INVESTMENT COMPANY INSTITUTE

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November 29, 2012

Ms. Sauntia S. Warfield
Assistant Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Regulation 4.5 Harmonization[1]

Dear Ms. Warfield:

The Investment Company Institute ("ICI")[2] is supplementing its comments on the Harmonization Proposal to address an issue of considerable concern to registered investment companies ("funds") unable to rely on amended Regulation 4.5 and their investment advisers, which may be required to register with the Commodity Futures Trading Commission ("Commission" or "CFTC") as commodity pool operators ("CPOs").[3] The issue is how CFTC Regulations 4.21, 4.24 and 4.25 (addressing the content and delivery of a commodity pool's Disclosure Document) will be applied to a fund that is part of a series company, as described below.

For decades, the Securities and Exchange Commission ("SEC") has allowed series companies flexibility in organizing the prospectuses for their funds – by using stand-alone prospectuses for each fund, combined prospectuses for groups of funds, or some combination of both approaches. In April

[1] *Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators*, 77 Fed. Reg. 11345 (Feb. 24, 2012) ("Harmonization Proposal").

[2] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). 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 ICI manage total assets of $13.5 trillion and serve over 90 million shareholders.

[3] Although ICI has judicially challenged amended Regulation 4.5, *see* Complaint, *Investment Company Institute, et al. v. CFTC*, Case No. 1:12-cv-00612 (D.D.C. Apr. 17, 2012), it is committed to assisting its members' efforts to comply with the amended regulation in the event the rule is upheld, and we appreciate your willingness to consider ICI members' concerns regarding harmonization.

2011, we explained to the Commission the importance of treating series funds in the same manner.[4] Although the Commission has yet to address this issue in a final harmonization rule, the Commission's staff recently has suggested that funds organized in series form would be required to include all funds in a series company in a single prospectus, *even if only a single fund in the series company cannot satisfy the conditions of amended Regulation 4.5*. If endorsed by the Commission, this approach would conflict with the SEC's longstanding policy goal of ensuring that investors receive "clear, concise and understandable" information about their fund investments.[5] It also would place unnecessary burdens on the disclosure review staffs of the SEC and the National Futures Association ("NFA") and impose significant additional costs on funds and their shareholders.

We accordingly urge the Commission to clarify in any final harmonization rule that funds unable to rely on amended Regulation 4.5 that are part of a series company will have discretion to use stand-alone or combined prospectuses.[6] Respecting the separateness of each fund within a series company is consistent with the Investment Company Act of 1940 and state laws under which registered investment companies are organized, and court decisions interpreting those laws. This approach, moreover, is consistent with the Commission's own treatment of series companies in applying Regulation 4.5 and would harmonize the CFTC and SEC disclosure regimes for such companies.

The Separateness of Each Fund in a Series Company is Well Established Under Law

Many registered investment companies are organized as a single corporation or trust that has multiple "series," each of which represents an interest in a separate pool of securities with separate and segregated assets, liabilities, and shareholders. This organizational structure offers important efficiencies and cost savings, which can be passed on to fund shareholders in the form of lower fees and improved performance. It is common practice for registered investment companies to be organized as series companies, sometimes with up to 100 or more funds within a single series company. It also is possible (although less common) for funds within a series company to be sponsored and managed by distinct—and unaffiliated—investment advisers.[7]

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[4] *See* Letter from Karrie McMillan, General Counsel, ICI to David A. Stawick, Secretary, CFTC, dated April 12, 2011 (commenting on the Commission's proposed amendments to Regulation 4.5).

[5] *Registration Form Used by Open-End Management Investment Companies*, 63 Fed. Reg. 13916, 13917 (Mar. 23, 1998).

[6] The text of CFTC Regulation 4.21 provides, in pertinent part, that "each commodity pool operator… must deliver… a Disclosure Document for the pool prepared in accordance with [Sections] 4.24 and 4.25" of the CFTC's regulations. CFTC Regulation 4.10(d) broadly defines the term "pool" to include "any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests." By means of this letter, we are effectively requesting the Commission clarify that, in the case of a series company, the term "pool" refers to each particular fund that does not qualify for the Rule 4.5 exclusion.

[7] This structure is sometimes referred to as a "turnkey" or "umbrella" trust. In such a structure, the series company (*i.e.*, the turnkey) contracts for services such as fund accounting and administration, transfer agency, and custody for all funds in the trust, thus allowing the investment adviser/sponsor for each fund to focus on managing the fund's portfolio. Such structures are commonly used by smaller advisers seeking an economical means to provide advisory services to registered funds.

The Investment Company Act and the rules thereunder specifically contemplate the use of the series company structure.[8] In fact, as part of the Investment Company Amendments Act of 1970, Congress added Section 18(f)(2) to the Investment Company Act to clarify that a mutual fund may issue "a number of series of preferred or special stock each of which is preferred over all other . . . series in respect of assets specifically allocated to that . . . series" without violating the Investment Company Act's general prohibition against mutual funds issuing "senior securities." Congress also granted the SEC rulemaking authority to ensure "fair and equitable treatment" of shareholders by requiring that any matter affecting shareholders of any series be voted upon separately by such series.[9] In 1972, in adopting Rule 18f-2 pursuant to this authority, the SEC noted in relevant part that:

> Investment companies issuing [series of securities as contemplated by Section 18(f)(2)] are commonly known as "series companies." The individual series of such a company are, for all practical purposes, separate investment companies. Each series of stock represents a different group of stockholders with an interest in a segregated portfolio of securities.[10]

In addition, the laws of Delaware, Maryland and Massachusetts – the states where most registered investment companies are organized – allow for the creation of series companies that can, in their governing documents, afford each series with limited liability. State law provides that such series have limited liability to the same degree and extent as if they were stand-alone companies.[11]

Courts that have considered series company issues have recognized the limited liability of each fund in a series company, treating such funds as separate entities for purposes of inter-series liability.[12] Indeed, comparing separate registered investment companies to series companies, one court has stated with respect to series funds that "functionally these funds stand on the same footing as do those funds that are each separately registered as investment companies."[13]

These points and the legal authorities underlying them are discussed more fully in the Appendix to this letter.

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[8] *See, e.g.,* Section 18(f)(2) (establishing the conditions pursuant to which series companies will not issue "senior securities" in violation thereof); Section 22(d) (allowing certain offers by the separate series in series companies); Rule 18f-2 (defining a series company and requiring matters that affect a separate series to be approved by a majority of that particular series rather than by a majority of the series company as a whole).

[9] Section 18(f)(2) of the Investment Company Act.

[10] *See Adoption of Rule 18f-2 under the Investment Company Act*, Investment Company Act Release No. 7276 (Aug. 8, 1972).

[11] *See* Appendix, *infra*, for a detailed discussion of the relevant state law. *See also* Section 851(g) of the Internal Revenue Code of 1986, which affords funds in a series company the same tax treatment as stand-alone companies.

[12] *See, e.g., Seidl v. American Century Companies, Inc.,* 713 F.Supp.2d 249, 257 (S.D.N.Y. 2010) (stating that "[t]he individual series of a registered investment company are, for all practical purposes, treated as separate investment companies . . . and therefore any recovery in a derivative suit would go to the shareholders of the [affected series], not to the shareholders of [other series]").

[13] *In re Mutual Funds Inv. Litigation*, 519 F.Supp.2d 580, 588-89 (D. Md. Oct. 19, 2007).

In Applying Regulation 4.5, the Commission Treats Each Fund in a Series Company as a Separate Entity

When the Commission adopted Regulation 4.5 in 1985, it specifically stated that it would treat each fund of a series company as a separate entity for purposes of determining whether the fund satisfied the conditions in the rule. As the release explains:

> The Commission also believes it necessary to clarify these provisions [of proposed Regulation 4.5] as they would apply to a registered series investment company where one or more portfolios thereof intend to trade commodity interests. The Commission is aware that, in the course of issuing "no-action" positions under proposed § 4.5, its staff has had occasion to consider under what circumstances relief from regulation as a CPO should be afforded to such series investment companies. Specifically, the staff issued such a "no-action" position where each portfolio that intended to trade interests met the operating criteria of the proposal and where there was separate ownership in and identities of each of the company's portfolios—regardless of whether any (other) such portfolio intended to trade commodity interests. [14]

In particular, the Commission noted with approval the staff's observation that:

> . . . in light of the separate ownership in and identities of the Fund's Portfolios—e.g., separate investment objectives, net asset valuation and dividend policies—we believe it consistent with the intent of proposed [Regulation] 4.5 to treat *as separate entities* each of the two Portfolios that intend to engage in commodity interest trading for purposes of determining whether the criteria of the proposal have been met. [15]

In endorsing the staff position, the Commission stated that "this approach is a sound one" and expressed its intention "that § 4.5 as adopted be so applied to a registered series investment company."[16]

For nearly thirty years, the Commission has applied Regulation 4.5 in this manner, and there is nothing in the adopting release to indicate that the conditions in the amended rule should be applied any differently.[17]

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[14] *See Commodity Pool Operators; Exclusion for Certain Otherwise Regulated Persons From the Definition of the Term "Commodity Pool Operator"; Other Regulatory Requirements*, 50 Fed. Reg. 15868 (Apr. 23, 1985).

[15] *Id.* (citing Division of Trading and Markets Staff Interpretive Letter 84-13, at 3 (Aug. 1, 1984)) (emphasis added). The staff letter further suggested that unless each series were treated as a separate entity, a single series may be able to treat its commodities trades as bona fide hedging based on the holdings of other series of the company and/or measure compliance with the 5% trading threshold based on the aggregate net asset value of all series of the company.

[16] *Id.*

[17] *See Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations*, 77 Fed. Reg. 11252 (Feb. 24, 2012); correction notice published at 77 Fed. Reg. 17328 (Mar. 26, 2012). This is also how Regulation 4.5 notice filings are made with the NFA. Specifically, if a series company is registered with the SEC under the Investment Company Act, NFA staff has advised that the "qualifying entity" for Regulation 4.5 purposes should always be the individual funds within the series company, never the series company itself, and that there should be a Regulation 4.5 notice filed for each fund within the series company.

The SEC's Disclosure Regime Respects the Separateness of Each Fund in a Series Company and Aids in Investor Understanding

The SEC long has permitted fund families to determine for themselves how to organize the prospectus(es) that cover their funds.[18] For series companies, this means that the various funds within a series company do not have to be presented within a single prospectus. This position allows fund families the flexibility to prepare prospectuses that are targeted to different types of investors (*e.g.*, institutional and retail investors, variable contract investors, managed account program participants). For example, a fund family may prepare a prospectus covering only the funds offered through a particular retirement plan or variable contract, and have one or more other prospectuses for funds in which the retirement plan participant or variable contract owner is not eligible to invest. Or it may choose to have separate prospectuses for equity funds and for fixed income funds. Prospectuses that provide relevant information to specific groups of investors are more likely to aid investor understanding of that information.[19]

A Contrary Approach by the Commission Would Raise Significant Public Policy Concerns

As noted above, if the Commission were to take a contrary approach and require that all funds in a series company (including those excluded from CFTC regulation under amended Regulation 4.5) be presented in a single prospectus, it would conflict with the SEC's goal of providing fund investors with clear, concise and understandable disclosure on which to base investment decisions. This would raise important public policy concerns, as briefly outlined below, and result in significant additional costs for funds and their shareholders. We likewise can discern no benefit to fund investors or to regulators from requiring that all funds in a series company be offered in a single prospectus.

- **Lengthy and unnecessary disclosure.** A prospectus that may have been relatively short (10-20 pages) could instead consist of hundreds if not literally thousands of pages, particularly for a series company that consists of dozens of funds. The costs associated with compiling, printing and mailing these hefty prospectuses would be borne by fund shareholders.

- **Investor confusion.** Fund investors are best served by clear, concise disclosures that focus their attention on the investment options that would help them achieve their investment goals. For this reason, many fund families organize their prospectuses according to type of investment (*e.g.*, target date funds, fixed income funds). Requiring investors to receive a single prospectus that covers all funds in a series company could result in investors receiving information that is not relevant to their investment decision. This problem would be compounded in cases where certain funds within a series company are open to only certain classes of investors.

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[18] *See Registration Form Used by Open-End Management Investment Companies*, Securities Act of 1933 Release No. 7398 (Feb. 27, 1997) (stating that General Instruction C to Form N-1A provides guidance on the use of Form N-1A by more than one fund and that Form N-1A may be used by more than one registrant, series or class); see also General Instruction C.3(c) of Form N-1A (stating that "Form N-1A may be used by one or more Registrants, Series, or Classes.").

[19] Advisers of funds in "turnkey" trusts, discussed *supra* note 7, require this flexibility to provide investors with prospectuses that pertain only to the funds in the trust that they advise.

- **Regulatory ambiguity for summary prospectus.** Interpreting CFTC regulations to require funds in series companies to provide a prospectus that pertains to all funds in the company would cast doubt on the ability of such funds to use a summary prospectus. This is because SEC rules require each summary prospectus to pertain only to one fund. In other words, summary prospectuses *per se* cannot include information on all the funds in a series company. The Commission should confirm that all funds may continue to use a summary prospectus as permitted by SEC rules.

- **Changes in procedures for disclosure updates**. Fund families often stagger the fiscal years of their funds in order to facilitate preparation of annual updates to the offering documents and the audit of each fund's financial statements, among other reasons. For example, the equity funds may have a different fiscal year than the fixed income funds, which may have a different fiscal year than the asset allocation funds and the sector funds. If a series company were required to include all of its funds in a single prospectus, it would have to prepare a complete updated prospectus covering all of the funds after the conclusion of each of the four fiscal year periods. This would transform what has been an annual update into multiple updates per year. Fund shareholders, who now typically receive a single annual update, would receive other updates during the year that would be irrelevant to them.[20] Because funds generally bear all the costs of their operations, the significant costs associated with these multiple updates would be passed on to shareholders in the form of increased operational expenses and reduced returns.[21]

- **Fund reorganizations**. It is likely that many fund families would reorganize their funds so that any fund unable to comply with amended Regulation 4.5 would become a separate legal entity rather than remain within a series company. This effort would entail all of the normal costs associated with establishing new legal entities, including but not limited to preparation of governing documents and separate registration statements. Such actions also could potentially require shareholder approval and therefore entail the costs of a proxy solicitation. As with the

[20] For purposes of illustration, assume a series company with 40 separate funds, including 10 equity funds, 10 bond funds, 10 sector funds and 10 asset allocation funds. Further assume that one of the bond funds cannot rely on amended Regulation 4.5; that the asset allocation funds are only offered through certain retirement plans and the retirement plans do not offer any of the other funds in the series company; and that the equity and sector funds have a fiscal year end of December 31, the bond funds have a fiscal year end of January 31 and the asset allocation funds have a fiscal year end of June 30. Currently, the equity and sector funds update their prospectus(es) on or about April 30 each year and mail such update to current shareholders; the bond funds update their prospectus(es) on or about May 31 each year and mail their update to current shareholders; and the asset allocation funds update their prospectus(es) on or about October 31 each year and mail their update to current shareholders. If, however, all 40 funds' prospectuses would need to be combined, the shareholders in all 40 funds would end up receiving an annual update three times per year – at the end of April, May and October. Each shareholder would receive two mailings per year that do not in any way pertain to their investment. The confusion would be compounded for shareholders in the asset allocation funds, who would receive prospectuses twice per year for investment options in which they are not even eligible to invest.

[21] We note that these costs, which would be significant, along with the other costs detailed below, were not considered by the Commission either in adopting amended Regulation 4.5 or issuing its Harmonization Proposal.

costs associated with updates, the costs of fund reorganizations would be passed on to shareholders in the form of increased operational expenses and reduced returns.

- **Significant additional burden on the NFA and SEC staffs.** If funds in series companies with one or more series that do not qualify to rely on amended Regulation 4.5 were required to use one prospectus for all funds in the series company, the SEC and NFA review staffs would face a near-term deluge of filings to combine such funds' prospectuses. The NFA review staff would be particularly impacted because all filings must be approved by the NFA before use. Further, the SEC staff also would be significantly impacted because funds may be required to make filings to combine their prospectuses that would be subject to SEC staff review. In the absence of fund reorganizations as discussed above, this staff burden would not be alleviated over time, because a series company would be required to amend its prospectus—which would cover all funds in the series company—whenever an amendment is required for any fund within the series company.

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ICI appreciates the opportunity to supplement its comments on the Commission's Harmonization Proposal. If you have questions or require further information, please contact me at 202/326-5815, Sarah A. Bessin at 202/326-5835 or Rachel H. Graham at 202/326-5819.

Sincerely,

/ s /

Karrie McMillan
General Counsel

cc: The Honorable Gary Gensler, Chairman
The Honorable Jill E. Sommers, Commissioner
The Honorable Bart Chilton, Commissioner
The Honorable Scott D. O'Malia, Commissioner
The Honorable Mark Wetjen, Commissioner

The Honorable Mary L. Schapiro, Chairman, SEC
The Honorable Elisse B. Walter, Commissioner, SEC
The Honorable Luis A. Aguilar, Commissioner, SEC
The Honorable Troy A. Paredes, Commissioner, SEC
The Honorable Daniel M. Gallagher, Commissioner, SEC

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Division of Investment Management, SEC

Gary Barnett, Director
Amanda Olear, Special Counsel
Michael W. Ehrstein, Attorney – Advisor
Division of Swap Dealer & Intermediary Oversight, CFTC

APPENDIX

Most investment companies are organized under the laws of one of three states – Delaware, Maryland or Massachusetts – and the laws of these states allow for the creation of series companies and permit them to afford each series with limited liability. Delaware law, for example, provides that a statutory trust can create separate series,[1] and the trust can limit the liability of each such series, provided that, among other things, certain corporate formalities are observed.[2] Pursuant to such statutory provisions, organizers of registered investment companies routinely organize series companies, the individual series of which have limited liability vis-à-vis the other series of the company and the company as a whole.[3]

Courts that have considered series company issues have affirmed the limited liability nature of funds in series companies, treating funds in series companies as separate entities for inter-series liability purposes.[4] In particular, courts have rejected arguments that a shareholder of one series of a series

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[1] 12 Del. C. § 3806(b)(2) (providing that "[a] governing instrument may contain any provision relating to the management of the business and affairs of the statutory trust, and the rights, duties and obligations of the trustees, beneficial owners and other persons, which is not contrary to any provision or requirement of this subchapter and, without limitation … [m]ay establish or provide for the establishment of designated series of trustees, beneficial owners, assets or beneficial interests having separate rights, powers or duties with respect to specified property or obligations of the statutory trust or profits and losses associated with specified property or obligations, and, to the extent provided in the governing instrument, any such series may have a separate business purpose or investment objective").

[2] *See* 12 Del. C. § 3804(a) (providing for limited liability "if separate and distinct records are maintained for any such series and the assets associated with any such series are held in such separate and distinct records (directly or indirectly, including through a nominee or otherwise) and accounted for in such separate and distinct records separately from the other assets of the statutory trust, or any other series thereof, and if the governing instrument so provides, and notice of the limitation on liabilities of a series as referenced in this sentence is set forth in the certificate of trust of the statutory trust"). *See also id.* ("the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to a particular series shall be enforceable against the assets of such series only, and not against the assets of the statutory trust generally or any other series thereof, and, unless otherwise provided in the governing instrument, none of the debts, liabilities, obligations and expenses incurred, contracted for otherwise existing with respect to the statutory trust generally or any other series thereof shall be enforceable against the assets of such series"). We note that the conditions applied to separate series of a series company seeking limited liability are substantially similar to the conditions with which separate corporate entities must comply in order to avoid the "piercing" of their "corporate veil." *See Sea-Land Services, Inc. v. Pepper Source,* 941 F.2d 519 (7th Cir. 1991). For Maryland law, *see* 12 Md. Code § 207 (comparable to 12 Del. C. § 3806(b)(2)) and 12 Md. Code § 501 (comparable to 12 Del. C. § 3804(a)). *See also* 2 Md. Code §§ 104-105 (for series companies organized as corporations rather than trusts). For Massachusetts law, *see* M.G.L.A. 182 §6 (providing, under Massachusetts law, for the organization of business trusts, whose liabilities, including inter-series liabilities, are established by their organizational documents).

[3] *See* Frankel and Schwing, Regulation of Money Managers at [1] (December 2011) (section entitled "Series Companies – Open-End Series Companies") ("With respect to the rights of the holders of interests in a series, each series in fact represents a separate entity against all other series as well as against outsiders."). *See also* 2 Balotti and Finkelstein, 2 Del. Law of Corps. and Bus. Orgs. § 19.11 (2012) ("A statutory trust may create one or more series, and the obligations of a particular series may be enforced against the assets of such series only and not against the assets of the statutory trust generally or the assets of any other series of the statutory trust, and, unless otherwise provided in the applicable governing instrument, none of the obligations applicable to the statutory trust generally or to any other series shall be enforceable against the assets of such series.").

[4] *See Seidl v. American Century Companies, Inc.,* 713 F.Supp.2d 249, 257 (S.D.N.Y. 2010) (stating that "[t]he individual series of a registered investment company are, for all practical purposes, treated as separate investment companies . . . and

company has standing to bring a derivative suit on behalf of shareholders of other series of the company;[5] and they have declined to waive the demand requirement for shareholders of series companies in the face of plaintiffs' arguments that the unique organization of series companies warrants such action.[6] Further, comparing separate registered investment companies to series companies, one court has stated with respect to series companies that "functionally these funds stand on the same footing as do those funds that are each separately registered as investment companies."[7]

In support of treating funds in series companies as, in effect, separately organized companies, courts have cited the SEC's explicit recognition of the series company structure.[8] The court in *In re Mutual Funds Investment Litigation,* for example, noted that the SEC had taken the position that individual series are "for all practical purposes, separate investment companies," which "represent[] a different group of stockholders with an interest in a segregated portfolio of securities."[9] The court also noted that various SEC staff no-action letters treat the separate series in series companies as separate companies.[10] Thus, like relevant state law, relevant case law strongly supports the proposition that funds in series companies should be treated as separate pools.

We are aware that the CFTC staff recently declined to treat each of the separate series of a (Delaware limited liability) series company as a "pool" for purposes of Part 4 of the Commission's regulations. According to the staff:

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therefore any recovery in a derivative suit would go to the shareholders of the [affected series], not to the shareholders of [the other series"); and *In re Mutual Funds Inv. Litig.,* 519 F.Supp.2d 580, 588-89 (D. Md. 2007). *See also Stegall v. Ladner*, 394 F.Supp.2d 358, 362-363 (D. Mass. 2005). We are not aware of any court holding the assets of one series of a series company to be available to satisfy liabilities of another series of a series company or the series company as a whole.

[5] *Stegall, supra* note 4, at 363 (citing *Williams v. Bank One Corp*., 2003 U.S. Dist. LEXIS 23522 (N.D. Ill. Dec. 15, 2003) and noting "the total separateness of the beneficial interest in the funds"). *Cf. Batra v. Investors Research Corp.,* 1991 U.S. Dist. LEXIS 14773, at *1 (W.D. Mo. Oct. 4, 1991) (holding, in the context of an excessive fee case, that where fund fees are charged on a company-wide rather than a series-by-series basis, a shareholder need hold shares of all series in the company in order to obtain standing as to all series).

[6] *E.g., Hartsel, et al. v. Vanguard Group, Inc.,* 2011 WL 2421003 (Del. Chancery Ct. June 15, 2011) (rejecting arguments that shareholders in series companies can proceed directly, rather than derivatively, against the company when they claim injury on behalf of only certain series because the injury is unique and not suffered by all other shareholders, as required for a derivative action); *Seidl*, *supra* note 4, at 262 (rejecting arguments that shareholders in series companies can proceed directly, rather than derivatively, against the company because making demand of directors of a series company would be futile given the adverse impact the derivative suit might have on other series in the series company and concluding that series companies are no different than separate investment companies "given that … each series is treated as a separate investment company").

[7] *In re Mutual Funds Inv. Litigation*, *supra* note 4, at 588-89.

[8] *Id.* at 589 (stating that the practice of establishing individual series of a registered investment company "is entirely in accord with applicable rules of the SEC, which has expressly pronounced that under such circumstances each series is to be treated as a separate investment company").

[9] *Adoption of Rule 18f-2 under the Investment Company Act*, Investment Company Act Release No. 7276 (Aug. 8, 1972). In addition, in 1986, Congress amended Subchapter M of the Internal Revenue Code to allow each series of a series company to be treated as a separate company for federal income tax purposes, eliminating the disparity in the tax treatment of series companies. *See* Section 851(g) of the Internal Revenue Code of 1986.

[10] *In re Mutual Funds Inv. Litigation*, *supra* note 4, at 589 (citing *Salomon Bros., Inc*. (pub. avail. May 26, 1995), *Mutual Series Fund, Inc.* (pub. avail. Nov. 7, 1995) and *Principal Investors Fund, Inc.* (pub. avail. May 13, 2005)).

> Commission Regulation 4.10(d) defines the term "pool" as it appears in Part 4 of the Commissions regulations as "any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests." Commission Regulation 4.20(a)(1) mandates that "a commodity pool operator . . . operate its pool as an entity cognizable as a legal entity separate from that of the pool operator."
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> [I]t would appear that individual series . . . would not satisfy the requirement of Regulation 4.20(a)(1) as a series is not an "entity cognizable as a legal entity;" rather it is part of a legally cognizable entity that is imbued by statute with certain rights and characteristics generally attributable only at the legal entity level. Therefore, the Division determines that it is not consistent with Commission regulations to interpret the term "pool" as it appears in Part 4 of the Commission's regulations to encompass a series of a Delaware Series Limited Liability Company.

The staff's highly technical reading of Regulation 4.20(a), however, reflects a different view of this regulatory requirement than the Commission itself has articulated. Specifically, in its 1984 release proposing Regulation 4.5, the Commission explained that Regulation 4.20(a) was designed to require separation between a CPO and its pool. That release states in relevant part:

> Under the Commission's regulatory framework, a CPO and its pool generally must be organized as separate entities. Specifically, Rule 4.20(a) provides that, subject to exception in the case of certain corporations, a CPO must operate its pool as an entity cognizable as a legal entity separate from that of the pool operator. The rule leaves to the discretion of the CPO the form of organization of its pool, *so long as that form is one which would be recognized as a separate entity by a court of competent jurisdiction* -- e.g., a general partnership, a limited partnership, a trust or other form of association. Among other things, Rule 4.20(a) is intended to afford pool participants the maximum amount of protection in the event of the CPO's insolvency, to prohibit a CPO from soliciting or accepting orders from members of the public for the purchase or sale of commodity futures contracts without being registered as a futures commission merchant ("FCM"), and to clarify the responsibility of the CPO for the activities and investment policies of its pool.[11]

As detailed in this Appendix, each fund within a series company "would be recognized as a separate entity in a court of competent jurisdiction" and, accordingly, should be treated as a separate pool for purposes of Part 4 of the Commission's regulations.[12]

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[11] Commodity Pool Operators and Commodity Trading Advisors; Exemption From Registration and From Subpart B of Part 4 for Certain Otherwise Regulated Persons and Other Regulatory Requirements, 49 Fed. Reg. 4778, 4780 (Feb. 8, 1984) (citations omitted and emphasis added).

[12] It also should be noted that a fund (regulated under the Investment Company Act) and its investment adviser (regulated under the Investment Advisers Act of 1940) are always separate legal entities.