TO OUR FRIENDS AND CLIENTS

Memorandum

November 24, 2009

CFTC Adopts Amendments to Commodity Pool Operator Reporting Requirements

The Commodity Futures Trading Commission (the “Commission” or “CFTC”) has adopted certain amendments to its Part 4 rules that govern the periodic account statements and annual financial reports that commodity pool operators (each, a “CPO”) prepare and provide to participants in their pools. 74 Fed. Reg. 57585 (November 9, 2009). The amendments become effective December 9, 2009, and changes that affect annual financial report requirements will be applicable to annual financial reports for fiscal years ending December 31, 2009 and thereafter.

I. Summary

In summary, the amendments clarify that periodic account statements of pools operated pursuant to Rule 4.7 must disclose either the net asset value per outstanding participation unit in the pool or the total value of a participant’s interest or share in the pool; set forth detailed information that must be included in the periodic account statements and annual reports for commodity pools with more than one series or class of ownership interest; extend the time period for filing and distributing annual reports of funds that invest in other funds (referred to as a “fund of funds”); streamline annual reporting requirements for pools ceasing operations; codify existing staff interpretations regarding the proper accounting treatment and financial statement presentation of certain income and expense items in the periodic account statements and annual reports; codify exemptions staff has provided to CPOs who operate offshore funds that elect to use non-United States GAAP in the preparation of pool financial statements; and clarify and update several other requirements for periodic and annual reports prepared and distributed by CPOs.

These amendments largely codify proposals published by the Commission for public comment earlier this year. See 74 Fed. Reg. 8220 (February 24, 2009). See also Fried Frank Memorandum dated March 10, 2009 (CFTC Proposes Amendments to Commodity Pool Operator Periodic and Annual Reporting Requirements). However, in response to certain comments and its further consideration of the issues, the Commission has made a few revisions to the amendments as proposed.
II. Discussion

We have summarized below the most significant amendments to the Part 4 rules.

A. Periodic Account Statements for Rule 4.7 Exempt Pools

The Commission is amending Rule 4.7(b)(2) as proposed to clarify that the periodic account statement provided to each pool participant in pools operated pursuant to Rule 4.7 must disclose either the net asset value per outstanding participation unit, or the total value of the participant’s interest or share, in the pool as of the end of the applicable reporting period. This amendment is intended to assure that pool participants, particularly in non-unitized pools, receive sufficient information regarding their investments and conforms the account statement requirements for Rule 4.7 exempt pools to the requirements for non-exempt pools pursuant to Rule 4.22(a).

B. Series Pools and Pools with Multiple Classes of Ownership Interests

The Commission is adopting certain amendments to Rules 4.7(b)(2) and 4.22(a) to permit periodic and annual account statements for pools structured as having multiple classes or series with limited liability among such classes or series to include only information for the class or series being reported. In contrast, for multiclass or multiseries pools that are not structured with a limitation on liability among the different classes or series, net asset value and other financial information must be presented for both the pool as a whole, as well as for each series or class of ownership interest.

C. Changes to Fund of Funds Extension Provisions Under Rule 4.22(f)(2)

The Commission is adopting certain amendments to Rules 4.22(f)(1) and (2) as proposed to extend applicable timing requirements for CPOs who are required to prepare and distribute annual financial reports to participants in a fund of funds and submit a copy of the annual report to the National Futures Association (“NFA”), a futures industry self-regulatory organization. Generally, a CPO must provide pool participants and file with NFA an annual report within 90 calendar days of the end of the pool’s fiscal year, but Rule 4.22(f)(2) permits a CPO of a fund of funds to claim up to an additional 60 days by filing a notice containing certain specified representations with NFA. The Commission is extending from 60 to 90 days the period of additional time that a CPO who operates a fund of funds may claim under Rule 4.22(f)(2).

The Commission is also extending the availability of the fund of funds extension to those Rule 4.7 exempt pools which do not provide audited financial statements. In addition, the Commission is streamlining the extension filing procedure by eliminating the requirement that a CPO who filed a claim of extension under Rule 4.22(f)(2) for a particular pool restate certain representations in a statement filed with the pool’s annual reports in subsequent years. Instead, the CPO will be presumed to operate such a pool as a fund of funds and otherwise continue to qualify for the automatic extension. The CPO, however, must provide NFA with notice if the pool no longer operates as a fund of funds and, in that event, distribute and file
such pool’s annual report within the standard time frame, i.e., within 90 days of the pool’s fiscal year end.

D. Procedures for Preparation and Filing of Reports for Liquidating Pools

The Commission has clarified an ambiguity regarding the timing of distribution of a pool’s final report by amending Rules 4.22(c) and 4.7 to require CPOs to distribute and file a pool’s final report within 90 days of the pool’s permanent cessation of trading. Prior to this amendment, CPOs of a Rule 4.7 exempt and non-exempt commodity pools that had ceased operation had been required to distribute a pool’s final report within 90 days of the pool’s permanent cessation of trading, but in any event no later than 90 days after funds are returned to pool participants.

This amendment also further permits a CPO who has not returned all funds to pool participants at the time the pool’s final report is distributed to include an estimate of the value of the funds remaining to be distributed and the anticipated time frame for distribution. The CPO is required to notify pool participants and NFA if the distribution of assets does not occur within that time frame. In response to comments noting that liquidation and distribution of a pool’s assets may take significantly longer than 90 days after the pool has stopped trading in certain situations, the Commission has provided that if distribution of assets to pool participants is expected to occur more than 90 days after the pool’s permanent cessation of trading, the CPO must also distribute to pool participants and concurrently file with NFA a report containing additional information such as any known impediments to liquidation and information regarding fees that will be charged to pool participants prior to the final distribution of the pool’s assets.

This amendment also limits the information required to be included in a pool’s final financial statement to the information that is most significant to remaining pool participants. In addition, the amendment permits CPOs of pools who would otherwise be required to distribute audited annual reports to distribute an unaudited final report upon obtaining written waivers from all of the pool’s participants.

E. Codifying Existing Policies Regarding Special Allocations of Ownership Equity, Unrealized Gains and Losses, and Investee Fund Income and Expenses.

The Commission is codifying CFTC staff interpretations regarding reporting in a pool’s annual financial report special allocations of partnership equity from limited partners to the general partner or any other special class of partner; combining gains and losses on regulated futures transactions with gains and losses on non-CFTC regulated futures transactions that are part of the same trading strategy in the Statement of Operations; and disclosing in the notes to the financial statements the amounts of management and incentive fees and expenses indirectly incurred as a result of investing in any fund where the investment in the fund exceeded five percent of the pool’s net asset value.

However, in response to a comment concerning reporting of income and fee information for investee pools in circumstances in which the CPO of a fund of funds may not be able to obtain specific fee or
expense information of a particular investee pool, the Commission is providing that the CPO may disclose
instead the percentage amounts and computational basis for the relevant items and include a statement
that the CPO is not able to obtain the specific amounts.

F. Use of International Financial Reporting Standards ("IFRS") in the Preparation of Pool Annual
Financial Reports

Rule 4.22(d) requires that audited and unaudited financial statements of commodity pools, as well as
periodic account statements, be presented and computed in accordance with generally accepted
accounting principles ("GAAP"). The CFTC staff has consistently interpreted this provision to mean
GAAP as established in the United States ("U.S. GAAP").

The Commission proposed to amend Rule 4.22(d) to permit CPOs who operate pools organized under
the laws of a foreign jurisdiction to prepare financial statements for such pools using IFRS as issued by
the International Accounting Standards Board in lieu of U.S. GAAP, subject to certain conditions set forth
in prior staff exemptive letters. The proposal also required that a CPO claim this relief by filing a notice
with NFA within 90 days of (i.e., after) the end of the pool’s fiscal year.

The Commission has adopted this amendment as proposed, subject to a few minor technical and
clarifying amendments. A CPO of an offshore pool who prepares financial statements for the pool using
Irish GAAP or Luxembourg GAAP in lieu of U.S. GAAP and who is subject to this requirement may
continue to seek exemptive relief from the staff on a case-by-case-basis. See discussion in G below.

G. GAAP Requirements in Rule 4.13

Currently, Rule 4.13(c) provides that, if a CPO who has claimed an exemption from registration under
Rule 4.13, e.g., the operator of a Rule 4.13(a)(4) exempt pool, distributes an annual report to pool
participants, the annual report must be presented and computed in accordance with GAAP and, if audited
by an independent public accountant, certified in accordance with Rule 1.16. As noted, the CFTC staff
has consistently interpreted this reference to GAAP to mean U.S. GAAP. As a result, CPOs of offshore
pools operated pursuant to Rule 4.13(a)(4) have sought exemptive relief in such circumstances to be able
to prepare financial statements for such pools using non-U.S. GAAP.

Given that Rule 4.13(c) does not require the annual reports to be prepared or distributed to pool
participants or filed with NFA, this requirement has been perceived to be unnecessary and burdensome.
The Commission has therefore deleted this requirement from Rule 4.13 on the basis that there is no need
to prescribe the form of annual reports which are not required to be prepared, distributed or filed under
the rule.

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If you have any questions about the contents of the memorandum, please call your regular Fried Frank contact, or any of the partners in the Fried Frank Asset Management and Private Equity Group listed below.

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