

MEMO# 23891

October 21, 2009

SEC and CFTC Issue Joint Report on Harmonization of Regulation

[23891]

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TO: ETF ADVISORY COMMITTEE No. 36-09
EQUITY MARKETS ADVISORY COMMITTEE No. 46-09
INVESTMENT ADVISER MEMBERS No. 19-09
SEC RULES MEMBERS No. 112-09 RE: SEC AND CFTC ISSUE JOINT REPORT ON
HARMONIZATION OF REGULATION

On October 16th, the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) issued a joint report on the harmonization of their regulations. [\[1\]](#) The report is briefly summarized below.

Background

On June 17th, the Obama Administration released a White Paper on Financial Regulatory Reform that, among other things, requested the SEC and CFTC to identify “all existing conflicts in statutes and regulations with respect to similar types of financial instruments and either explain why those differences are essential to achieve underlying policy objectives with respect to investor protection, market integrity, and price transparency or make recommendations for changes to statutes and regulations that would eliminate the differences.” The report is the product of that exercise.

The Report

The report analyzes eight specific areas of regulation and makes a series of

recommendations based on that analysis. The areas of regulation are: (i) product listing and approval; (ii) exchange/clearinghouse rule changes; (iii) risk-based portfolio margining and bankruptcy/insolvency regimes; (iv) linked national market and common clearing versus separate markets and exchange-directed clearing; (v) price manipulation and insider trading; (vi) customer protection standards applicable to financial advisers; (vii) regulatory compliance by dual registrants; and (viii) cross-border regulatory matters.

The report does not address all of the differences between the SEC and CFTC regulatory regimes. For example, the report does not cover derivatives. Although it recognizes that there are regulatory gaps with respect to the oversight of derivatives, the report simply notes that these gaps are discussed at length in the Treasury White Paper and currently are the subject of deliberation before Congress.

Recommendations

The report makes twenty recommendations for strengthening the agencies' oversight and enforcement, enhancing investor and customer protection, rendering compliance more efficient, and improving coordination and cooperation between the agencies. Of particular interest to registered investment companies and their advisers are recommendations for "legislation that would impose a uniform fiduciary duty on intermediaries who provide similar investment advisory services regarding futures or securities" [\[2\]](#) and for "legislation that would grant the SEC specific statutory authority for aiding and abetting under the Securities Act and the Investment Company Act." [\[3\]](#)

The report makes ten other recommendations for new legislation. These include recommendations for legislation that would:

- Facilitate the use of margin accounts (e.g., by facilitating the use of futures in a securities margin account and the use of securities derivatives in a futures margin account);
- Provide for expedited judicial review of jurisdictional disputes over new products;
- Enhance CFTC authority over exchange and clearinghouse compliance with the Commodity Exchange Act (CEA);
- Empower the CFTC to require foreign boards of trade to register with the CFTC;
- Expand the CFTC's conflict of interest prevention authority;
- Address whistleblower protections;
- Address customer restitution in CFTC enforcement actions;
- Enhance the CFTC's authority over disruptive trading practices;
- Expand the scope of insider trading prohibitions under the CEA; and
- Authorize the SEC and the CFTC to jointly form, fund, and operate a "Joint Advisory Committee" that would be tasked with considering and developing solutions to emerging and ongoing issues of common interest in the futures and securities markets.

The report also makes eight recommendations for reforms or other actions by the agencies that would not require legislation. These include recommendations for:

- A review by the SEC of its approach to cross-border access and cross-border transactions in securities;
- Alignment of the agencies' record retention requirements for intermediaries;
- Greater consistency in the agencies' customer risk disclosure documents (noting that the SEC intends to review its current options disclosure document to determine whether a customer disclosure document more akin to that which is used for futures products would be appropriate and consistent with the protection of investors and the public interest);
- Review and alignment of the agencies' private fund reporting and recordkeeping requirements;
- The creation of a "Joint Agency Enforcement Task Force" to harness synergies from shared market surveillance data, improve market oversight, enhance enforcement, and relieve duplicative regulatory burdens;
- The establishment of a joint cross-agency training program for staff;
- The development of a program for the regular sharing of staff through detail assignments; and
- The development of a "Joint Information Technology Task Force" to pursue linking information on regulated persons.

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endnotes

[1] A Joint Report of the SEC and the CFTC on Harmonization of Regulation (October 16, 2009), available at <http://www.sec.gov/news/press/2009/cftcjointreport101609.pdf>.

[2] See pages 12, 66-73, and 90 of the report.

[3] See pages 7, 14, 61, and 92-93 of the report.

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