



U.S. COMMODITY FUTURES TRADING COMMISSION

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Office of General Counsel

CONFIDENTIAL MEMORANDUM

TO: Chairman Gensler

FROM: Dan M. Berkovitz 
General Counsel and Designated Agency Ethics Official

John P. Dolan 
Counsel and Alternate Designated Agency Ethics Official

DATE: December 13, 2011

SUBJECT: Participation in Matters Concerning MF Global, Inc.

I. Introduction and Summary

Pursuant to 5 C.F.R. § 2635.502, the Commodity Futures Trading Commission (CFTC or Commission) designated agency ethics official (DAEO) has undertaken this review of the participation of CFTC Chairman Gary Gensler in certain CFTC matters regarding MF Global, Inc. (MFGI), a futures commission merchant (FCM) registered with the CFTC. During the 1980s and 1990s Chairman Gensler and the former President and Chief Executive Officer (CEO) of MFGI, Jon Corzine, worked together and were partners at Goldman Sachs (GS), an investment bank.¹

On November 3, 2011, the General Counsel and DAEO provided Chairman Gensler with an oral opinion that the Chairman was not required to withdraw from participation in MFGI matters as a result of his prior relationship with Mr. Corzine. On that same date Chairman Gensler nonetheless elected to not participate in enforcement matters related to MFGI.² Following this

¹ Mr. Corzine resigned as President and CEO of MFGI on Friday, November 4, 2011.

² On November 8, 2011, Chairman Gensler executed a "Statement of Non-Participation." This statement explained the Chairman's decision: "With respect to the recent matters involving MF Global, the staff at the CFTC is working hard to recover customers' funds and to find out what happened to the missing customer money and how it happened. The CFTC has a tremendously capable staff and I do not want my participation to be in any way a distraction in this important matter."

decision, the General Counsel and DAEO and ADAEO decided to undertake this review to determine whether Chairman Gensler's participation in matters involving MFGI was appropriate.

Based on the facts and circumstances detailed in this memorandum, and based upon the standards set forth in 5 C.F.R. § 2635.502, this review concludes that Chairman Gensler was not required to withdraw from matters involving MFGI. From a legal and ethical perspective, Chairman Gensler's participation in Commission matters involving MFGI was not improper.

II. Factual Background

A. MF Global, Inc.

Subsidiary of MF Global

MG Global is a financial business comprising a holding company, MF Global Holdings Ltd., a Delaware corporation headquartered in New York City, and a variety of subsidiaries located in the United States and other countries.³ One of the subsidiaries is MFGI, which is an FCM registered with the CFTC as well as a securities broker-dealer registered with the SEC.⁴ According to the Annual Report (SEC Form 10-K) filed by MF Global Holdings Ltd. in May 2011, MF Global is a broker in markets for commodities and listed derivatives and a broker-dealer in markets for commodities, fixed income securities, equities, and foreign exchange.⁵

MFGI Bankruptcy

On October 31, 2011, the Securities Investor Protection Corporation (SIPC) filed an application for the entry of a protective order in the U.S. Bankruptcy Court placing MFGI in liquidation under the Securities Investor Protection Act (SIPA). On that same date, "the Commission's Division of Enforcement opened an investigation into whether the Commodity Exchange Act (CEA) or Commission regulations were violated in connection with MFGI, and the Commission [] authorized the Division to issue subpoenas."⁶

In a filing on November 2, the Commission informed the Bankruptcy Court that it "intends to take all appropriate action, within the purview of the Bankruptcy Code and the [CEA], to ensure that customers maximize their recovery of funds and to discover the reason for the shortfall in

³MF Global Holdings Ltd. Form 10-K for fiscal year ended March 31, 2011 at 1, <http://www.sec.gov/Archives/edgar/data/1401106/000119312511145663/d10k.htm> (accessed November 6, 2011); *see* Disclaimer, MF Global Website, <http://www.mfglobal.com/disclaimer> (accessed November 6, 2011).

⁴ Disclaimer, MF Global Website, <http://www.mfglobal.com/disclaimer> (accessed November 6, 2011).

⁵ MF Global Holdings Ltd. Form 10-K for fiscal year ended March 31, 2011 at 5, <http://www.sec.gov/Archives/edgar/data/1401106/000119312511145663/d10k.htm> (accessed November 6, 2011).

⁶ CFTC Press Release, PR6140-11, November 10, 2011.

segregation.”⁷

Key officials

Jon S. Corzine was the Chairman and Chief Executive Officer of MF Global Holdings Ltd. until his recent resignation.⁸ According to the MF Global website, Mr. Corzine also is an operating partner at J.C. Flowers & Co. LLC.⁹ According to the MF Global website, Mr. Corzine joined GS as a fixed income trader in 1975 and subsequently served as chief financial officer and as chairman and senior partner from 1994 through 1999.¹⁰

Bradley I. Abelow is the President and Chief Operating Officer of MF Global Holdings Ltd.¹¹ According to the MF Global website, Mr. Abelow previously was a partner and managing director of GS, where he managed the operations group.¹² Earlier he was responsible for GS’s operations, technology, risk, and finance functions in Asia.¹³ He joined GS in 1989.¹⁴

Laurie R. Ferber is the General Counsel of MF Global Holdings Ltd.¹⁵ According to the MF Global website, Ms. Ferber worked for GS for over 20 years beginning in 1987.¹⁶ She held a number of different positions including serving as co-general counsel of the Fixed Income,

⁷ Statement of Commodity Futures Trading Commission in Support of the Trustee’s Emergency Motion for an Order Approving the Transfer of Certain Segregated Customer Commodity Accounts of MF Global Inc. and Related Margin and Motion for Expedited Hearing, MFGI Bankruptcy Case, November 2, 2011.

⁸ Executive Officers Biography, MF Global Website, <http://www.mfglobalinvestorrelations.com/phoenix.zhtml?c=194911&p=irol-govManage> (accessed November 6, 2011).

⁹ Executive Officers Biography, MF Global Website, <http://www.mfglobalinvestorrelations.com/phoenix.zhtml?c=194911&p=irol-govBio&ID=198970> (accessed November 6, 2011).

¹⁰ *Id.*

¹¹ Executive Officers Biography, MF Global Website, <http://www.mfglobalinvestorrelations.com/phoenix.zhtml?c=194911&p=irol-govManage> (accessed November 6, 2011).

¹² Executive Officers Biography, MF Global Website, <http://www.mfglobalinvestorrelations.com/phoenix.zhtml?c=194911&p=irol-govBio&ID=204097> (accessed November 6, 2011).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Executive Officers Biography, MF Global Website, <http://www.mfglobalinvestorrelations.com/phoenix.zhtml?c=194911&p=irol-govManage> (accessed November 6, 2011).

¹⁶ Executive Officers Biography, MF Global Website, <http://www.mfglobalinvestorrelations.com/phoenix.zhtml?c=194911&p=irol-govBio&ID=186545> (accessed November 6, 2011).

Currency and Commodities Division and launching and running the economic derivatives business.¹⁷

J. Christopher Flowers is the founder and executive chairman of J.C. Flowers & Co. LLC, a private equity firm.¹⁸ According to press reports, J.C. Flowers & Co. owns preferred stock in MF Global that, if converted to common stock, would amount to 6% of the total.¹⁹ Also according to press reports, Mr. Flowers worked with Mr. Corzine at GS and later recommended that Mr. Corzine take over as MF Global's chairman and chief executive officer in March 2010.²⁰

B. Relationship Between Chairman Gensler and Mr. Corzine²¹

Chairman Gensler's Employment at GS

Chairman Gensler worked at GS from September 1979 until September 1997, when he left to serve as Assistant Secretary of Treasury for Financial Markets.²² In late 1988, when Chairman Gensler became a partner in the firm, there were approximately 128 partners at GS, including Chairman Gensler and Mr. Corzine.²³

From his arrival at GS in 1979 until late 1991 or early 1992, Chairman Gensler worked in the Mergers and Acquisitions (M&A) Department.²⁴ In late 1991 or early 1992, Chairman Gensler and a few other junior partners at the firm were asked to transfer to other departments as part of their career development. The transfers were suggested by Mr. Robert Rubin (the co-Chairman and Co-Senior Partner of GS at the time) and Mr. Corzine (the co-head of the fixed income department (FI) at the time). Mr. Gensler was asked to transfer to FI and agreed.

Chairman Gensler's initial assignment in FI was in the mortgage trading department. In this capacity, he reported to Michael Mortara, who reported to Mr. Corzine and the other co-head of FI, Mr. Mark Winkelman. Chairman Gensler, Mr. Mortara, and Mr. Corzine all worked on the fixed income trading floor.

¹⁷ *Id.*

¹⁸ J.C. Flowers & Co. LLC: Private Company Information – Business Week, (accessed November 6, 2011) <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=1089967>.

¹⁹ JC Flowers Fund Said to See \$47.8 Million Loss on MF Global – Businessweek (November 2, 2011), <http://www.businessweek.com/news/2011-11-02/jc-flowers-fund-said-to-see-47-8-million-loss-on-mf-global.html> (accessed November 6, 2011).

²⁰ *Id.*

²¹ The facts in this section are based primarily upon an interview with Chairman Gensler conducted on November 4, 2011.

²² Chairman Gensler served as Assistant Secretary for Financial Markets from September 1997 until April 1999, and as Undersecretary of Treasury for Domestic Finance from April 1999 to January 2001.

²³ By 1997, when Chairman Gensler left GS, there were approximately 190-200 partners at GS.

²⁴ Chairman Gensler spent approximately 6-12 months during the 1983-1984 time period on the equity trading floor as part of a “mobility program.”

In January 1993, Mr. Corzine requested, and Chairman Gensler agreed, that Chairman Gensler serve as co-head of fixed income trading in the GS office in Tokyo, Japan. Chairman Gensler served in this position until late 1994. During this two-year period, Mr. Corzine and Mr. Winkelman were Chairman Gensler's direct supervisors.

In the fall of 1994, Chairman Gensler was asked by Mr. Steve Friedman, who was then co-head of GS with Mr. Rubin, to transfer out of FI to be the head of the Operations, Technology, and Finance Division (OTF) in Asia. Chairman Gensler reported to Mr. John Thain, head of worldwide OTF. Shortly thereafter, Mr. Corzine became the Senior Partner of GS and Chairman of the Management Committee.²⁵

Chairman Gensler returned to New York in November 1995 to become co-head of Finance. In this position, Chairman Gensler continued to report to Mr. Thain, who continued to report to Mr. Corzine and Mr. Paulson. As co-head of Finance, Chairman Gensler served on various committees of the firm, including the Risk Committee. Mr. Corzine also was a member of the Risk Committee (which had approximately 10-15 members), and sometimes he participated on other committees, too. Chairman Gensler served as co-head of Finance until he left GS in 1997 for the Treasury Department. Prior to leaving GS, Chairman Gensler visited with Mr. Corzine at the latter's apartment to provide departing observations.²⁶

After Chairman Gensler Left GS

To the best of his recollection, Chairman Gensler believes he did not see Mr. Corzine for three years after Chairman Gensler left GS.²⁷ While Chairman Gensler served at Treasury, the only time that he saw Mr. Corzine was in late 2000 or early 2001. Then-Senator-elect Corzine had come to the Treasury Department to visit with Secretary of Treasury Lawrence Summers, and following the meeting with Secretary Summers, Mr. Corzine stopped by to say hello to then-Undersecretary Gensler.

In early 2002, Chairman Gensler volunteered to serve as an advisor to Senator Paul Sarbanes on legislation that eventually was enacted as the Sarbanes-Oxley Act. Senator Sarbanes was Chairman of the Senate Committee on Banking, Housing and Urban Affairs and Senator Corzine was a member of the same Committee. In his role as advisor to Senator Sarbanes, Chairman Gensler occasionally spoke with Senator Corzine about the pending legislation. Chairman Gensler also spoke with Senator Corzine while Chairman Gensler, Senator Sarbanes, and Senator Corzine were on the Senate floor during the consideration of the legislation for final Senate passage.

²⁵ Executive functions were shared between Mr. Corzine and Mr. Henry Paulson, who served as Chief Operating Partner and Vice-Chairman of the Management Committee. Mr. Thain reported to Mr. Corzine and Mr. Paulson.

²⁶ Mr. Corzine subsequently left GS in early 1999.

²⁷ Chairman Gensler believes that he may have spoken with Mr. Corzine once or twice by telephone while serving at Treasury, but cannot specifically recall any such conversations.

In 2003-2004, Chairman Gensler served as Treasurer of the Maryland State Democratic Party. During the same time, Senator Corzine became head of the Democratic Senatorial Campaign Committee. As a result of their fundraising responsibilities, Chairman Gensler saw Senator Corzine at several political events attended by large numbers of people. This included an event to support the campaign of Senator Kerry for President in 2004, which was attended by approximately 400 others, including other members of Congress.

In 2005, Chairman Gensler was invited to a fundraiser in Washington, DC, for the New Jersey State Democratic Party. Approximately 100 people attended, including both Senator Corzine and the other Senator from New Jersey, Senator Frank Lautenberg. At the time, Senator Corzine was campaigning to be elected Governor of New Jersey. As a participant in the fundraiser, Chairman Gensler contributed \$10,000 to the New Jersey State Democratic Party (as he similarly contributed to the State Democratic Party of several other States), which earned him the title of being a “host” of the fundraiser.²⁸ Chairman Gensler did not see Governor Corzine for another three years.

During the primary season for the 2008 Presidential campaign, Chairman Gensler first served as an unpaid senior advisor to the campaign of then-Senator Hilary Clinton. Chairman Gensler recalls speaking with Governor Corzine on a couple of occasions to answer Governor Corzine’s questions about Senator Clinton’s positions on various policy issues. Chairman Gensler recalls seeing Governor Corzine at a fundraising event in New Jersey in either August or September of 2008 for then-Senator Obama.

Chairman Gensler’s Tenure at the CFTC

Chairman Gensler began serving as Chairman of the CFTC in May 2009. At the time he joined the CFTC, Chairman Gensler determined not to participate in any CFTC matters involving GS.

Shortly after joining MFGI in March 2010, Mr. Corzine met with Chairman Gensler and the Chairman’s staff at CFTC headquarters. Mr. Corzine requested the meeting, which Chairman Gensler recalls as a “meet and greet” and that Mr. Corzine did not make any specific requests to Chairman Gensler.

In November 2010, Mr. Corzine asked Chairman Gensler to speak at a seminar at Princeton University that Mr. Corzine was conducting on financial institutions and regulation.²⁹ Mr. Andrew Ross Sorkin also spoke at this seminar, and Mr. Corzine introduced both of them. Following the seminar, Chairman Gensler joined Mr. Corzine and approximately 15-20 students for dinner.³⁰ Chairman Gensler and Mr. Corzine did not discuss any issues relating to MFGI while Chairman Gensler was at Princeton.

²⁸ Chairman Gensler’s contribution was to the New Jersey State Democratic Party, not directly to Senator Corzine’s campaign for Governor.

²⁹ A copy of Chairman’s Gensler’s speech can be found at: <http://www.cftc.gov/PressRoom/SpeechesTestimony/2010/index.htm>. (last visited Nov. 6, 2011).

³⁰ Mr. Sorkin was unable to stay for the dinner.

In December 2010, Mr. Corzine and Ms. Ferber met with Chairman Gensler and other CFTC staff. Chairman Gensler does not recall the subject of the meeting or the matters discussed.

In June 2011, Chairman Gensler was the keynote speaker at lunch at a conference sponsored by Sandler O'Neill and Partners, an investment banking and broker/dealer firm.³¹ Mr. Corzine was seated at the same table as Chairman Gensler during the lunch. The invitation did not come from Mr. Corzine, and Chairman Gensler and Mr. Corzine did not discuss any issues relating to MFGI while Chairman Gensler was at the conference.

In September 2011, Chairman Gensler and Mr. Corzine were both wedding guests of mutual acquaintances. Chairman Gensler and Mr. Corzine did not discuss any issues relating to MFGI while attending the wedding.

Chairman Gensler has been on two conference calls with Mr. Corzine during his term as Chairman of the CFTC. The first, on July 20, 2011, was a conference call to discuss topics relating to a rulemaking regarding CFTC Rules 1.25 and 30.7.³² Second, Chairman Gensler participated in a series of conference calls with other regulatory authorities and MFGI during the days leading up to the filing of the MFGI bankruptcy proceedings. Chairman Gensler is aware that Mr. Corzine was on the line for at least part of one of these calls, regarding the European bond portfolio.³³ Since becoming Chairman of the CFTC, Chairman Gensler has not had any private telephone conversations with Mr. Corzine.³⁴

Summary

Chairman Gensler worked with Mr. Corzine during the last 6 years of Chairman Gensler's tenure at GS. During two of those years (1993-1994), Chairman Gensler reported directly to co-heads Messrs. Corzine and Winkelman; during the other four years, Mr. Corzine was his second-level supervisor. Their relationship during this period was solely professional. Chairman Gensler and

³¹ The firm regularly sponsors such conferences. See, e.g., <https://register.sandleroneill.com/conferences/> (last visited Nov. 6, 2011).

³² A record of this call can be found at http://www.cftc.gov/LawRegulation/DoddFrankAct/ExternalMeetings/dfmeeting_072011_928 (last visited Nov. 7, 2011). In response to media questions as to whether a delay in consideration of this rulemaking showed favoritism to MFGI, Chairman Gensler has stated that he has "been consistent on this rule, and I allowed more time for others to continue to look at it." See Silla Brush, Bloomberg, "MF Global Didn't Get Preferential Treatment, CFTC's Gensler," Nov. 7, 2011.

³³ It is possible that Mr. Corzine was on the line during other portions of these conference calls.

³⁴ On November 8, 2011, BNA reported that Chairman Gensler and Mr. Corzine spoke shortly after Mr. Corzine resigned from his positions at MF Global. See Steven Joyce, BNA, "Gensler Says Recusal Decision Made Days Before Corzine Resignation, Grassley Letter," Nov. 8, 2011. This report is not accurate; the reported conversation between Chairman Gensler and Mr. Corzine did not occur.

Mr. Corzine did not socialize or spend time together apart from their mutual professional activities.³⁵

Since the time they worked together at GS over 14 years ago, Chairman Gensler's contacts with Mr. Corzine have been infrequent. Generally, they have met when they both were present at a function organized by others. Similarly, Chairman Gensler has not socialized with Mr. Corzine after his departure from GS, nor have their families socialized with each other. Chairman Gensler and Mr. Corzine do not correspond with each other; Chairman Gensler does not recall any emails or other electronic communications between himself and Mr. Corzine for at least as far back as ten years. Chairman Gensler does not carry Mr. Corzine's personal phone number in his cell phone directory.

Chairman Gensler and Mr. Corzine have never attended any of each other's major non-professional life-events during the entire time they have known each other. Mr. Corzine did not attend Chairman Gensler's wedding (which occurred while Chairman Gensler was at GS), the bat-mitzvahs of Chairman Gensler's daughters, or the funeral of Chairman Gensler's wife. Similarly, Chairman Gensler did not attend Governor Corzine's inaugural in 2005 or his wedding in 2010.

Chairman Gensler did not ask Mr. Corzine for support of his nomination as CFTC Chairman. He has never contributed directly to any of Mr. Corzine's electoral campaigns. He has raised money for several national Democratic figures, but has never solicited a campaign contribution for Mr. Corzine. Nor does he recall ever soliciting a campaign contribution from Mr. Corzine.

C. Relationship Between Chairman Gensler and Other Former GS Officials Working For or On Behalf Of MFGI³⁶

Certain other current MFGI employees and officials previously worked at GS at the same time as Chairman Gensler. Chairman Gensler's relationship with these individuals is as follows:

Brad Abelow

Mr. Abelow became a partner at GS at around the time that Chairman Gensler was leaving GS. At some point, Mr. Abelow became head of OTF in Asia, the position Chairman Gensler had previously occupied. Chairman Gensler recalls that when he was in OTF he and Mr. Abelow had a "weekly to bi-weekly working relationship."

³⁵ Chairman Gensler recalls one non-professional interaction that indirectly involved Mr. Corzine during his tenure at GS. In 1991, Chairman Gensler learned that Mr. Corzine had registered to run in the New York City Marathon that year. Chairman Gensler recalls that he asked Mr. Corzine's secretary whether Mr. Corzine actually was going to run the marathon. A few weeks later Mr. Corzine's secretary told Chairman Gensler that Mr. Corzine would not run in the race and would not use the number he had been provided. Mr. Corzine's secretary gave Mr. Corzine's number to Mr. Gensler, who then used Mr. Corzine's bib number in the race.

³⁶ The facts in this section are based primarily upon an interview with Chairman Gensler conducted on November 4, 2011.

After leaving GS, Chairman Gensler did not see Mr. Abelow until August or September 2008, at a fundraiser for the Presidential campaign of then-Senator Obama. As previously noted, Governor Corzine also attended this event. At the time, Mr. Abelow was Governor Corzine's Chief of Staff. Chairman Gensler recalls speaking to Mr. Abelow for approximately five to ten minutes at this event.

Chairman Gensler believes it is possible that he may have spoken to Mr. Abelow on one or more occasions in his capacity as Governor Corzine's Chief of Staff to facilitate the discussions with Governor Corzine previously noted during the Presidential primary season prior to the 2008 election. After that, Chairman Gensler did not speak with Mr. Abelow again until one of the multi-party conference calls between regulators and MFGI during the weekend prior to the bankruptcy filing of MFGI.

Chairman Gensler and Mr. Abelow did not have a social relationship apart from their professional relationship at GS.

Christopher Flowers

Chairman Gensler began working with Mr. Flowers in the M&A department at GS upon his arrival at GS in 1979. They worked together in M&A for approximately 12 years—until Chairman Gensler was transferred from M&A to FI. While Chairman Gensler was in the M&A department, he and Mr. Flowers frequently discussed M&A issues and strategies, but Chairman Gensler and Mr. Flowers specialized in different industries and, to the best of his recollection, did not work together on any specific deals.

After Chairman Gensler left GS, Mr. Flowers visited him once at the Treasury Department. Chairman Gensler recalls that as part of this visit they may have had lunch together.

Chairman Gensler does not recall seeing Mr. Flowers in person since that meeting at the Treasury Department. Mr. Flowers called Chairman Gensler twice at the CFTC. With respect to the first call, Chairman Gensler recalls that Mr. Flowers expressed condolences that his wife had passed away, and he provided Chairman Gensler with the name of an individual who was knowledgeable about financial market regulation.³⁷ Mr. Flowers did not ask for any action by Chairman Gensler or the CFTC.

In connection with the MFGI matter, Mr. Flowers called Chairman Gensler on October 31, 2011, before Chairman Gensler arrived at the office. Chairman Gensler returned Mr. Flowers' call after he arrived at the office. Several other CFTC employees were present in Chairman Gensler's office for the call and several individuals were present with Mr. Flowers, including Mr. Goldfield, Henri Steenkamp (Chief Financial Officer) and another MFGI official. The MFGI officials on the call provided the call participants with information regarding MFGI's financial status.

³⁷ Chairman Gensler did not contact that individual and does not recall his or her name.

Chairman Gensler and Mr. Flowers did not have a social relationship apart from their professional relationship at GS.

Laurie Ferber

At the time that Chairman Gensler was in FI at GS, Ms. Ferber was a senior compliance officer/attorney at the firm. Chairman Gensler believes that he may have spoken with Ms. Ferber on one or more compliance matters when he was in FI, but he does not recall anything specific.

After leaving GS, Chairman Gensler did not have any contact with Ms. Ferber until he met with the Board of Directors of the Futures Industry Association (FIA) in September 2010. At the time, Ms. Ferber represented MFGI on the FIA Board of Directors. Ms. Ferber also attended the meeting between Mr. Corzine and CFTC officials, including Chairman Gensler, in December 2010. Ms. Ferber also was on the July 20, 2011, conference call between MFGI officials (including Mr. Corzine) and CFTC officials, including Chairman Gensler, concerning topics relating to a CFTC rulemaking regarding Rules 1.25 and 30.7. Chairman Gensler does not believe that he met or spoke with Ms. Ferber after that, until she participated in one or more multi-party conference calls between MFGI and regulators prior to the bankruptcy filing.

Chairman Gensler and Ms. Ferber did not have a social relationship apart from their professional relationship at GS.

Jacob Goldfield

Chairman Gensler first met Mr. Goldfield in late 1991 or early 1992, after Chairman Gensler began working in FI. Mr. Goldfield also worked in FI, trading options on the government bond desk.

At the time that Chairman Gensler was co-head of fixed income trading in Tokyo, he also had co-supervisory responsibility for the trading of Yen currency swaps conducted in Asia. At the same time, Mr. Goldfield, who was located in New York, had supervisory responsibility for the worldwide GS swap book. Accordingly, Chairman Gensler and Mr. Goldfield had overlapping responsibilities with respect to the GS Yen swap book. Chairman Gensler recalls that he and Mr. Goldfield also later may have served together on the Risk Committee.

Mr. Goldfield visited Chairman Gensler on one occasion at the CFTC. During the consideration of the Dodd-Frank legislation, Mr. Goldfield met with Chairman Gensler and at least one other member of the Chairman's staff. Mr. Goldfield told the Chairman that he was doing good work and if he ever needed anything, to give him a call. Chairman Gensler does not recall any other meetings with Mr. Goldfield since Chairman Gensler left GS.

On October 30, 2011, Mr. Goldfield e-mailed Chairman Gensler to inform him that he was at MF Global "in case there are questions." Mr. Goldfield also informed Mr. Gensler that he had "no financial interest in the company and [was] not looking at it for investment." Mr. Gensler asked Mr. Goldfield whether there were "any observations you wish to pass along?" Mr. Goldfield replied, "Not as of now, I want only to send along novel insights that are useful." Chairman Gensler responded, "Novel and useful. Now those are limiting conditions, though I

would say that most everything you have shared over our long knowing each other has been useful.” Mr. Goldfield then stated, “Also want to make sure that I am right before I comment.” Chairman Gensler does not recall any further comments or information from Mr. Goldfield.

Mr. Goldfield was present at MFGI during one of the conferences call between MFGI and regulators on October 30, 2011. To the best of his recollection, Mr. Goldfield did not speak on the call. A participant from another regulatory agency who was present at MFGI headquarters in New York and who was on the call relayed to Chairman Gensler during the call that Mr. Goldfield walked by and requested that he say “hello to Gensler.”

Mr. Goldfield also was present at MFGI during a conference call between MFGI and regulators on the morning of October 31, 2011.

Chairman Gensler and Mr. Goldfield did not have a social relationship apart from their professional relationship at GS.

III. Legal Standard

The standard for determining whether an employee may participate in a matter affecting the employee’s financial interests, or involving persons with whom the employee has or has had a professional, business, economic, or personal relationship, is set forth in 5 C.F.R. § 2635.502.

Specifically, § 2635.502(a) provides:

(a) *Consideration of appearances by the employee.* Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.

(1) In considering whether a relationship would cause a reasonable person to question his impartiality, an employee may seek the assistance of his supervisor, an agency ethics official or the agency designee.

(2) An employee who is concerned that circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter.

With respect to a “covered relationship,” § 2635.502(b)(iv) provides that an employee has a “covered relationship” with any person “for whom the employee has, *within the last year*, served

as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee.” (Emphasis added.)³⁸

When the circumstances identified in § 2635.502(a) are not present—i.e., there is no direct and predictable effect on the financial interest of a member of his household, and there is no covered relationship—§ 2635.502(a)(2) provides that the procedures specified in § 2635.502 should still be followed if a question concerning the employee’s impartiality may nevertheless remain.³⁹

³⁸ Section 2635.502(b) provides in full that an employee has a “covered relationship” with:

(i) A person, other than a prospective employer described in § 2635.603(c), with whom the employee has or seeks a business, contractual or other financial relationship that involves other than a routine consumer transaction;

(ii) A person who is a member of the employee’s household, or who is a relative with whom the employee has a close personal relationship;

(iii) A person for whom the employee’s spouse, parent or dependent child is, to the employee’s knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee;

(iv) Any person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee; or

(v) An organization, other than a political party described in 26 U.S.C. 527(e), in which the employee is an active participant. Participation is active if, for example, it involves service as an official of the organization or in a capacity similar to that of a committee or subcommittee chairperson or spokesperson, or participation in directing the activities of the organization. In other cases, significant time devoted to promoting specific programs of the organization, including coordination of fundraising efforts, is an indication of active participation. Payment of dues or the donation or solicitation of financial support does not, in itself, constitute active participation.

³⁹ Under these circumstances—where no financial interest is affected and no covered relationship exists—the Office of Government Ethics (OGE) does not consider the failure to follow these procedures to be “an ethical lapse”:

OGE has consistently maintained that, although employees are encouraged to use the process provided by section 2635.502(a)(2), “[t]he election not to use that process cannot appropriately be considered to be an ethical lapse.” OGE Informal Advisory Letter, 94 x 10(2); *see also* OGE 97 x 8 (‘obligation’ to follow process where covered relationships involved, but employees ‘encouraged’ to use process in other circumstances); OGE 95 x 5 (‘not required by 5 C.F.R. 2635.502 to use the process described in that section’ where there is no covered relationship with person who is a party or represents a party); OGE 94 x 10(1)(employee may ‘elect’ to use process in section 2635.502(a)(2), but ‘election not to use that process should not be characterized, however, as an ‘ethical lapse’).

“For example,” the Office of Government Ethics (OGE) explains, “if an employee believes that a personal friendship, or a professional, social, political or other association not specifically treated as a covered relationship, may raise an appearance question, then the employee should use the section 2635.502 process to resolve the question.”⁴⁰

In this event, under the § 2635.502 process, the threshold determination is to “consider whether the employee’s impartiality would reasonably be questioned if the employee were to participate in a particular matter involving specific parties where persons, with certain personal or business relationships with the employee are involved.”⁴¹ If it is determined that the employee’s participation would “raise a question in the mind of a reasonable person about his impartiality,” the agency’s designated ethics official may nonetheless authorize the employee to participate in the matter “based on a determination, made in light of all relevant circumstances, that the interest of the Government in the employee’s participation outweighs the concern that a reasonable person may question the integrity of the agency’s programs and operations.”⁴²

OGE 01 x 8, Impartiality and Romantic Relationships, August 23, 2001. OGE has further indicated that in such circumstances, “even if it were now determined, in hindsight, that a reasonable person with knowledge of the circumstances would question the [person’s] impartiality, we cannot say that she violated the impartiality rule.” *Id.*

⁴⁰ OGE, Memorandum dated April 26, 1999, from Stephen D. Potts, Director, to Designated Agency Ethics Officials, Regarding Recusal Obligations and Screening Arrangements, 99 x 8. Under section 2635.502(a)(2), an employee may determine not to participate in a matter due to appearance concerns even if that employee’s withdrawal is not required. *Id.*

⁴¹ *Id.*; 5 C.F.R. § 2635.502(c).

⁴² 5 C.F.R. § 2635.502(d). This section provides the following factors that may be considered in making this determination:

- (1) The nature of the relationship involved;
- (2) The effect that resolution of the matter would have upon the financial interests of the person involved in the relationship;
- (3) The nature and importance of the employee’s role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) The sensitivity of the matter;
- (5) The difficulty of reassigning the matter to another employee; and
- (6) Adjustments that may be made in the employee’s duties that would reduce or eliminate the likelihood that a reasonable person would question the employee’s impartiality.

IV. Analysis

Is there a financial interest or “covered relationship”?

Neither Chairman Gensler nor any member of his household has a financial interest in MFGI, or in any commodity or security interest held by MFGI. More broadly, neither Chairman Gensler nor any member of his household has any other financial interest that would be predictably or directly affected by a CFTC investigation involving MFGI or associated CFTC actions, including participation in the MFGI bankruptcy proceedings, and the recovery of customer funds. Accordingly, the resolution of the MFGI matter would not have a “direct and predictable” effect upon the financial interests of Chairman Gensler or any member of his household. Chairman Gensler does not have a “covered relationship” with MFGI or any of its employees, officers, directors, or shareholders. Chairman Gensler’s partnership with GS, Mr. Corzine, and other partners at GS terminated in 1997, more than 14 years ago. This is far beyond the one-year “cooling off period” provided in § 2635.502(b)(iv) for a person who was a general partner with another person to be considered to have a “covered relationship” with such other person.⁴³

Is there a reasonable basis to question the employee’s impartiality?

The sole fact that Chairman Gensler at one time was a business partner with Mr. Corzine, without more, does not constitute a reasonable basis, within the meaning of § 2635.502, to question Chairman Gensler’s impartiality with respect to matters relating to MFGI.

Once the one-year cooling-off period has passed, the fact that an employee previously was within a covered relationship with respect to another individual, without more, cannot by itself be the basis to reasonably question an employee’s impartiality. To hold otherwise would, in effect, transform the one-year cooling off period into a lifetime prohibition, for in every such instance the covered relationship within the one-year period could be cited as the basis for disqualification beyond the one-year period.⁴⁴

The ethics regulations do not require such a result. To the contrary, the procedures in § 2635.502 clearly contemplate that employees who at one time may have had a covered relationship with respect to another person or entity, but that no longer have such a covered relationship, may participate in a matter involving the person or entity that previously was within the covered relationship.

To constitute a reasonable basis to question Chairman Gensler’s impartiality, therefore, there must be some additional indicia of a relationship between Chairman Gensler and Mr. Corzine, GS, or its partners, beyond the factors that would establish a covered relationship—i.e., facts in

⁴³ 5 C.F.R. § 2635.502(b)(iv). As previously noted, OGE has stated that if no financial interest is involved and a covered relationship is not present, a determination not to follow the procedures in § 2635.502—and hence to participate in the matter—cannot be considered to be an “ethical lapse.” Nonetheless, in accordance with OGE recommendations, Chairman Gensler has determined to follow the § 2635.502 process.

⁴⁴ This conclusion is consistent with the OGE position that in circumstances in which no financial interest is involved and a covered relationship is not present, a determination not to follow the procedures in § 2635.502 cannot be considered to be an “ethical lapse.”

addition to Chairman Gensler's partnership at GS some 14 years ago. However, the facts regarding Chairman Gensler's relationship with Mr. Corzine and others at GS who are now associated with MFGI – both during the time that Chairman Gensler worked at GS and afterwards -- are insufficient to provide such indicia.

The record set forth above indicates that at all times, both during their partnership and afterwards, the relationship between Chairman Gensler and Mr. Corzine was exclusively a professional relationship. Chairman Gensler and Mr. Corzine did not socialize or meet apart from their professional obligations and interests. The record indicates that since Chairman Gensler and Mr. Corzine left GS in the late 1990s, they have met only infrequently and solely on matters of mutual professional interest. Indeed, most of their encounters have occurred when they both have been invited to attend an event by others. Although both Chairman Gensler and Mr. Corzine have been involved in political fundraising and electoral campaigning, neither has done so on the other's behalf or at the other's request. They have not socialized, and they have not been involved in each other's personal lives. Their infrequent professional contacts, over a 14-year period following their departure from their partnership at GS, do not constitute a covered relationship or a similar type of relationship that would form a reasonable basis under section 2635.502 to question Chairman Gensler's impartiality with respect to MFGI.⁴⁵

Following his departure from GS, Chairman Gensler's contacts with Mr. Abelow, Mr. Flowers, Ms. Ferber, and Mr. Goldfield have been more attenuated than his contacts with Mr. Corzine. Based on the highly infrequent nature of Chairman Gensler's contacts with these individuals since he left the GS partnership in 1997, Chairman Gensler's relationships with these individuals, both individually and collectively, are insufficient to constitute a reasonable basis under section 2635.502 to question Chairman Gensler's impartiality with respect to MFGI.

In sum, this review determines, based on the facts and circumstances stated herein, that there is not a reasonable basis under 5 C.F.R. § 2635.502 to question Chairman Gensler's impartiality with respect to the Commission's investigation of MFGI and involvement in related matters, such as the MFGI bankruptcy proceedings. Accordingly, 5 C.F.R. § 2635.502 does not preclude Chairman Gensler's participation in these matters, and Chairman Gensler is not required to withdraw from participation. From a legal and ethical perspective, Chairman Gensler's participation in Commission matters involving MFGI would not be improper.⁴⁶

⁴⁵ Chairman Gensler's contribution to the New Jersey State Democratic Party at the time Mr. Corzine was campaigning for Governor of New Jersey is not sufficient to warrant a different conclusion. During this time period, Chairman Gensler was an active fundraiser for and contributor to Democratic candidates for elected office in many states. Chairman Gensler's contribution to the New Jersey State Democratic Party therefore is not sufficient to establish a special relationship between Chairman Gensler and Mr. Corzine that would warrant a different conclusion.

⁴⁶ This review solely addresses matters before the Commission prior to and at the time of the Chairman's election not to participate and is based on the facts contained herein.