

CFTC Letter No. 01-48

May 31, 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 Operators of Certain Hedge Funds

Dear Mr. Gaine:

This is in 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 operators of hedge funds^[2] that are registered with the CFTC as commodity pool operators (“CPOs”), and which are exempt from registration with the SEC because of Section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940. Specifically, you seek clarification that these CPOs are subject to the privacy rules of the CFTC and not those of the Federal Trade Commission (“FTC”).

We appreciate the fact that your inquiry is time-sensitive: if the CFTC privacy rules apply, the compliance deadline for the CPOs in question is March 31, 2002; however, if these CPOs are subject to the privacy rules of another federal functional regulator^[3] or of the FTC, the compliance deadline is July 1, 2001. Our conclusion is that registered CPOs who operate hedge funds are subject to the CFTC's privacy rules and their March 31, 2002 compliance deadline. Accordingly, such CPOs are not subject to the FTC's privacy rules.^[4]

As your letter notes, Section 509(3)(B) of Title V of GLB, when originally adopted, specifically excluded “persons or entities” subject to CFTC jurisdiction from the coverage of GLB.^[5] This exclusion was eliminated with the enactment of the Commodity Futures Modernization Act of 2000 (“CFMA”) on December 21, 2000.^[6] 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.^[7] These entities are: (1) futures commission merchants, (2) commodity trading advisors, (3) commodity pool operators, and (4) introducing brokers.

Section 160.1(b) of the CFTC's recently adopted privacy rules establishes the applicability of the privacy rule to CPOs who operate hedge funds.^[8] The recent CFMA amendments to the CEA state expressly that “any . . . commodity pool operator . . . that is subject to the jurisdiction of the Commission with respect to any financial activity shall be treated as a financial institution for purposes of Title V [of the GLB Act] with respect to such financial activity.”^[9]

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.

Your letter dated May 9, 2001 also asks the Division to address the issue of whether a CPO or commodity trading advisor with only institutional investors, including pension funds, is subject to the CFTC's privacy rules. This issue is still under consideration by the Division and will be addressed at a later date.

If you have any questions concerning this matter, please contact me or Susan Elliott, a senior attorney in the Chief Counsel's Office, at (202)418-5464.

Very truly yours,

John C. Lawton
Acting Director

^[1] 66 Fed. Reg. 21,236 (April 27, 2001); to be published as 17 C.F.R. Part 160.

^[2] In the 1999 Report of the President's Working Group on Financial Markets, hedge funds were loosely defined as “any pooled investment vehicle that is privately organized, administered by professional investment managers, and not widely available to the public. The primary investors in hedge funds are wealthy individuals and institutional investors. In addition, hedge fund managers frequently have a stake in the funds they manage.” Report at p. 1.

^[3] The term “federal functional regulator” is used in the Gramm-Leach-Bliley (“GLB”) privacy legislation to refer to the following specified agencies: the Office of the Comptroller of the Currency, the

Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the Securities and Exchange Commission, and the National Credit Union Administration.

^[4] See n. 9, infra.

^[5] 15 U.S.C. §1609(3)(B) stated: “Notwithstanding subparagraph (A), the term ‘financial institution’ does not include any person or entity with respect to any financial activity that is subject to the jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act [7 U.S.C.A. §1 et seq.].”

^[6] Pub. L. No. 106-554, 114 Stat. 2763 (2000), amending 7 U.S.C. §1 et seq.

^[7] Section 124 adds a new Section 5g to the CEA, which provides: “Sec. 5g. Privacy. (a) Treatment as Financial Institutions. – Notwithstanding section 509(3)(B) of the Gramm-Leach-Bliley Act, any futures commission merchant, commodity trading advisor, commodity pool operator, or introducing broker that is subject to the jurisdiction of the Commission under this Act with respect to financial activity shall be treated as a financial institution for purposes of title V of such Act with respect to such financial activity. (b) Treatment of CFTC as Federal Functional Regulator. For purposes of title V of such Act, the Commission shall be treated as a Federal functional regulator within the meaning of section 509(2) of such Act and shall prescribe regulations under such title within 6 months after the date of enactment of this section.” (Emphasis added.)

^[8] See 66 Fed. Reg. at 21,237, 21,252.

^[9] See 66 Fed. Reg. at 21,252 & n. 6. Section 505 of GLB gives the FTC jurisdiction only if a financial institution or other person is not subject to the jurisdiction of one of the federal functional regulators named in the Act. The FTC privacy rule further notes that “financial institution” does not include “any person or entity with respect to any financial activity that is subject to the jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. §1 et seq.).” 65 Fed. Reg. 33,646, 33,680 (May 24, 2000); 16 CFR §313k(3)(i) (2001).