MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

September 25, 2009

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Harmonization of Regulation; File Number 4-588

Dear Ms. Murphy and Mr. Stawick:

Managed Funds Association ("MFA") appreciates the opportunity to participate on the "Regulation of Investment Funds" panel at the joint meeting of the Commodity Futures Trading Commission ("CFTC") and Securities and Exchange Commission ("SEC") on harmonization of regulation on September 3, 2009. We are pleased to submit this letter to supplement our written statement from September 3rd to respond to the question Commissioner Aguilar asked me at the joint meeting. Specifically, Commissioner Aguilar asked me to submit a proposed framework for determining an adviser's primary business and regulator.

As previously stated, MFA supports adviser registration. MFA believes that an adviser should be subject to either the CFTC or SEC's registration framework depending on whether it is primarily engaged in the business of advising on the value or advisability of trading in futures or securities. Advisers who are equally or largely engaged in advising on both futures and securities should be subject to both CFTC and SEC registration. We support the current statutory framework, which provides an exemption for an adviser that is registered with one agency and is not primarily engaged in advising activity within the other agency's purview from registration with the other agency.[1] We believe that this framework promotes efficiency, reduces overlap, helps prioritize regulatory resources, and reduces compliance cost to advisers and their customers.

Current Framework

In particular, section 203(b)(6) of the Investment Advisers Act of 1940 ("Advisers Act") provides an exemption from registration for "[a]ny investment adviser that is registered with the Commodity Futures Trading Commission as a commodity trading advisor whose business does not consist primarily of acting as an investment adviser" and that does not act as an investment adviser to a registered investment company or a business development company.

[1] *See* Section 203(b)(6) of the Investment Advisers Act of 1940 and Section 4m(3) of the Commodity Exchange Act.

Similarly, Section 4m(3) of the Commodity Exchange Act ("CEA") provides an exemption from registration for "any commodity trading advisor that is registered with the Securities and Exchange Commission as an investment adviser whose business does not consist primarily of acting as a commodity trading advisor . . . and that does not act as a commodity trading advisor to any investment trust, syndicate of similar form of enterprise that is engaged primarily in trading in any commodity for future delivery . . . ."

To date, the Commissions have not provided explicit guidance in interpreting an adviser's primary engagement. We believe the standard set in the Peavey Commodity Futures Fund SEC No-action letter[2] (Peavey) to determine the primary business engagement of a fund for purposes of determining whether it is an investment company under section 3(b)(1) of the Investment Company Act of 1940 ("Company Act") is a fair and flexible standard for determining whether an adviser registered with the CFTC is primarily acting as an investment adviser pursuant to section 203(b)(6) of the Advisers Act. In addition, we believe the same analysis may be applied for purposes of determining whether an adviser registered with the SEC is primarily acting as a commodity trading advisor pursuant to section 4(m)(3) of the CEA.

Section 3(b)(1) of the Company Act excludes from the definition of investment company any issuer engaged primarily in a business or businesses other than investing, reinvesting, owning, holding or trading in securities, either directly or through wholly-owned subsidiaries.

Under the Peavey analysis, in determining whether an entity investing in futures was otherwise primarily engaged in the business of investing in securities so as to be an investment company, the SEC considered the composition of the entity's assets, the sources of its income, the area of business in which it anticipated realization of the greatest gains and exposure to the largest risks of loss, the activities of its officers and employees, its representations, its intentions as revealed by its operations, and its historical development. The SEC recognized that with respect to a commodity pool, "a snapshot picture of its balance sheet contrasting the value of its futures contracts (unrealized gain on such contracts) with the value of its other assets" may not reveal the primary nature of the business as a pool's reserves and margin deposits are generally in the form of United States government notes and other securities.[3] In Peavey, the SEC stated that of greatest importance in its analysis was the area of business in which the entity anticipated realization of the greatest gains and exposure to the largest risks of loss as revealed by its operations on an annual or other suitable basis.[4]

We believe the factors under the Peavey analysis are appropriate for determining the primary business activity of an adviser and whether it should be registered with the CFTC, SEC or both. Accordingly, we recommend the Commissions, in determining whether an adviser is acting primarily as an investment adviser or a commodity trading advisor, to consider the Peavey

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[2] *See* Peavey Commodity Futures Fund, SEC No-Action Letter (pub. avail. June 2, 1983), 1983 SEC No-Act. LEXIS 2576 ("Peavey") (determining the primary engagement of a fund for purposes of the Investment Company Act of 1940). *See also,* Tonopah Mining Co. of Nevada, 26 S.E.C. 426 (1947) (adopting a five factor analysis for determining an issuer's primary business for purposes of assessing the issuer's status under the Investment Company Act of 1940).

[3] *See id.*

[4] For example, a company's anticipated gains and losses in futures trading as compared to its anticipated gains and losses on its government securities and other securities.

analysis—the composition of the adviser's assets, the sources of its income, the area of business in which the adviser anticipates realization of the greatest gains and exposure to the largest risks of loss, the activities of its officers and employees, its representations, its intentions as revealed by its operations, and its historical development.

For your convenience, we have attached a copy of Peavey, as well as a copy of the Managed Futures Association SEC No-action letter, which applies a "look through" analysis in determining the primary business of a commodity pool that invests in other commodity pools.[5]

Oversight and Examination

The SEC has oversight and examination authority over investment advisers and the CFTC and National Futures Association ("NFA") have oversight and examination authority over commodity trading advisors and commodity pool operators. We support enhancing coordination, communication and consultation among the SEC, CFTC and NFA with respect to examinations of dual registrants. As discussed in our written statement, we believe the regulators should consider developing a shared internal database of advisers who engage in futures and securities activities to assist with regulation and oversight of registrants. We believe a shared database would facilitate and promote the sharing of information between the regulators and enhance coordination and regulation. Such a database would provide a regulator with information about an adviser that engages in securities and futures activities regardless of an adviser's registration status (*e.g.,* single or dual registrant).

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We support a regulatory framework that requires an adviser to be subject to either the CFTC or SEC's registration framework depending on whether it is primarily engaged in the business of advising on futures or securities. To the extent that an adviser is equally or largely engaged in advising on both futures and securities, we believe the adviser should be registered with both the CFTC and SEC. We believe that such a framework, combined with enhanced SEC and CFTC coordination and communication, such as through a shared adviser database and with respect to examinations, would maximize regulatory efficiency and effectiveness while reducing compliance costs for advisers and their customers.

[5] Managed Futures Association, SEC No-Action Letter (pub. avail. July 15, 1996), 1996 SEC No-Act. LEXIS 623. Managed Futures Association subsequently changed its name to Managed Funds Association.

MFA appreciates the opportunity to share its views on the SEC and CFTC's harmonization of regulation and is committed to working with regulators to enhance our regulatory system. If the Commissioners or staffs have any questions or comments, please contact Jennifer Han or the undersigned at (202) 367-1140.

Respectfully submitted,

/s/ Richard H. Baker

Richard H. Baker
President and CEO

CC: The Hon. Mary Schapiro, Chairman, SEC
The Hon. Kathleen L. Casey, Commissioner, SEC
The Hon. Elisse B. Walter, Commissioner, SEC
The Hon. Luis A. Aguilar, Commissioner, SEC
The Hon. Troy A. Paredes, Commissioner, SEC

The Hon. Gary Gensler, Chairman, CFTC
The Hon. Michael Dunn, Commissioner, CFTC
The Hon. Jill E. Sommers, Commissioner, CFTC
The Hon. Bart Chilton, Commissioner, CFTC