MEMORANDUM

TO: File Nos. S7-32-10, S7-36-10, S7-37-10, S7-39-10
File for Public Comments on SEC Regulatory Initiatives Under the Dodd-Frank Act

FROM: Michael E. Coe
Office of Commissioner Luis A. Aguilar

DATE: December 16, 2010

SUBJECT: Meeting with Representatives of the Managed Funds Association

On December 8, 2010, Commissioner Aguilar, along with Smeeta Ramarathnam, Zachary May, and Michael E. Coe, Counsels to the Commissioner, met with the following representatives of the Managed Funds Association:

Paul Friedman – BlueMountain Capital Management
Brian Gunderson – Elliot Management
David Rubenstein – BlueMountain Capital Management
Jay Ryan – King Street Capital Management, L.P.
Michael Waldorf – Paulson & Co., Inc.
Stuart Kaswell – Managed Funds Association
Ben Allensworth – Managed Funds Association

The discussion included, among other things:

- the Commission's proposed Prohibition Against Fraud, Manipulation, and Deception in Connection with Security-Based Swaps;
- the Commission's proposed Rules Implementing Amendments to the Investment Advisers Act of 1940;
- the Commission's proposed Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers;
- the Commission's proposed Further Definition of "Swap Dealer,""Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant"; and
- provisions of the Dodd-Frank Act regarding a Study on Enhancing Investment Adviser Examination Pursuant to Sec. 914 of the Dodd-Frank Act, a Study on Short Sale Disclosure, and Position Limits and Position Accountability for Security-Based Swaps.

In addition, the Managed Funds Association representatives provided Commissioner Aguilar with a copy of the attached letter, dated December 6, 2010, regarding Comment Periods and Implementation of new Derivatives Regulations.

American Bankers Association
ABA Securities Association
The Clearing House Association L.L.C.
Financial Services Forum
Financial Services Roundtable
Futures Industry Association
Institute of International Bankers
International Swaps and Derivatives Association
Investment Company Institute
Managed Funds Association
Securities Industry and Financial Markets Association

December 6, 2010

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: Comment Periods and Implementation of New Derivatives Regulations

Dear Ms. Murphy and Mr. Stawick:

As trade associations representing market participants that account for most of the activity in various derivatives markets in the United States and globally, we are highly interested in the development and implementation of new rules governing derivatives. Swaps and other derivatives are important financial tools used by asset managers, insurance companies, banks, and the vast majority of the largest commercial and industrial companies to manage risk. Adoption of new regulatory rules for derivatives pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") will provide the much-needed certainty that providers and users of derivatives products require.

Derivatives play an important role in our economy. The markets for these products are large and diverse, with rules and conventions governing trading activity that have developed over decades. Thus, it is important that the Securities and Exchange Commission ("SEC"), Commodity Futures Trading Commission ("CFTC") (together, the "Commissions"), and other agencies writing the new regulatory rules develop those rules through a process that is deliberative, gives all affected parties a reasonable

opportunity to comment (and have their comments be given thoughtful consideration), and implements those rules in a manner that gives market participants sufficient time to do the work necessary to comply with new requirements being imposed on them. If the process does not have these attributes, the result will be rules that not only do not reflect full participation in the comment process, but actually undermine regulatory certainty, with the effect of unnecessarily interfering with the functioning of markets and the usefulness of important financial tools.

We appreciate that Dodd-Frank imposes short and strict deadlines by which each agency must adopt various rules and that many of these concern activities and products that are complex and new to regulatory oversight. We commend the SEC and CFTC for their diligence and dedication with regard to this unprecedented rulemaking endeavor. We believe, however, that the Commissions should consider making certain changes in the rulemaking process, as discussed below.

Specifically, we are concerned that the order in which rules are being published for comment makes it difficult for many firms to know whether they should submit comments on particular rules, and also to determine what the substance and extent of their comments should be. For example, on November 10, 2010, the CFTC approved issuance of proposed rules on six different topics, including among other things conflicts of interest, chief compliance officers, and registration of swap dealers and major swap participants ("MSPs"). In each case, these rules might raise significant issues for swap dealers and MSPs, but not be particularly significant for other entities. The timing of the issuance of these rules is problematic because the Commissions have only recently (in open meetings of the CFTC on December 1 and the SEC on December 3) addressed the terms "swap dealer" and "major swap participant" in proposed regulation. Without guidance as to the scope of these definitions, some firms – in particular, smaller firms – were (and are) uncertain whether they should comment on the rules that apply to swap dealers and MSPs, because they did not know whether these rules would apply to them. Preparing comment letters requires significant time and expense and firms are reluctant to incur the cost of commenting unnecessarily. To give all possibly affected parties an opportunity to comment on relevant proposed rules, we recommend the CFTC and SEC extend the comment deadlines for rules that utilize terms that were not defined when the rules were published so that those comment deadlines are at least no earlier than the deadlines applicable to the rules defining the terms.

We also are concerned about a process that provides for provisional registration of entities prior to adoption of final rules defining the various categories of registrants and establishing their respective obligations. A more logical sequence would first adopt definitions for the different regulated entities, then requirements for such entities, and finally registration of such entities. Such a sequence would better serve both market participants and the public.

With respect to the implementation process for new rules, we are concerned that market participants will be asked to do too much in too short a time. We agree with other commentators who have observed that application of Dodd-Frank's clearing and execution provisions across the full or a broad range of different types of swaps within a relatively short period would likely impose a compliance burden with which market participants, and in particular dealers, simply could not comply. Further, mandating the implementation of reporting requirements in the same short period as implementation of clearing and execution requirements increases the likelihood that market participants will be unable to comply. Their only alternative would be to stop entering into the transactions for which compliance is not immediately

possible, thus leaving segments of the market with diminished or possibly no liquidity. This could have significant adverse consequences for the customers that rely on these products and it would be inconsistent with the risk reduction goals of Dodd-Frank. To implement a complex new regulatory structure without adequate time to adapt, prepare, and test systems also could lead to an ineffective or poorly designed reporting, clearing, and exchange infrastructure, which also would impair liquidity, and lead to higher costs, increased risk, and other adverse consequences.

Implementing clearing and execution requirements without thoroughly analyzing the ability of particular asset classes to absorb the changes carries a number of other risks as well. Clearing, for example, is an extraordinarily complex undertaking that requires significant adaptation to existing (and development of new) technology systems, operational infrastructure, and legal arrangements between parties. As new clearinghouses proliferate and compete, the early-mover advantage may entice some clearinghouses to start clearing products before they are truly ready from an operational standpoint. Problems are likely to develop, and significant disruption of the markets for certain asset classes can be expected. Similar problems are likely to arise with trade execution requirements, where liquidity considerations should play a primary role in driving implementation timeframes. In all of these instances, premature imposition of new rules can, and likely will, lead to increased risks for markets and market participants.

We respectfully note that the CFTC and SEC have discretion in determining when new regulatory measures will become applicable. For example, section 754 of Dodd-Frank provides that the provisions of Title VII, Subtitle A (covering Regulation of Over-the-Counter Swaps Markets) that require rulemaking "shall take effect . . . ***not less than*** 60 days after publication of the final rule or regulation" (emphasis added). This language reflects an understanding that regulated entities need sufficient time to comply (*i.e.*, the effective date must be no less than 60 days, but *can* be more). A corresponding provision is contained in section 774 of Subtitle B (Regulation of Security-Based Swap Markets).

The CFTC has demonstrated its willingness to use its regulatory discretion under Dodd-Frank to address impossible or impractical requirements. For example, in establishing the effective date for interim reporting of pre-enactment swaps, the CFTC noted that although the legislation imposed reporting requirements that became effective upon enactment of Dodd-Frank, there are no registered data repositories to accept the data, nor is the CFTC *ready* to accept it. Accordingly, the CFTC provided in its interim final rule that the obligation to report such transactions would not become effective until the compliance date for reporting under section 2(h)(5) of the Commodity Exchange Act or "within 60 days after a swap data repository becomes registered . . . and commences operations to receive and maintain data related to such swap, whichever occurs first." We believe it is important for the CFTC, SEC, and other agencies to utilize their discretion in this manner where it is appropriate, including situations where the demands placed upon regulated entities would make it impossible or impractical for them to comply in accordance with the most restrictive time limits provided in the legislation. Accordingly, we urge regulators to take into account the practical realities facing market participants and to phase-in the application of new regulatory requirements over a reasonable period of time, determined through discussions with the market participants that the agencies expect to be directly affected by those requirements.

We are committed to working with the SEC and CFTC to develop and implement the rules mandated by Dodd-Frank, and we strongly support completion of these efforts in a prompt and timely fashion. We

urge the Commissions to use their discretion to propose, adopt, and implement rules in a sequence that will achieve these important goals.

If you would like to discuss our concerns further, please contact any of us at your convenience.

Respectfully submitted,

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