October 7, 2004

By E-Mail: rule-comments@sec.gov

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. 34-50335; File No. SR-NASD-2004-136 (the "Release")**

Ladies and Gentlemen:

Managed Funds Association ("MFA") is the only US-based membership organization dedicated to serving the needs of professionals who manage futures funds, hedge funds, and funds of funds. Our over 800 members manage a significant portion of the estimated $750 billion invested in these alternative investment vehicles. Among the MFA membership are commodity pool operators ("CPOs"), commodity trading advisors ("CTAs") and futures commission merchants ("FCMs"), as well as NASD-member broker-dealers, who provide their respective services in connection with a significant portion of the estimated $87 billion invested in managed futures products, including publicly offered commodity pools. Accordingly, MFA's members have a keen interest in the proposals set forth in the Release and in the NASD's policy on trail commissions.

MFA has addressed the NASD's proposed rescission of its trail commissions policy twice before. In its comment letter to NASD on Notice to Members 04-07 dated March 12, 2004 (the "NASD Comment"), the MFA explained its belief that the NASD's policy should be codified rather than rescinded, to permit the continued efficient operation of commodity pools, including provision of important services to commodity pool investors. In its comment letter to the Securities and Exchange Commission ("Commission") dated August 20, 2004 (the "SEC Letter"), MFA established its beliefs that (i) the NASD's proposal to rescind its policy constitutes a significant rule change that should have been accorded the required notice and comment period prior to its effectiveness under Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Exchange Act"), and (ii) the Commission should abrogate the effectiveness of the

proposal or permit the NASD to withdraw and revise it because it is inconsistent with the provisions of the Exchange Act applicable to the NASD. Copies of MFA's prior letters are attached.

By extending the effective date for rescission of its policy on trail commissions, the NASD has corrected the short-term negative effect of its action on those pools involved in the registration process as of July 13, 2004. The NASD has not, however, either in the Release or in its letter to the SEC dated August 30, 2004 (the "Rebuttal"), adequately addressed the main issues raised in the SEC Letter.

First, the NASD's proposed rule change is a significant rule change that should be accorded the required new notice and comment period prior to its effectiveness under Section 19(b)(1) of the Securities Exchange Act. At the end of such a period, the Commission would be in a position to weigh for itself the merits of the proposal against its potential burdens. The reasons and precedent supporting this position appear in the SEC Letter.

Second, the proposal is inconsistent with the Sections 15A(b)(6) and (9) of the Exchange Act, and so the Commission should exercise its power under Exchange Act Section 19(b)(3)(A) to summarily abrogate the NASD policy and require that it be refiled under Section 19(b)(1). The NASD has not addressed either of the MFA's arguments with respect to Section 15A(b)(6) in the SEC Letter. The proposed rule permits "unfair discrimination between customers, issuers, brokers, or dealers . . . ." in that it may result in discrimination between commodity pools and futures managed accounts. Further, the proposed rule purports to "regulate by virtue of any authority conferred by [the Exchange Act] matters not related to the purposes of [the Exchange Act] or the administration of the [NASD]" in that the activities of commodity pools are regulated by the Commodity Futures Trading Commission and the National Futures Association. These arguments are expanded in the SEC Letter.

The NASD addressed the first of MFA's arguments under Section 15(A)(b)(9) by extending the effective date. The NASD did not, however, address the argument in the SEC Letter concerning barriers to entry that will be erected by the proposal.

Moreover, in its Rebuttal, the NASD attempts to establish that the proposed rule is in the public interest. It does so by stating that (i) trail commissions are "excessive" and that (ii) "[u]niformity in the application of Rule 2810 serves an important public interest." It is difficult to understand why the NASD is empowered to determine that trail commissions earned for commodity related services are "excessive" when, as demonstrated by the NASD Comment and other comments provided by industry participants, trail commissions are consistent with commission charges generally in the managed futures industry. In addition, NASD rules governing sales compensation are not uniform currently. Investment companies and real estate investment trusts, for example, are treated differently from other entities. Therefore, it is impossible to determine that uniformity is the hallmark of the public interest. As demonstrated by MFA and other industry participants in their comment letters to the NASD and the Commission, commodity pools differ from other types of investment vehicles and those differences, including the complexity of futures trading and regulation by a separate federal

regulator, warrant different treatment by NASD rules, as has been accorded for over 20 years under the existing trail commissions policy.

Finally, in its Rebuttal, the NASD states that the "calls for abrogation are simply an attempt to impose a procedural hurdle to delay the impact of NtM 04-50." The administrative procedures required by and of the U.S. government and its agencies are not impediments to good government, but necessities of good government. As the Supreme Court has regularly reminded us, people must turn square corners when dealing with the government, but so too must government turn square corners when dealing with people. *See, e.g.,* U.S. v. Winstar Corp, 518 U.S. 839, 886, n.31 (1996); Heckler v. Community Health Services of Crawford Cty., Inc., 467 U.S. 51, 61, n.13 (1984); St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting); Federal Crop Insurance Corp. v. Merill, 322 U.S. at 387-388 (1947)(Jackson, J. dissenting).

In conclusion, for the reasons outlined in MFA's NASD Comment and its SEC Letter, the SEC should abrogate the proposal or permit the NASD to withdraw and revise it in order to cure its flaws and, if a proposal is resubmitted, require that the public be afforded a formal notice and a comment period before approval or disapproval of the proposed rule.

We hope our comments are helpful to the Commission and its staff. Please call me at (202) 367-1140 if we can provide additional information.

Respectfully submitted,

John G. Gaine
President

Attachments: MFA's letter dated March 12, 2004
MFA's letter dated August 20, 2004

cc(w/att.): The Hon. William H. Donaldson, Chairman
The Hon. Paul S. Atkins, Commissioner
The Hon. Cynthia A. Glassman, Commissioner
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Gary Goldsholle, Associate General Counsel, Regulatory Practice & Policy, NASD

August 20, 2004

By E-Mail: rule-comments@sec.gov

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 Treatment of Commodity Pool Trail Commissions; Release No. 34-50065; File No. SR-NASD-2004-108 (the "Release")**

Ladies and Gentlemen:

Managed Funds Association ("MFA") welcomes the opportunity to comment on the Release concerning the NASD's proposal to rescind its long-standing policy with respect to compensation paid to CFTC-regulated brokers who place interests in a publicly offered commodity pool and provide ongoing services to investors in the pool ("trail commissions"). We hope our comments prove helpful to the Commission.

Under the NASD's policy, trail commissions have not been deemed to be sales compensation, subject to the limitations in NASD Rule 2810, for over 20 years. MFA believes that the NASD's policy should be codified rather than rescinded, to permit the continued efficient operation of commodity pools, including provision of important services to commodity pool investors. The reasons for MFA's belief were set forth in its letter dated March 12, 2004 on Notice to Members 04-07 (the "MFA Letter"), a copy of which is attached As we discuss below, moreover, MFA believes that (i) the NASD's proposal to rescind its policy constitutes a significant rule change that should have been accorded the required notice and comment period prior to its effectiveness under Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Exchange Act"), and (ii) the Commission should abrogate the effectiveness of the proposal or permit the NASD to withdraw and revise it because it is inconsistent with the provisions of the Exchange Act applicable to the NASD.

MFA is the only US-based membership organization dedicated to serving the needs of professionals who manage futures funds, hedge funds, and funds of funds. Our over 700 members manage a significant portion of the estimated $750 billion invested in these

alternative investment vehicles. Among the MFA membership are commodity pool operators ("CPOs"), commodity trading advisors ("CTAs") and futures commission merchants ("FCMs"), as well as NASD-member broker-dealers, who provide their respective services in connection with a significant portion of the estimated $87 billion invested in managed futures products, including publicly offered commodity pools. Accordingly, MFA's members have a keen interest in the proposals set forth in the Release and in the NASD's policy on trail commissions.

I. Background.

As noted above, the NASD policy, under which commodity pool trail commissions have been excluded from the limitations in NASD Rule 2810, has been in place for over 20 years. The exclusion was reconfirmed in the NASD approval process of the underwriting arrangements for every public commodity pool registered under the Securities Act of 1933 during that time. The sponsor of the pool was required to represent that (i) trail commissions would be paid only to FCMs or introducing brokers ("IBs") registered with the Commodity Futures Trading Commission ("CFTC"), (ii) FCMs or IBs would share trail commissions only with their associated persons who were registered with the CFTC, having passed the Series 3 or 31 Exam and (iii) associated persons receiving trail commissions would provide ongoing services to investors in the pool.

In the fall of 2003, NASD staff began questioning the exclusion for trail commissions in its review of several new commodity pool filings. Industry participants met with NASD staff to provide them information concerning the operation of commodity pools and the commercial need for payment of trail commissions. On March 12, 2004 in Notice to Members 04-07, the NASD proposed rescinding its exclusion from Rule 2810 for commodity pool trail commissions and requested comments from interested persons. As stated in the Release, the NASD received 26 comment letters, almost all of them opposed to the rescission. Letters were received from NASD members, CPOs and CTAs, industry groups, regulators and self-regulators and the Association of the Bar of the City of New York. Nonetheless, on July 13, 2004, the NASD issued its Notice to Members 04-50 (the "Notice"), which rescinded the NASD policy on trail commissions, effective immediately.

The Notice did not provide a detailed summary or analysis of the arguments and issues raised in the comment letters opposed to the rescission. The Notice baldly stated that the reasons underlying the trail commissions policy "no longer apply today", and that no evidence was presented that "commodity pool DPP investors receive a significantly higher level of service than investors in other DPPs." In fact, that simply was not true. Commodity pool investments are more complex and less widely understood than stocks, bonds, real estate or physical commodities like oil and gas. As a result, investors in commodity pools receive a significantly higher level of services than investors in other DPPs. Provision of those services, moreover, is a commodity-related activity, as it has been for over 20 years. These points were amply demonstrated in comment letters on Notice to Members 04-07, including the MFA Letter.

In the short run, as a result of this precipitous action of the NASD, registrations of at least two public commodity pools pending with the NASD have been disrupted. These

offerings will have to be altered or withdrawn. The sponsors of these offerings have expended substantial amounts to prepare and file documents which complied with NASD rules in effect before July 13, 2004, but no longer comply as a result of the rescission in the Notice.

In the longer run, the action of the NASD will impede the growth and operation of an industry that provides public investors with alternative investment opportunities that are not available elsewhere. A description of the industry, the benefits to the public of commodity pools and the arguments against rescission of the policy on trail commissions appear in the attached MFA Letter.

II. Procedures to Implement Rule Changes.

The NASD's 20-year policy of excluding trail commissions from the limitations in Rule 2810 amounted to a de facto rule. Therefore, the proposal to rescind the policy on trail commissions should be regarded as a proposed rule change, rather than a change in interpretation of an existing rule. The NASD should have filed its proposal as a proposed rule change under Section 19(b)(1) of the Exchange Act without reliance on the exception from the notice-and-comment period that permits immediate effectiveness for changed interpretations of an existing rule. Had the NASD followed this procedure, the proposal would have been published in the Federal Register, comments would have been solicited and the Commission would have been able to review and evaluate those comments, all before the proposal became effective - in accord with the Congressional intent underlying the Commission's oversight of the NASD.

As the Commission is aware, the NASD is generally required to file proposed rule changes with the Commission and obtain Commission approval before the rule changes can become effective. An exception to this general requirement in Exchange Act Section 19(b)(3)(A) and Rule 19b-4(f)(1) permits a self-regulatory organization ("SRO") to declare a rule change effective upon filing with the SEC if the SRO designates the rule change to be a "stated policy, practice or interpretation with respect to the meaning, administration, or enforcement of an existing rule" of the SRO. Exchange Act Rule 19b-4(b) defines the term "stated policy, practice or interpretation" to mean, in pertinent part, any statement made generally available to the membership of, to all participants in, or to persons having or seeking access to the facilities of the SRO that establishes or changes any standard, limit, or guideline with respect to (i) the rights, obligations or privileges of such persons or (ii) the meaning, administration or enforcement of an existing rule. Rule 19b-4 goes on to state that a stated policy, practice or interpretation shall be deemed a rule change unless (i) it may be reasonably and fairly implied by an existing rule or (ii) it is concerned solely with the administration of the SRO.

The NASD's policy of excluding trail commissions from the application of Rule 2810, although not literally a written provision included in Rule 2810, has operated as such a written exclusion would have operated for over 20 years. The NASD has uniformly applied the exclusion as if it were a rule during all that time. The exclusion has been applied in written form through the means of comment letters on specific underwriting arrangements issued by NASD staff. The entire commodity pool industry has relied on the exclusion in offering and operating

its commodity pools. Therefore, the exclusion is part of Rule 2810. The Notice purports to change the rule in a manner that cannot be reasonably and fairly implied by the existing rule. In fact, the Notice rescinds the rule entirely and, in effect, imposes a prohibition on payment of trail commissions exceeding the limits in Rule 2810. As the U.S. Court of Appeals for the Tenth Circuit noted in *General Bond & Share Co. v. SEC*, 39 F.3d 1451 at 1460 (1994). "When a prohibition sets a new standard for its members, …the NASD is required by statute to submit such a change to SEC prior to enforcing it." *See also, Matter of Bloomberg L.P.,* Securities Exchange Act Release No. 49076 (January 14, 2004) (New York Stock Exchange interpretations and requirements built into contracts were rules and, in the absence of Commission approval, were invalid and unenforceable).

As discussed above, the NASD's policy on trail commissions has been and is part of Rule 2810. Therefore, to impose a prohibition on the payment of certain trail commissions, the NASD was obliged to file its proposed rule change (i.e., rescission of its policy) with the SEC for notice and comment *before* declaring the rule change effective.

III. Exchange Act Requirements for SEC Action.

Regardless of whether it concludes the NASD could not, as we believe, lawfully make its new policy effective upon filing, the Commission should exercise its power under Exchange Act Section 19(b)(3)(A) to summarily abrogate the NASD policy and require that it be refiled under Section 19(b)(1). The standard for that action, as the Commission knows, is broad and discretionary. The Commission may exercise that power whenever it appears necessary or appropriate in the public interest, for the protection of investors or otherwise furthers the purposes of the Exchange Act.

The Commission should exercise its summary abrogation power, MFA respectfully suggests, in cases where an NASD action raises serious questions of legality under the Exchange Act standards applicable to the NASD. MFA believes this is such a case, as discussed below.

A. Section 15A(b)(6).

As the Commission knows, Exchange Act Section 15A(b)(6) requires that NASD rules not be "designed to permit unfair discrimination between customers, issuers, brokers, or dealers . . . ." The new NASD policy discriminates between an NASD member's customers as well as its associated persons who service the customers' accounts, discriminating without any reasonable basis between cases where the customer invests in commodity managed accounts — where trail commissions are unlimited — and cases in which customers invest in a publicly offered commodity pool — where trail commission are limited. In the case of both pools and managed accounts, an FCM will execute and clear futures contracts, an IB may introduce clients and a CPO and/or CTA will manage the account. In the case of the public commodity pool investment, however, the FCM or IB will be able to compensate its associated persons for providing ongoing services to investors only within the limitations of Rule 2810. Similarly, if the CPO/CTA pays the FCM or IB, the CPO/CTA will be limited by Rule 2810 with respect to the public pool. These limitations are not applicable to individual commodity managed

accounts. If the discrimination is not in fact necessary or appropriate to address a valid regulatory purpose, and in the case of this proposed rule change it is not, it is inconsistent with the requirements of Section 15A(b)(6).

Section 15A(b)(6) further requires that NASD rules not be designed to "regulate by virtue of any authority conferred by [the Exchange Act] matters not related to the purposes of [the Exchange Act] or the administration of the [NASD]." In this case, the NASD's proposed rule change is designed and will have the effect of regulating the activities of FCMs, IBs, CPOs and CTAs and their associated persons, which activities are subject to the Commodity Exchange Act and Commodity Futures Trading Commission jurisdiction. These matters are not related to the purposes of the Exchange Act.

B. Section 15A(b)(9).

Section 15A(b)(9) requires that NASD rules "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act]." As a result of the immediate effectiveness of the proposed rule change, the rule change has placed a burden on competition by requiring costly and time consuming changes to the offering arrangements of the pools that were in registration, but not yet approved, when the proposed rule change was published.

Another anticompetitive impact of the rule change is the barrier to entry to the publicly offered pool industry that it creates for new or small CPOs. These CPOs will be less able to afford to increase staff to provide the services that otherwise could be contracted out to brokers compensated by means of trail commissions.

C. Result.

As demonstrated above, the proposed rule change is inconsistent with the provisions of the Exchange Act applicable to the NASD because it discriminates unfairly among customers and brokers, purports to regulate matters not related to the purposes of the Exchange Act and imposes unnecessary and inappropriate burdens on competition.

IV. Conclusion.

As discussed above, the NASD's proposed rule change is a significant change to a well-established business practice of an entire industry that by law should have been submitted to the SEC for notice and comment before effectiveness. Moreover, the proposed rule change is inconsistent with the provisions of the Exchange Act applicable to the NASD. Therefore, the SEC should abrogate the proposal or permit the NASD to withdraw and revise it in order to cure its flaws and, if a proposal is resubmitted, require that the public be afforded a formal notice and a comment period before approval or disapproval of the proposed rule.

We hope our comments are helpful to the Commission and its staff. Please call me at (202) 367-1140 if we can provide additional information.

Respectfully submitted,

John G. Gaine
President

Attachment: MFA's letter dated March 12, 2004

cc(w/att.): The Hon. William H. Donaldson, Chairman
The Hon. Paul S. Atkins, Commissioner
The Hon. Cynthia A. Glassman, Commissioner
The Hon. Harvey J. Goldschmid, Commissioner
The Hon. Roel C. Campos, Commissioner
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Mary L. Schapiro, Vice Chairman and President, Regulatory Policy and Oversight, NASD
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Joseph E. Price,Vice President, Corporate Financing, NASD
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MANAGED FUNDS ASSOCIATION

VIA ELECTRONIC MAIL: PUBCOM@NASD.COM

March 12, 2004

Ms. Barbara Z. Sweeney
Senior Vice President and Corporate Secretary
NASD
1735 K Street, NW
Washington, DC 20006-1500

Re: NASD Notice to Members 04-07: Policy on Trail Commissions in Publicly Offered Commodity Pools

Dear Ms. Sweeney:

MFA welcomes the opportunity to comment upon the NASD's proposal to rescind its long-standing policy with respect to compensation paid to CFTC-regulated brokers who place interests in a publicly offered commodity pool and provide ongoing services to investors in the pool ("trail commissions"). Under that policy, trail commissions have not been deemed to be sales compensation, subject to the limitations in NASD Rule 2810, for over 20 years. As demonstrated in this letter, MFA believes that the NASD's policy should be codified rather than rescinded in order to permit the continued efficient operation of commodity pools, including provision of important services to commodity pool investors.

MFA is the only US-based membership organization dedicated to serving the needs of professionals who manage managed futures funds, hedge funds, and fund of funds. Our over 700 members manage a significant portion of the estimated $750 billion invested in these alternative investment vehicles. Among the MFA membership are commodity pool operators (CPOs), commodity trading advisors (CTAs), as well as NASD-member broker-dealers, who represent a significant portion of the estimated $87 billion invested in managed futures products, including publicly offered commodity pools. Accordingly, MFA's members have a keen interest in the proposals set forth in NASD's Notice to Members 04-07.

What are Commodity Pools? For purposes of this letter, commodity pools are publicly offered collective investment vehicles that trade in futures contracts and options on futures contracts ("futures"). Some also trade in spot and forward foreign currencies. Commodity pools do not trade in securities, although some may maintain cash balances in Treasury bills or other cash equivalents. Commodity pools are not investment companies as defined under the

Investment Company Act of 1940. Recent industry estimates indicate that there are about 55 public pools in the United States aggregating approximately $9 billion.[1]

Trading in futures is subject to the jurisdiction of the Commodity Futures Trading Commission ("CFTC") under the Commodity Exchange Act ("CEA"). The CFTC under the CEA also regulates the professionals involved in futures, including commodity pool operators ("CPOs"), commodity trading advisors ("CTAs") and futures commission merchants ("FCMs"). Each commodity pool has one or more CPOs, CTAs and FCMs. The CPO of a pool in the form of a limited partnership is its general partner. The CTA may be the CPO or one or more unaffiliated persons who provide trading advice to the pool with respect to futures. The FCM is the commodity broker that carries the commodities account(s) of the pool. The FCM may execute and clear all trades for the pool or trades may be executed by other firms and "given-up" to the FCM for clearing. Each of the CPOs, CTAs and FCMs for commodity pools is registered with the CFTC and is a member of NFA, the futures self-regulatory organization. Each is subject to the rules of the CFTC and the NFA.

Commodity pools pay management and incentive fees to their CTAs for commodity trading advice and brokerage commissions to their FCMs for commodity brokerage services. Some pools also pay administrative fees to their CPOs. Trail commissions are typically portions of the commodity brokerage commissions paid by the pool. Such commissions may be charged as a flat percentage of assets on a monthly basis or as round-turn commissions for each futures trade. In some pools trail commissions may be portions of the management or administrative fees paid by the pool. We know of no pool in which trail commissions are a separate charge to the pool or a charge deducted from an investor's subscription amount as suggested in the Notice to Members. In all cases, trail commissions are payments for ongoing services provided to the pool and its investors. Trail commissions are not selling commissions deducted from an investor's subscription amount and paid to a selling agent.

It should be noted that the prospectus and offering materials for commodity pools are reviewed by the Securities and Exchange Commission ("SEC"), the NASD, the CFTC/NFA and many of the states. All of the fees payable by commodity pools, including those from which trail commissions are paid and the level of trail commissions paid, are required to be disclosed in the prospectus. The facts that trail commissions will be paid, the amount of the trails and the conflicts of interest related to payment of trails are disclosed, along with a description of the services provided. In addition, since trails are paid from other forms of compensation, which are themselves limited in amount by the NASAA Commodity Pool Guidelines, trails are indirectly regulated.

In over twenty years of history, publicly offered commodity pools have had no history of abuses; and, more specifically, there is no history of abuses connected with the payment of trail commissions. In addition, over this period, advisory and brokerage fees paid by

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[1] *See MAR/Hedge Report* (February 2004), *Stark Trader Analysis Report* (February 2004) for public commodity pool industry statistics as of January 31, 2004.

public commodity pools have been substantially reduced, presumably as the result of competition. While it is not possible to foresee the consequences of rescission of the NASD's trail policy on future offerings of public commodity pools, it is likely that the result would be a decrease in the number of pools offered to the public. Reduction in the number of publicly offered pools could lead to reduced competition and more rigid pricing.

Benefits of Commodity Pools. Commodity pools are generally acknowledged by regulators and the financial press as offering the safest and least expensive mechanism for retail investors to engage in futures trading for investment and/or portfolio diversification purposes through the inclusion of a non-correlated investment to a traditional stock and bond portfolio: pools offer daily net asset valuation, liquidity in the form of monthly (or, more recently, even daily) redemption rights, and professional trading and fund management. These pools are highly regulated and provide limited liability for investors, as well as containing higher suitability standards and solicitation restrictions than other commodity-related investments. For example, individual managed futures accounts are subject to CFTC/NFA regulation, but are not subject to SEC, NASD or state jurisdiction and have unlimited liability, typically higher fees, restricted access to advisors and less regulatory oversight.

Moreover, these commodity pools provide retail investors with access to many of the most successful CTAs. This access would be severely curtailed if commodity pools were not available, due to the large minimum account size requirements of many of those CTAs and the higher suitability requirements and capital obligations of privately offered commodity pools. In addition, portfolio diversification is a basic tenet of modern investment theory. Studies have shown an historical lack of correlation between the performance of managed futures and the performance of the stock and bond components of a traditional investment portfolio. Therefore, pools provide potential diversification from stock and bond portfolios. In fact, most pools offered today are offered as part of a portfolio diversification strategy. If the NASD's policy on trail commissions is rescinded as proposed, and as a result, the number of publicly offered commodity pools is severely reduced, retail investors will be denied access to the only affordable futures-based product currently available in a limited liability structure (i.e., a limited partnership or limited liability company) and to one of the only alternative investment products available to diversify a traditional stock and bond portfolio.

Finally, one of the main functions of futures trading is to provide price discovery with respect to the underlying commodity. In order for futures markets to perform this function, both speculators and hedgers must use the markets. These commodity pools provide a significant source of speculative capital for the United States futures markets that might be curtailed by rescission of the NASD's policy on trail commissions. This could lead to reduced liquidity and volume on U.S. exchanges, and consequently have an adverse effect on the price discovery function performed by those markets.

Justifying Trail Commissions. Trail commissions are service fees paid for commodity-related services. Trail commissions developed from and are consistent with practices of FCMs with respect to individual customer futures accounts. Associated persons of FCMs who service those futures accounts typically share in the commodity brokerage commissions

generated by the accounts. Thus, the qualification requirements applicable to recipients of trail commissions are similar to those applicable to associated persons who limit their activities to individual customer futures accounts.

Those who receive trails must qualify to receive them by registering as associated persons under the CEA and must first pass either the Series 3 or the Series 31 examination which requires a demonstrated competency in commodity-related matters. As registrants under the CEA, these individuals are subject to sanctions under the CEA and related rules (including those of the CFTC and NFA). Registrants are also subject to periodic ethics training requirements.

The services provided by associated persons in return for the trails require knowledge of both the product and the commodity markets. The services generally described in the prospectuses of publicly offered commodity pools are: (a) responding to inquiries from investors about the value of units; (b) providing information and responding to inquiries about the futures and forward markets and the fund's trading in those markets; (c) responding to limited partners' inquiries about monthly statements and annual reports and tax information provided to them; (d) providing information to investors about redemption rights and procedures; (d) assisting investors in redeeming units; and (e) providing other services requested from time to time by investors.

As noted above, commodity pools are often offered as part of a portfolio diversification strategy. Consequently, associated persons may be required to monitor the traditional elements of an investor's portfolio as well as the futures component.

If associated persons did not provide these services to pool investors, the pool's CPO would have to incur additional expenses to develop an alternative mechanism for providing such services to pool investors.

Commodity Pools are Different. The regulatory requirements that apply to publicly offered commodity pools exceed considerably those that apply to other limited partnership programs. Those products, such as real estate or oil and gas partnerships, are not subject to a separate federal regulatory framework. Commodity pools and commodity professionals, as noted above, are subject to regulation by the CFTC and NFA under the CEA.

Many states substantively review prospectuses for public pools and impose investor suitability requirements (income and/or net worth - exclusive of home, furnishings and automobiles) on public pool participants. In fact, most states have adopted the NASAA Guidelines for Commodity Pools, which set forth requirements for and limitations on the operation of commodity pools. Limitations include maximum fees to be charged. The current Guidelines specifically permit payment of trail commissions. In contrast, states do not review the prospectuses of registered investment companies and almost anyone can purchase shares in them.

Publicly offered commodity pools also differ from other direct participation programs subject to NASD Rule 2810 in significant structural and operational ways. For example, real estate and oil and gas partnerships typically purchase properties or other assets at

the outset of operations and then hold those properties or assets until the termination of the partnership. Although these programs provide annual financial statements, they often do not provide daily net asset values and typically do not permit regular redemptions. Commodity pools, on the other hand, engage in daily trading of multiple futures contracts on multiple markets. Commodity pools are required to provide daily net asset values. Commodity pools provide redemption opportunities on at least a monthly basis. In addition, most commodity pools engage in continuous offerings of interests, at least until such time as a maximum level of assets is reached. As a result of these differences, investors require more and different information than investors in other direct participation programs.

Commodity pools bear certain similarities to closed-end investment companies subject to Rule 2810. These investment companies engage in investments over the life of the fund and may provide redemption opportunities by electing to be treated as an "interval fund." However, investment companies typically have a much lower portfolio turnover rate than commodity pools and often seek to generate long-term capital gains by holding positions for at least a year, whereas commodity pools often engage in short-term trading activity, placing trades on a daily basis. Thus, investors in commodity pools may require information with respect to trading on a daily basis. In addition, the redemption opportunities, if any, afforded by closed-end investment companies are not as frequent as commodity pools. Thus, investors in commodity pools may require information and/or advice from their associated persons in making frequent decisions on whether or not to redeem or purchase more units.

Conclusion. As demonstrated in this letter, trail commissions derive from the futures industry practice with respect to individual futures accounts, are paid out of legitimate and regulated fees paid by commodity pools rather than assessed separately against an investor's subscription amount and are fully disclosed as required by federal and state regulators. In addition, commodity pools and the services provided in return for trail commissions may be distinguished from other direct participation programs. Therefore, MFA believes that the NASD's long-standing policy excluding trail commissions from the limitations in Rule 2810 should be codified rather than rescinded. Such codification will permit the continued efficient operation of publicly offered commodity pools, including provision of important services to commodity pool investors.

We stand ready to meet with you and your colleagues at the NASD to discuss the comments set forth above. I can be reached at 202.367.1140.

Sincerely,

/s/ John G. Gaine

John G. Gaine

President

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cc: Mary L. Schapiro

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