MANAGED FUNDS ASSOCIATION
POLICY BRIEF

25 YEARS 1991-2016

Dec. 2015—Jan. 2016

CFTC Approves a Final Rule on Margin Requirements for Uncleared Swaps

On January 6, the CFTC published its final margin rule for uncleared swaps. The final rule applies to swap dealers and major swap participants as "covered swap entities" (or CSEs) that are not regulated by a prudential regulator.

The rule release also provides final rules addressing the segregation requirements for the margin rule. The CFTC will address the cross-border application of the margin rule in a separate rulemaking. The CFTC's final rule is otherwise very similar to the prudential regulators' final margin rule for uncleared swaps and security-based swaps issued in October.

The final rule release cites MFA 16 times. Following the rule's release, we are pleased to note that:

- **Cash-only variation margin has been eliminated:** The final rule permits assets that are eligible as initial margin (IM) to also be eligible as variation margin for swaps between a CSE and a financial end user.

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

September 14, 2015

Via Electronic Submission: http://comments.cftc.gov

Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

Re: Proposed Rule on "Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants – Cross-Border Application of the Margin Requirements" (RIN 3038–AC97)

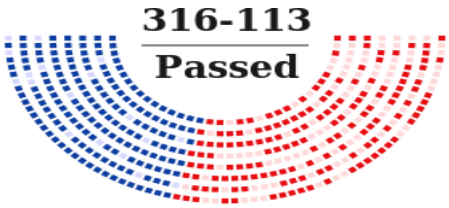
Dear Mr. Kirkpatrick:

Managed Funds Association ("**MFA**")[1] appreciates the opportunity to provide comments to the Commodity Futures Trading Commission (the "**Commission**") on its proposed rule on "Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants – Cross-Border Application of the Margin Requirements" (the "**Proposed Rule**").[2] MFA strongly supports a rational and proportionate approach to the extraterritorial application of the Commission's margin requirements for uncleared swaps ("**Proposed Margin Requirements**") that avoids subjecting counterparties to duplicative or conflicting margin rules. In addition, we greatly appreciate the Commission's attentiveness to the concerns of end users, and the efforts of the Commission to ensure adequate protection of end users,[3] during its rulemaking process

- **Revised definition of "affiliate":** This should result in fund-level application of initial margin thresholds. The final rule's definition of "margin affiliate" replaces the proposed control test for affiliation with a financial accounting consolidation analysis.
- **T+1 timing for initial obligation to post VM**: Under the final rule, the CSE's initial obligation to collect or pay the required VM amount begins "on or before the business day after the day of execution."
- **Material swaps exposure increased from $3 billion to $8 billion:** Under the final rule, CSEs must collect and post IM only with financial end user counterparties that have a "material swaps exposure", which is a defined term that means at least $8 billion in aggregate notional exposure.
- **Separate netting portfolios to avoid retroactive application of new margin requirements to pre-compliance date swaps:** The final rule gives parties an option to document old and new swaps as separate portfolios for netting purposes under the same eligible master netting agreement (EMNA). Exercising this option would avoid retroactivity of the new margin requirements to pre-compliance date swaps under the same EMNA with post-compliance date swaps.

MFA's Comment Letter to the CFTC on Uncleared Swap Margin Rules

Congress Approves Year-End Spending and Tax Measures, Concludes Work for Year



In December, the U.S. Congress completed work on a bipartisan, $1.1 trillion omnibus spending and tax extenders package to fund the Federal Government through September 2016, as well as to make a number of tax provisions permanent while extending other tax provisions for five years and retroactively extending the remaining through 2016.

The Omnibus measure came on the heels of the "Bipartisan Budget Act," which the Congress approved in October 2015. The Bipartisan Budget Act contained a significantly scaled back version of the original TEFRA (the "Renassi Bill") legislation as a revenue raiser, which removes the problematic joint and several liability provisions and included a reporting alternative to a the partnership level tax, in addition to addressing other MFA Member concerns. MFA Members and Staff continue to engage with Congressional leaders, Treasury and IRS officials, and White House staff on outstanding technical and implementation related concerns (ex. the impact of the on tiered-partnership) with regards to the revised TEFRA measure.

MFA Submits Response to Capital Markets Union Call for Evidence

On January 31, MFA submitted its response to the European Commission's Call for Evidence on the EU Regulatory Framework for its Capital Markets Union action plan.

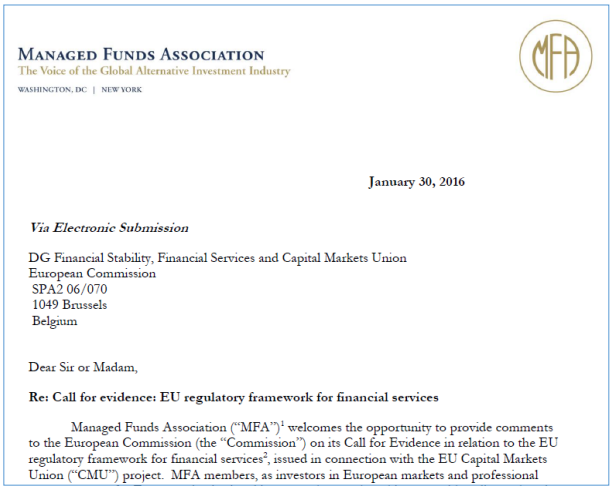
The Call for Evidence, which was broad-ranging in nature, was intended to help the European Commission attain a clearer understanding of the interaction between individual rules and the cumulative impact of legislation and regulation in the EU, including potential overlaps, inconsistencies and gaps.

MFA's letter commented on a wide range of policy issues identified by Members and Staff. Following is a brief summary of the key policy issues MFA addressed.

Treatment of non-performing loans – At present, transfers of non-performing loan ("NPL") portfolios are at risk of being characterized as "securitizations" under the Capital Requirements Regulation ("CRR"). This may dissuade professional investors, including asset managers, from involvement in such transactions. Sales of these portfolios to professional investors should be encouraged to allow banks to de-leverage and divest risk, thereby providing banks with an ability to make new loans and support economic growth in the EU.

Short selling regulation – The European Commission should consider how harmonization could be achieved across EU Member States in relation to filing and disclosure requirements under the Short Selling Regulation ("SSR"). Additionally, rules requiring the public disclosure of individual short positions and rules banning or restricting legitimate short selling activity has adverse consequences on capital markets. With respect to the SSR in particular, we believe the long-term effect of the regulation will be deterioration in the efficiency and efficacy of European capital markets, while making it more difficult for issuers – whether banks, corporates or sovereigns – to raise capital. In view of the negative effects of short selling restrictions and disclosure requirements, policymakers should consider other, less harmful, means to regulate short selling effectively.

Harmonized approach to "equivalence" assessments – Given that future "equivalence" assessments made under legislation such as the European Market Infrastructure Regulation ("EMIR") (with respect to third country CCPs and Article 13, for example) and the Markets in Financial Instruments Directive ("MiFID II" and the related regulation "MiFIR")) (with respect to third country trading venues and third country investment firms, for example) will have a substantial bearing on the ability of EU investors to trade with non-EU firms, or to utilize non-EU market infrastructure such as third country CCPs and Swap Execution Facilities ("SEFs"), there is a need for a pragmatic and consistent approach to equivalence by EU authorities. If such an approach is not taken, liquidity fragmentation could occur on a cross-border basis, as market participants would be driven to focus their trading activity in local markets.



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January 30, 2016

Via Electronic Submission

DG Financial Stability, Financial Services and Capital Markets Union
European Commission
SPA2 06/070
1049 Brussels
Belgium

Dear Sir or Madam,

Re: Call for evidence: EU regulatory framework for financial services

Managed Funds Association ("MFA")[1] welcomes the opportunity to provide comments to the European Commission (the "Commission") on its Call for Evidence in relation to the EU regulatory framework for financial services[2], issued in connection with the EU Capital Markets Union ("CMU") project. MFA members, as investors in European markets and professional

Treatment of hedge funds as "shadow banking" entities – Given that hedge funds do not have deposit-like funding structures and do not present the same risk of high leverage as banks, EU authorities should not seek to extend bank-like regulation to them, *e.g.*, by treating them as "shadow banking entities".

Marketing by third country managers under the AIFMD – While our members appreciate the ability for non-EU alternative investment fund managers ("AIFMs") to market their funds in the EU without being subject to full authorization under the AIFMD, the national private placement regimes have led to duplication, inconsistencies and potential conflicts. One area of concern that policymakers should address is the additional regulation and restrictions imposed by individual Member States that act as a barrier to entry for many non-EU AIFMs.

Treatment of research under the MiFID II inducements regime – Under MiFID II, portfolio managers and firms providing investment advice on an independent basis are not permitted to accept and retain fees, commission or any monetary or non-monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of services to clients. We are concerned that ESMA's proposals for unbundling of research will disadvantage EU investors and small and medium enterprises ("SMEs") by unintentionally reducing the ability of EU asset managers to obtain access to research relating to EU SMEs. We also are concerned that the proposals will impose legal obstacles on hedge fund managers and other firms that operate on a global basis, and that seek to obtain high quality research from the best available sources. Policymakers should consider alternatives to current proposals to avoid these unintended consequences.

Data security – We believe the confidentiality safeguards set out in MiFID II should be amended to incorporate specific references to data security. We also would like to see a specific confidentiality obligation introduced for trading venues, as a result of their role in collecting position reports under MiFID II.

Impartial access to trading venues – EU authorities should use the implementation of MiFID II as an opportunity to address the current "two-tier" market structure of dealer-to-dealer and dealer-to-customer markets. This could be accomplished during the MiFID II "Level 2" drafting process or by putting in place guidelines outlining direct and indirect forms of discrimination which are not permissible under the MiFID II regime. These guidelines should make clear that access to MTFs and OTFs in particular should be on terms that do not confer an unfair advantage on large or incumbent firms, and that market participants should be permitted to act simultaneously as both liquidity providers (or "makers") and "takers" of liquidity.

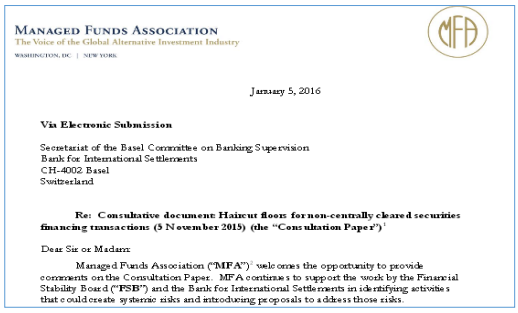
EU Commissioner for Financial Services Lord Jonathan Hill, launching the Green Paper consultation on the Capital Markets Union last February in Brussels.

In addition to the above, MFA's comment letter addressed several other important topics, including:

- Harmonizing rules regarding capital markets-based lending
- MiFIR transparency requirements
- MiFID II treatment of local pension funds
- AIFMD reporting requirements for third country managers
- Overlapping reporting requirements
- Commodity derivative position reporting
- Disclosure requirements in securitization regulation
- Standardized documentation
- Impact of the leverage ratio on clearing
- Definition of "OTC derivative"
- Definition of "gross notional value"
- EMIR thresholds for investment funds
- Definition of a financial counterparty
- Article 13 of EMIR
- Regulatory gaps
- Need for regulatory no-action relief

MFA's Letter in Response to the European Commission's Call for Evidence
European Commission 2016 Work Programme

MFA Submits Letter to Basel Committee in Response to Consultation Paper on Haircut Floors for SFTs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January 5, 2016

Via Electronic Submission

Secretariat of the Basel Committee on Banking Supervision
Bank for International Settlements
CH-4002 Basel
Switzerland

Re: Consultative document: Haircut floors for non-centrally cleared securities financing transactions (5 November 2015) (the "Consultation Paper")

Dear Sir or Madam:

Managed Funds Association ("MFA") welcomes the opportunity to provide comments on the Consultation Paper. MFA continues to support the work by the Financial Stability Board ("FSB") and the Bank for International Settlements in identifying activities that could create systemic risks and introducing proposals to address those risks.

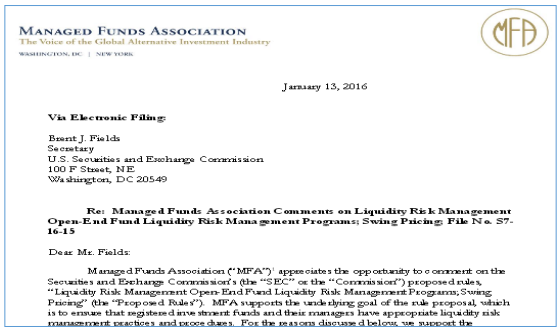
On January 5, MFA submitted a comment letter in response to the Basel Committee's consultation paper on haircut floors for non-centrally cleared securities financing transactions.

In the letter, MFA encourages the Basel Committee not to adopt the mandatory minimum haircut approach proposed in the paper; but, to instead consider an alternative approach similar to that proposed with respect to determining initial margin requirements under the European Market Infrastructure Regulation by the Joint Committee of the European Supervisory Authorities in their draft technical standards on margin requirements with respect to non-centrally cleared derivative contracts.

To the extent the Basel Committee nonetheless adopts the mandatory minimum haircuts, the letter encourages the Basel Committee to provide that a failure to comply with haircut floors will reduce the value of the collateral in proportion to the difference between the haircut floor and the haircut applied by the banks. As was suggested by the Financial Stability Board in prior consultations, they would take such action rather than treating the entire transaction as unsecured, as proposed in the Basel consultation. MFA's letter also encourages the Basel Committee to provide further guidance regarding the term "main index equities" and the treatment of convertible instruments under the proposed framework.

MFA's Comment Letter to Basel Committee on Haircut Floors for SFTs

MFA Comment Letter on SEC Proposed Liquidity Risk Management Rules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January 13, 2016

Via Electronic Filing:

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: Managed Funds Association Comments on Liquidity Risk Management Open-End Fund Liquidity Risk Management Programs; Swing Pricing; File No. S7-16-15

Dear Mr. Fields:

Managed Funds Association ("MFA") appreciates the opportunity to comment on the Securities and Exchange Commission's (the "SEC" or the "Commission") proposed rules, "Liquidity Risk Management Open-End Fund Liquidity Risk Management Programs; Swing Pricing" (the "Proposed Rules"). MFA supports the underlying goal of the rule proposal, which is to ensure that registered investment funds and their managers have appropriate liquidity risk management practices and procedures. For the reasons discussed below, we support the

On January 13, MFA submitted a comment letter in response to the SEC's proposed liquidity risk management rules for registered investment companies. In the letter, MFA: (1) expressed general support for the activities-based approach taken by the SEC to address regulatory concerns about liquidity risk; (2) supported the SEC's proposed exclusion of private funds from the scope of the rule; and (3) encouraged the SEC to adopt a final rule that provides registered investment companies and their managers with appropriate flexibility in establishing and implementing liquidity risk management programs, to avoid potential unintended consequences from a one-size fits all approach.

MFA's Comment Letter on Proposed Liquidity Risk Management Rules

CFTC Approves Final Amended Rule 1.35(a)

On December 24, 2015, the CFTC published a final rule to amend recordkeeping Rule 1.35(a). Consistent with MFA's request, the final rule excludes commodity trading advisors that are members of a designated contract market (DCM) or a swap execution facility (SEF) from the requirement to record and keep records of oral pre-trade communications.

The final rule also provides an exclusion of members of DCMs or SEFs that are not CFTC registrants from the requirements to keep written pre-trade communications and text messages.

Finally, it's worth noting that final amended Rule 1.35(a) does not require market participants to convert their records to searchable electronic databases. Rather, market participants can maintain their paper and electronic records in a manner they deem prudent and appropriate for their businesses, so long as their records can be searched and retrieved promptly, accurately and reliably.

sifma Invested in America | asset management group — Managed Funds Association

October 21, 2015 — Request for Relief – 17 C.F.R. §1.35(a)

Via E-mail

Ms. Eileen Flaherty
Director, Division of Swap Dealer and Intermediary Oversight

Mr. Vincent McGonagle
Director, Division of Market Oversight

Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: **Extension of Time-Limited No-Action Relief for Certain Members of Swap Execution Facilities from the Requirement to Record Oral Communications Pursuant to Commission Regulation 1.35(a) — No-Action Letters 13-77, 14-60 and 14-147**

MFA Letter to the CFTC on Rule 1.35(a)

MFA and Industry Submit *Amicus* in CFTC Manipulation Case

On January 12, 2016, MFA, CME Group Inc., the Commodity Markets Council (CMC), Intercontinental Exchange, Inc. (ICE) and the Futures Industry Association, Inc. (FIA) submitted an amicus brief to the United States District Court for the Southern District of New York.

The brief supported the long-standing legal standard for attempted price manipulation and explained why adopting a new legal standard for intent in attempted manipulation cases departs from settled law. For decades, the jurisprudence on price manipulation under the Commodity Exchange Act (CEA), including the CFTC's own precedents, established and maintained an important, carefully defined line between trading misconduct and legitimate trading—a line designed to advance the public interests enumerated by Congress. Contrary to three decades of caselaw, the CFTC is now asserting that proof of intent to create an "artificial price" is not required to prove attempted price manipulation. Because such standard is contrary to law and will bring adverse policy consequences, the amici support the long-standing legal standard for attempted price manipulation.

Industry Amicus in CFTC Manipulation Case

MFA, Industry Associations Submit Request for Revised CFTC Guidance on Parallel Managed Accounts

January 27, 2016

Via Email

Amanda Olear, Associate Director, Registration and Compliance
Division of Swap Dealer and Intermediary Oversight
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, NW
Washington, DC 20581

Re: **Industry Response to "CFTC Division of Swap Dealer and Intermediary Oversight Responds to Frequently Asked Questions Regarding Commission Form CPO-PQR"**

Dear Ms. Olear,

The Investment Adviser Association,[1] the Investment Company Institute,[2] the Alternative Investment Management Association[3] and the Managed Funds Association[4] (the

On January 27, MFA, ICI, IAA and AIMA filed a letter with CFTC staff requesting for revised guidance with respect to the CFTC's responses regarding the treatment of parallel managed accounts, reporting of monthly rates of return and spot currency positions in its FAQs to Form CPO-PQR. Specifically, we urged the CFTC to revise the following FAQs and clarify that:

a) a CPO should not aggregate parallel managed accounts to a related pool for reporting purposes (FAQ 7, 15 and 16);
b) a CPO needs to report monthly rates of return for a pool only if such results are calculated on a monthly basis (FAQs 29, 30 and 31); and
c) consistent with previous CFTC interpretations, a foreign exchange transaction with a settlement period longer than two business days may be considered a bona fide spot transaction depending on the customary settlement deadline of the relevant market (FAQ 42).

In addition, we are requesting that the Commission delay the implementation of the FAQs until the first quarter 2016 filing while the Associations work with the CFTC staff to address the issues raised in our letter.

MFA, Industry Associations Letter Requesting Revised CFTC Guidance on

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