

•Are CPOs and CTAs exempt from registration nevertheless required to register as members with the NFA and as such, required to pay the CPO and/or CTA annual NFA membership fees?

•If CPOs and CTAs exempt from registration are nevertheless required to register as members with the NFA, would they be obligated to have procedures in place pursuant to NFA Bylaw 1101 which prohibits NFA members from doing business with non-NFA members?

•If CPOs and CTAs exempt from registration are nevertheless required to register as members with the NFA, would they be required to complete annually the NFA Self-Examination Checklist?

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[9] See Sections 4k(2) and (3) of the CEA.

[10] See Section 4k(2) and (3) of the CEA; CFTC Rule 3.12 under the CEA; and NFA Compliance Rule 401(a)(1).

[11] See CFTC Interpretive Letter 90-4 (January 31, 1990) (persons who serve as finders on behalf of a CPO must register as an Associated Person of that CPO).

[12] The NFA proposes that a CPO would have to maintain books and records prepared in connection with its activities as a CPO for five years. See Fed. Reg. at 68786-68787.

[13] The MFA proposes that within one hundred eighty (180) days of the end of its fiscal year, a CPO would have to deliver to participants in its pool year-end financial statements certified by independent public accountants and prepared in accordance with generally accepted accounting principles. Moreover, the CPO would have to file two (2) copies of the year-end financials with the CFTC. See Fed. Reg. at 68787-68788.

•If the MFA proposal to require annual financial reports to be filed with the Commission is adopted, in light of the amendment to Rule 4.7(b)(3) to require the filing of the annual financial report with only the NFA, will the final rules require the year-end financials to be filed with the NFA instead?[14]

We appreciate the time the Commission has given to consider our views. If you wish to discuss our comments and suggestions further whether by phone or in person, please feel free to contact Michael G. Tannenbaum, Esq. (tannenbaum@tanhelp.com), Ricardo W. Davidovich, Esq. (davidovich@tanhelp.com) or Roderick J. Cruz, Esq. (cruz@tanhelp.com).

Respectfully yours,

Tannenbaum Helpern
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[14] See Commodity Futures Trading Commission; Commodity Pool Operators and Commodity Trading Advisors; final rules. 67 Fed. Reg. 77409-77411 (December 18, 2002); Commodity Futures Trading Commission; Review by the National Futures Association of Annual Financial Reports Required to Be Filed by Commodity Pool Operators; notice and order. 67 Fed. Reg. 77470-77473 (December 18, 2002).