CFTC Letter No. 01-70 July 6, 2001 Interpretation Division of Trading and Markets

> John G. Gaine President Managed Funds Association 2025 M St., N.W. Suite 800 Washington, D.C. 20036-3309

Re: Applicability of CFTC Privacy Rules to Institutional Investors, Including Pension Funds

## Dear Mr. Gaine:

This is in further response to your letter dated May 9, 2001, to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("CFTC"), as supplemented by telephone conversations with Division staff. By your correspondence, you request, on behalf of the Managed Funds Association ("MFA"), an interpretative letter pursuant to CFTC Rule 140.99 regarding the applicability of the CFTC's recently-adopted privacy rules [1] to commodity pool operators ("CPOs") and commodity trading advisors ("CTAs") whose pool participants and clients are institutional investors, including pension funds. [2]

As your letter notes, the privacy legislation as originally adopted (Section 509(3)(B) of Title V of the Gramm-Leach-Bliley Act, hereafter "GLB"), specifically excluded "persons or entities" subject to CFTC jurisdiction from the coverage of GLB. This exclusion was eliminated with the enactment of the Commodity Futures Modernization Act of 2000 ("CFMA") on December 21, 2000. [3] Under Section 124 of the CFMA, Congress amended the Commodity Exchange Act ("CEA") to add a new Section 5g to the CEA to include the CFTC and certain financial institutions subject to its jurisdiction within Title V of GLB. That section of the CFMA makes the CFTC a "federal functional regulator" and mandates that it promulgate privacy rules for certain entities subject to its jurisdiction. These entities are: (1) futures commission merchants, (2) CTAs, (3) CPOs, and (4) introducing brokers.

CTAs and CPOs are therefore subject to the privacy rules of the CFTC. However, the actions that a CTA or CPO is required to take under these rules depend on the type of persons served by the CTA or CPO. Those persons must meet the definition of "consumer" before they are entitled to the protections

afforded by the CFTC privacy rule with respect to personal, nonpublic information. [4]

CFTC Rule 160.1(a) provides that "[Part 160] governs the treatment of nonpublic personal information about *consumers*." (emphasis added.) The term "consumer" is defined in Rule 160.3(h)(1) as follows: "*Consumer* means an individual who obtains or has obtained a financial product or service from you that is to be used primarily for personal, family or household purposes, or that individual's legal representative."

Because an institutional investor is not an individual investing for personal, family or household purposes, an institutional investor is therefore not a "consumer" within the definition of the CFTC privacy rules, and is not entitled to the notice, the information disclosure protections, or the opt-out opportunity provided by these rules. [5] Further, the institutional investor generally invests for business purposes, which would remove the institutional investor from coverage under the CFTC's privacy rules pursuant to Rule 160.1(b): "[Part 160] does not apply to information about companies or about individuals who obtain financial products or services primarily for business, commercial, or agricultural purposes."

The position adopted herein is based on the information provided to us. Any different, changed or omitted facts or conditions might require us to reach a different conclusion. This position is solely that of the Division of Trading and Markets and does not necessarily represent the views of the CFTC or those of any unit of its staff.

If you have any questions concerning this matter, please contact me or Susan Elliott, an attorney on my staff, at (202) 418-5464.

Very truly yours,

John C. Lawton Acting Director

- [1] 66 Fed. Reg. 21,236 (April 27, 2001). These rules will be published as 17 C.F.R. Part 160.
- The Division replied, by letter dated May 31, 2001, to the portion of your May 9 letter concerning whether CFTC rules or the Federal Trade Commission's privacy rules apply to CPOs who manage hedge funds.
- [3] Pub. L. No. 106-554, 114 Stat. 2763 (2000), amending 7 U.S.C. §1 et seq.

- Further protections are provided to those who qualify as "customers". <u>See</u> Rule 160.3(k) (definition of "customer"), and Rule 160.30 (procedures to safeguard customer records and information).
- We understand the term "institutional investor" as used in your letter to include only non-natural persons. In the Commission's Rules Relating to Intermediaries of Commodity Interest Transactions, 65 Fed. Reg. 77,993, 78,008 (December 13, 2000), which were subsequently withdrawn, 65 Fed. Reg. 82,272 (Dec. 28, 2000), the Commission had adopted a new definition of "institutional customer" to mean the same as the term "eligible participant" in Commission Rule 35.1(b). That term, as well as the term "eligible contract participant" in Section 1a(12) of the CEA, as added by the CFMA, included an individual with total assets exceeding \$10 million. Please be aware that, even if the Commission were to subsequently adopt a general definition of the term "institutional customer" that cross-references the definition of "eligible contact participant" in the CEA, which would therefore include individuals with assets exceeding \$10 million, for purposes of the Commission's privacy rules such individuals would still be considered to be consumers entitled to notice, information disclosure protections and the opt-out opportunity in accordance with the Commission's privacy rules.