



**Futures Industry Association**

2001 Pennsylvania Ave. NW  
Suite 600  
Washington, DC 20006-1823

202.466.5460  
202.296.3184 fax  
www.futuresindustry.org

March 12, 2004

Via e-mail: pubcomm@nasd.com  
Ms. Barbara Z. Sweeney  
NASD  
Office of the Corporate Secretary  
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:

The Futures Industry Association (“FIA”) appreciates this opportunity to comment on NASD Notice to Members 04-07: Policy on Trail Commissions in Publicly Offered Commodity Pools (the “Notice”)<sup>1</sup>. The Notice proposes rescinding the NASD’s long-standing policy with respect to compensation paid to Commodity Futures Trading Commission (“CFTC”)-registered brokers who place interests in publicly offered commodity pools and provide ongoing services to investors in those pools (“trail commissions”). For over 20 years, that policy has treated trail commissions as excluded from the limitations on sales compensation in NASD Rule 2810. For the reasons set forth in this letter and those in the separate comment letter provided by the Managed Funds Association, FIA believes that the NASD’s policy should be codified rather than rescinded.

First, the NASD’s policy with respect to trail commissions was developed by NASD staff working with CFTC and National Futures Association staffs to coordinate regulation of commodity pools. The NASD policy reflects a recognition that the sole business of commodity pools is trading in commodity futures, options and forward contracts, and the sole business of futures commission merchants (“FCMs”) is executing and clearing those same commodity contracts. The payment of trail commissions derives from the commodities industry practice of paying associated persons of FCMs a portion of the round-turn commissions generated by the associated person’s commodity customers with individual accounts. The associated person is compensated for providing an array of services to the customer including providing advice with

---

<sup>1</sup> FIA is a principal spokesman for the commodity futures and options industry. FIA’s regular membership is comprised of approximately 40 of the largest futures commission merchants (“FCMs”) in the United States. Among its associate members are representatives from virtually all other segments of the futures industry, both national and international. Reflecting the scope and diversity of its membership, FIA estimates that its members effect more than ninety percent of all customer transactions executed on United States contract markets.

respect to specific trades and the commodity markets in general. In the realm of commodity pools, these payments became a pro rata portion of the brokerage commissions generated by a pool based on amounts contributed to the pool by the associated person's customers. In return, the associated person provides an even larger array of services to its customers, including advice with respect to purchasing and selling units, as well as advice with respect to specific trades and the commodity markets in general. Thus, the NASD policy permits associated persons to receive trail commissions provided that they pass the Series 3 or 31 Exam and provide ongoing services to customers. FIA believes that the NASD, CFTC and NFA reached a suitable accommodation of regulatory interests and customer protection in adopting the policy. That accommodation should continue by codification of the policy.

Second, futures markets are not commonly used or understood by retail customers. Commodity pools trade in these markets using various trading strategies and advisors. Publicly offered commodity pools provide retail customers with access to the futures markets through a limited liability vehicle (*e.g.* a limited partnership) and the ability to diversify a traditional stock and bond portfolio by adding a non-correlated investment, which access and ability would otherwise not be readily available. Commodity pools are able to provide these benefits to retail customers because associated persons are trained to explain the investment at the outset and provide ongoing advice to those customers with respect to the pool, its transactions and its advisor. Trail commission appropriately compensate these associated persons for their ongoing futures-related services.

Finally, trail commissions (including the amounts of trails and any conflicts arising from the payment of trails) are fully disclosed to investors in publicly offered commodity pools. To our knowledge, payment of trail commissions have never been the subject of customer litigation or governmental action. Therefore, one may conclude that investors purchase commodity pool interests understanding that associated persons receive trails in return for the ongoing services they render and that no material problems with trails have been perceived by those investors or the regulators in the 20 plus years that commodity pools have been in existence. In light of the aforesaid, FIA believes that the NASD's policy that excludes trails from the limitations of NASD Rule 2810 should be embraced – and codified.

FIA appreciates the opportunity to submit these comments. If the NASD has any questions concerning the comments in this letter, please contact Barbara Wierzynski, FIA's General Counsel, at (202) 466-5460.

Sincerely,

John M. Damgard  
President