



March 31, 2009

Via Electronic Mail: secretary@cftc.gov

David A. Stawick
Secretary
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, D.C. 20581

**Re: Commodity Pool Operator Periodic Account Statements and Annual
Financial Reports**

Dear Mr. Stawick:

The Managed Funds Association (“MFA”)¹ appreciates the opportunity to comment on the Commodity Futures Trading Commission’s (“Commission”) proposed rulemaking “Commodity Pool Operator Periodic Account Statements and Annual Financial Reports” (the “Proposed Rules”).² MFA generally supports the Proposed Rules and appreciates the Commission’s efforts to amend regulations pertaining to commodity pool operators (“CPOs”) by clarifying ambiguities in existing regulations, reducing administrative burdens, streamlining filing procedures for liquidating pools and codifying certain existing policies the Commission has developed through interpretative letters. We provide the Commission with comments on one aspect of the Proposed Rules—the procedures for liquidating pools.

Procedures for Liquidating Pools

A. Delivery of Final Annual Report

The Commission proposes to amend Regulation 4.22(c) (“Proposed Reg 4.22(c)”) to specify that a CPO of a commodity pool that has ceased operation must distribute a final annual report to commodity pool participants no later than 90 days after the pool ceases trading. The Commission also proposes to simplify the reporting requirements for CPOs of pools ceasing operation and to provide participants with the option of receiving unaudited financial statements (as discussed further in section B). The Commission has proposed these changes to reduce expenses to the pool, thereby maximizing the amount of funds available to such pool participants.

¹ MFA is the voice of the global alternative investment industry. Its members are professionals in hedge funds, funds of funds and managed futures funds, as well as industry service providers. Established in 1991, MFA is the primary source of information for policy makers and the media and the leading advocate for sound business practices and industry growth. MFA members include the vast majority of the largest hedge fund groups in the world who manage a substantial portion of the approximately \$1.5 trillion invested in absolute return strategies. MFA is headquartered in Washington, D.C., with an office in New York.

² 74 FR 8220 (Feb. 24, 2009).

We support the Commission's efforts to streamline the filing procedures for liquidating pools to assist CPOs in providing pool participants with the most timely and meaningful information. We are concerned, however, that as drafted, Proposed Reg 4.22(c) would create reporting inefficiencies for CPOs and participants of pools with assets that are difficult to liquidate.

Currently, Regulation 4.22(c) references two possible timeframes by which a CPO must file a final annual report when a pool ceases trading:

- (1) within 90 days of the pool's permanent cessation of trading; and
- (2) no longer than 90 days after funds are returned to pool participants.

In an effort to simplify procedures for liquidating pools, the Commission proposes to amend Regulation 4.22(c) to specify that:

The final annual report must be filed no later than 90 days after the pool ceases trading. A CPO that has not distributed all funds to participants by the date that the report is issued must provide information about the return of funds to pool participants, including an estimate of the value of funds remaining to be distributed and the anticipated timeframe of when those funds are expected to be returned. When the remaining funds are returned to participants, the CPO should send a notice to all participants and to NFA.³

We believe this procedure is appropriate for a CPO whose pool portfolio consists solely of futures and options contracts, which are highly liquid instruments. Proposed Reg 4.22(c), however, would create reporting inefficiencies for a CPO of, or investor in, a pool that contains assets other than futures and options contracts that could not be easily liquidated (*i.e.*, within 90 days after the pool ceases trading). We are concerned that Proposed Reg 4.22(c) would cause CPOs of such pools to file a "final report" when in fact the report may not be the final annual report and provide a number of scenarios below for the Commission's consideration where we believe more meaningful, accurate and cost-effective information could be provided to investors. We urge the Commission to weigh our recommendations as it performs a cost-benefit analysis pursuant to Section 15(a) of the Commodity Exchange Act.

Example 1. A CPO of a liquidating pool may be unable to file an audited final annual report within 90 days from the time the pool ceases trading if the pool has contracts other than futures and options contracts, such as swaps contracts or London Metal Exchange contracts that must be held to maturity.⁴ For example, if such a pool ceased trading on August 31, but had swaps contracts that would not mature until November 30, it would not have enough time to file an audited final report within the 90 day timeframe from when the pool ceases trading. Under Proposed Reg 4.22(c), the CPO would need to provide investors in the pool an audited final report that provides an estimate rather than a definitive calculation of all funds. We believe investors would be better served if the CPO sent a final report after the final distribution of all funds to investors as such report would be more accurate and complete.

³ 74 FR 8222.

⁴ Swap contracts may be available up to three years forward. See products listed on www.theice.com. London Metal Exchange contracts may be available up to 63 months out. See London Metal Exchange contract specifications at http://www.lme.co.uk/downloads/contractspeccs/NFcontspeccsWeb-V2_1-0209.pdf.

Example 2. A CPO of a liquidating pool that contains highly illiquid or difficult to value assets may be unable to file an audited final annual report within 90 days from the time the pool ceases trading. Take for example, the scenario of a pool that contains highly illiquid assets—assets that cannot be liquidated for at least a year from the date it permanently ceases trading—that distributes its annual report on April 30 and permanently ceases trading on August 31. Under Proposed Reg 4.22(c), the CPO would have to file a final annual report by November 30. If the CPO could not liquidate and distribute pool assets until the following August, we understand that the CPO would have to continue sending each participant monthly statements, including an annual report the following April, until the CPO successfully liquidated and returned all funds to participants.⁵ In such instance, Proposed Reg 4.22(c) would require a CPO to distribute an additional annual report in between the CPO’s year-end annual reports and due to the expense associated with the additional annual report a pool participant would receive less money after all assets were liquidated.

Example 3. Participants in a pool that becomes insolvent would benefit from receiving a final report after the final distribution of funds. In the case where a pool is taken into receivership, a court appointed trustee of the pool is required to file with the bankruptcy court a final accounting in conjunction with the final distribution of assets. As a result, participants in a pool that becomes insolvent could find themselves in a situation where they would receive two “final” reports—a report within 90 days from the permanent cessation of trading as required by Proposed Reg 4.22(c) and a report after the final distribution of funds to investors from the trustee. We believe the expense associated with producing two “final” reports would exceed the benefits to such pool participants.

We also request that the Commission allow a CPO to provide pool participants with quarterly statements in lieu of monthly statements from the time a pool ceases trading until a final report is delivered to investors. During this period, because a pool has ceased trading there is minimal account activity from month-to-month as liquidated funds are simply accumulating interest while the pool awaits termination and liquidation of outstanding investments. We believe investors would be better served with quarterly statements in lieu of monthly statements when a pool ceases trading as a pool engages in no new trading activity during this period and quarterly statements would reduce investor expenses.

Finally, we are concerned that a CPO that intends to provide an audited final report may have difficulty obtaining an auditor’s certification prior to liquidation of highly illiquid or difficult to value assets. Simply put, a pool that invests in highly illiquid or difficult to value assets may find that it is unable to comply with the requirement to provide an audited final report prior to the liquidation of such instruments.

For the reasons discussed, we believe it would be more meaningful, accurate and cost-effective for a CPO to provide investors with a final annual report after all funds have been distributed to investors. We understand, however, that a regulator may be interested in receiving notification of a pool’s liquidation prior to the full distribution of funds to participants, especially if the liquidation is likely to be a lengthy process. Thus, we recommend the Commission require a CPO to issue a notification of liquidation to the National Futures Association (“NFA”) and to

⁵ The described example is also the liquidation process for a guaranteed fund that ceases trading prior to the date on which the zero coupon bonds or other instrument providing the guarantee are due to mature.

pool participants shortly after a pool permanently ceases trading and to issue the final annual report within 90 days after the final distribution of funds to participants.

B. Investor Waiver Regarding Final Audit

The Commission recognizes the cost of preparing audited financial statements may reduce significantly the amount of funds available to return to participants, particularly where the pool has ceased operation due to material trading and investment losses, and may exceed the benefits to the pool participants.⁶ To provide CPOs and pool participants with more streamlined regulatory options, the Commission proposes to provide a CPO with the option of providing an unaudited final annual report, provided that the CPO obtains from all participants and files with NFA written waivers of each of the participant's rights to receive an audited annual report ("Proposed Reg 4.22(c)(7)").⁷ The Commission states that this practice is consistent with case-by-case exemptions that Commission staff has granted to CPOs of pools that have ceased operation.

Indeed, we believe Proposed Reg 4.22(c)(7) will provide a CPO and pool participants of a liquidating pool with greater flexibility and financial options. We note, however, that public, and even some private, commodity pools may have thousands of participants. To reduce the administrative and practical hurdles a CPO would face in obtaining written waivers from each participant in a commodity pool, we respectfully request the Commission consider allowing a CPO to use a "negative consent letter" to obtain a participant's waiver to the right to receive an audited final report. Accordingly, a CPO would have to send each participant a letter/form setting forth the participant's option of receiving an audited or unaudited final report; requiring the participant to return the form if it did not consent to waiving its right to an audited financial report; and notifying the participant that if the CPO received a single return form from a participant by a set date, all participants would receive an audited final report.

We believe allowing a CPO to use a negative consent letter to obtain a participant's waiver to an audited final report would further reduce the administrative costs associated with liquidating a pool. We believe such proposal should not affect the level of protection to participants as the bar for receiving an unaudited final report is quite high—unanimous consent by participants. Thus, we recommend the Commission allow a CPO to use a negative consent letter to obtain an investor's waiver to the right to receive an audited final report.

Conclusion

MFA applauds the Commission's efforts to update regulations regarding CPO periodic account statements and annual financial reports, which we believe will enhance regulatory and operational efficiency for CPOs and, in turn, benefit participants in commodity pools through greater cost-savings. We are concerned that Proposed Reg 4.22(c) and Proposed Reg 4.22(c)(7), as drafted, would create reporting and administrative inefficiencies. Accordingly, we recommend the Commission require a CPO to issue a notification of liquidation to the NFA and pool

⁶ *Id.* at 8222.

⁷ Proposed regulation 4.22(c)(7)(iii).

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participants shortly after a pool permanently ceases trading and to issue the final annual report within 90 days after the final distribution of funds to investors. We also recommend the Commission allow a CPO to use a negative consent letter to obtain an investor's waiver to the right of an audited final report.

We would be happy to discuss our comments at greater length with the staff. If the staff has questions or comments, please do not hesitate to call Jennifer Han or the undersigned at (202) 367-1140.

Respectfully submitted,

/s/ Stuart J. Kaswell

Stuart J. Kaswell
Executive Vice President & General Counsel

CC: The Hon. Michael Dunn, Acting Chairman
The Hon. Walter Lukken, Commissioner
The Hon. Jill E. Sommers, Commissioner
The Hon. Bart Chilton, Commissioner
Terry Arbit, General Counsel
Eileen Chotiner, Futures Trading Specialist
Division of Clearing and Intermediary Oversight