



February 5, 2010

Via Electronic Mail: fisherj@gao.gov

John D. Fisher
Financial Markets and Community Investment
U.S. Government Accountability Office
441 G St., NW
Washington, DC 20548

Re: Comments on Joint Report of the SEC and CFTC on Harmonization of Regulation

Dear Mr. Fisher:

Managed Funds Association (“MFA”)¹ appreciates the opportunity to provide the Government Accountability Office (“GAO”) with comments to assist in its assessment of the *Joint Report of the SEC and CFTC on Harmonization of Regulation* (the “Harmonization Report”). We believe the Report provides a number of important recommendations with respect to regulatory oversight and enforcement, enhancing investor and customer protection, rendering compliance more efficient, and improving coordination and cooperation between the Securities and Exchange Commission (“SEC”) and the Commodity Futures Trading Commission (“CFTC”).

The SEC and the CFTC extensively regulate the activities of MFA members, and the markets in which they trade, and as such, we support greater SEC and CFTC coordination and communication of regulation. MFA, our members, and their investors, have a strong interest in effective and efficient regulation that reduces inconsistency and duplication. We believe Harmonization Report recommendations that would enhance coordination and communication and reduce duplication between the agencies would streamline regulation, improve oversight, reduce compliance costs for the public sector, and make better use of limited government resources. Nevertheless, as the GAO assesses the Harmonization Report, we also believe it is critical not to lose sight of the fact that the securities and futures regulatory frameworks have been separate and distinct because these markets have grown from and serve very different purposes—capital formation and risk management, respectively.

We are pleased to respond to the GAO’s questions below and to provide a more detailed discussion of the Harmonization Report recommendations.

¹ MFA is the voice of the global alternative investment industry. Its members are professionals in hedge funds, funds of funds and managed futures funds, as well as industry service providers. Established in 1991, MFA is the primary source of information for policy makers and the media and the leading advocate for sound business practices and industry growth. MFA members include the vast majority of the largest hedge fund groups in the world who manage a substantial portion of the approximately \$1.5 trillion invested in absolute return strategies. MFA is headquartered in Washington, D.C., with an office in New York.

1. Which of the report's recommendations should receive the highest priority from Congress, CFTC and the SEC?

Harmonize Registration Requirements and “Align Specific Private Fund Reporting Requirements.” MFA believes the SEC and CFTC should work together to prevent regulatory gaps while reducing duplicative or inconsistent regulation. Of first priority, we believe policy makers and regulators should harmonize registration requirements and “Align Specific Private Fund Reporting Requirements.” MFA supports adviser registration and believes that an adviser should be subject to either the SEC or CFTC’s registration framework depending on whether it is primarily engaged in the business of advising on the value or advisability of trading in securities or futures. We believe that advisers who are registered with one agency and are not offering products or programs that are primarily focused on instruments within the other agency’s purview should remain eligible for an exemption from registration with the other agency,² and that the SEC and CFTC should work together to define registration thresholds. Such an exemption reduces duplication and overlap, and would allow each agency to better direct the use of its limited resources.

Advisers who are primarily or substantially engaged in advising on both securities and futures should be subject to both SEC and CFTC registration. To streamline registration and regulation and to avoid duplicate filings, however, we believe the SEC and CFTC should harmonize registration and align specific private fund reporting requirements. Such a process would significantly reduce the burden of adviser registration and compliance, as well as simplify regulatory oversight of dual registrants. Moreover, we believe a single registration application and aligned reporting requirements would better serve investors by reducing investor confusion over duplicative, inconsistent or conflicting reports.

“Create a Joint Information Technology Task Force.” We believe an important component to harmonization of SEC and CFTC regulation, which should receive high priority, is the sharing of information between the agencies and among self-regulatory agencies (“SROs”). We support the development of a Joint Information Technology Task Force for purposes of linking public and non-public information on SEC and CFTC regulated persons in an integrated database, provided that all non-public information from registrants remain protected and confidential. Such database would assist the staff of both agencies in conducting their respective investigations, examinations, enforcement matters, and market surveillance activities. We believe greater information exchange between the agencies would also reduce duplicative information requests to registrants and the cost and burden of compliance.

We believe the National Futures Association (“NFA”)³ and the Financial Industry Regulatory Association (“FINRA”)⁴ should also be represented on the Joint Information Technology Task Force as they conduct examinations of registrants. In addition to sharing an integrated database, we believe the agencies and the SROs should enhance communication and coordination of examinations, as discussed further below under question 3, so that examiners may

² See Section 203(b)(6) of the Investment Advisers Act of 1940 and Section 4m(3) of the Commodity Exchange Act.

³ The National Futures Association oversees commodity trading advisers, commodity pool operators and futures commission merchants.

⁴ The Financial Industry Regulatory Authority oversees broker-dealers.

benefit from information learned by another regulator and avoid conducting simultaneous yet separate routine examinations of dual registrants.

“Facilitate Portfolio Margining.” We strongly support the Harmonization Report’s recommendation for legislation to facilitate the holding of futures products in an SRO securities portfolio margin account and securities options, securities futures products and certain other securities derivatives in a futures portfolio margin account. Such a framework would provide investors with greater choice and control in how their funds are protected. Investors would benefit from the enhanced efficiency, risk-management capabilities and simplicity from a single portfolio margin account. To properly achieve single account portfolio margining, however, we believe legislative and rule changes to the bankruptcy/insolvency regime of the SEC by amending the Securities Investor Protection Act to provide for insurance protection of futures positions and performance bond supporting such positions is imperative.

“Facilitate Product Approval Process and Provide Legal Certainty.” We strongly support the Harmonization Report’s recommendation for legislation that would provide a process for expedited judicial review of jurisdictional matters regarding new products. While we appreciate the different agency approaches to reviewing and approving products, rule changes, and amendments for exchanges, clearinghouses, and other SROs, we believe it is critical for Congress to establish a process for the prompt resolution of jurisdictional disputes between the SEC and CFTC over products. We believe such a process would encourage innovation and product development. Unfortunately, we believe that under the current framework the agencies are unable to promptly resolve jurisdictional issues, and that the current framework impedes innovation and development of products such as security futures. As investors, we welcome a marketplace that offers a rich and diverse multitude of products.

2. Please comment on any of the report’s recommendations that you disagree with and, if applicable, the revisions you would suggest.

MFA is a strong proponent of well regulated and properly functioning markets and supports the Harmonization Report recommendation to “expand the scope of insider trading prohibitions under the CEA” to include trading on the basis of material non-public information that is sourced from any governmental authority. However, we believe that the insider trading standards developed under the securities laws with respect to an issuer are not analogous to the commodity markets, and that Congress and the CFTC must establish objective criteria as to what constitute material and non-public information with respect to a commodity market.

In addition, we believe there needs to be a complementary prohibition on government agencies, including the CFTC, Federal Reserve, the Treasury Department, the Department of Agriculture and other government bodies from selectively disclosing non-public information in breach of a fiduciary duty. We also believe that recipients of such information who trade on it should be subject to a “known or should have known” test that is analogous to the test that is relevant to determining liability of securities law tippees. Without such a prohibition on government officials and a related test for recipients of information, it could be very difficult for market participants to know when they have received information in breach of a duty that is material, non-public information relating to the commodity markets.

We recommend that these changes in the law should be limited to government enforcement only, and that there should be no explicit or implicit private rights of action to

enforce such new authorities. We also believe that the GAO should examine alternative approaches to government enforcement of these matters to ensure objectivity and evenhanded enforcement. In particular, we believe that it may be difficult for the CFTC to bring an enforcement case against a CFTC Commissioner or staff member. Accordingly, GAO may need to explore alternative enforcement mechanisms.

3. Please describe any potential areas for harmonization or other relevant matters that were not adequately covered in the joint SEC/CFTC report.

Joint Agency Compliance Task Force. The Harmonization Report recommends aligning specific private fund reporting requirements and creating a Joint Agency Enforcement Task Force and a Joint Information Technology Task Force. We believe an area subject that the Harmonization Report has not adequately addressed is the harmonization or communication and coordination of oversight of dual registrants, such as investment advisers and commodity trading advisers (“CTAs”). One of the more costly aspects of compliance is the task of trying to comply with and be responsive to two different regulatory frameworks and examination staffs. While the recommendation to align specific private fund reporting requirements will address certain rulemaking disparities, we believe it is important for examination staff to communicate and share information. Uncoordinated oversight programs are not cost-efficient for regulators, and in turn, are costly for registrants, investors and taxpayers.

We believe a Joint Information Technology Task Force will promote the sharing of information between the SEC and the CFTC, and that the agencies should even consider sharing information on registrants that are only registered with one agency, due to the nature of their primary business, who advise on products within the other agency’s purview. Nevertheless, a Joint Information Technology Task Force by itself will not go far enough in enhancing communication and coordination between the agencies. To enhance regulation and oversight of dually registered investment advisers and CTAs, we believe that the examination staff of each agency and/or SRO should have a certain base level of understanding for how the other agency/SRO examines the entity, and that the exams and compliance recommendations should be, at the very least, consistent.

While joint examinations may not be necessary, and in our view, should not be conducted unless the exams are truly integrated and not merely simultaneous separate exams, we believe regulators and registrants would both benefit from greater integration of oversight. We also believe communication and coordination between SEC and NFA examination staff could enhance oversight of registered advisers, create government efficiencies and reduce compliance burdens on registered advisers. We recommend the creation of a Joint Agency Compliance Task Force.

OTC Derivatives. The Harmonization Report does not cover regulation of over-the-counter (“OTC”) derivatives. While Congress debates a new statutory framework for the regulation of OTC derivatives, the Obama Administration and key policy makers have indicated that such regulatory framework should require close cooperation and coordination between the SEC and CFTC. We believe it is crucial for the agencies to cooperate and coordinate in the promulgation of OTC derivatives rulemaking to ensure that regulation is effective and accommodates the differences across OTC derivative products and the market participants that use them. Without regulatory harmonization of OTC derivatives regulation, we believe that similar concerns as discussed in the Harmonization Report with respect to securities and futures regulation will arise for OTC derivatives, resulting in costly and ineffective regulation.

4. What additional steps, if any, should the agencies take to reduce or eliminate gaps in oversight, enhance regulatory effectiveness and efficiency, and improve market transparency? Please suggest any areas that you believe merit further study by the agencies or consideration by Congress.

As previously stated, MFA supports the current regulatory framework which provides an adviser who is registered with one agency and is not primarily engaged in advising activity within the other agency's purview with an exemption from registration with the other agency. We believe that this framework promotes efficiency, reduces duplication and overlap, helps prioritize regulatory resources, and reduces compliance cost to advisers and their clients. To the extent that regulators are concerned that a CTA is not registered as an investment adviser and is engaged in a *de minimis* level of advising on securities, we believe the regulators should cooperate in sharing information and reports including findings or examinations relating to such adviser to eliminate gaps in oversight rather than require for separate registration with the SEC. We believe such coordination would create government efficiencies and reduce compliance burdens on registered advisers.

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MFA appreciates the opportunity to assist the GAO in its assessment of the Harmonization Report. If staff of the GAO has 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