STEBEN & COMPANY, INC.
Managed Futures Since 1989

<u>By E-Mail: rule-comments@sec.gov</u>

October 7, 2004

Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-0609
Attention: Mr. Jonathan G. Katz, Secretary

Re: **Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Implementation Date of Notice to Members 04-50 (Treatment of Commodity Pool Trail Commissions Under Rule 2810); Release No. 34-<u>50335; File No. SR-NASD-2004-136 (the "Release")</u>**

Ladies and Gentlemen:

Steben & Company, Inc. is a commodity pool operator, introducing broker, broker dealer and a member of the NFA and NASD. We have operated our own commodity pools for almost 15 years and we also wholesale the commodity pools of other companies through a network of 70 broker dealers.

We believe the NASD has made an uninformed decision with regard to Notice 04-50, for the following reasons:

1. Investors do better in commodity pools if they take a long term approach. Investors will make better decisions if they have good advice. Good advice will help them to overcome their short term emotional reactions to decline periods. Investors will get better advice and will take a more long term approach when their broker is paid to provide that service. The hand holding and education provided by brokers who invest their clients into commodity pools is far more demanding for the broker than what is required for traditional investments. Therefore, higher and ongoing compensation is justified. Over the long term, the record of the managed futures investment class as indicated by the CISDM Trading Advisor Qualified Index and the CISDM Fund Pool Index has been very profitable. Looking at the track records of those trading advisors who have been successful over the long term, (and who control the largest amounts of money in this investment class), it is very evident that decline periods are to be expected. Information in the media about bear markets in equities and other traditional investments helps investors keep a proper perspective and can keep them from liquidating their investments at the wrong time. Investors in commodity pools can't find the public media references that investors in traditional investments have access to. Therefore, those investors who don't understand what is going on and who do not receive good advice often redeem out of their investment during the worst point of declines. As a result they don't derive the long term benefits that they could otherwise enjoy. This is a very expensive result of inadequate guidance.

2. Brokers will move investors out of commodity pools after they stop receiving compensation. It is unrealistic to think that a tough regulatory environment will prevent this. We see this all time. When a broker moves to a new broker dealer that doesn't have a selling agreement with the commodity pool their investors are in, they almost always find a reason within a few months or less to recommend to their investors to move to different

investments. This will certainly happen when trails are capped by the new NASD regulation. Brokers will find a reason why a new fund has advantages. It is not possible for regulators to judge whether the brokers reasoning, (as to why a different investment will be better), is justifiable or not. There are many reasons that can be found that could be effectively argued. The new NASD regulation will cause churning that will be even more expensive to the investor and this is not in the best interest of the public. Any thinking otherwise is simply not realistic.

3. The capping of trail commissions will cause a movement of managed futures investments into individual managed accounts and privately offered commodity pools. Brokers will earn far more from individual managed accounts and privately offered commodity pools since they don't have a cap on compensation to the broker of record. There are many consequences to this, many of which are not in the investors' best interest. Individual managed accounts do not have the limited liability of commodity pools. The better commodity trading advisors almost always have large minimum account sizes, usually one million dollars or often even 10 million dollars or more. The commodity trading advisors who accept smaller individual managed accounts almost always offer more risky trading programs. Private offerings do not have the same levels of disclosure and regulation that public offerings do, and they are not available to as broad a spectrum of investors. The trend towards riskier investments and investments with less disclosure is very expensive for investors.

4. With NASD 04-50 implemented as of October 12th, new public offerings of commodity pools will not be able to compete, so less product will reach the marketplace. Currently CPO's with existing publicly offered funds are rushing to file large amounts of units prior to October 12th since they can continue to offer unlimited compensation on these units. Sponsors wanting to offer new publicly offered commodity pools after October 12th will have units with capped commissions. These funds will not be able to compete with funds which pay unlimited trail commissions. This situation could continue for up to two years. The result will be fewer products available to investors, which means less competition. This is not in the best interest of the public.

Commodity pools are a unique type of investment. In the interest of reducing expenses for investors in public commodity pools, the new regulation in NASD 04-50 will actually wind up causing worse investment patterns resulting in less profits and greater losses for investors, far outweighing the benefits of reduced commissions. The new regulation will result in less product being available, churning, a movement towards smaller individual managed accounts with riskier CTA trading programs, private offerings over public offerings and investors making poor timing decisions in commodity pools.

The current regulatory environment reflects the assumption that, even with full disclosure, free markets will not work and competition will not bring lower expense products to the marketplace. Even assuming this assumption is correct, it would produce a far better effect for the public if the SEC and NASD were to allow ongoing trail commissions, even if at a reduced level, rather than an outright cap.

We urge the SEC and the NASD to reverse this change in regulation. Thank you for your consideration of this issue.

Sincerely,

Ken Steben

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President of the General Partner

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