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September 24, 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”) is writing 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”) with respect to the CFTC’s harmonization rules (“Harmonization Rules”) for operators of registered investment companies for which the Regulation 4.5 exclusion is not available (“Registered Funds”) that are subject to registration as commodity pool operators (“CPOs”) with respect to those Registered Funds (“Registered Fund CPOs”).<sup>1</sup>

This letter supplements our letter to you dated August 28, 2013 in which we requested the staff’s written confirmation with regard to several matters (“August Letter”). This letter addresses one additional matter that we discussed with the DSIO staff but did not cover in the August Letter, and it elaborates on the discussion in the August Letter regarding the CFTC’s intention to further amend Regulation 4.23 (recordkeeping). We respectfully request that the DSIO staff promptly provide a written response that confirms the matters discussed in both letters, so that our members have greater certainty about their compliance obligations under the Harmonization Rules.

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<sup>1</sup> *Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators*, 78 Fed. Reg. 52308 (Aug. 22, 2013) (“Harmonization Adopting Release”). 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.

## **I. Commodity Trading Advisors (“CTAs”) to Registered Funds**

Amended Regulation 4.12(c) provides relief to Registered Fund CPOs from certain provisions of Part 4 of the Commission’s regulations. It does not address the Part 4 obligations of a registered CTA acting in that capacity as a sub-adviser to a Registered Fund. Therefore, absent an applicable exemption from the CTA Disclosure Document preparation, pre-clearance and delivery requirements in the Part 4 regulations, it appears that such a sub-adviser may be required to prepare a fully compliant CTA Disclosure Document, pre-clear it with the National Futures Association (“NFA”) staff, deliver it to the Registered Fund CPO and update it every 12 months.

We understand, based on our August 21 conversation, and request confirmation from the DSIO staff, that registered CTAs acting in that capacity as sub-advisers to Registered Funds before November 22, 2013 will not be required to comply with the CFTC’s CTA Disclosure Document preparation, pre-clearance and delivery requirements with respect to those Registered Funds even if an exemption from the requirement to prepare a CTA Disclosure Document is not otherwise available. We note that such a registered CTA sub-adviser already will have been retained by the Registered Fund and its CPO, and that the information required to be provided to the Registered Fund’s Board of Directors or Board of Trustees and CPO, consistent with the requirements of the Investment Company Act of 1940, already will have been provided.

## **II. Further Amendments to CFTC Regulation 4.23**

As noted in the August Letter, we understand that the CFTC intends to further amend Regulation 4.23 to permit Registered Fund CPOs to maintain books and records with third-party service providers beyond those already identified in the Harmonization Adopting Release. During our August 21 call with DSIO staff and in the August Letter, we emphasized the fact that many Registered Fund CPOs currently maintain their books and records with professional records maintenance and storage companies, and with sub-advisers or CTAs, and we recommended that the CFTC’s further relief from Regulation 4.23 should extend to books and records maintained with those third-party recordkeepers.

In our April 24, 2012 comment letter on the Harmonization Rules as proposed, we noted that Registered Fund shareholder records typically are maintained by the Registered Fund’s transfer agent, rather than the Registered Fund or its adviser/CPO.<sup>2</sup> Accordingly, we recommend that the CFTC’s further relief from Regulation 4.23 also extend to books and records maintained by the transfer agent to a Registered Fund, in addition to professional records maintenance and storage companies, sub-advisers and CTAs.

Finally, we understand that this further relief from Regulation 4.23 may not attempt to identify all permissible third-party recordkeepers but rather to describe such entities by the function they perform. We believe that this approach would provide sufficient flexibility to

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<sup>2</sup> See Letter from Karrie McMillan, General Counsel, ICI to David A. Stawick, Secretary, CFTC, dated April 24, 2012 (“Harmonization Comment Letter”) at 43. The letter is available at <http://www.ici.org/pdf/26083.pdf>.

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cover the types of companies commonly used for records maintenance yet still ensure that the CFTC and NFA would have timely access to a registrant's books and records. For Registered Fund CPOs, this approach also appears to be consistent with the requirements applicable to the use of third-party recordkeepers by registered investment companies and registered investment advisers, as administered by the Securities and Exchange Commission.<sup>3</sup>

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The ICI appreciates the opportunity to work with the DSIO staff to 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  
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<sup>3</sup> For a discussion of these requirements, *see id.* at 42-44.