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COMMENT

MANAGED FUNDS ASSOCIATION
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John G. Gaine
President

OFFICE OF THE SECRETARIAT

April 18, 2001

*The Association for investment
professionals in futures, hedge funds
and other alternative investments.*

Ms. Jean A. Webb
Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, N.W.
Washington, D.C. 20581

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RECORDS SECTION

RE: Proposed Privacy Rules

Dear Ms. Webb:

Managed Funds Association (MFA) submits these comments in response to the CFTC's recently proposed rules regarding Privacy of Customer Information. See 66 Fed. Reg. 15550 (March 19, 2001). In general MFA believes the CFTC's proposed rules are consistent with Congressional intent in enacting Section 124 of the Commodity Futures Modernization Act of 2000 and with the customer privacy rules adopted by the other Federal Functional Regulators called for under Title V of the Gramm-Leach-Bliley Act. MFA provides 4 specific comments on the proposed rules in response to the CFTC's request for comments.

MFA, located in Washington, D.C., is the only U.S.-based membership organization dedicated to serving the needs of the professionals who specialize in the global alternative investment industry – hedge funds, funds of funds and private and public managed futures funds. MFA has over 600 members who represent all segments of the alternative investment industry – including commodity trading advisors and commodity pool operators. Our members represent a significant portion of the \$500 billion invested in hedge funds, funds of funds, futures funds and other alternative investment vehicles. MFA members, which include many of the largest international financial services conglomerates, are based in both the U.S. and Europe.

1. Delayed Compliance Date for Small Entities

MFA believes that the Commission should provide a delayed privacy rule compliance date for "small entities." MFA represents a large number of the commodity trading advisors and commodity pool operators. The vast majority of the 2,800 commodity trading advisors and 1,500 commodity pool operators which are registered

with the Commission have less than \$25 million in assets under management and would, in our opinion, qualify as “small entities.” The burden of complying with the privacy rules will be more burdensome to these “small entities” which do not have the staff and resources which large financial institutions have to change systems, software, draft privacy policies and opt out notices. MFA notes that while the compliance date is set for December 31, 2001, virtually all of the privacy rule compliance work would need to be done by mid November since the Commission staff has made it clear in the preamble that compliance is required by December 31, 2001. See 66 Fed. Reg. at 15562. We would recommend delaying privacy rule compliance for small entities until at least March 31, 2002. The additional 90 days which we are suggesting would ensure that small entities will have the time they need to come into compliance. MFA believes this request is very reasonable due to the fact that the delay would only be for small businesses and the additional 90 days would give these small entities about the same 8 months which the other Federal Functional Regulators provided financial institutions subject to their jurisdiction to come into compliance.

2. CFTC Jurisdiction over Financial Institutions

MFA applauds the CFTC jurisdictional statement in the proposed rule. MFA members include entities which are CFTC registered as well as exempt from CFTC registration. The vast majority of our members are, however, subject to the CFTC’s jurisdiction. We appreciate the clarity of the preamble to the proposed rule regarding treatment of financial institutions which are subject to the CFTC’s jurisdiction, but which are exempt from registration. See 66 Fed. Reg. at 15551. This statement makes it clear that the CFTC, and not the FTC, will determine what privacy rules, if any, such financial institutions will have to follow. MFA would recommend that the CFTC again address the jurisdictional issue clearly in the preamble to the final rule. We also believe that it would be very important for the Commission to discuss the status of floor brokers, various trading facilities and clearing organizations which Congress has chosen to exclude from privacy rule coverage.

3. Financial Institutions Exempt from CFTC Registration

The Commission invited comment on whether financial institutions exempted from registration should be subject to the privacy rules. See 66 Fed. Reg. at 15551. MFA believes the CFTC should either exempt all these entities from the privacy rules as long as the non-registered financial institution does not provide nonpublic personal information to unaffiliated third parties outside the service provider exemption in proposed 160.14 or provide such entities with a regulatory safeharbor which requires more limited compliance.

MFA believes there are several reasons which could justify the CFTC exempting non-registered financial institutions from the privacy rules. First, it is very clear that Congress did not intend to subject all financial institutions subject to the CFTC’s jurisdiction to the privacy rules. For example, as the Commission staff noted in the

preamble to the proposed rule floor brokers, various trading facilities and clearing organizations subject to the Commission's jurisdiction are not included in the scope of the privacy rules due to the specific language in the Commodity Futures Modernization Act of 2000. See 66 Fed. Reg. at 15554. The Commission staff has also made it clear that foreign futures commission merchants are similarly not covered by the proposed privacy rules. See 66 Fed. Reg. at 15551. Clearly Congress intended that many financial institutions which are subject to the CFTC's jurisdiction would not have to comply with the privacy rules. We believe that the non-registered financial institutions should be provided treatment similar to these financial institutions, as long as they do not share their customers' nonpublic personal information with unaffiliated third parties except pursuant to the service provider exemption in proposed 160.14.

MFA believes that the CFTC has the clear statutory authority to provide further exceptions to the privacy rules. Under Section 504(b) of the Privacy Provisions of Gramm-Leach-Bliley Act Congress provided the Federal Financial Regulators with the explicit statutory authority to grant additional exceptions in the rulemaking process from the statutory privacy requirements. It would appear that this, and other, statutory authority gives the Commission the authority to provide non-registered financial institutions subject to their jurisdiction with significant, if not complete, relief from the customer privacy rules.

MFA believes that from a policy perspective that it would be consistent with Congressional intent for the CFTC to exempt those non-registered financial institutions which do not share their customers' nonpublic financial information with unaffiliated third parties except subject to the service provider exception found in proposed 160.14 or provide such entities with a regulatory safeharbor which requires more limited compliance. MFA would recommend that the Commission incorporate in its final rule a safeharbor provision for financial institutions which are exempt from registration. The safeharbor would exempt such financial institutions from having to comply with the customer privacy rules. The safeharbor would be conditioned upon the fact that the financial institution is exempt from registration with the Commission, that the financial institution does not share nonpublic customer information with unaffiliated third parties other than subject to proposed 160.14 and that the financial institution makes a clear and conspicuous statement to its customers that it does not share nonpublic customer information with unaffiliated third parties.

MFA would recommend that if the CFTC chooses to completely exempt financial institutions which are not required to register rather than providing an explicit safeharbor that it state clearly in the preamble to the final privacy rule that such financial institutions are not required to follow the privacy rules of other Federal Functional Regulators unless they are registered with such Regulators.

4. Notice Registrants and Substituted Compliance

MFA strongly supports the Commission's approach with respect to substituted compliance with privacy rules. Under proposed Section 160.2 (b) Rules of Construction

the Commission would permit any person or entity subject to its jurisdiction to be in compliance if the financial institution is in compliance with the SEC's Regulation S-P. See 66 Fed. Reg. at 15566. We believe this approach is both reasonable and efficient and will further the privacy policy goals underlying both the Gramm-Leach-Bliley Act and the Commodity Futures Modernization Act.

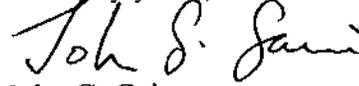
MFA recommends at least two changes to this subsection. First, we recommend that the title of the subsection "Notice Registrants" be changed to "Dual Registrants." Changing the title would make it clear that financial institutions which are currently registered with both the CFTC and SEC are intended to be covered. The term "notice registrants" could be viewed as applying solely to those financial institutions which register with both the CFTC and SEC as a result of the security futures compromise found in the Commodity Futures Modernization Act. MFA has several CTA members which are also currently registered with the SEC as investment advisors. The number of CTAs which register with the SEC as investment advisors could grow significantly due to the new legislation. The change in title, as well as a clear explanation in the preamble to the final rule, will avoid any confusion by financial institutions which are currently dual registrants.

Our second recommended change would be to expand the scope of the provision to permit financial institutions to have substituted compliance with the CFTC's privacy rules by compliance with the privacy rules of any other federal functional regulator. We believe the language which restricts substituted compliance to just the SEC privacy rule is much too narrow and would not cover all "dual registrants." We note that "small" investment advisers – those with less than \$25 million in assets under management and which do not advise a registered investment company – are not registered with the SEC, but with the States, and would therefore be subject to the Federal Trade Commission's privacy rules. For this reason, the language of the rule should, at a minimum, be expanded to cover the Federal Trade Commission's privacy rules. MFA believes, however, that the Commission should expand the scope of substituted privacy rule compliance to permit dual registrants to satisfy their compliance requirement through compliance with any of the other federal functional regulators privacy rules.

MFA notes that the Commission requested comment on whether substituted compliance should be permitted in a much broader fashion. MFA supports permitting as broad as possible substituted privacy rule compliance and would not necessarily limit this to dual registrants. Many of MFA's members are part of large financial conglomerates which are subject to other federal functional regulators and their existing privacy rules. It would be significantly easier from a compliance point of view if our members could use the same privacy disclosure documents as used by the holding company and other affiliates. MFA recommends that the final rule state clearly that the financial institution, at its option, may substitute privacy rule compliance through compliance with any other federal financial regulator privacy rules with which an affiliate is required to follow.

MFA appreciates the opportunity to comment on the CFTC's proposed rule. If you have questions regarding our comments, please contact me or Patrick J. McCarty, General Counsel, at (202) 367-1140.

Sincerely yours,

A handwritten signature in black ink that reads "John G. Gain". The signature is written in a cursive style with a large, prominent "J" and "G".

John G. Gain
President

Cc: Acting Chairman James E. Newsome
Commissioner Barbara Pedersen Holum
Commissioner David D. Spears
Commissioner Thomas J. Erickson