INVESTMENT COMPANY INSTITUTE

1401 H Street, NW, Washington, DC 20005-2148, USA
202/326-5800 www.ici.org

January 13, 2015

Christopher J. Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

Re: Records of Commodity Interest and Related Cash or Forward Transactions
CFTC RIN 3038-AE23

Dear Mr. Kirkpatrick:

The Investment Company Institute ("Institute" or "ICI")[1] appreciates the opportunity to comment on the proposal by the Commodity Futures Trading Commission ("Commission" or "CFTC") to amend certain recordkeeping requirements applicable to members of a designated contract market ("DCM") or swap execution facility ("SEF") with respect to transactions relating to their business of dealing in commodity interests.[2] ICI appreciates and supports the provisions of the Proposed Amendments that would expand and make permanent the temporary no-action relief that the CFTC staff has granted to commodity trading advisors ("CTAs") that are members of a DCM or SEF to exclude them from the requirement to record all oral communications with customers that lead to the execution of a transaction in a commodity interest.[3] We recommend, however, that the Commission make changes to further exclude operators of registered investment

[1] The Investment Company Institute is the world's leading association of regulated funds, including mutual funds, exchange-traded funds ("ETFs"), closed-end funds, and unit investment trusts ("UITs") in the United States and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors and advisers. ICI's U.S. fund members manage total assets of $17.7 trillion and serve more than 90 million U.S. shareholders.

[2] *Records of Commodity Interest and Related Cash or Forward Transactions*, 79 Fed. Reg. 68140 (November 14, 2014) ("Proposed Amendments"). Specifically, CFTC Regulation 1.35(a) requires that persons covered by the regulation keep records of, among other things, "all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices that lead to the execution of a transaction in a commodity interest and related cash or forward transactions, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device or other digital or electronic media."

[3] *See, e.g.,* CFTC Letter 14-147 (Dec. 16, 2014), *available at* http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-147.pdf; CFTC Letter 14-60 (Apr. 25, 2014), *available at* http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-60.pdf.

companies ("registered funds") that are registered CTAs and/or commodity pool operators ("CPOs"), and that also are DCM or SEF members, from the requirements of Regulation 1.35 pertaining to written records.[4]

Registered fund CTAs and CPOs enter orders solely on a discretionary basis, making it unnecessary to subject them to the requirements of Regulation 1.35. In addition, registered fund CTAs and CPOs, and the funds they manage, are subject to comprehensive recordkeeping requirements under Securities and Exchange Commission ("SEC") regulations. These SEC recordkeeping requirements are analogous to those that would apply to registered fund CPOs and CTAs under Regulation 1.35. As a condition to relief from the written records requirement of Regulation 1.35, the CFTC could require that registered fund CPOs and CTAs provide the CFTC with the same access to their SEC-required records as is required under SEC regulations. Such an approach would satisfy any regulatory need the CFTC may have for records from registered fund CPOs and CTAs, while avoiding subjecting these entities to overlapping and costly recordkeeping requirements, which costs would ultimately be borne by fund shareholders.

I. INTRODUCTION

Prior to 2012, operators of registered funds were generally excluded from CPO registration under CFTC Regulation 4.5, regardless of the amount of commodity interest trading undertaken on behalf of the registered fund. The CFTC amended this regulation in February 2012 to put limits on the amount of a registered fund's commodity interest trading (which now includes swaps) if the operator wants to claim the CPO exclusion.[5] This narrowing of Regulation 4.5 has resulted in hundreds of additional CPOs and CTAs being required to register.

The fact that an increasing amount of swaps are being executed on or subject to the rules of a SEF has caused some CPOs and CTAs, including registered fund CPOs and CTAs, to consider becoming, or to become, SEF members, in an effort to undertake swap transactions for the funds they manage in a more efficient and cost effective manner. ICI is concerned that the recordkeeping requirements imposed by Regulation 1.35 may create a disincentive to do so, which could lead to greater use of intermediaries to execute swaps for registered funds, potentially resulting in greater costs and less efficient execution for registered fund shareholders.[6]

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[4] For the sake of clarity in this regard, ICI recommends that the Commission state in the preamble of the announcement of final regulations that registered fund CPOs and CTAs are not subject to any of the provisions of Regulation 1.35, except for Regulation 1.35(b)(5) with respect to bunched orders.

[5] *Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations*, 77 Fed. Reg. 11252 (February 24, 2012).

[6] The ICI also notes that the prior amendments to CFTC Regulation 1.35 that extended the rule to "members" of a SEF or DCM had their genesis in a notice of proposed rulemaking with the innocuous title, *Adaptation of Regulations*

While existing Regulation 1.35(a) exempts CPOs from the requirement to record oral communications, it does not exempt them from the requirement to maintain written records under the rule.[7] We therefore request an exclusion from the requirement to maintain written records under Regulation 1.35 for both registered fund CTAs and CPOs.

II. THE CFTC SHOULD EXCLUDE REGISTERED FUND CPOs AND CTAs FROM REGULATION 1.35 BECAUSE THEY OPERATE SOLELY PURSUANT TO DISCRETIONARY TRADING AUTHORITY

The CFTC proposes to exclude CTAs from the requirement to record and maintain oral communications based on an acknowledgement that most CTAs that are members of a DCM or SEF have discretionary trading authority over their customers' accounts and, therefore, typically would not have telephone conversations with customers that lead to execution of an order. The CFTC explains that it is not proposing to relieve members of a DCM or SEF that are CTAs from the written recordkeeping requirements of Regulation 1.35 because it believes certain CTAs may execute orders for customers on a *non-discretionary* basis, or may receive instructions changing or limiting their discretionary authority.

Registered fund advisers and sub-advisers, however, trade *solely* on a discretionary basis. Investors purchase interests in registered funds to participate in a certain investment strategy that is disclosed in the registered fund's offering documents. The adviser then either enters orders on behalf of the registered fund according to that strategy and/or engages a sub-adviser or sub-advisers to make trades with respect to all or a portion of the registered fund's assets in accordance with the strategy. These arrangements are documented in detail in an investment management agreement and in the registered fund's prospectus and statement of additional information. If a sub-adviser (CTA) is retained on behalf of a particular registered fund, that sub-adviser is given discretion to manage the portion of the registered fund's assets allocated to it. The main adviser (CPO) is not required to approve or implement such sub-adviser's portfolio trades.

Thus, the same rationale that applies to the CFTC's decision to exclude CTAs from the requirement to record oral communications would apply to exclude registered fund CTAs and CPOs from the requirement to maintain written records under Regulation 1.35. On this basis, we

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to Incorporate Swaps, 76 Fed. Reg. 33066 (July 7, 2011). At the time of that publication, ICI members were generally exempt from requirements to register as CPOs or CTAs, and no SEFs were provisionally registered. Not surprisingly, comments received in response to that notice did not address how proposed amendments to CFTC Regulation 1.35(a) would impact registered fund CPOs and CTAs that are SEF or DCM members, and none of the trade associations representing such CPOs and CTAs filed comments.

[7] Specifically, Regulation 1.35(a)(1)(v), which is proposed to be redesignated as paragraph (a)(4)(v), provides that " . . . the requirement in this paragraph (a)(1) to record oral communications shall not apply to . . . [a] commodity pool operator . . ."

see no policy justification for requiring registered fund CPOs and CTAs to maintain records of either oral or written communications under Regulation 1.35.[8]

We note also that the registered funds on whose behalf CPOs and CTAs operate are truly the customers in commodity interest transactions. The other parties that they deal with, whether it is a swap dealer counterparty or a futures commission merchant ("FCM") that may submit a particular transaction for clearing, are required to maintain extensive transaction records. These requirements also should assure that the CFTC will have the records it needs to perform any necessary market oversight.

III. THE CFTC SHOULD EXCLUDE REGISTERED FUND CPOS AND CTAS FROM REGULATION 1.35 BASED ON THEIR COMPLIANCE WITH SEC RECORDKEEPING REQUIREMENTS

CPOs and CTAs to registered funds are registered with the SEC as investment advisers under the Investment Advisers Act of 1940 ("Advisers Act"). The funds they manage are registered with the SEC under the Investment Company Act of 1940 ("Investment Company Act"). The SEC's regulations under the Advisers Act[9] and the Investment Company Act[10] impose extensive recordkeeping obligations on registered funds and their advisers, which are generally analogous to, and serve the same purpose as, those to which registered fund CPOs and CTAs would be subject under Regulation 1.35.[11] For example, Section 31(a) of the Investment Company Act and Rule 31a-1 thereunder require every registered fund to maintain and preserve those accounts, books, and other documents that constitute the basis for its financial statements. This includes books and records relating to derivatives investments. Rule 31a-1, for example, requires registered funds to maintain separate ledger accounts (or other records) regarding, among other things, each purchase,

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[8] The CFTC notes that it considers the costs to CTAs of recording and maintaining these written records to be "significantly less" than the costs to maintain oral communications. Proposed Amendments, *supra* note 2, at 68144. This is not true, however, for registered fund CTAs and CPOs, which are already subject to comprehensive recordkeeping requirements under SEC regulations, and for which the costs of maintaining these records would be in addition to the recordkeeping costs to which they already are subject, costs that would be inevitably passed on to registered fund shareholders.

[9] *See* Rule 204-2 under the Advisers Act, 17 C.F.R. §275.204-2.

[10] *See* Rules 31a-1 and 31a-2 under the Investment Company Act, 17 C.F.R. §270.31a-1; 17 C.F.R. §270.31a-2.

[11] We note that some of the books and records required by Regulation 1.35 would not typically be applicable to registered fund CPOs and CTAs due to the nature of their activities – unlike FCMs and introducing brokers ("IBs"), which receive, execute and report the execution of customer orders, registered fund CPOs and CTAs act as agent for their clients by *entering* orders with FCMs and IBs. *See, e.g.,* Regulation 1.35(b) (recording of customers' orders) and (f) (trading cards).

sale, receipt, and delivery of commodities for such accounts. These requirements are substantially similar to requirements under Regulation 1.35.

As a result, subjecting registered fund CPOs and CTAs to the additional recordkeeping requirements of Regulation 1.35, including the requirements regarding written communications, would be overlapping and burdensome, and impose costs that would be indirectly borne by registered fund shareholders. These costs would be significant for both large and small registered fund CTAs and CPOs, as both would be subject to additional compliance and recordkeeping costs on an ongoing basis.[12] We believe, however, that any regulatory need the CFTC may have for records relating to a registered fund CPO's or CTA's trading on a SEF or DCM would be fully satisfied by the CFTC's requiring, as a condition to the requested exclusion, that registered fund CPOs and CTAs provide it with the same access to their SEC-required records as they are obligated to provide the SEC under SEC recordkeeping regulations.

Our request that registered fund CPOs and CTAs be excluded from the recordkeeping provisions of Regulation 1.35 based on their compliance with SEC recordkeeping requirements is also consistent with our submission to the CFTC 11 months ago of a Petition for Rulemaking to Amend CFTC Regulations 4.12(c)(3), 4.23 and 4.33 ("Petition").[13] The Petition requests that the CFTC amend those regulations to permit compliance with SEC recordkeeping regulations as substituted compliance with the CFTC's recordkeeping requirements. The Petition explains that the recordkeeping objectives of the CFTC with respect to registered fund CPOs and CTAs can be satisfied by requiring that such entities adhere to the SEC's recordkeeping requirements and requiring that the CFTC be provided the same access to these records as the SEC. ICI believes that its arguments in the Petition further support excluding registered fund CPOs and CTAs from being subject to additional, overlapping recordkeeping requirements under CFTC Regulation 1.35. A copy of the Petition is enclosed for your review and reference.

IV. CONCLUSION

ICI appreciates and supports the CFTC's proposal to codify its previous no-action relief excluding CTAs from the requirement to record and maintain oral communications. ICI recommends that

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[12] In response to the question in the Proposal, we therefore believe that both large and small CTAs should be excluded from the oral recordkeeping requirements under Regulation 1.35, and that, for the reasons discussed in our letter, both large and small registered fund CTAs and CPOs should be excluded from the written recordkeeping requirements of Regulation 1.35 as well.

[13] Petition for Rulemaking to Amend CFTC Regulations 4.12(c)(3), 4.23 and 4.33 filed by the Investment Company Institute on March 11, 2014. We urge the CFTC to give prompt consideration to the Petition and propose for public comment amendments to the regulations as requested in the Petition. Until the CFTC amends the regulations as requested, we reiterate our request that the CFTC staff provide temporary no-action relief to last until final rules related to the Petition are adopted and effective.

the CFTC extend this relief for both registered fund CTAs and CPOs to written records, and exclude such entities from the recordkeeping requirements of Regulation 1.35 in recognition of the discretionary nature of their trading authority, and the comprehensive recordkeeping requirements to which they are already subject under SEC regulations. Registered fund advisers and sub-advisers, many of whom have had to register with the CFTC as CPOs and CTAs for the first time in the last two years, seek to provide services in the most efficient and cost-effective way for fund shareholders. In the absence of our recommended revisions, the Proposed Amendments would make it more difficult for these advisers and sub-advisers to do so, which would ultimately increase costs for registered fund shareholders.

We would be happy to discuss the points raised in this submission in further detail with any of the Commissioners or the CFTC staff. Please feel free to contact the undersigned, Sarah Bessin at 202-326-5835, Rachel Graham at 202-326-5819, or our outside counsel at K&L Gates, Cary J. Meer at 202-778-9107, or Lawrence B. Patent at 202-778-9219, if you have any questions or we can be of assistance.

Sincerely,

/s/ David W. Blass

David W. Blass
General Counsel

Enclosure

cc: Tom Smith, Acting Director
Katherine Driscoll, Associate Director
Division of Swap Dealer and Intermediary Oversight
Commodity Futures Trading Commission

INVESTMENT COMPANY INSTITUTE

1401 H Street, NW, Washington, DC 20005-2148, USA
202/326-5800 www.ici.org

March 11, 2014

Ms. Melissa D. Jurgens
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: Petition for Rulemaking to Amend CFTC Regulations 4.12(c)(3), 4.23 and 4.33

Dear Ms. Jurgens:

The Investment Company Institute (the "ICI" or "Petitioner") respectfully petitions the Commodity Futures Trading Commission (the "Commission" or the "CFTC") under CFTC Regulation 13.2 to amend (i) CFTC Regulation 4.12(c), which contains exemptions from Subpart B of the Commission's Part 4 regulations, (ii) CFTC Regulation 4.23, which contains recordkeeping requirements applicable to commodity pool operators ("CPOs"), and (iii) CFTC Regulation 4.33, which contains recordkeeping requirements applicable to commodity trading advisors ("CTAs").

The Petitioner specifically requests that the entities listed below may satisfy their recordkeeping requirements under the CFTC's regulations through substituted compliance with the recordkeeping rules of the Securities and Exchange Commission (the "SEC") under the Investment Company Act of 1940, as amended (the "Investment Company Act"), and the Investment Advisers Act of 1940, as amended (the "Advisers Act"):

(i) CPOs to investment companies registered under the Investment Company Act ("Registered Funds") that are unable to rely on the exclusion in CFTC Regulation 4.5 ("Registered Fund CPOs"),

(ii) CTAs that are sub-advisers to Registered Funds whose operators are unable to rely on the exclusion in Regulation 4.5 ("Registered Fund CTAs"), and

(iii) CPOs and CTAs to controlled foreign corporations ("CFCs") of Registered Funds ("CFC CPOs" and "CFC CTAs," respectively).

In particular, the Petitioner requests that the Commission amend CFTC Regulations 4.12(c)(3), 4.23 and 4.33 to allow for substituted compliance with the SEC's recordkeeping rules under the Investment Company Act and the Advisers Act for these Registered Fund CPOs, Registered Fund CTAs, CFC CPOs and CFC CTAs (collectively, "Registrants"). Specifically, the ICI is requesting:

(i) Relief regarding the content of records to be kept; and

(ii) Relief regarding the manner of keeping such records, which relates to:

(1) Who may keep such records, and

(2) How such records must be kept (*i.e.*, the technological requirements relating to recordkeeping).

For the reasons set forth below, the ICI is also respectfully requesting temporary no-action relief on an expedited basis to last until final rules relating to this petition are adopted and effective.

The text of the proposed rule amendments is set forth in Appendix A to this letter.

I. The Petitioner

A. Petitioner's Background

The ICI is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds, and unit investment trusts. The 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 the ICI manage total assets of $16.3 trillion and serve more than 90 million shareholders.

B. Nature of Petitioner's Interest

Registrants[1] are already subject to a comprehensive recordkeeping regime under the Investment Company Act and the Advisers Act and the rules thereunder. This recordkeeping regime serves the same regulatory purposes as the CFTC's recordkeeping regulations and, as discussed further below, is tailored to registered funds and their advisers. Furthermore, the CFTC would have full access to these records if substituted compliance is granted as requested herein. As a result of the changes to the Part 4

[1] Frequently, the Registered Fund's CPO serves as the CPO to the Registered Fund's wholly-owned CFC.

regulations made in 2012,[2] many investment advisers (and sub-advisers) to Registered Funds and CFCs are now also registered as CPOs or CTAs and consequently are subject to dual regulation by the CFTC and the SEC with respect to recordkeeping, which is inefficient and costly to these entities. The ICI is therefore requesting, on behalf of its members, that the CFTC provide for the recordkeeping relief requested herein.[3]

II. Supporting Arguments

A. Harmonization

When the CFTC narrowed the Regulation 4.5 exclusion for Registered Funds, it indicated that these changes might result in inconsistent regulation of Registered Fund CPOs and CTAs, and that, accordingly, it was proposing to harmonize its rules with those of the SEC.[4] Consequently, at the same time it issued the Adopting Release, the CFTC issued a companion release stating its intention to harmonize certain of its rules with the corresponding SEC rules in the areas of disclosure, reporting and recordkeeping requirements for dual registrants (*i.e.*, Registered Fund CPOs).[5]

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[2] *See Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations*, 77 Fed. Reg. 11252 (Feb. 24, 2012), amended by *Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations*, 77 Fed. Reg. 17328 (Mar. 26, 2012) (collectively, "Adopting Release").

[3] In prior letters to the CFTC staff, ICI requested confirmation that the CFTC would provide relief for Registered Funds to maintain their books and records with a variety of third-party recordkeepers including, in addition to the third parties currently permitted under amended CFTC Regulation 4.23, professional records maintenance and storage companies, sub-advisers, CTAs, and transfer agents. We understand that the CFTC staff intends to address this issue through interpretive relief in the near future. *See* Letters from Karrie McMillan, General Counsel, Investment Company Institute, to Mr. Gary Barnett, Director, Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, dated Aug. 28, 2013 ("August ICI Letter"), and Sept. 24, 2013.

[4] Adopting Release, *supra* note 2, at 11255 ("A number of commenters who expressed general opposition also acknowledged that if the Commission determined to proceed with its proposed changes to § 4.5, certain areas of harmonization with SEC requirements should be addressed. To that end, concurrently with the issuance of this rule, the Commission plans to issue a notice of proposed rulemaking detailing its proposed modifications to part 4 of its regulations to harmonize the compliance obligations that apply to dually registered investment companies. . . . The Commission also recognizes that modification to § 4.5 may result in costs for registered investment companies. For that reason, as stated above, in conjunction with finalizing the proposed amendments to § 4.5, the Commission has proposed to adopt a harmonized compliance regime for registered investment companies whose activities require oversight by the Commission. Although the Commission believes the modifications to § 4.5 enhance the Commission's ability to effectively oversee derivatives markets, it is not the Commission's intention to burden registered investment companies beyond what is required to provide the Commission with adequate information it finds necessary to effectively oversee the registered investment company's derivatives trading activities. Through this harmonization, the Commission intends to minimize the burden of the amendments to § 4.5.").

[5] *See Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators*, 77 Fed. Reg. 11345, at 11350 (Feb. 24, 2012) (the proposing release for harmonization) ("To address the

ICI appreciates that some limited recordkeeping relief was granted in the Harmonization Release.[6] We note, however, that much of that relief (specifically, the ability to keep records with certain third-party recordkeepers and the relief from the subsidiary ledger requirement) sought to modernize the CFTC's recordkeeping rules for all CPOs. The only aspect of the relief specific to Registered Fund CPOs avoids a direct conflict with the federal securities laws.[7] Given the robust recordkeeping requirements to which Registered Fund CPOs are already subject, we believe more comprehensive harmonization in this area is necessary, appropriate and consistent with the Commission's stated intention. Accordingly, we are recommending a substituted compliance approach (similar to the approach to disclosure provided by the Harmonization Release), with respect to both the content of books and records and the manner in which they are maintained.

Moreover, while the Harmonization Release focused solely on Registered Fund CPOs, we believe relief is also needed for Registered Fund CTAs; otherwise, harmonization relief would apply to Registered Fund advisers but not also to Registered Fund sub-advisers.[8] Importantly, the SEC's rules under the Investment Company Act and the Advisers Act do not distinguish between Registered Fund advisers and sub-advisers — they are each treated as an "adviser" and required to be registered under the Advisers Act. Thus, not providing relief for Registered Fund CTAs as requested herein will undercut the benefit of substituted compliance for Registered Funds.

Furthermore, Registered Funds and their advisers and sub-advisers are subject to established requirements under the Investment Company Act and the Advisers Act with respect to the maintenance of a broad range of books and records, including records with respect to CFCs. These records, whether maintained by the adviser, sub-adviser, or other third party, are readily accessible by

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commenters' concerns about the content and timing of disclosure documents, account statement delivery and certification, and *recordkeeping* requirements, the Commission is proposing to harmonize its regulatory requirements with those of the SEC to reduce the costs for dual registrants. Each of these harmonizing provisions involves recordkeeping and reporting obligations that would be a collection of information under the [Paperwork Reduction Act].") (emphasis added).

[6] *See Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators*, 78 Fed. Reg. 52308 (Aug. 22, 2013) ("Harmonization Release").

[7] The recordkeeping relief specific to Registered Fund CPOs is contained in Regulation 4.12(c)(3)(iii), which exempts Registered Fund CPOs from having to make their records available to participants for inspection or copying. *See id.* at 52321.

[8] *See Division of Swap Dealer and Intermediary Oversight Responds to Frequently Asked Questions – CPO/CTA: Amendments to Compliance Obligations* (Aug. 14, 2012), which postponed the recordkeeping, reporting, and disclosure compliance obligations for Registered Fund CTAs until "60 days following the effective date of a final rule implementing the Commission's proposed harmonization effort." Unfortunately, the Harmonization Release did not address the compliance obligations for Registered Fund CTAs.

the SEC. As detailed in Appendix B,[9] we believe that these existing recordkeeping requirements serve the same purposes as, and in some respects are more extensive than, those set forth in CFTC Regulations 4.23 and 4.33.

B. CFTC Recordkeeping Rules

CFTC Regulation 4.23 establishes the recordkeeping requirements for CPOs, and CFTC Regulation 4.33 establishes the recordkeeping requirements for CTAs. Books and records required to be maintained under Regulation 4.23 and 4.33 must be maintained in accordance with CFTC Regulation 1.31,[10] which prescribes how those records must be kept and imposes certain detailed requirements regarding electronic records. Moreover, pursuant to CFTC Regulation 4.23(c)(2), if a Registered Fund CPO wishes to use a third party to keep some of its records, such recordkeeper must certify that it will keep and maintain the records in compliance with CFTC Regulation 1.31.[11]

When CFTC Regulation 1.31 was originally adopted in 1937, it required all CFTC registrants to retain records for five years, the first two years of which the records were to be readily accessible. The regulation further required that such books and records be subject to inspection by the appropriate government agencies.

When the Commission subsequently amended CFTC Regulation 1.31 in 1976 and 1993, it added provisions to allow for keeping records in microfilm or microfiche[12] and electronically.[13] And when the CFTC adopted current CFTC Regulation 1.31(b) in 1999, it modeled its rule on the SEC's electronic recordkeeping rule for broker-dealers, which the SEC adopted in 1997 (Rule 17a-4(f) under the Securities Exchange Act of 1934 ("Exchange Act")).[14] Those SEC recordkeeping requirements, including the electronic maintenance requirements, only applied to broker-dealers, however, not

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[9] Appendix B contains a comparison of the content of records required to be kept under the CFTC's regulations and the SEC's rules under the Investment Company Act and the Advisers Act.

[10] *See* CFTC Regulations 4.23 and 4.33.

[11] CFTC Regulation 4.23(c)(2) states, "[t]he pool operator shall also file electronically with the National Futures Association a statement from each person who will be keeping required books and records in lieu of the pool operator wherein such person…[a]grees to keep and maintain such records required in accordance with §1.31 of this chapter."

[12] *See Rules Under the Commodity Exchange Act - General Conformity Revisions*, 41 Fed. Reg. 3192 (Jan. 21, 1976).

[13] *See Recordkeeping*, 58 Fed. Reg. 27458 (May 10, 1993).

[14] *Recordkeeping*, 64 Fed. Reg. 28735, at 28735 (May 27, 1999) ("In light of the significant number of Commission registrants that are subject to the recordkeeping requirements of the [SEC], the Proposal included many provisions similar to those adopted by the SEC in 1997.").

investment advisers.[15] Four years later, however, the SEC adopted a separate electronic recordkeeping rule for advisers and Registered Funds, as discussed below.[16]

C. Investment Company Act and Advisers Act Recordkeeping Rules

The SEC's recordkeeping rules under the Investment Company Act and the Advisers Act provide comprehensive recordkeeping requirements with respect to registered investment advisers ("RIAs") and Registered Funds, and also include requirements that apply with respect to CFCs, generally requiring the same types of records be maintained as are required under the CFTC's regulations. Additionally, the Investment Company Act and the Advisers Act recordkeeping rules are more tailored to the Registered Fund and RIA business models than the CFTC's regulations.[17]

For example, the SEC's electronic recordkeeping rules under the Investment Company Act and the Advisers Act applicable to RIAs and Registered Funds are better suited, for the reasons discussed above, to Registered Fund CPOs and CTAs than current CFTC Regulation 1.31(b) which is based on SEC Rule 17a-4(f) for broker-dealers.

Requiring Registered Fund CPOs and Registered Fund CTAs (and their third-party recordkeepers) to comply with CFTC Regulation 4.23 and Regulation 4.33, each of which require compliance with CFTC Regulation 1.31, would subject these Fund advisers to burdensome, outdated, and costly technological requirements that are unnecessary to meet the CFTC's regulatory objectives. The SEC considered similar factors when it determined to adopt different electronic recordkeeping requirements for RIAs and Registered Funds than it did for broker-dealers, noting in the Electronic Records Adopting Release that:

> We requested commenters to address whether rules 31a-2 and 204-2 should require funds and advisers to preserve records in a non-rewriteable, non-erasable (also known as

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[15] *See Reporting Requirements for Brokers or Dealers Under the Securities Exchange Act of 1934*, 62 Fed. Reg. 6469, at 6469 (Feb. 12, 1997) ("The [SEC] is amending its broker-dealer record preservation rule to allow broker-dealers to employ, under certain conditions, electronic storage media to maintain records required to be retained.").

[16] *See Electronic Recordkeeping by Investment Companies and Investment Advisers*, 66 Fed. Reg. 29224 (May 30, 2001) ("Electronic Records Adopting Release"), which allowed "funds and advisers . . . to maintain records electronically if they establish and maintain procedures: (i) To safeguard the records from loss, alteration, or destruction, (ii) to limit access to the records to authorized personnel, the [SEC], and (in the case of funds) fund directors, and (iii) to ensure that electronic copies of nonelectronic originals are complete, true, and legible." *Id*. at 29224. Importantly, the SEC did not adopt the specific electronic recordkeeping requirements it had adopted for broker-dealers regarding how the records are to be maintained.

[17] *See* Rule 31a-2(f) under the Investment Company Act and Rule 204-2(g) under the Advisers Act. *See* Appendix B for a comparison of the content of records required to be kept under the CFTC's regulations and the SEC's rules under the Investment Company Act and the Advisers Act.

> "write once, read many," or "WORM") format. Commenters concurred . . . that the costs of such a requirement would be likely to outweigh the benefits (with respect to advisers and funds). Based on our consideration of costs, benefits, and other factors described in the proposing release we are not adopting such a requirement at this time. *We recognize that the standards for electronic recordkeeping we are adopting for funds and advisers are different from the rules that we have adopted for broker-dealers, which require brokerage records to be preserved in a WORM format. We have not experienced any significant problems with funds or advisers altering stored records. Moreover, most advisory and mutual fund arrangements involve multiple parties (e.g., brokers, custodians, transfer agents), each with its own, often parallel, recordkeeping requirement. As a result, our compliance examiners typically have an alternative means to verify the accuracy of adviser and fund records. In light of these factors, the costs of requiring funds and advisers to invest in new electronic recordkeeping technologies may not be justified.*[18]

More broadly, we believe that the recordkeeping objectives of the CFTC with respect to Registered Fund CPOs and CTAs can be satisfied by requiring that such entities adhere to the SEC's recordkeeping requirements and by requiring that the CFTC be given the same access to these records as the SEC.[19] This substituted compliance approach would avoid overlapping requirements from the two regulatory regimes, as well as the high costs associated with making changes to existing recordkeeping arrangements or systems, which would likely be borne by Registered Fund shareholders.

D. Current Industry Practices

It is our understanding that many CPOs and CTAs maintain books and records in a manner that may not strictly comply with CFTC Regulation 1.31, and that the National Futures Association staff, during examinations, generally has not been critical of these entities in such circumstances, provided that they can promptly produce the required records. Because the requirements of CFTC Regulation 1.31(b) are based on old, outdated technology, and were adopted at a time when electronic records were just emerging, the requirements of CFTC Regulation 1.31(b) do not comport with current industry practice. Electronic recordkeeping has become standard in the industry, and thus the recordkeeping rules of CFTC Regulation 1.31(b) are no longer appropriate.

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[18] Electronic Records Adopting Release, *supra* note 16, at 29224 (emphasis added).

[19] If, for some reason, the CPO of a business development company (a "BDC") cannot comply with the conditions of CFTC No-Action Letter 12-40 (Dec. 4, 2012), which are modeled on CFTC Regulation 4.5 with the addition of a notice to the CFTC's Division of Swap Dealer and Intermediary Oversight, the CPO of a BDC should be treated as the CPO of a Registered Fund for purposes of this petition and the related temporary no-action relief requested. Accordingly, we have included in Appendix A in brackets proposed rule amendments that would also provide relief for such BDCs.

Now, more persons are subject to CFTC Regulation 1.31. This includes not only Registrants but also many of their third-party recordkeepers. We understand that such recordkeepers, despite their best efforts, have faced challenges in meeting the technical requirements of Regulation 1.31. Moreover, some third-party recordkeepers (such as professional records maintenance and storage companies)[20] only keep the records in the manner in which the records have been entrusted to them, and they have no obligation under their storage contracts to maintain these records in a manner other than that in which the records have been supplied.

E. Relief Relating to CPO and CTA Required Records

In the August ICI Letter,[21] ICI requested that the CFTC staff confirm (and subsequently provide more definitive relief through rule amendments or no-action relief) that, where a substantive requirement for Registered Fund CPOs was removed by the Harmonization Release, there should be no corresponding recordkeeping requirement for that item.

For example, while the Harmonization Release exempted Registered Fund CPOs from the Account Statement preparation and distribution requirements under CFTC Regulation 4.22(a) and (b), it did not contain a corresponding exemption from maintaining books and records relevant to such Account Statements called for by paragraphs (a)(10), (a)(11), and (a)(12) of CFTC Regulation 4.23. As a further example, CFTC Regulations 4.23(b)(1)-(3) require a CPO to keep records regarding the proprietary commodity interest trading of the CPO itself and of its principals as well as the confirmations of those transactions. However, Registered Fund CPOs that cannot comply with CFTC Regulation 4.5 are only required to show the CPO's related performance in the Registered Fund's disclosure documents (and only if the pool has less than three years of operating history). There is no requirement to show the performance of the CPO's or principals' proprietary trading under CFTC Regulation 4.12(c). Thus, there should be no record maintenance requirement for a record that is not otherwise substantively required by the applicable CFTC rules. As stated above, we have requested that the CFTC reconcile such inconsistencies and confirm that Registered Fund CPOs are not required to maintain any books and records under CFTC Regulation 4.23 related to compliance obligations to which they are not subject by virtue of the Harmonization Release.

The CFTC should take a similar approach with respect to recordkeeping by Registered Fund CTAs. For example, CFTC Regulations 4.33(b)(1) and 4.33(b)(2)(i) and (ii) require a CTA to keep records regarding the proprietary commodity interest trading of the CTA itself and of its principals. However, the performance of a CTA that is not the Registered Fund CPO is not required to be included in the Registered Fund's disclosure document under CFTC Regulation 4.12(c)(3)(i)(A).

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[20] We understand that the CFTC staff expects shortly to permit professional records maintenance and storage companies to serve as permissible third-party recordkeepers. *See supra* note 3.

[21] August ICI Letter, *supra* note 3.

Thus, there should be no corresponding recordkeeping requirement. Consequently, Registered Fund CTAs should be granted similar relief from CFTC Regulation 4.33(b)(2)(i) and (ii), which corresponds to the trade confirmation recordkeeping requirement for CPOs under Regulation 4.23(b)(2)(i) and (ii). This relief was not requested in the August ICI Letter and, accordingly, the Petitioner respectfully requests that the CFTC reflect this relief in any recordkeeping amendments adopted pursuant to this petition.

III. Requested Relief

The Petitioner hereby respectfully requests that the Commission amend CFTC Regulations 4.12(c)(3), 4.23 and 4.33 to allow for substituted compliance by Registrants with the SEC's recordkeeping rules under the Investment Company Act and Advisers Act and applicable regulations thereunder, as set forth in Appendix A to this letter.

There are two main reasons why the Petitioner is requesting substituted compliance with the SEC's recordkeeping rules under the Investment Company Act and the Advisers Act, and those are cost and time. Principally, it is extremely costly for Registrants and their third-party recordkeepers to comply with CFTC Regulations 4.23 and 4.33, including Regulation 1.31. Firms have trended for years toward maintaining records in electronic format because most documents are now created electronically. Converting these systems to use non-erasable, non-rewriteable media would have significant costs for these firms, including purchasing hardware, migrating document repositories, implementing software to remove records once the retention period expires and training staff.[22] In particular, the requirement in Regulation 1.31(b) that any person who uses only electronic storage media to preserve some or all of its required records must enter into an arrangement with at least one third-party technical consultant ("Technical Consultant") is a costly and unnecessary burden on the recordkeeper. The Technical Consultant would need to be granted access to, and trained on, a multitude of proprietary systems (as opposed to common systems, such as email). Many Registrants and their third-party recordkeepers may balk at granting access to systems that are critical to their operations or present a competitive advantage. The SEC's recordkeeping rules under the Investment Company Act and the Advisers Act do not contain a similar Technical Consultant requirement, and the SEC generally has not had difficulty obtaining required records from those advisers or sub-advisers based on the manner in which their records are required to be maintained.

Furthermore, it is important to note that the requirements of CFTC Regulation 1.31(b) are based on old, outdated technology, and were adopted at a time when electronic records were just

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[22] *See* discussion in Section II.C above.

emerging. Now that electronic recordkeeping is standard in the industry, these recordkeeping requirements are no longer appropriate.[23]

Finally, it would be very time consuming, with little or no corresponding benefit, for Registrants to comply with CFTC Regulation 1.31. Many of the required records are maintained in system-critical applications that cannot be quickly modified to work with new storage media. Additionally, the lack of practical alternatives for Registrants and their third-party recordkeepers may ultimately prove to be a time consuming task for them. If a Registrant (or a third-party recordkeeper) cannot comply with the requirements of CFTC Regulation 1.31(b), its main alternatives are to store records in hard copy or on micrographics. This would be a very time consuming task and would provide little, if any, benefit to the CFTC or to the general public (as it would require the recordkeeper to print out and store paper, microfilm or microfiche copies of countless records). These costs likely will be borne by the shareholders of the Registered Fund.

IV. Temporary No-Action Relief

The Petitioner acknowledges that it will take time for the CFTC to give its full consideration to this request and to conduct a further rulemaking. For this reason, Petitioner also requests temporary no-action relief, which would allow the CFTC adequate time to fully consider the substituted compliance request while sparing Registrants (and their third-party recordkeepers) from having to modify long-standing recordkeeping arrangements and systems, the cost of which would likely be borne by Registered Fund shareholders. We request that this temporary no-action relief exempt all Registrants from compliance with CFTC Regulation 4.23, subject to their adherence to the SEC's recordkeeping requirements under the Investment Company Act and the Advisers Act and applicable regulations thereunder, until the effective date of the further rulemaking.

V. Conclusion

Registrants already must comply with the extensive recordkeeping requirements under the Investment Company Act and the Advisers Act. These rules serve the same regulatory purposes as the CFTC's recordkeeping regulations, provide comprehensive recordkeeping requirements with respect to RIAs and Registered Funds, and require similar types of books and records. With respect to the manner of their maintenance, we respectfully submit that the SEC has not had difficulty obtaining electronically-maintained records from RIAs and third-party recordkeepers, even though these parties are subject to recordkeeping procedures that are different than those required by CFTC Regulation 1.31(b). Therefore, the Petitioner respectfully requests that the CFTC adopt a substituted compliance

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[23] We recognize that these issues suggest the need for a general overhaul of CFTC Regulation 1.31. As discussed above, the Petitioner is requesting substituted compliance relief for Registered Funds in the context of CFTC Regulations 4.23 and 4.33, which would include relief from Regulation 1.31 for Registered Funds.

approach for Registrants that adhere to the SEC's recordkeeping requirements under the Investment Company Act and the Advisers Act and applicable regulations thereunder. As discussed above, the CFTC would have full access to these records.

The Petitioner also respectfully requests temporary expedited no-action relief in this regard, to last until final rules relating to this petition are adopted and effective.

* * * *

We sincerely appreciate the Commission's willingness to address the industry's concerns. If you have questions or require further information, please contact me at (202) 218-3563, Sarah A. Bessin at (202) 326-5835, or Rachel H. Graham at (202) 326-5819, or our outside counsel at K&L Gates, Cary J. Meer at (202) 778-9107, or Mark Amorosi at (202) 778-9351.

Sincerely,

/s/ Dorothy M. Donohue

Dorothy M. Donohue
Acting General Counsel

cc: Gary Barnett, Director
Amanda Olear, Associate Director
Division of Swap Dealer and Intermediary Oversight
Commodity Futures Trading Commission

APPENDIX A

Text of Proposed Rule Amendments[24]

Additions to current regulations in *bold italics*. Deletions in ~~strikethrough~~.

§4.12 Exemption from provisions of part 4.

* * * * *

(c) * * *

(3) * * *

* * * * *

(iii) ~~Exemption from the provisions of §4.23 that require that a pool operator's books and records be made available to participants for inspection and/or copying at the request of the participant.~~ ***The pool operator of an offered pool will be exempt from the requirements of §4.23; Provided, that (1) the pool's books and records, the books and records of any controlled foreign corporation of the pool and the pool operator's books and records are maintained in accordance with the Investment Advisers Act of 1940 and/or the Investment Company Act of 1940, and applicable regulations thereunder, and (2) any such records are made available for inspection upon request by an authorized representative of the Commission or the United States Department of Justice.***

* * * * *

§4.23 Recordkeeping

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(d) Notwithstanding the foregoing, if a commodity pool operator is registered as an investment adviser under the Investment Advisers Act of 1940 and is advising a controlled foreign corporation of an investment company registered under the Investment Company Act of 1940 [or a business

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[24] Text of amendments providing relief to business development companies is bracketed below.

development company that has made an election under Section 54 of such act and continues to be regulated by the Securities and Exchange Commission as a business development company], such commodity pool operator may keep the books and records with respect to such entities in accordance with the requirements of such acts; Provided, that such books and records are made available for inspection upon request by an authorized representative of the Commission or the United States Department of Justice.

* * * * *

§4.33 Recordkeeping.

* * * * *

(c) Notwithstanding the foregoing, if a commodity trading advisor is registered as an investment adviser under the Investment Advisers Act of 1940 and is advising an investment company registered under the Investment Company Act of 1940, a controlled foreign corporation of such investment company, [or a business development company that has made an election under Section 54 of such act and continues to be regulated by the Securities and Exchange Commission as a business development company] (collectively, "Regulated Entities"), such commodity trading advisor may maintain the books and records with respect to such Regulated Entities in accordance with the requirements of such acts and applicable regulations thereunder.

(d) Notice of claim for exemption. Any commodity trading advisor that desires to claim the relief available under subsection (c) of this §4.33 must file electronically a claim of exemption with the National Futures Association through its electronic exemption filing system. Such claim must:

> ***(1) Provide the name, main business address and main business telephone number of the registered commodity trading advisor making the request;***
>
> ***(2) Contain a representation that the books and records required to be maintained by the Investment Advisers Act of 1940 and/or the Investment Company Act of 1940 will be maintained (i) in accordance with the Investment Advisers Act of 1940 and/or the Investment Company Act of 1940, and applicable regulations thereunder, as applicable, and (ii) made available for inspection upon request by an authorized representative of the Commission or the United States Department of Justice; and***
>
> ***(3) Be filed by a representative duly authorized to bind the commodity trading advisor.***

APPENDIX B

Relief Regarding Content of Books and Records

This exhibit compares the books and records that Registered Funds and their RIAs (including advisers and sub-advisers to Registered Funds) are required to maintain under SEC rules with the books and records that CPOs and CTAs are required to maintain under the CFTC's Part 4 regulations. Investment advisers and sub-advisers also are required to maintain similar records under the Advisers Act with respect to CFCs. In addition, Registered Funds are required, under the Investment Company Act, to maintain books and records relating to CFCs in connection with preparing consolidated financial statements for the Registered Fund.

I. Comparable Records

The books and records that Registered Funds and RIAs are required to maintain under the Investment Company Act, the Advisers Act, and the rules promulgated thereunder are generally equivalent to, and serve the same purposes as, the required books and records under CFTC Regulations 4.23 and 4.33 under the Commodity Exchange Act (the "CEA"). Examples of comparable records required to be maintained under the two regulatory regimes include the following:

- Journals containing an itemized daily record of all purchases or sales of securities and commodity interest transactions;[25]

- General ledgers or other records reflecting, among other things, all asset, liability, capital, income and expense accounts;[26]

- Separate ledger accounts (which may be maintained by a transfer agent) showing for each shareholder of record or commodity pool participant the securities or commodity interests held;[27]

- Check books, bank statements, cancelled checks, and cash reconciliations and all bills or statements (or copies thereof);[28]

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[25] *Cf.* CFTC Regulations 4.23(a)(1) and 4.23(a)(2) with Investment Company Act Rule 31a-1(b)(1) and Advisers Act Rule 204-2(a)(1).

[26] *Cf.* CFTC Regulation 4.23(a)(6) with Investment Company Act Rule 31a-1(b)(2) and Advisers Act Rule 204-2(a)(2).

[27] *Cf.* CFTC Regulation 4.23(a)(4) with Investment Company Act Rule 31a-1(b)(iv).

[28] *Cf.* CFTC Regulations 4.23(a)(8) and 4.23(b)(3) with Advisers Act Rules 204-2(a)(4) and (a)(5).

- Notices, circulars, advertisements, newspaper articles, investment letters, bulletins or other communications sent to clients and prospective clients;[29]

- Powers of attorney and other documents granting the CTA, RIA or Registered Fund sub-adviser discretionary authority over a client's assets or account;[30] and

- Copies of written agreements with clients.[31]

II. Additional Records Under SEC Rules

The recordkeeping requirements under the Investment Company Act and the Advisers Act also impose additional recordkeeping obligations on Registered Funds and RIAs (including sub-advisers to Registered Funds) that are not required under the CFTC's Part 4 regulations. Examples of additional records required to be maintained by Registered Funds and RIAs (including sub-advisers to Registered Funds) include the following:

- The Registered Fund's corporate charter, certificate of incorporation, and by-laws, as well as minute books of stockholders' and directors' meetings;[32]

- All bills or statements (paid or unpaid), trial balances, financial statements, and internal audit working papers related to the business of a Registered Fund adviser or sub-adviser;[33]

- Communications sent to or received by a Registered Fund adviser or sub-adviser that detail proposed investment advice, any receipt, disbursement, or delivery of funds or securities, or the placing or execution of any order to purchase or sell any security;[34]

- A copy of the code of ethics of a Registered Fund adviser and sub-adviser, and records of any violation of the code of ethics and any action taken as a result of such violation;[35]

- A record of certain securities transactions in which a Registered Fund adviser or sub-adviser or its "access persons" have a direct or indirect beneficial ownership or interest;[36]

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[29] *Cf.* CFTC Regulations 4.23(a)(9) and 4.33(a)(7) with Advisers Act Rule 204-2(a)(11).

[30] *Cf.* CFTC Regulation 4.33(a)(3) with Advisers Act Rule 204-2(a)(9).

[31] *Cf.* CFTC Regulation 4.33(a)(4) with Advisers Act Rule 204-2(a)(10).

[32] Investment Company Act Rule 31a-1(b)(4).

[33] Advisers Act Rule 204-2(a)(5) and (6).

[34] Advisers Act Rule 204-2(a)(7).

[35] Advisers Act Rules 204-2(a)(12)(i) and 204-2(a)(12)(ii).

- Copies of performance advertisements and documents necessary to form the basis for or demonstrate the calculation of such performance information;[37]

- Copies of a Registered Fund adviser and sub-adviser's brochures and brochure supplements, and each amendment or revision thereto;[38]

- Copies of a Registered Fund adviser's and sub-adviser's policies and procedures, as well as any records documenting the annual review of such policies and procedures;[39]

- Records that substantiate compliance with the "pay-to-play" rules under Rule 206-4(5) under the Advisers Act;[40]

- Records (*e.g.*, questionnaires or other documents) of each initial and subsequent determination that a director is not an interested person of a Registered Fund, as well as any materials used by the Registered Fund's "disinterested" directors to determine that the person who is acting as legal counsel to the directors is independent;[41] and

- Documents related to the approval or renewal of contracts between a Registered Fund and its adviser and/or sub-adviser.[42]

Based on the significant overlap between the content of the required records under the SEC's and CFTC's regimes, as well as the additional recordkeeping requirements under the SEC's rules, we believe that compliance with the SEC's books and records rules by Registrants is fully consistent with investor protection and should be permitted in lieu of compliance with the CFTC's recordkeeping regulations.

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[36] Advisers Act Rule 204-2(a)(13).

[37] Advisers Act Rule 204-2(a)(16).

[38] Advisers Act Rule 204-2(a)(14)(i).

[39] Advisers Act Rule 204-2(a)(17).

[40] Advisers Act Rule 204-2(a)(18).

[41] Investment Company Act Rule 31a-2(a)(5).

[42] Investment Company Act Rule 31a-2(a)(6).