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VIA EMAIL

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Securities and Exchange Commission  
450 Fifth Street, N. W.  
Washington, D. C. 20549-0609  
Attention: Jonathan G. Katz, Secretary

Re: File Number SR-NASD-2004-108 – Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Treatment of Commodity Pool Trail Commissions

Ladies and Gentlemen:

John W. Henry & Company, Inc. (JWH) welcomes the opportunity to comment on the above-referenced rule change of the National Association of Securities Dealers, Inc. (NASD) and the related notice published in the Federal Register on July 30, 2004 (69 F.R. 45870 ff.).

JWH believes that this rule change deserves further scrutiny by the Commission and its staff in order to determine if the factual assumptions underlying the rule change and cited in the notice under “Self-Regulatory Organization’s Statement on Burden on Competition” are in fact valid. At no time during the comment period on Notice to Members 04-07 did the NASD acknowledge or address the issues raised in the comment letters opposing the proposed rule change.

Specifically, the notice states that “NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.” This conclusion is not supported by any factual findings about the nature of competition between the firms that have offered commodity funds in the past, nor is there any indication that any factual investigation was undertaken. JWH believes that there are in fact anti-competitive effects to the rule, both in its substance and in the manner it was promulgated. To the best of our knowledge, at least two offerings of public commodity funds have been disrupted and perhaps prevented by the abrupt issuance of the proposed rule change on July 13. Those offerings had been undertaken by their sponsors in good faith that the twenty year treatment of trail commissions by the NASD in its review of underwriting arrangements would continue to be permitted. JWH believes that the prevention of the registration of these products, and the consequent limitation of commodity funds for investors to choose from, would have been prevented by a phase-in of any new policy, such as a 60 or 90 day delay in effectiveness, or at least grandfathering of registration statements filed prior to the effective date.

In the longer term, JWH believes that the proposed rule change will have other and more significant anti-competitive effects. One will be the creation of a barrier to entry for sponsors of publicly offered commodity funds. Potential sponsors who are new to the industry will be less likely to be able to afford to increase staff to provide the investor services that historically have been, in effect, contracted out to broker dealers and their representatives who have been compensated by trail commissions. Competition in fund expenses and service levels will also likely be restricted since the variable of trail commissions will be eliminated. These arguments are valid ones and there is no evidence that NASD staff examined them before issuing the proposed rule change.

JWH endorses the arguments raised in the comment letter of the Managed Funds Association. JWH believes that the statement cited in the notice under “Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others” to the effect that NASD staff has seen no evidence that commodity pool investors receive a higher level of service than investors in other direct participation programs is not supported by the record. The MFA comment letter and others submitted in response to Notice to Members 04-07 provided information to the NASD staff on those points.

For the foregoing reasons, JWH joins the MFA in urging the Commission to abrogate the NASD policy under Section 19(b)(3)(A) of the Securities Exchange Act of 1934 or permit the NASD to withdraw it and conduct a full factual inquiry prior to any revision of the proposal. Any revised proposal should then be subject to a formal notice and comment period to permit a fuller factual record to be developed on these issues.

Respectfully submitted,

s/ David M. Kozak

David M. Kozak  
Senior Vice President and General Counsel