

Review of the Commodity Futures Trading Commission's  
Oversight and Regulation of MF Global, Inc.

Prepared by the  
Office of the Inspector General  
Commodity Futures Trading Commission

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### Executive Summary

On October 31, 2011, MF Global Holdings Ltd. and MF Global Finance USA Inc. filed for bankruptcy protection in the Southern District of New York under Chapter 11 of the Bankruptcy Code. On the same day, the United States District Court for the Southern District of New York entered an order granting the application of the Securities Investor Protection Corporation ("SIPC") for issuance of a Protective Decree adjudicating that the customers of MFGI were in need of protection afforded by Securities Investor Protection Act, and appointing a Trustee to oversee the liquidation. The Trustee eventually reported that MFGI suffered a shortfall in segregated property available to return to customers ("customer segregated funds") totaling "approximately \$900 million in domestic accounts (both commodities and securities), plus an additional approximately \$700 million related to trading by customers on foreign exchanges."<sup>1</sup>

On November 30, 2011, Senator Richard C. Shelby, then Ranking Member on the Banking, Housing, and Urban Affairs Committee, requested "a report on the CFTC's oversight and regulation of MF Global Inc." He also requested that our Office examine whether CFTC Chairman Gary Gensler's decision to recuse himself (or issue a statement of non-participation) is consistent with the agency's official recusal policy. Specifically, our report was requested to include:

1. A detailed account of the CFTC's role in overseeing and regulating MFGI, including an assessment of whether its oversight and regulation of MFGI differed in any material way from its oversight and regulation of other futures commission merchants (FCMs);
2. A detailed account of how the CFTC coordinated with the Chicago Mercantile Exchange ("CME"), the designated self-regulatory organization for MFGI, in overseeing MFGI's customer segregated funds;
3. A summary of relevant examination manuals or other guidance for staff involved in overseeing and regulating MFGI or monitoring the CME's oversight of MFGI;
4. An analysis of whether and how the CFTC's oversight of MFGI changed after the CFTC's enforcement actions against MFGI in December 2007 and December 2009;

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<sup>1</sup> Report of Trustee's Investigation and Recommendations ("Trustee's Report"), page 2, filed June 4, 2012, *In re MF Global, Inc.*, Case No. 11-2790 (MG) SIPA, US Bankruptcy Court, Southern District of New York. A link to the Trustee's Report is available here: <http://dm.epiq11.com/MFG/Project>. All internet addresses cited in this report were last visited on May 15 or May 16, 2013.

5. An analysis of the CFTC's role in the determination that caused MFGI to increase its net capital in August 2011;
6. An analysis of the CFTC's activities with respect to MFGI in the week prior to the liquidation;
7. An analysis of whether CFTC Chairman Gary Gensler's decision to recuse himself from matters relating to the MFGI investigation is consistent with the CFTC's official recusal policy; and
8. An analysis of whether and how a decision by CFTC Chairman Gary Gensler to recuse himself from previous matters relating to MFGI would have been consistent with the CFTC's official recusal policy.

In order to complete our report, we interviewed or discussed specific matters of interest with more than 30 individuals, including current and former CFTC employees, current and former CFTC Commissioners, Chairman Gensler, and market professionals. Several were interviewed on multiple occasions. In addition, we reviewed thousands of documents furnished by representatives of the Trustee for MFGI, and furnished by the Commission. Documents included email, memoranda, spreadsheets, correspondence, pleadings, drafts, and other items. We also reviewed recordings of closed Commission meetings at the end of October and beginning of November, 2011.

Our responses to the first five questions are addressed at pages 10 through 16 of this report, and summarized briefly below.

CFTC's monitoring of MFGI differed from other FCMs in that CFTC enhanced surveillance of MF Global three years before the events leading to the MF Global bankruptcy. These enhancements consisted of daily (rather than monthly) review of MF Global's limited financial information (known as the "cap, seg, and secured" statement),<sup>2</sup> along with a limited review performed after 2009 that did not involve a detailed examination of MFGI's treatment of customer funds. CFTC also required MF Global to undergo a review by an independent consulting firm in 2009, as part of a settlement following a CFTC Enforcement proceeding. CFTC staff charged with responsibility for monitoring MFGI reviewed those findings and was briefed on MFGI's compliance with the settlement provisions.

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<sup>2</sup> In accordance with CME's Audit Information Bulletin #12-04, dated April 2, 2012, and NFA Financial Requirements Section 8, CME and NFA require FCMs to submit daily segregated, secured 30.7 and sequestered statements, as applicable, through WinJammer™ by 12:00 noon on the following business day.  
[http://www.cmegroup.com/tools-information/lookups/advisories/clearing/Daily\\_Segregatedx\\_Secured\\_30.7\\_and\\_Sequestered\\_Statements.html](http://www.cmegroup.com/tools-information/lookups/advisories/clearing/Daily_Segregatedx_Secured_30.7_and_Sequestered_Statements.html).  
NFA has published detailed information on current daily reporting requirements here:  
<http://www.nfa.futures.org/NFA-compliance/NFA-futures-commission-merchants/fcm-reporting.pdf>.

The Trustee's Report refers to this statement as the Segregated and Secured Statement. See, e.g., Trustee's Report at 92 (discussing CFTC and CME's request for cap, seg, and secured statements for October 26, 2011). We use "cap, seg, and secured" because it was the term used by CFTC staff during our interviews.

CFTC staff did not formally coordinate with CME concerning oversight of MFGI. Staff told us that they would communicate with CME occasionally pertaining to MFGI, essentially to address specific issues as deemed necessary, but nothing formal was in place to coordinate regulatory efforts with regard to MFGI (or any other FCM). CFTC staff encountered CME staff at MFGI offices during the final week of MFGI's existence, but these encounters were not coordinated. Instead, CFTC separately determined to go to MFGI's offices to obtain information and assurances, and found CME staff arriving on site within a short period. CME and CFTC communicated during the final week of MFGI's existence on a consistent basis.

CFTC had no examination manuals or other guidance for staff involved in overseeing and regulating MFGI or any other FCM, or for monitoring CME's oversight of MFGI or any other FCM. Instead, prior to MFGI's collapse, CFTC relied on materials provided by the Joint Audit Committee,<sup>3</sup> its own guides for registrants regarding FCM statements, and CFTC published interpretations. CFTC staff had detailed guidance for FCM examinations in its early years; we do not know when the detailed guidance was abandoned. Since the collapse of MFGI, CFTC has created a guide to reviewing the monthly financial statements it receives for all FCMs under its oversight, which CFTC staff state describes what they were already doing with regard to financial statement reviews.

The CFTC Division of Enforcement ("Enforcement") charged MFGI in two Enforcement proceedings in the four years leading to the eventual SIPC filing; however, neither Enforcement proceeding involved misconduct pertaining to treatment of customer segregated funds. CFTC did not alter its oversight of MFGI after the first Enforcement proceeding in 2007, but it did enhance its oversight of MFGI following the second CFTC Enforcement proceeding in 2009. The 2009 Enforcement proceeding arose from a rogue trader event that took place in February 2008; unauthorized trading resulted in overnight losses to MFGI in excess of \$141 million, which immediately impacted MFGI's net capital.<sup>4</sup> Daily review of MFGI's financial information would permit CFTC staff to know quickly if a similar large overnight decrease in firm capital took place in the future, indicating a similar rogue trader situation, and CFTC staff required MFGI to submit their financial information to CFTC on a daily basis. CFTC staff charged with day-to-day oversight responsibilities for MFGI also remained informed on MFGI's compliance with undertakings that were part of the 2009 settlement agreement, which pertained to branch office training of managers and establishment of supervisory controls pertaining to the monitoring and supervision of traders.

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<sup>3</sup> The Joint Audit Committee is a representative committee of US futures exchanges and regulatory organizations. Information about the Committee (including documents) is available here: <http://www.wjammer.com/jac/>.

<sup>4</sup> On December 12, 2012, the trader admitted guilt in a federal criminal proceeding, and faced a maximum prison sentence of 10 years and a \$1 million fine; the trader was sentenced to five years in prison. *Former MF Global Trader Pleads Guilty in \$141 mln Trading Loss*, Ann Saphir, Thomson Reuters News & Insight, December 11, 2012. [http://newsandinsight.thomsonreuters.com/Legal/News/2012/12\\_-\\_December/Former\\_MF\\_Global\\_trader\\_pleads\\_guilty\\_in\\_\\$141 mln\\_trading\\_loss/](http://newsandinsight.thomsonreuters.com/Legal/News/2012/12_-_December/Former_MF_Global_trader_pleads_guilty_in_$141 mln_trading_loss/); *Ex-MF Global Broker Sentenced to 5 Years for Rogue Trades*, Andrew Harris, Bloomberg, April 17, 2013. <http://www.bloomberg.com/news/2013-04-16/ex-mf-global-broker-sentenced-to-5-years-for-trades-correct.html>.

We note that MFGI was also subject to numerous exchange disciplinary actions between 2007 and MFGI's collapse.<sup>5</sup>

CFTC had no official role in the determination that caused MFGI to increase its net capital in August 2011. Staff charged with responsibility for day-to-day oversight of MFGI were aware of the situation at the time, and were in communication with FINRA and CME.

The final three questions posed by Senator Shelby are addressed at pages 17 through 57 of this report; our response is summarized below.

In the week prior to the SIPC filing, CFTC staff charged with responsibility for day-to-day oversight were on site at MFGI in Chicago and New York on Thursday and Friday. On Thursday, CFTC staff were briefed on MFGI's financial status; CFTC staff asked for supporting documentation for the cap, seg, and secured statement for that day (which would reveal status as of close of business on Wednesday October 26), but they left without the documentation. Staff returned on Friday and received the documents on disc. CFTC staff did not go to MFGI on Saturday, but did remain in contact with FINRA, CME, and other regulators. By the end of the day, Saturday, it was clear that the parent companies would likely be placed in bankruptcy, and it was hoped (but by no means a sure thing) that MFGI could be sold, intact, with an uncomplicated transfer of customer funds to a new owner. The Chairman became an active participant on Saturday, speaking directly not only with regulators but also with an outside attorney for MFGI, asking that MFGI comply with document requests made by staff, and that staff be updated on bankruptcy contingency plans. This level of participation was not unusual for the Chairman; when necessary or requested by staff, the Chairman has directly called registrants and other related professionals in connection with official business.

CFTC staff deployed to MFGI offices in Chicago and New York on Sunday. Staff demanded customer fund status as of close of business Friday and were put off by MFGI until approximately 5 pm CST.<sup>6</sup> At 5 pm CST, MFGI staff let CFTC know that initial calculations of segregated customer funds showed a \$900 million shortfall, but claimed that it was an error caused by the amount and type of entries at the end of the week, and promised the deficit would be cured once the error was found. CFTC staff in Washington worked on technical matters necessary to facilitate the anticipated sale of MFGI (to Interactive Brokers) and the transfer of customer funds.

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<sup>5</sup> Hearing entitled "The Collapse of MF Global," Dec 15, 2011, House of Representatives Committee on Financial Services, Subcommittee on Oversight and Investigations, CME Group Response ("CME timeline") at pages 7-8 of the .pdf. [http://financialservices.house.gov/uploadedfiles/cme\\_group\\_response.pdf](http://financialservices.house.gov/uploadedfiles/cme_group_response.pdf). We did not audit or verify the factual assertions contained in the CME timeline; where witness statements appear inconsistent with the CME timeline, we have so noted in this report.

<sup>6</sup> Central Standard Time. All times represent our best estimate based on our ability to reconstruct the events using the available documents that have been reviewed, and also on individuals' best recollections.

At 2:30 am EST,<sup>7</sup> MFGI admitted the segregated funds deficiency was not an error, but was real. The sale fell through, as Interactive Brokers withdrew from negotiations. By 5:30 am it was decided that MFGI would be subject to a SIPC filing. At noon, the Commission held a closed emergency meeting led by Chairman Gensler. Chairman Gensler described the events of the prior week and weekend, and with staff briefed the Commissioners on the procedures to be followed in the SIPC proceeding. Before the meeting ended, the Commissioners voted an Order of Investigation of MFGI to the Division of Enforcement; the Chairman made the motion and voted “aye.”

The Chairman exclusively used his personal email account over the weekend while dealing with MFGI matters from his home. In fact, it appears he used his personal email consistently from his arrival at CFTC in 2009 until the collapse of MFGI. He used his personal email so much that he carried two smartphones, one issued by CFTC with his work email, and another for his personal email. He used his personal email to schedule meetings and for substantive conversations; he used it to contact CFTC staff at their official CFTC email addresses as well as their personal email accounts; he used it because he did not know how to access his official email at home. In reviewing hundreds of email messages using the Chairman’s personal email address, we found nothing that appeared corrupt, and he has since ceased this practice. Nevertheless, our examination of the Chairman’s email was limited to email pertaining to MFGI.

On November 2, the Commission participated in a hearing in the SIPC proceeding to permit the first bulk transfer of customer accounts; the Chairman participated and was fully briefed following the hearing. The Commission held a second closed meeting to discuss MFGI; the Chairman led the meeting, and he did not discuss the possibility of recusal nor did he express any concern for appearances caused by his continued participation.

On November 3, the Chairman sought the advice of the General Counsel and Designated Agency Ethics Officer, asking whether he should recuse himself at this point. The Commission does not have an official recusal policy, but the General Counsel and Designated Agency Ethics Officer does give advice on recusals when requested and follows Office of Government Ethics (OGE) regulations and policy in giving advice. The General Counsel and Designated Agency Ethics Officer instructed that there was no need to recuse given the fact that there was neither a financial conflict nor an appearance problem under OGE regulations. The Chairman nevertheless decided to recuse himself; the General Counsel and Designated Agency Ethics Officer advised it would be more consistent with OGE regulatory language to state that he would no longer participate. The Chairman decided not to participate in matters involving MFGI.

On November 8, the Chairman signed a Statement of Non-Participation. On the same day, the Commission received a memo and sign-off to appoint Commissioner Sommers to oversee matters involving MFGI; the appointment was completed on November 9.

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<sup>7</sup> Eastern Standard Time. Central Standard Time is one hour behind Eastern Standard Time. On October 31, 2011, both time zones were on Daylight Saving Time.

On December 13, the General Counsel and Designated Agency Ethics Official issued a memorandum describing the Chairman's involvement in matters leading up to the collapse of MFGI in detail, and concluded that the Chairman's initial involvement was consistent with OGE standards and was not improper.

The Chairman's level of involvement in MFGI was not inconsistent with CFTC's interpretation of OGE recusal policy leading up to the collapse of MFGI; his decision to issue a non-participation statement ran counter to specific advice on the matter offered by the General Counsel and Designated Agency Ethics Official.

REDACTED

Review of the Commodity Futures Trading Commission's  
Oversight and Regulation of MF Global, Inc.

Table of Contents

Executive Summary .....	i
Table of Contents .....	vii
Significant Individuals .....	ix
CFTC .....	ix
MF Global.....	x
Introduction.....	1
Background.....	1
Protection of Customer Funds .....	1
MFGI Timeline .....	2
Senator Shelby's Request .....	8
Methodology.....	9
Analysis of the Eight Topics Posed by Senator Shelby.....	10
CFTC's Role in Overseeing and Regulating MFGI .....	10
CFTC's Coordination with the Chicago Mercantile Exchange Regarding Monitoring of MFGI's Customer Segregated Funds.....	12
Examination Manuals and Guidance for Overseeing and Regulating MFGI.....	13
CFTC's Oversight of MFGI after the CFTC's Enforcement Actions in 2007 and 2009.....	14
The 2007 Enforcement Action.....	14
The 2009 Enforcement Action.....	15
CFTC's Role in the Determination that Caused MFGI to Increase its Net Capital in August 2011 .....	16



CFTC’s Activities with Respect to MFGI in the Week Prior to the Liquidation.....	17
Monday, October 24 – Wednesday, October 26.....	17
Thursday, October 27.....	19
Friday, October 28 .....	22
Saturday, October 29 .....	27
Sunday, October 30.....	28
Monday, October 31 .....	35
Tuesday, November 1 – Thursday, November 3 .....	41
Friday, November 4 – Friday, November 11 .....	43
The Chairman’s Use of Personal Email to Accomplish Official CFTC Business .....	44
The Chairman’s Recusal.....	46
An Analysis of Whether CFTC Chairman Gary Gensler’s Decision to Recuse Himself from Matters Relating to the MFGI Investigation is Consistent with the CFTC’s Official Recusal Policy .....	46
An Analysis of Whether and How a Decision by CFTC Chairman Gary Gensler to Recuse Himself from Previous Matters Relating to MFGI Would Have Been Consistent with the CFTC’s Official Recusal Policy .....	57
Conclusion .....	58

Significant Individuals

CFTC

Chairman, CFTC	Gary Gensler
Director, Division of Swap Dealer and Intermediary Oversight (DSIO)	Gary Barnett
Director, Division of Clearing and Risk (DCR)	Ananda Radhakrishnan
[HQ DSIO Senior Supervisory Auditor]	[REDACTED]
[HQ DSIO Supervisory Auditor]	[REDACTED]
[CH DSIO Audit Team Leader Supervisor]	[REDACTED]
[CH DSIO Audit Team Leader]	[REDACTED]
[CH DSIO Staff Auditors 1 - 3]	[REDACTED], [REDACTED], and [REDACTED]
[NY DSIO Audit Team Leader Supervisor]	[REDACTED]
[NY DSIO Audit Team Leader 1]	[REDACTED]
[NY DSIO Audit Team Leader 2]	[REDACTED]
[HQ DCR Senior Supervisory Attorney]	[REDACTED]
General Counsel, Office of General Counsel (Office of General Counsel or OGC)	Dan Berkovitz
OGC Attorney charged with bankruptcy responsibilities	[REDACTED]
[NY Enforcement Senior Supervisory Attorney]	[REDACTED]
[NY Enforcement Staff Attorney]	[REDACTED]
[CH Enforcement Supervisory Attorney 1]	[REDACTED]
[CH Enforcement Supervisory Attorney 2]	[REDACTED]
Chicago Enforcement Investigator	[REDACTED]

Significant Individuals  
(continued)

MF Global<sup>8</sup>

MF Global Holdings, Ltd.	MFGI	
Chairman and Chief Executive Officer	CEO and Board Member	Jon Corzine
President and Chief Operating Officer	Board Member	Bradley Abelow
General Counsel	General Counsel and Board Member	Laurie Ferber
Chief Financial Officer, Chief Accounting Officer, and Global Controller <sup>9</sup>		Henri Steenkamp
Chief Risk Officer		Michael Stockman
	North American CFO	Christine Serwinski
	Global Treasurer	Vinay Mahajan
	Assistant Treasurer	Edith O'Brien
	[MFGI Accountant 1]	[REDACTED]
	[MFGI Attorney 1]	[REDACTED]
	[MFGI Attorney 2]	[REDACTED]

<sup>8</sup> Trustee's Report at 17-21.

<sup>9</sup> MFGI's Global Treasurer reported directly to Mr. Steenkamp. Trustee's report at 20.

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Introduction

Background

Protection of Customer Funds

All FCMs are required by statute to “treat and deal with all money, securities, and property received by such person to margin, guarantee, or secure the trades or contracts of any customer of such person, or accruing to such customer as the result of such trades or contracts, as belonging to such customer.”<sup>10</sup> The law further requires that customer “money, securities, and property shall be separately accounted for and shall not be commingled with the funds of such commission merchant...”<sup>11</sup> An FCM is prohibited under Commission regulations from drawing upon customer segregated funds beyond its actual interest therein.<sup>12</sup> In addition, Commission regulations require that “[e]ach [FCM] ... must, at the close of each business day, hold in segregated accounts on behalf of commodity or option customers [s]ufficient United States dollars held, in the United States, to meet all United States dollar obligations ...”<sup>13</sup> The Commission has opined:

Section 4d was designed for the broad purpose of protecting customers from having their money, securities or property appropriated by a futures commission merchant, or some other depository, without adequate legal basis, and the more specific purpose of ensuring the integrity of the futures market by preventing the use of customer funds to finance market transactions by a futures commission merchant for its own account or for other customers.<sup>14</sup>

It has been remarked that customer segregated accounts are the “third rail” of the futures industry.<sup>15</sup>

Part 30 of the CFTC’s regulations (17 C.F.R. Part 30) governs the treatment and protection of customer funds deposited by customers for foreign futures and options transactions. In October 2011, customer fund protections for foreign futures and options customers differed

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<sup>10</sup> Section 4d(a)(2) of the Act, 7 U.S.C. § 6d(a).

<sup>11</sup> Id.

<sup>12</sup> Regulation 1.23, 17 C.F.R. § 1.23.

<sup>13</sup> Regulation 1.49, 17 C.F.R. § 1.49.

<sup>14</sup> *Dorn v. Shearson Hayden Stone, Inc.*, Commodity Futures Trading Commission, 1981 CFTC LEXIS 169, Comm. Fut. L. Rep. (CCH) P21,253 [’80-’82 Transfer Binder, Oct. 6, 1981].

<sup>15</sup> *CFTC Public Roundtable to Discuss Additional Customer Collateral Protections*, February 29, 2012 (PM session), page 60 (statement by Michael Greenberger, Law Professor, UMd School of Law); available here: <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/transcript022912pm.pdf>.

significantly from domestic futures customers, resulting in lesser protections. These differences are discussed in the course of this review.<sup>16</sup>

### MFGI Timeline

The final days of MFGI have been recounted in detail in the Trustee's Report and in a report issued by staff for the House Committee on Financial Services, Subcommittee on Oversight & Investigations ("House Staff Report").<sup>17</sup> Familiarity with both reports is presumed, and we will cite to the reports for various background facts and references throughout this review. Nevertheless, we give a brief outline of the essential facts:

1783	James Man started a sugar brokerage business.
1869	James Man's sugar brokerage became known as E.D.& F. Man.
1972	E.D. & F. Man began trading commodity futures.
1983	E.D. & F. Man expanded to include investment management.
1994	E.D. & F. Man was first listed on the London Stock Exchange.
2000	E.D. & F. Man created Man Group plc (which thereafter acquired 17 additional companies).
2007	Man Group formed MF Global, Inc. (MFGI) a Bermuda company.
2007 (July)	MFGI announced an initial public offering of MFGI under the ticker symbol "MF." It was the second largest NYSE IPO of 2007. <sup>18</sup>

<sup>16</sup> See fn. 89 and accompanying text. MFGI was also a broker-dealer. Broker-dealer regulatory requirements and related customer protection rules are discussed in detail in the Trustee's Report at 26-30.

<sup>17</sup> Staff Report Prepared for Rep. Randy Neugebauer, Chairman, Subcommittee on Oversight & Investigations, Committee on Financial Services, 112<sup>th</sup> Congress, November 15, 2012 (available here: <http://financialservices.house.gov/uploadedfiles/256882456288524.pdf>). The House Staff Report, a public document, includes mention or discussion of the following CFTC employees: Chairman Gensler; Dan Berkovitz, General Counsel; Gary Barnett, Director, DSIO; Ananda Radhakrishnan, Director, DCR; [HQ DSIO senior Supervisory Auditor]; [HQ DSIO Supervisory Auditor]; [CH DSIO Audit Team Leader Supervisor]; [HQ DCR Senior Supervisory Attorney]. It includes mention or discussion of the following MFGI Officers or employees: Jon Corzine, Bradley Abelow, Laurie Ferber, Henri Steenkamp, Michael Stockman, Christine Serwinski, Vinay Mahajan, Edith O'Brien, [MFGI Accountant 1], and [MFGI Attorney 2].

<sup>18</sup> Timeline information up to 2007 is gleaned from the House Staff Report, pages 5-6.

2007 (December)	CFTC simultaneously filed and settled an administrative action against MFGI and Thomas Gilmartin. CFTC charged violations of section 4g of the Commodity Exchange Act, 7 U.S.C. § 6g, and Commission Regulations 1.35(a-1)(1) and 166.3, 17 C.F.R. §§ 1.35(a-1)(1) and 166.3. MFGI and Gilmartin paid civil monetary penalties of \$2 million and \$250,000, respectively, and paid an additional \$76 million to a receiver. <sup>19</sup>
2007	MFGI was fined for exchange rule infractions (some involving multiple rule violations) on 13 separate occasions in 2007. Fine amounts for each instance ranged from \$1,000 to \$75,000. The average fine was \$11,292; fines totaled \$135,000 for 2007. Six fines were based on rule violations charged in 2006; one fine was based on rule violations charged in 2005. <sup>20</sup>
2008 (February)	MFGI suffered losses of \$141.5 million loss in wheat futures due to the actions of one rogue trader. <sup>21</sup> MFGI share prices fell 28%, and the firm subsequently became leveraged at almost 39-to-1.
2008 (June)	MFGI's stock fell more than 43% following a negative announcement.
2008 (July)	MFGI announced the appointment of David Schamis to its board (nominated by Christopher Flowers). MFGI stock continued to fall.
2008 (October)	MFGI announced the appointment of Bernard W. Dan as CEO. MFGI's stock rallied 80% within a week.
2008 (December)	MFGI began inquiries with the NY Fed to obtain designation as a "primary dealer" <sup>22</sup>

<sup>19</sup> *MF Global Inc. and Thomas Gilmartin to Pay More Than \$77 Million to Settle Actions by CFTC and Receiver ad litem*, CFTC press release, available here: <http://www.cftc.gov/PressRoom/PressReleases/pr5427-07>.

<sup>20</sup> CME timeline, *supra fn. 5*, at page 7 of the .pdf. The CME timeline, a public document, names the following CFTC Officers and employees: Chairman Gensler; Ananda Radhakrishnan, Director, DCR; [HQ DSIO Supervisory Auditor]; [CH DSIO Audit Team Leader Supervisor]; [CH DSIO Audit Team Leader]; [CH DSIO Staff Auditor 2]; [NY DSIO Audit Team Leader 2]. It names or discusses the following MFGI Officers and employees: Jon Corzine, Laurie Ferber, Henri Steenkamp, Michael Stockman, Christine Serwinski, Edith O'Brien, [MFGI Attorney 2].

<sup>21</sup> *CFTC Statement on MF Global Wheat Futures Trading*, CFTC press report, available here: <http://www.cftc.gov/PressRoom/PressReleases/pr5462-08>.

<sup>22</sup> The events of 2008 listed here are described in detail in the House Report at page 9-11. NY Fed information regarding primary dealers may be found here: [http://www.newyorkfed.org/markets/pridealers\\_policies.html](http://www.newyorkfed.org/markets/pridealers_policies.html).

2008 (December)	The Chicago Board of Trade (CBOT) fined MFGI \$400,000 for failing to supervise employees and certain trade practice violations, including pre-execution communications. <sup>23</sup>
2008	MFGI was fined for exchange rule infractions on nine occasions in 2008. Fine amounts ranged from \$1,500 to \$400,000 (the \$400k fine is described above). The average fine was \$49,167; fines totaled \$442,500 for 2008. Five penalties were based on rule violations charged in 2007. <sup>24</sup>
2009 (December)	CFTC simultaneously filed and settled an administrative action against MFGI stemming from the Dooley trading incident. The CFTC charged MFGI with violations of supervision requirements under Commission Regulation 166.3, 17 C.F.R. § 166.3. MFGI paid a civil monetary penalty of \$10 million. <sup>25</sup>
2009 (December)	CBOT fined MFGI \$495,000 for violations of CBOT rules in connection with the Dooley trading incident (taking into account the CFTC enforcement action). <sup>26</sup>
2009	MFGI was fined for exchange rule infractions on five occasions in 2009. Fine amounts ranged from \$2,500 to \$495,000 (the \$495k fine is described above). The average fine was \$78,214 and the total amount of fines imposed was \$547,500. One fine was for misconduct charged 2008. <sup>27</sup>
2010 (January)	NY Fed revised its standards to prohibit primary dealer status to applicants that have been subject to (among other things) regulatory action or investigation within the last year. <sup>28</sup>
2010 (January)	MFGI reincorporated in Delaware, in order to obtain primary dealer status with NY Fed.

<sup>23</sup> CME Timeline, *supra* fn. 5, at page 3-4 of the .pdf.

<sup>24</sup> CME Timeline, *supra* fn. 5, at page 7-8 of the .pdf.

<sup>25</sup> CFTC Sanctions MF Global Inc. \$10 Million for Significant Supervision Violations between 2003 and 2008, CFTC press release, Dec. 17, 2009, available here: <http://www.cftc.gov/PressRoom/PressReleases/pr5763-09>. The order is available here: <http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfmfglobalorder12172009.pdf>.

<sup>26</sup> CME Timeline, *supra* fn. 5, at page 5-6 of the .pdf.

<sup>27</sup> CME Timeline, *supra* fn. 5 at page 8 of the .pdf.

<sup>28</sup> New York Fed Publishes Revised Policy for Administration of Primary Dealer Relationships, NY Fed press release, January 11, 2010, available here: <http://www.newyorkfed.org/newsevents/news/markets/2010/ma100111.html>; *Operating Policy: Administration of Relationships with Primary Dealers*, January 11, 2010, available here: [http://www.newyorkfed.org/markets/pridealers\\_policies.html](http://www.newyorkfed.org/markets/pridealers_policies.html).

2010 (March 17)	Bernard Dan resigned as CEO of MF Global.
2010 (March 23)	Jon S. Corzine was appointed as chairman and CEO of MF Global Holdings, Ltd.
2010	CME reported no fines for MFGI during 2010.
2011 (February)	NY Fed bestowed primary dealer status on MFGI. <sup>29</sup>
2011 (March)	CME reported MFGI was fined \$5,000 each for two rule infractions occurring on March 17, 2010. <sup>30</sup>
August 2011	CME reported the results of an audit as of January 31, 2011, which did not find any material problems with MFGI's calculations of net capital, segregated amounts, or secured amounts. <sup>31</sup>
October 24, 2011	Moody's <sup>32</sup> downgrades MFGI and MF Global Holdings, Ltd. due to (among other things) reports of excessive proprietary investment in European Sovereign debt and resulting FINRA action requiring MFGI to increase haircuts on these investments for net capital calculation purposes. <sup>33</sup>
October 25, 2011	MFGI announced its largest-ever quarterly loss, reporting a net deficit of \$191.6 million. <sup>34</sup>
October 26, 2011	S&P put MFGI on "Credit Watch Negative." Commissioners were briefed on MFGI status. <sup>35</sup>
October 27, 2011	Moody's cut MFGI to junk status; <sup>36</sup> CFTC was on site at MFGI offices in New York and Chicago, and began a review of MFGI's customer fund documentation as of close of business, October 26.

<sup>29</sup> Memorandum to all Primary Dealers and Recipients of the Weekly Press Release on Dealer Positions and Transactions, Nov. 2, 2010, available here:

<http://www.newyorkfed.org/newsevents/news/markets/2011/an110202p.html>.

<sup>30</sup> CME Timeline, *supra* fn. 5 at page 8 of the .pdf.

<sup>31</sup> Trustee's Report at page 46.

<sup>32</sup> Moody's Investors Services (Moody's) provides credit ratings and research covering debt instruments and securities. Its parent company is Moody's Corporation. <http://www.moodys.com/Pages/atc.aspx>.

<sup>33</sup> *Ratings Action: Moody's Downgrades MF Global to Baa3; reviews for further downgrade*, Moody's announcement available here: [http://www.moodys.com/research/Moodys-downgrades-MF-Global-to-Baa3-reviews-for-further-downgrade--PR\\_229068](http://www.moodys.com/research/Moodys-downgrades-MF-Global-to-Baa3-reviews-for-further-downgrade--PR_229068).

<sup>34</sup> Trustee's Report at page 91.

<sup>35</sup> House Report at page 88.

<sup>36</sup> Moody's notice is available here: [http://www.moodys.com/research/Moodys-downgrades-MF-Global-to-Ba2-reviews-for-further-downgrade--PR\\_229534](http://www.moodys.com/research/Moodys-downgrades-MF-Global-to-Ba2-reviews-for-further-downgrade--PR_229534).



October 28, 2011 CFTC was on site at MFGI offices in New York and Chicago; staff continued to request documents to support customer fund balances as of close of business, October 26, and was satisfied with document production by close of business Friday. Commissioners were briefed on MFGI in a regularly scheduled closed Commission meeting to discuss surveillance and enforcement matters.

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October 29, 2011 CFTC learned that the NY Fed planned to terminate MFGI's primary dealer status. CFTC was not on site at MFGI; staff was in communication with regulators and each other; the Chairman was personally involved in substantive outside communications involving MFGI; he requested documents and other information regarding MFGI's plans.

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October 30, 2011

- Early afternoon -- CFTC staffers were on site at MFGI in New York and Chicago; CFTC attorneys with responsibility for bankruptcy-related matters were on site at CFTC in Washington; CFTC Enforcement was on site at CFTC in New York. Through the afternoon CFTC requested financial information.
- CFTC staff performed administrative document drafting pertinent to the anticipated sale and also to the possible SIPC filing; staff was in frequent contact with each other, other regulators, and MFGI.
- 5-6 pm (EST) -- CFTC staff learned that MFGI had identified a deficit in customer segregated funds totaling approximately \$900 million which both MFGI and CFTC treated as an error.
- 8 pm (EST) -- The Chairman updated the Commissioners and sought their assistance with no-action relief necessary to expedite account transfers that would accompany the anticipated sale. The Chairman continued to be personally involved in substantive outside communications pertaining to MFGI, including requests for cooperation with staff document requests.

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October 31, 2011

- 2 – 5:30 am (EST) -- CFTC learned that customer segregated funds are officially missing, the deal had fallen through, and a SIPC proceeding would be filed. The Chairman was personally involved in outside conversations pertaining to MFGI during this time.
- 6 am (EST) -- The two Washington CFTC attorneys charged with bankruptcy duties headed for New York.
- 8 – 9 am (EST) -- CFTC staff returned to the MFGI Offices in New York and Chicago. They were later joined by Enforcement staff.
- Noon (EST) -- The Commission was updated in a closed emergency meeting; the Commission authorized an Enforcement investigation into MFGI; the Chairman led the meeting and voted in favor of the Enforcement investigation.
- MF Global Holdings, Ltd., and MF Global Finance USA Inc. filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code and a SIPC proceeding was filed for MFGI, all in the Southern District of New York.

- The CFTC attorneys charged with bankruptcy-related duties were not informed of the filing; they got a tip from CFTC staff on site at MFGI in New York, and intercepted the Trustee's lawyers at the courthouse; they made changes to the pleadings believed necessary to protect the interests of CFTC and futures customers; the SIPC proceeding was filed with these changes in original handwriting by a CFTC attorney.

November 2, 2011	CFTC filed a statement in support of the first requested bulk transfer of MFGI customer accounts and related margin. The Commission approved this filing with the Chairman participating. The Chairman held a second closed emergency meeting; the Chairman led this meeting and did not announce or indicate he felt uncomfortable continuing to participate in MFGI matters.
November 3, 2011	The Chairman determined to cease participation in all matters involving MFGI.
November 4, 2011	The Commission held a regularly scheduled closed meeting to discuss surveillance and enforcement matters. Commissioner Chilton conducted the meeting; Commissioner Chilton did not state that the Chairman would no longer participate in matters involving MFGI; the Chairman did not join this meeting. MFGI was discussed.
November 8, 2011	The Chairman issued a Statement of Non-Participation
November 9, 2011	The Commission approved the appointment of Commissioner Sommers to oversee matters involving MFGI.
November 15, 2011	The General Counsel and Designated Agency Ethics Official issued a memorandum concluding that the Chairman did not violate any ethics provisions in connection with his participation in matters pertaining to MFGI prior to November 3, or in waiting to request ethics advice on that date.

Senator Shelby's Request

On November 30, 2011, Senator Shelby asked our Office to review the CFTC's oversight and regulation of MF Global.<sup>37</sup> The Senator asked our report to include the following:

- 1) A detailed account of the CFTC's role in overseeing and regulating MFGI, including an assessment of whether its oversight and regulation of MFGI differed in any material way from its oversight and regulation of other futures commission merchants;
- 2) A detailed account of how the CFTC coordinated with the Chicago Mercantile Exchange ("CME"), the designated self-regulatory organization for MFGI, in overseeing MFGI's customer segregated funds;
- 3) A summary of relevant examination manuals or other guidance for staff involved in overseeing and regulating MFGI or monitoring the CME's oversight of MFGI;
- 4) An analysis of whether and how the CFTC's oversight of MFGI changed after the CFTC's enforcement actions against MFGI in December 2007 and December 2009;
- 5) An analysis of the CFTC's role in the determination that caused MFGI to increase its net capital in August 2011;
- 6) An analysis of the CFTC's activities with respect to MFGI in the week prior to the liquidation;
- 7) An analysis of whether CFTC Chairman Gary Gensler's decision to recuse himself from matters relating to the MFGI investigation is consistent with the CFTC's official recusal policy; and
- 8) An analysis of whether and how a decision by CFTC Chairman Gary Gensler to recuse himself from previous matters relating to MFGI would have been consistent with the CFTC's official recusal policy.

Senator Shelby requested that we begin our review "once the immediate concerns about customers' access to their funds are addressed," and that we take all necessary steps to preserve all relevant documents and to ensure that a thorough review could be conducted.

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<sup>37</sup> The full text of Senator Shelby's letter may be found here:  
[http://shelby.senate.gov/public/index.cfm/newsreleases?ContentRecord\\_id=8355755F-2D3B-40F0-9CE9-27CDFCED885](http://shelby.senate.gov/public/index.cfm/newsreleases?ContentRecord_id=8355755F-2D3B-40F0-9CE9-27CDFCED885).

## Methodology

In order to complete our review, we first consulted with staff in the Office of General Counsel charged with document retention and preservation in the MFGI matter. We obtained access to a database compiled and updated on an ongoing basis containing email, correspondence, memoranda, drafts, pleadings, and other documents, all pertaining to MFGI and all gleaned from CFTC systems and compiled in one searchable database in order to facilitate the Enforcement investigation, FOIA requests, and Congressional requests. This database contained over 350,000 items at the end of February 2013 (including duplicates).

Next, we contacted the Trustee to ascertain the status of the Trustee's efforts to address concerns about customers' access to their funds, and to ask for access to all documents in the Trustee's possession that could be disclosed to our Office consistent with applicable law.

Through the Agency and the Trustee we received and were given access to hundreds of thousands of documents. We accessed unredacted versions of all documents supplied by the Agency and the Trustee. We conducted targeted searches of the documents. For the Trustee production we reviewed every document with the phrase "CFTC." In the Agency database, we conducted numerous searches by employee names, dates, and by specific keywords. We searched separately for the Chairman's various email addresses. Document review was ongoing throughout 2012.

We also consulted with the Division of Enforcement at the outset, and occasionally during our field work, with a view to avoiding disruption or interference with ongoing investigative efforts involving potential wrongdoing by MFGI, its former Officers and employees, and others. We did not interview MFGI or CME employees; Enforcement did not share its files with us; we have not reviewed or evaluated their investigation. Enforcement had interviewed and taken statements from most of the CFTC employees identified by our Office as involved with the CFTC's regulation and oversight of MFG, and they did this before Senator Shelby issued his request to our Office. We did not obtain Enforcement's notes of these interviews; however, Enforcement was helpful regarding the location and identities of CFTC employees to be interviewed, and was helpful discussing background information that did inform our interview efforts.

Interviews took place from April 2012 through December 2012. We interviewed over 30 people, including current and former Commission employees and Commissioners, and market professionals who reached out to us. We actively sought out current CFTC employees who either had regular duties involving MFGI or who were in contact with MFGI during its final days. We did not seek out former employees or market professionals; however, to the extent they reached out to us we did listen to what they had to say.

## Analysis of the Eight Topics Posed by Senator Shelby

### CFTC's Role in Overseeing and Regulating MFGI

FCM oversight is the responsibility of three Examinations Branch offices headed by three **[DSIO Audit Team Leader Supervisors]**, one each in Chicago, New York, and Kansas City.<sup>38</sup> As of September 30, 2011, NFA reported 123 registered FCMs.<sup>39</sup> In October 2012, the Kansas City Examinations Branch, with a staff of seven comprising two examination teams, had oversight responsibility for 13 FCMs. Each examination team was charged with day to day oversight of six or seven FCMs. The Chicago branch, with a staff of 17, had four teams tasked with oversight over 36 FCMs; each team was responsible for daily oversight of nine Futures Commission Merchants. The New York branch, with a staff of 21, had four teams tasked with oversight of 67 FCMs. In October 2011, the Examinations Branch was under the Capital, Margin and Segregation Branch headed by **[HQ DSIO Senior Supervisory Auditor]**, which in turn was within the Division of Swap Dealer and Intermediary Oversight (DSIO), with Gary Barnett serving as Director. The **[HQ DSIO Senior Supervisory Auditor]** and Mr. Barnett worked out of the CFTC headquarters office.

This Examinations Branch structure was relatively new. On August 9, 2011, the CFTC established the new DSIO and the new Division of Clearing and Risk (DCR), and terminated the old Division of Clearing and Intermediary Oversight (DCIO).<sup>40</sup> Prior to August 9, 2011, the Examinations Branch was called the Audit and Financial Review Branch, and it was under the Audit and Financial Review Section, albeit with the same **[HQ DSIO Senior Supervisory Auditor]**.

The August restructure was not a major upheaval for the Examination Branch employees because everyone up through the Deputy kept their same duties; the only change was overall supervision switched from Mr. Radhakrishnan in DCIO to Mr. Barnett in DSIO.<sup>41</sup> Gary Barnett started with the Commission on August 28, 2011.

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<sup>38</sup> The Kansas City **[DSIO Audit Team Leader]** is also the **[Senior Supervisor]** in Kansas City. The New York and Kansas City **[Audit Team Leader Supervisors]** are Certified Public Accountants. The **[CH DSIO Audit Team Leader Supervisor]** has an MBA (Finance).

<sup>39</sup> CFTC publication *President's Budget and Performance Plan, Fiscal Year 2013* (CFTC FY 2013 Budget Publication), at page 155 (<http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/cftcbudget2013.pdf>, at page 164 of the .pdf).

<sup>40</sup> Internal CFTC memo addressed to all CFTC and dated Friday, May 13, 2011. We found no press release announcing the restructure. During our fieldwork, upon inquiry we learned that the appropriate Federal Register notices were under construction and would be forthcoming. On April 13, 2013, the Commission issued a final rule "amending its regulations to reflect the reassignment of responsibilities, including delegations of authority, resulting from its recent reorganization of Commission staff." 78 FR 22418 (Apr. 16, 2013) (available here: <http://www.gpo.gov/fdsys/pkg/FR-2013-04-16/pdf/2013-08353.pdf>). We note the Commission also amended discrete delegations in piecemeal fashion prior to this date. See, 77 FR 67866 (Nov. 14, 2012) (available here: <http://www.gpo.gov/fdsys/pkg/FR-2012-11-14/pdf/2012-26435.pdf>); 76 FR 69334 (Nov. 8, 2011) (available here: <http://www.gpo.gov/fdsys/pkg/FR-2011-11-08/pdf/2011-27536.pdf>).

<sup>41</sup> In addition, the New York, Chicago, and Kansas City **[Audit Team Leader Supervisors]** were re-titled as **[ ]**." We retained the old moniker **[Audit Team Leader Supervisors]** for this report in order to avoid

Based on interviews with employees and our review of email among employees in the Examinations Branch, the restructure did not create any substantive difficulties during the last week of MF Global. Mr. Radhakrishnan and Mr. Barnett were in constant communication and were both involved with CFTC's activities during the last days of MF Global, with Mr. Radhakrishnan having greater involvement.<sup>42</sup>

The Examination Branch teams review the monthly financial statements and all required filings for each of the FCMs, noting significant changes in FCM financial health and taking action as appropriate. On a day-to-day basis, the team members also deal with filing issues. Issues arising within financial statements and other required reports may trigger a limited review by the team.

Chairman Gensler summarized the process in testimony before Congress: "the CFTC ... does limited-scope reviews of FCMs in a 'for cause' situation that are sometimes referred to as 'audits,' but they are not full-scale audits as accountants commonly use that term."<sup>43</sup> In its most recent budget request, the CFTC more fully described FCM reviews (which have been grouped with examinations of major swap participants and swap dealers since May 2011) as follows:

While the bulk of the examinations of major swap participants and swap dealers will be performed by the NFA, the Commission will be required to undertake direct examinations of these entities in response to possible violations of the Commission's regulations, or as part of the oversight of the NFA's major swap participant and swap dealer surveillance program. The Commission also supports routine direct examinations of these entities as necessary for staff to obtain an understanding of the books and records, and general back-office operations. Such knowledge and familiarity of the operations of a major swap participant or swap dealer is necessary in order for staff to be properly prepared to respond in situations when these entities fail to meet its minimum financial requirements or other regulatory requirements. The Commission would focus its direct examinations that are not conducted on a for-cause basis on those entities that present the greatest potential exposure. These entities generally would be the most active and largest major swap participants and swap dealers, including the six members of the "G-14" dealers that are part of domestic banking organizations.

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confusion with the [HQ DSIO Supervisory Auditor] working in HQ (directly under the [HQ DSIO Senior Supervisory Auditor]), whose title was not changed.

<sup>42</sup> The CFTC General Counsel represents that delegations of authority were prepared as necessary to permit Ananda Radhakrishnan's involvement in DSIO matters pertaining to MFGI, and to permit the [HQ DCR Supervisory Attorney] to represent the Commission in matters bankruptcy matters pertaining to MFGI (and normally charged to the OGC).

<sup>43</sup> Testimony of Gary Gensler, Chairman, CFTC, before the U.S. Senate Committee on Agriculture, Nutrition and Forestry, Washington, DC (Aug. 1, 2012). Available here: <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-120>.

Approximately three-to-five staff members are required to conduct a limited scope direct examination of a large FCM or, as measured by regulatory capital and customer funds on deposit, other comparable intermediary. These examinations generally run for six months from start to report generation. Staff currently performs approximately 20 direct examinations each year.<sup>44</sup>

In 2012, the Examinations Branch performed 17 reviews of FCMs. In 2012, the Examinations Branch made 21 referrals to Enforcement. It appears that Enforcement referrals were not formally tallied in prior years.

#### CFTC's Coordination with the Chicago Mercantile Exchange Regarding Monitoring of MFGI's Customer Segregated Funds

Since 2000, designated self-regulatory organizations (“DSROs”) in the futures industry have been the primary regulators of FCMs, introducing brokers, commodity pool operators, and commodity trading advisors.<sup>45</sup> The CME, a futures industry DSRO, was responsible for MFGI's front-line oversight.<sup>46</sup> As stated in the Trustee's report:

- “As MFGI's DSRO, CME was responsible for: (i) conducting audits of MFGI on a risk-based cycle; (ii) reviewing the monthly and annual reports submitted by MFGI; and (iii) reporting any concerns or deficiencies in MFGI's compliance with CFTC regulations.”<sup>47</sup>
- “As MFGI's DSRO, the CME was charged with supervising MFGI's compliance with the financial and reporting requirements of the CEA and relevant CFTC regulations. In order to ensure compliance, the CME conducted periodic audits of the FCM and shared the results of the audit with the other regulatory bodies of which the firm is a member. The CME conducted audits of MFGI every nine to fifteen months pursuant to standards

<sup>44</sup> CFTC FY 2013 Budget Publication, *supra* fn. 39, at page 39.

<sup>45</sup> In 2000, Congress sought “to transform the role of the Commodity Futures Trading Commission to oversight of the futures markets” and in so doing, amended Section 3 of the Commodity Exchange Act to state: “It is the purpose of this Act to serve the public interests through a system of effective self-regulation of trading facilities, clearing systems, market participants and market professionals under the oversight of the Commission.” Commodity Futures Modernization Act, sections 2 and 108, P.L. 106-554, 114 Stat. 2763A-365, 2763A-366 and 2763A-383.

<sup>46</sup> The CME formed in 1898 as a not-for-profit corporation. In 2000, CME became a share-holder corporation, and in 2002 CME Holdings completed its initial public offering, and is listed on the NASDAQ Global Select Market. In 2007, CME Holdings merged with CBOT Holdings, and became CME Group. In 2008, CME acquired Credit Market Analysis Limited (and its subsidiaries), a provider of credit derivatives market data. Also in 2008, CME merged with NYMEX Holdings. In 2010, CME entered into a joint venture with Dow Jones Indexes to create CME Group Index Services, and acquired Elysian Systems Limited, and provider of electronic trading and market technology. Also in 2010, CME Clearing Europe became CME's wholly-owned subsidiary established in London and recognized by the Financial Services Authority of the United Kingdom. *CME Group 2010 Annual Report*, page 5 (2010) (<http://files.shareholder.com/downloads/CME/2108553774x0x529156/D94F567D-ED01-46E1-911B-A90183B37953/MostRecentAnnualReport.pdf>).

<sup>47</sup> Trustee's report at page 32, citing *MF Global Bankruptcy: Hearing Before the H. Comm. on Financial Services, Subcomm. on Oversight and Investigations*, 112th Cong. 2d Sess. (Dec. 15, 2011) (Testimony of Terry Duffy, Exec. Chairman, CME Group (“Duffy Testimony”) at 3).

and procedures established by the Joint Audit Committee (“JAC”) and reported such results to the CFTC and MFGI’s DCOs.”<sup>48</sup>

- “The most recent audit was as of January 31, 2011, which the CME completed in August 2011 and which did not find any material problems with MFGI’s calculations of net capital, segregated amounts or secured amounts.”<sup>49</sup>

CFTC employees in the Examinations Branch told us that CFTC did not generally coordinate with CME in the ordinary course of their work, including the last week of MFGI’s existence. However, CFTC and CME were in regular communication during the final days of MFGI.

We asked about CME’s audits of FCMs, and specifically about the CME audit of MFGI that took place earlier in 2011. This audit was reviewed at staff level in the Examinations Branch.

The CFTC’s Major Review Branch (“Major Review”) has regulatory oversight responsibilities with regard to the DSROs as it pertains to DSRO oversight of FCMs. Major Review consists of two employees, a supervisory auditor who serves as Assistant Director for Major Review, and a senior auditor, located in CFTC’s Kansas City and Chicago field offices.<sup>50</sup> Major Review selects FCM audits performed by the DSROs for further review. Major Review does not perform a formal audit of the DSRO’s work product, but instead takes a random sample of data within a report and verifies the data. Major Review did not review any CME audits of MFGI during the period 2004-2011. To our knowledge Major Review reports are not made public.

#### Examination Manuals and Guidance for Overseeing and Regulating MFGI

In October 2011 there was no specific manual for overseeing and regulating MFGI or any other FCM. We heard this from CFTC staff in New York, Chicago, and Kansas City. However, staff said they look to the CFTC’s guides intended for registrants, such as the Form 1-FR instructions,<sup>51</sup> as well as the Commission’s Financial and Segregation Interpretation No. 4-1 (Advisory Interpretation For Self-Regulatory Organization Surveillance Over Members’ Compliance With Minimum Financial, Segregation, Reporting, and Related Recordkeeping Requirements),<sup>52</sup> and also CFTC Interpretation 4-2 (Risk-Based Auditing).<sup>53</sup> Staff also stated that they may consult the Joint Advisory Committee resources on its website.<sup>54</sup>

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<sup>48</sup> Trustee’s report at page 45-46, citing *MF Global Bankruptcy: Hearing Before the H. Comm. on Agriculture*, 112th Cong. 2d Sess. (Dec. 8, 2011) (Testimony of Dan Roth, Chairman/CEO, NFA (“Roth Testimony”) at 29; Duffy Testimony at 7).

<sup>49</sup> Trustee’s report at page 46.

<sup>50</sup> The Assistant Director and senior auditor each had over 20 years experience at CFTC in October 2011.

<sup>51</sup> Available here: <http://www.cftc.gov/ucm/groups/public/@iointermediaries/documents/file/1fr-fminstructions.pdf>.

<sup>52</sup> Available here: [http://www.cftc.gov/tm/finseginterp\\_4-1.htm](http://www.cftc.gov/tm/finseginterp_4-1.htm).



Staff told us that each targeted review performed by the CFTC Examinations Branch in New York, Kansas City, and Chicago is tailored to address the unique issue and situation at hand, and therefore there is no general manual or generalized guidance to guide their work. Some staff were disgruntled with this situation, others found it appropriate.

During our work on this project, we did learn from a retired CFTC employee that there was a checklist for FCM audits performed by the former Division of Trading and Markets in the 1980s, and it required verifying bank balances as represented by the FCM, as well as detailed verification of other FCM books, records, and representations. The checklist harkens to a time when there were fewer markets, and manual processes were still the norm. We do not know when the checklist was abandoned.

Since the collapse of MFGI, CFTC has created a guide to reviewing the monthly financial statements it receives for all FCMs under its oversight. CFTC staff told us the new guide did not institute new procedures, but rather documented what they were already doing with regard to financial statement reviews.

#### CFTC's Oversight of MFGI after the CFTC's Enforcement Actions in 2007 and 2009

##### The 2007 Enforcement Action

CFTC's 2007 Enforcement Action involved violations committed by MFGI and by Associated Person Thomas Gilmartin in connection with their oversight and recordkeeping pertaining to a hedge fund. The hedge fund traded through MFGI and was handled by Gilmartin as an MFGI associated person.

CFTC separately charged the hedge fund, Philadelphia Alternative Asset Management Co. (PAAMCo), and its manager, Paul Eustace, in a 2005 complaint alleging that Mr. Eustace and PAAMCo concealed over \$100 million in losses from participants in an off-shore hedge fund known as the Philadelphia Alternative Asset Fund, Ltd (the Off-shore fund).<sup>55</sup> This deception was accomplished through, among other things, backdating execution dates of certain trades executed through MFGI in order to bolster the apparent profitability of the Off-shore Fund. Eustace and PAAMCo were ordered to pay more than \$279 million in restitution; Eustace was also ordered to pay a \$12 million civil monetary penalty, and PAAMCo was ordered to pay an \$8.8 million civil monetary penalty.<sup>56</sup>

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<sup>53</sup> Available here: <http://www.cftc.gov/tm/letters/99letters/tm99-32.htm>.

<sup>54</sup> The Joint Advisory Committee website is here: <http://www.wjammer.com/jac/>.

<sup>55</sup> CFTC Obtains Federal Court Freeze of Assets of Philadelphia Company and its President in Fraud Action Involving Hedge Fund and \$230 Million Commodity Pool, CFTC Press Release 5091-05, June 29, 2005, available here: <http://www.cftc.gov/opa/enf05/opa5091-05.htm>.

<sup>56</sup> Hedge Fund Trader Paul Eustace and Philadelphia Alternative Asset Management Co. Ordered to Pay More Than \$279 Million to Defrauded Customers and More than \$20 Million in Civil Monetary Penalties in CFTC Action, CFTC Press Release, Aug. 19, 2008, available at: <http://www.cftc.gov/PressRoom/PressReleases/pr5531-08>. See also, CFTC Obtains Federal Court Freeze of Assets of Philadelphia Company and its President in Fraud Action

In a related action, Gilmartin and MFGI were charged with failing to diligently supervise the handling of the PAAMCo hedge fund accounts in that (among other things) they failed to respond to indications of questionable activity by Eustace. Gilmartin and MFGI were also charged with recordkeeping violations. The CFTC's sanctions included civil monetary penalties against MFGI and Gilmartin in the amounts of \$2 million and \$250,000, respectively, and an order that Gilmartin never apply for registration or claim exemption from registration with the CFTC in any capacity. In addition, the CFTC's order included a requirement that MFGI and Gilmartin pay a total of \$75 million, consisting of \$69 million for the benefit of the receivership estate, which the receiver managed on behalf of investors in the funds traded by Eustace and PAAMCo, and \$6 million to reimburse the estate for the litigation costs of pursuing the claims against MFG and Gilmartin.<sup>57</sup>

The 2007 Enforcement action against MFGI resulted in no change to CFTC's oversight of MFGI.

#### The 2009 Enforcement Action

CFTC's oversight of MFGI changed in 2008. Beginning in 2008, CFTC required MFGI to post their daily "cap, seg, & secured" statements with CFTC, in order to keep currently informed of MFGI's net capital calculations. This increased oversight of net capital was triggered by unauthorized trading by an MFGI employee in February 2008. A drastic change in MFGI's net capital immediately reflected overnight losses by this trader totaling \$141 million;<sup>58</sup> daily examination of the cap, seg & secured statement would permit CFTC to receive immediate notice of any similar losses. In 2009, CFTC filed and simultaneously settled charges against MFGI relating to risk supervision failures in four separate instances between 2003 and 2008 (including the 2008 unauthorized trading), imposing a \$10 million civil monetary penalty against MFGI, and requiring undertakings related to MFGI's internal management processes.<sup>59</sup>

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Involving Hedge Fund and \$230 Million Commodity Pool, CFTC Press Release 5091-05, June 29, 2005, available at: <http://www.cftc.gov/opa/enf05/opa5091-05.htm>.

<sup>57</sup> *MF Global Inc. and Thomas Gilmartin to Pay More Than \$77 Million to Settle Actions by CFTC and Receiver ad litem*, CFTC Press Release 5427-07, Dec. 26, 2007, available at: <http://www.cftc.gov/PressRoom/PressReleases/pr5427-07>.

<sup>58</sup> On December 12, 2012, the trader admitted guilt in a federal criminal proceeding, and faced a maximum prison sentence of 10 years and a \$1 million fine; the trader was sentenced to five years in prison. *Former MF Global Trader Pleads Guilty in \$141 mln Trading Loss*, Ann Saphir, Thomson Reuters News & Insight, December 11, 2012. [http://newsandinsight.thomsonreuters.com/Legal/News/2012/12\\_-\\_December/Former\\_MF\\_Global\\_trader\\_pleads\\_guilty\\_in\\_\\$141 mln\\_trading\\_loss/](http://newsandinsight.thomsonreuters.com/Legal/News/2012/12_-_December/Former_MF_Global_trader_pleads_guilty_in_$141 mln_trading_loss/); *Ex-MF Global Broker Sentenced to 5 Years for Rogue Trades*, Andrew Harris, Bloomberg, April 17, 2013. <http://www.bloomberg.com/news/2013-04-16/ex-mf-global-broker-sentenced-to-5-years-for-trades-correct.html>.

<sup>59</sup> *CFTC Sanctions MF Global, Inc. \$10 Million for Significant Supervision Violations between 2003 and 2008*, CFTC Press Release 5763-09, Dec. 17, 2009, available here: <http://www.cftc.gov/PressRoom/PressReleases/pr5763-09>. Order available here: <http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfmfglobalorder12172009.pdf>.

Besides reviewing daily filings by MFGI following the trading incident in 2008, Examinations Branch section employees in Chicago were kept in the loop with regard to MFGI's remediation efforts following the 2009 Enforcement action; they reviewed evaluation reports prepared pursuant to the settlement and participated in related presentations regarding MFGI's undertakings pursuant to the settlement.<sup>60</sup> These follow-up activities, ongoing as late as May 2011, did not focus on the protection of customer segregated and secured funds or related back-office processes; rather, the focus was supervision of associated persons and internal controls designed to enhance risk management processes.

#### CFTC's Role in the Determination that Caused MFGI to Increase its Net Capital in August 2011

We copy the summary of the relevant facts from the Trustee's report for purposes of background:

In August of 2011, because of concerns about MF Global's exposure to sovereign debt, the Financial Industry Regulatory Authority ("FINRA") required MFGI to record additional capital charges to reflect risks associated with the European sovereign debt portfolio. The increased capital charges meant that, in FINRA's view, MFGI had a net capital deficiency as of July 31, 2011, and MFGI had to restate its financial results in its July 2011 Financial and Operational Combined Uniform ("FOCUS") report. As a result, MFGI underwent a \$183 million capital infusion to satisfy the increased minimum net capital threshold under SEC uniform net capital Rule 15c3-1.<sup>61</sup>

CFTC staff and management told us they had no active role in the determination that caused MFGI to increase its net capital in August 2011. We reviewed Examination Branch staff notes and memoranda from August 2011 indicating they had current information and a full understanding of the situation, and there is no indication CFTC took an active role.<sup>62</sup> This decision was governed by SEC regulations. There are no reports that MFGI directly used customer funds to invest in foreign sovereign debt, even though this would have been legal at the time under Commission Rule 1.25. Instead, it invested indirectly at the parent company level through repo transactions.<sup>63</sup>

In December 2011, the Commission amended Commission Rule 1.25 to forbid, among other things, investment of customer segregated funds in foreign sovereign debt, as well as transactions with affiliates.<sup>64</sup>

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<sup>60</sup> Email dated May 9, 2011. Author: [HQ Enforcement Deputy Director]. Recipient: Ananda Radhakrishnan and the [HQ DSIO Senior Supervisory Auditor]; cc: David Meister (updating the Examinations Branch on upcoming presentations related to undertakings set out in the 2009 settlement with MFGI).

<sup>61</sup> Trustee's report at 9.

<sup>62</sup> August 31, 2011, CFTC staff notes regarding the FINRA action requiring MFGI to increase net capital.

<sup>63</sup> Trustee's report at 63-71.

<sup>64</sup> The new rule, which also included other investment prohibitions and other provisions, became effective February 17, 2012. 76 Fed. Reg. 78,776 (Dec. 19, 2011). <http://www.gpo.gov/fdsys/pkg/FR-2011-12-19/pdf/2011-31689.pdf>.

### CFTC's Activities with Respect to MFGI in the Week Prior to the Liquidation

We studied the period October 24 through November 9, 2011, in order to describe not only CFTC's activities regarding the regulation of MFGI leading up to the bankruptcy, but also leading up to and including the Chairman's non-participation statement and the appointment of Commissioner Sommers to take over regarding MF Global issues.

#### Monday, October 24 – Wednesday, October 26

All CFTC staff and management interviewed were aware of and concerned for MFGI during the early part of the last week of October 2011, due to the ratings downgrade on Monday the 24<sup>th</sup> and the earnings report on Tuesday the 25<sup>th</sup>. Apart from MFGI's daily cap, seg and secured statements, it appears that Monday and Tuesday CFTC staff and management in Chicago and Agency-wide received their information from public reports.<sup>65</sup>

Staff and management in Chicago continued to receive daily cap, seg, and secured statements on Monday, Tuesday, and Wednesday of that week. The downgrade negatively impacted all numbers on Tuesday (reported to CFTC on Wednesday); however, the cap, seg, and secured nevertheless reported excess seg, excess secured, and excess capital. On Wednesday, the Enforcement Officer of the Day received an inquiry from an MFGI customer asking if his account equity "was segregated or protected against forfeiture." The [CH DSIO Audit Team Leader] spoke with the customer; the [HQ DSIO Senior Supervisory Auditor] asked her to give a "[g]eneral discussion of what protections apply to futures and don't apply to FOREX accounts."<sup>66</sup> The [CH DSIO Audit Team Leader Supervisor] did not alter a previously approved recurring telework day scheduled for Thursday, October 27, and on Tuesday, October 25, the [HQ DSIO Senior Supervisory Auditor] approved an additional episodic telework day for the [CH DSIO Audit Team Leader Supervisor] on Friday, October 28.

Staff in the New York DSIO Audit and Financial Review Office told us they were aware of the ratings downgrade and earnings report, and were not involved with MF Global during the early part of the final week.

At CFTC headquarters, staff and management at all levels likewise indicated they were aware of the ratings downgrade on Monday the 24<sup>th</sup> and the earnings report on Tuesday the 25<sup>th</sup>, and were concerned. The Director of Swaps and Intermediary Oversight, Gary Barnett, had been

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<sup>65</sup> The Chairman and a supervisory economist in the Division of Market Oversight (Chicago Office) received an email on October 18 expressing general concern for MFGI's financial health and the protection of customers; it did not specifically allege that MFGI was under seg or undercapitalized, and it does not appear that this email was circulated or brought to the attention of CFTC officials with responsibility for oversight of MFGI.

<sup>66</sup> Email dated October 26, 12:51pm. Author: [DOE Staff Member 1] (Enforcement Officer of the Day). Recipient: the [HQ DSIO Senior Supervisory Auditor]. The [HQ DSIO Senior Supervisory Auditor] forwarded the email to the Chicago FCM review team, and the [CH DSIO Audit Team Leader Supervisor] assigned the matter to the [CH DSIO Audit Team Leader].

in place only since August 28 of that year; October 24 was his 57<sup>th</sup> day at CFTC. He was not involved with MFGI in the early part of the week. Mr. Barnett stated he depended on management in Chicago to keep him updated. The Director of Clearing and Risk, Ananda Radhakrishnan, also was not involved with MFGI in the early part of the week.

MFGI emails received from the Trustee indicate that on Monday, October 24, 2011,<sup>67</sup> MFGI management prepared briefing points for the CME, CBOE, FINRA, and the NY Fed,<sup>68</sup> but determined not to brief the SEC and CFTC regarding MFGI's response to the downgrade.<sup>69</sup> Essentially, MFGI informed the other entities that it disagreed with Moody's characterization of MFGI's risk management and controls, and stated that MFGI remained confident that it had sufficient resources. MFGI staff and management discussing this issue included [MFGI Employee 3], Laurie Ferber, Christine Serwinski, [MFGI Employee 1], and [MFGI Employee 2].

CFTC staff did have mundane contact with MFGI during the early part of the week. [MFGI Employee 3] of MFGI spoke with a staff auditor in the Chicago CFTC DSIO office to get advice on a press report. The staff auditor agreed with [MFGI Employee 3] that the report was erroneous, and recommended contacting the reporter directly.<sup>70</sup>

The Chairman was aware of the events of the 24th and 25th; in the early part of the week he got his information from public reports. On Wednesday, October 26th, Mr. Radhakrishnan briefed senior staff on MFGI, with the approval or at the request of the Chairman. Staff recalled that the Chairman discussed MFGI at this meeting and predicted based on his industry experience that MFGI could collapse by the end of the week.

On Wednesday, October 26, the Chairman went to the Division of Clearing and Risk at CFTC headquarters and asked staff to obtain documentation of MFGI's current customer fund balances. Separately, on Wednesday Securities and Exchange Commission (SEC) employees in New York called CFTC staff in DSIO in the New York office and requested CFTC attendance at a meeting scheduled at MFGI headquarters in New York on Thursday. These two requests – from the Chairman and from the SEC – motivated CFTC staff to be present in MFGI's Chicago and New York offices on Thursday, with some employees recalling they went over on Thursday at the request of the Chairman, others at the request of the SEC.

It appears that New York staff took the lead in organizing staff participation. New York staff clarified that the books and records for the FCM were in Chicago, that the [CH DSIO Audit Team Leader Supervisor] and the [CH DSIO Audit Team Leader] were

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<sup>67</sup> Each email discussed in this report was created in 2011, unless otherwise noted.

<sup>68</sup> Email dated Oct. 24, 3:01 pm (EST). Author: Laurie Ferber. Recipients: Christine Serwinski, [MFGI Employee 1], [MFGI Employee 2], [MFGI Employee 3].

<sup>69</sup> Email dated Oct. 24, 8:31 pm (CST). Author: Christine Serwinski. Recipients: Laurie Ferber, [MFGI Employee 1], [MFGI Employee 2], [MFGI Employee 3].

<sup>70</sup> Email dated October 24, 1:49 pm (CST). Author: Christine Serwinski. Recipient: [MFGI Employee 1]. Cc: [MFGI Employee 3].

“heavily involved” with MFGI in Chicago, and that both the Chicago and New York CFTC DSIO would send people to the Thursday meeting.<sup>71</sup> While there was debate about the role of the SEC in reviewing documentation housed with the FCM, the message from CFTC management was clear: “I am only concerned that we’re part of a ‘joint’ regulatory visit to our common registrant.”<sup>72</sup> Preparations for the meeting included plans to request documentation of segregated and secured funds as of October 26.

Email received from the MFGI Trustee indicates that on October 26 MFGI prepared for the same meeting from their end,<sup>73</sup> and that on the 26<sup>th</sup> MFGI also began coordinating a document request from CBOE and FINRA for daily liquidity numbers on the reverse repos (i.e., house information not FCM information) and the corresponding rates as well as daily reports regarding current available credit line from affiliates.<sup>74</sup>

#### Thursday, October 27

Email received from the MFGI Trustee indicates that CBOE and FINRA required early submission of net capital figures on October 27.<sup>75</sup>

Ananda Radhakrishnan requested a separate briefing by MFGI to take place on October 27, prior to the scheduled 2 pm meeting.<sup>76</sup> Laurie Ferber informed Mr. Radhakrishnan that they were already “interacting with several CFTC people,” and that CFTC and SEC representatives would be on site at a meeting scheduled that afternoon, and asked Mr. Radhakrishnan to “please let me know if at any time you would like us to provide a general overview briefing or any updates to you or any of your staff.”<sup>77</sup> They settled on 10:00 am (EST) for a phone briefing, and Mr. Radhakrishnan gave Ms. Ferber the dial-in and passcode numbers for this call.<sup>78</sup>

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<sup>71</sup> Email dated October 26, 12:54 pm (EST). Author: [NY DSIO Audit Team Leader 2]. Recipients: [NY DSIO Supervisory Auditor], [NY DSIO Audit Team Leader 1], [NY DSIO Audit Team Leader 3], and the [NY DSIO Audit Team Leader Supervisor].

<sup>72</sup> Email dated October 26, 5:39 pm (EST). Author: the [NY DSIO Audit Team Leader Supervisor]. Recipients: [NY DSIO Audit Team Leader 2], and the [CH DSIO Audit Team Leader Supervisor].

<sup>73</sup> Email dated October 26, 8:53 pm (EST). Author: Laurie Ferber. Recipients: Henri Steenkamp, Christine Serwinski, John Corzine, [MFGI Employee 4].

<sup>74</sup> Email dated October 26, 10:17 pm (EST). Author: Christine Serwinski. Recipients: [MFGI Employee 1], [MFGI Employee 2], [MFGI Employee 3], Vinay Mahajan, Edith O’Brien, [MFGI Employee 4], and Laurie Ferber.

<sup>75</sup> Email dated October 27, 7:53 am (CST). Author: [MFGI Employee 5]. Recipients: Edith O’Brien and [MFGI Accountant 1].

<sup>76</sup> Email dated October 27, 8:08 am (EST). Author: Ananda Radhakrishnan. Recipient: Laurie Ferber. Cc: the [HQ DSIO Senior Supervisory Auditor], and [HQ DCR Deputy Director].

<sup>77</sup> Email dated October 27, 7:06 am (EST). Author: Laurie Ferber. Recipient Ananda Radhakrishnan.

<sup>78</sup> Email dated October 27, 8:57 am (EST). Author: Ananda Radhakrishnan. Recipient: Laurie Ferber. Cc: the [HQ DSIO Senior Supervisory Auditor], [HQ DCR Deputy Director], [CH DCR Supervisory Risk Analyst], the [HQ DCR Senior Supervisory Attorney], the [HQ DSIO Supervisory Auditor], the [CH DSIO Audit Team Leader Supervisor], [DCR staff].

During the morning and early afternoon of October 27<sup>th</sup>, CFTC NY DSIO staff continued to plan for the afternoon meeting, stating that “at minimum” CFTC would retrieve the “seg and secured statement for the last week of business,” along with an explanation of the customer funds investments reported in the September 30 seg statement as well as background information regarding the August 2011 increase in net capital required by FINRA.<sup>79</sup> The **[CH DSIO Audit Team Leader Supervisor]** and CFTC DSIO staff in Chicago were able to provide this information.

Email received from the Trustee indicates MFGI held a pre-meeting at 11 am (EST) to prepare for the afternoon meeting.<sup>80</sup> Also prior to the 2 pm meeting, the SEC contacted CFTC New York DSIO staff to arrange a post-meeting with representatives of SEC, CFTC, and the NY Fed.<sup>81</sup>

On Thursday, October 27, the Chairman was informed that CFTC staff was on site at MFGI. The meeting took place at 2 pm (EST), and CFTC reports that the **[CH DSIO Audit Team Leader]**, and three staff auditors were on site at MFGI’s Chicago Office,<sup>82</sup> and **[NY DSIO Audit Team Leader 2]**, along with DSIO staff auditors **[NY DSIO Staff Auditor 2]** and **[NY DSIO Staff Auditor 1]**, were on site in New York.<sup>83</sup> The **[CH DSIO Audit Team Leader Supervisor]** participated by phone during her regularly recurring telework day.<sup>84</sup> The **[CH DSIO Audit Team Leader Supervisor]** represented she would not have gone with staff to the MFGI Offices as her supervisory duties pertained to the team responsible for MFGI as well as other teams; moreover, CME was reporting MFGI compliant with all obligations throughout the week. The **[NY DSIO Audit Team Leader Supervisor]** did not visit the MFGI New York Offices.

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<sup>79</sup> Email dated October 27, 9:45 am (EST). Author: **[NY DSIO Audit Team Leader 2]**. Recipients the **[CH DSIO Audit Team Leader Supervisor]**, the **[CH DSIO Audit Team Leader]**. Cc: **[NY DSIO Staff Auditor 1]**, **[NY DSIO Staff Auditor 2]**.

<sup>80</sup> Appointment notice for meeting to be held October 27 at 11 am (EST), subject “Prep for SEC/CFTC Meeting;” required attendees: Michael Stockman, Vinay Mahajan, Edith O’Brien, **[MFGI Employee 6]**, **[MFGI Employee 3]**, **[MFGI Employee 2]**, Christine Serwinski, **[MFGI Employee 7]**, **[MFGI Employee 8]**, **[MFGI Employee 9]**, **[MFGI Employee 10]**; optional attendees: Laurie Ferber, **[MFGI Employee 4]**, Henri Steenkamp, Bradley Abelow.

<sup>81</sup> Email dated October 27, 1:01 pm (EST). Author **[NY DSIO Audit Team Leader 2]**. Recipients: the **[CH DSIO Audit Team Leader]**, the **[CH DSIO Audit Team Leader Supervisor]**. Cc: the **[HQ DSIO Senior Supervisory Auditor]**, the **[NY DSIO Audit Team Leader Supervisor]**.

<sup>82</sup> 440 South La Salle St., Chicago, IL, about a 15 minute walk from the CFTC Chicago Office located at 520 W. Monroe.

<sup>83</sup> Email dated October 27, 1:50 pm (EST), announcing Chicago attendees at the meeting. Author: Chicago staff auditor **[CH DSIO Staff Auditor 2]**. Recipient: **[MFGI Employee 11]**. Cc: **[MFGI Employee 3]**, Christine Serwinski. MFGI’s New York Office, 55 East 52<sup>nd</sup> St, NY, NY., was about 7 miles or a 15-30 minute cab ride from the CFTC New York Office at 140 Broadway, NY, NY.

<sup>84</sup> The CME timeline (at page 11 of the .pdf) differs; it states that the **[CH DSIO Audit Team Leader Supervisor]** was on site at MFGI on October 27.

About a half hour after Chicago CFTC DSIO staff arrived at MFGI, representatives of CME also arrived. This meeting was not planned. CFTC New York DSIO staff did not see CME staff at the meeting in New York. Around 4:30 pm (EST) the [CH DSIO Audit Team Leader] requested “all supporting documentation for the October 26, 2011, Segregation and Secured Computations,” including:

- Bank statements
- Exchange Statements
- Carrying Broker Statements
- Firm reconciliations
- Moneyline report
- Investment reports
- Basically, all supporting documentation used to prepare the segregation and secured computations.<sup>85</sup>

Email received from the Trustee indicate that MFGI considered the request to come from CFTC and CME, set up a special file to hold the responsive documents,<sup>86</sup> and assigned the following MFGI employees and operating divisions to CFTC’s request, as follows:<sup>87</sup>

- |                               |                    |
|-------------------------------|--------------------|
| 1. Bank statements            | [MFGI Employee 12] |
| 2. Exchange Statements        | [MFGI Employee 13] |
| 3. Carrying Broker Statements | [MFGI Employee 13] |
| 4. Firm reconciliations       | [MFGI Employee 13] |
| 5. Moneyline report           | REGULATORY         |
| 6. Investment reports         | TREASURY           |

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<sup>85</sup> Email dated October 27, 3:37 pm (CST). Author: the [CH DSIO Audit Team Leader]. Recipient: [MFGI Employee 15].

<sup>86</sup> Email dated October 27, 4:42 pm (CST). Author: [MFGI Employee 15]. Recipients: [MFGI Employee 12], [MFGI Employee 13], [MFGI Employee 5], [MFGI Employee 14]. Cc: Edith O’Brien, [MFGI Employee 3].

<sup>87</sup> Email dated October 27, 3:52 pm (CST). Author: [MFGI Employee 15]. Recipients: Edith O’Brien, [MFGI Employee 14]. Cc: [MFGI Employee 3], Christine Serwinski, [MFGI Employee 2].



7. Internal reverse repurchase agreements shown on a mark to market investment summary report. TREASURY-REPO VALUATION

The [CH DSIO Audit Team Leader] left the MFGI Chicago Office at the end of the day on October 27 without the records. Email received from the Trustee indicates that MFGI began emailing responsive documents to Chicago DSIO staff on Friday.<sup>88</sup>

Friday, October 28

In the morning of October 28, 2011, the Chairman reviewed with staff financial information for MFGI as well as its FOCUS report for September 30. The Chairman noticed a \$600 million decrease in 30.7 funds from close of September to October 27. He learned from staff that MFGI was compliant with CFTC regulations under the so-called alt method, meaning in the event of bankruptcy customer secured funds may not be sufficient to cover customer account balances.<sup>89</sup> He also noticed a tri-party repo with an entity called “MF Securities.” Chairman Gensler directed Ananda Radhakrishnan and staff in headquarters to obtain documentation for the tri-party repo, including evidence of the collateral (i.e., securities on hand). He also directed CFTC staff to obtain documentation of MFGI’s seg balances. CFTC staff briefed him on MFGI’s attempts to find a buyer and told him which companies were interested in purchasing MFGI at that time. During the morning, Chairman Gensler along with Mr. Radhakrishnan spoke briefly with CME Executive Chairman Terry Duffy about MFGI customer funds status.<sup>90</sup>

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<sup>88</sup> Email dated October 28, 2011, 2:56 pm (CST). Author [MFGI Employee 5]. Recipient: the [CH DSIO Audit Team Leader](attachments: money line documents for October 26).

<sup>89</sup> From the Trustee’s Report, page 37:

There are two methods under which a FCM may compute its secured amount requirement. The common method historically used by FCMs to determine their secured amount requirement is the Net Liquidating Method, which is calculated from the sum of the net liquidating value of customer accounts plus any customer securities held (the “Netliq Requirement”). (See Foreign Futures and Options Guide, The Joint Audit Committee, December 2001, at 5-5.) This method mirrors the computation used to calculate the Segregation Requirement for customer trading on U.S. exchanges. Alternatively, an FCM may elect to use the Alternative Method in calculating the secured amount requirement. The Alternative Method is the sum of an account’s risk maintenance margin requirement (“MMR”), open trade equity (“OTE”), securities and net options value (“NOV”) (the “Alternative Secured Requirement”). See 17 C.F.R. § 1.3(rr); Foreign Futures and Options Guide, The Joint Audit Committee, December 2001, at 5-6.

The Alternative Secured Requirement is computed on a customer account by customer account basis and results in a significantly lower regulatory requirement as compared to the Netliq Requirement. Thus, use of the Alternative Method meant that the regulatory requirement for funds to be kept in secured accounts — the Alternative Secured Requirement — was significantly lower than actual customer net liquidating balances. The Secured Statement filed with the regulators showed the amount required to be secured under the Alternative Method. The “Regulatory Excess” was the difference between the Netliq Requirement and the Alternative Secured Requirement. Prior to the acquisition of Refco, MFGI used the Net Liquidating Method, while Refco used the Alternative Method. Around the time MFGI acquired the assets from Refco in 2005, MFGI decided to use the Alternative Method.

<sup>90</sup> CME Timeline, supra fn. 5, at page 12 of the .pdf.

Also during the morning, the Chairman participated in a conference call in CFTC staff offices with Ananda Radhakrishnan, Gary Barnett, the [HQ DSIO Senior Supervisory Auditor], and from MFGI Laurie Ferber and Edith O'Brien, in which CFTC wanted to know what steps MFGI was taking to increase liquidity.

Later that morning, the Commission's regularly scheduled closed surveillance meeting took place at 11 am.<sup>91</sup> MFGI was not on the meeting agenda, but the Chairman asked at the start of the meeting for an update. The [HQ DSIO Senior Supervisory Auditor] did not attend; he left early that day to begin a one week vacation, and spoke with the [CH DSIO Audit Team Leader Supervisor] before he left for the day.<sup>92</sup>

The [HQ DSIO Supervisory Auditor] presented information to the Commission regarding MFGI. She told the Commission that MFGI was an FCM registered with the CFTC and a broker-dealer registered with the SEC, that all information from MFGI filings indicated that MFGI was presently in compliance with regulatory requirements, and that CFTC staff were in the NY and Chicago offices of MFGI on Thursday and that day. She gave the current excess seg and secured balances reported by MFGI. She stated that MFGI was reporting full compliance with capital requirements. She stated that 44% of the reported seg funds were held at the various clearing houses and that CFTC staff was in the process of getting further detailed information about the funds that were not held at the clearing houses. She stated that staff would be getting additional detail for secured funds as well.

Chairman Gensler stated that MFGI's handling of seg funds tests the requirements of CFTC regulation 1.25. The Chairman stated his concern that 56% of MFGI's customer money may be inside the MF broker-dealer funding their house securities positions. Staff stated that MFGI was one of the proponents of keeping the status quo for regulation 1.25, noting that in-house transactions either have to be unwound every day or on demand, and must be retained in an account that is denominated as a 4d customer account with segregation.

Mr. Radhakrishnan explained that the recent multiple ratings downgrades made it much more expensive for MFGI to borrow money, and indicated that counterparties likely would refuse to do business with MFGI, causing liquidity issues. The question would be whether MFGI could continue to borrow money and sell off house assets sufficient to permit it to meet net capital requirements during the liquidity drain.

Staff explained that the ratings downgrade was due to trade activity not by the FCM or its customers, but at the holding company level. Staff explained that the holding company was invested in sovereign debt, providing information that accorded with public accounts available at that time. Staff explained the FINRA determination in August 2011 that caused the holding

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<sup>91</sup> The Sunshine Act notice is published here: 76 Fed. Reg. 59118 (Sept 23, 2011).  
<http://www.gpo.gov/fdsys/pkg/FR-2011-09-23/pdf/FR-2011-09-23.pdf>.

<sup>92</sup> The [HQ DSIO Senior Supervisory Auditor] was updated and in communication with CFTC during the final days of MFGI. He told us he would have skipped the vacation if he had not received confirmation on Friday that MFGI was reporting compliance with cap, seg, and secured requirements, and that CME was reporting MFGI's compliance with exchange obligations.

company to increase its haircuts on sovereign debt and report a retroactive net capital deficiency for July 2011. Staff stated that the size of the sovereign debt holdings caused the ratings downgrades.

Mr. Radhakrishnan discussed the possibility of a sale of MFGI and with staff explained the process. Staff stated they had been and would continue to be in contact with the SEC, the NY Fed, and the exchanges.

As he did during the Senior Staff meeting on Wednesday, the Chairman again predicted that, based on his market experience, these situations usually do not last long and predicted that MFGI would be gone before the next NY Fed auction scheduled the following week.

Staff emphasized that the FCM was stable but would very likely have to be sold due to the liquidity crunch caused by the ratings downgrade. The Chairman emphasized that the CFTC's regulatory remit is the protection of customer funds and of the clearing houses. The Chairman also continued to express concern regarding the treatment of customer funds by MFGI. Staff stressed that a sale of the FCM, with transfer of customer accounts and positions, would be the best outcome.

During the discussion of MFGI at Friday's surveillance briefing there was no discussion of whether customers were withdrawing funds from MFGI. NY Times reports on October 26 and 27 did not indicate customers were leaving the firm, while Fox Business News claimed the opposite.<sup>93</sup> Later, the Trustee would report that there was a run on the bank during its last week of operation, stating that "[t]he simultaneous occurrence of a customer 'run on the bank' and unwinds of repo counterparty and proprietary positions within a three-day timeframe overwhelmed the Firm."<sup>94</sup>

In the afternoon of Friday October 28, staff continued to exchange information with FINRA; the [CH DSIO Audit Team Leader Supervisor] spoke to Grace Vogel at FINRA and informed the [HQ DSIO Senior Supervisory Auditor], as well as the [HQ DSIO Supervisory Auditor] and the [CH DSIO Audit Team Leader], that MFGI was in liquidity mode, looking for a buyer, gave the anticipated buyer, and further stated that the

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<sup>93</sup> Although the Trustee reported that there was a "run on the bank" at MFGI during its last week, it does not appear to have been widely reported at the time. On October 26 the New York Times reported "it is not clear whether [MFGI's] clients are staying put." *Europe's Debt Threatens MF Global, and Corzine*, NY Times, Oct 26, 2011, 9:16 PM (<http://dealbook.nytimes.com/2011/10/26/europes-debt-threatens-mf-global-and-corzine/>). On October 27, the New York Times, claiming to have information from "people close to MF Global," reported that "as of Thursday afternoon, only a small percentage of client funds – in the low single digits – had left the firm." *MF Global Fights to Stay Afloat After Two Credit Downgrades*, NY Times, Oct 27, 2011, 3:41 pm (updated 9:07 pm)(<http://dealbook.nytimes.com/2011/10/27/mf-global-shares-continue-plunge-after-fitch-downgrade/>). However, on October 28, Charles Gasparini of Fox Business News reported that customers were fleeing and there was a run on the bank at MF Global. *Fox Business Network: MF Global "Will Not Survive The Weekend,"* October 28, 2011, © 2011 Benziga.com.

<sup>94</sup> Trustee's report, page 149.

parent corporation was continuing to sell its house positions.<sup>95</sup> The [HQ DSI0 Supervisory Auditor] let the [CH DSI0 Audit Team Leader Supervisor] and others know that the Chairman and Mr. Radhakrishnan had separately spoken with Grace Vogel.<sup>96</sup> Ms. Vogel discussed potential buyers for MFGI. The Chairman spoke with Grace Vogel from his home that evening, and learned that “MF Securities” was not known to her as an MF Global entity.

[HQ DCR Senior Supervisory Attorney] began preparing for a possible bankruptcy of the FCM, and exchanged email with Ken Caputo, an attorney for SIPC, discussing the provisions CFTC would need in any bankruptcy filing and asking that CFTC be furnished a draft prior to any filing.

Throughout October 28th, CFTC staff and management were also in communication with CME requesting information regarding the location of segregated funds that were not with the clearinghouse, as well as the status of secured fund balances, which were being requested to be raised to the net liq requirement rather than the alt method amount. CME represented that MFGI was in compliance with its obligations to CME as of October 26.<sup>97</sup> During the afternoon, Mr. Radhakrishnan and the [HQ DSI0 Supervisory Auditor] spoke with CME President Kimberly Taylor and [CME Manager 1], and around 5 pm (EST) the [HQ DSI0 Supervisory Auditor] informed staff and management that MFGI had committed to increasing secured funds from the smaller amount permitted under the alt method to the net liq amount that would be required for 4d seg.<sup>98</sup> A short time later, staff reported participation in a Joint Advisory Committee (JAC) teleconference, and informed that all of the exchanges reported MFGI was meeting its obligations and that “some” customers had transferred their accounts.<sup>99</sup> An update JAC call was scheduled for Monday October 31, 10 am.<sup>100</sup>

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<sup>95</sup> Email dated Friday October 28, 2:26 pm (CST). Author: the [CH DSI0 Audit Team Leader Supervisor]. Recipients: the [HQ DSI0 Senior Supervisory Auditor] and the [CH DSI0 Audit Team Leader].

<sup>96</sup> Email dated Friday October 28, 2:56 pm (CST). Author: the [HQ DSI0 Supervisory Auditor]. Recipients: the [CH DSI0 Audit Team Leader Supervisor], the [HQ DSI0 Senior Supervisory Auditor], and the [CH DSI0 Audit Team Leader]. Cc: Ananda Radhakrishnan and Gary Barnett.

<sup>97</sup> Email string dated Friday, October 28, beginning 10:37 am and continuing to 2:44 pm (EST), between and among [CME Auditor 1], [CME Auditor 2], [CME Manager 1], [CME Auditor 3], as well as the [HQ DSI0 Senior Supervisory Auditor], the [HQ DSI0 Supervisory Auditor], the [CH DSI0 Audit Team Leader Supervisor], the [CH DSI0 Audit Team Leader], and Ananda Radhakrishnan.

<sup>98</sup> Email dated Friday, October 28, 4:57 pm (EST). Author: the [HQ DSI0 Supervisory Auditor]. Recipient: the [HQ DSI0 Senior Supervisory Auditor]. Cc: Gary Barnett, Ananda Radhakrishnan, and the [CH DSI0 Audit Team Leader Supervisor]. Increasing the secured funds to the net liq method was necessary to prevent a potential shortfall in customer funds to assure distribution to customers in the event of a SIPC or bankruptcy filing (but was not necessary in order to assure compliance with CFTC regulations).

<sup>99</sup> Email dated Friday, October 28, 5:19 pm (EST). Author: the [HQ DSI0 Supervisory Auditor]. Recipients: the [HQ DSI0 Senior Supervisory Auditor], Gary Barnett, and Ananda Radhakrishnan; cc: the [CH DSI0 Audit Team Leader Supervisor].

<sup>100</sup> Email dated Friday, October 28, 5:19 pm (EST). Author: the [HQ DSI0 Supervisory Auditor]. Recipients: the [HQ DSI0 Senior Supervisory Auditor], Gary Barnett, and Ananda Radhakrishnan. Cc: the [CH DSI0 Audit Team Leader Supervisor].

In addition, on October 28, 2011, a CFTC New York DMO staffer sent to MFGI an “urgent” request for the large trader file for October 27, 2011, naming two specific entities to be included in the response.<sup>101</sup> MFGI satisfied the request in about twenty minutes.<sup>102</sup>

In the morning on Friday, October 28, the [CH DSIO Audit Team Leader], and two staff auditors headed over to the Chicago Office of MFGI to collect the documentation for the cap, seg, and secured statement issued on Thursday, October 27.<sup>103</sup> This would permit CFTC to verify the reported seg and secured customer fund amounts as of the close of business on Wednesday, October 26. The request for documentation had been made the day before and MFGI had yet to fulfill it. CME staff arrived within 30 minutes of CFTC staff; just as on Thursday, CME’s arrival was by coincidence and was not planned. CFTC Staff did not visit the MFGI NY Office.

CFTC staff told OIG that they were not going to leave MFGI’s Chicago Office on Friday without documentation to support Wednesday’s cap, seg, and secured statement, and MFGI gave the disc to CFTC staff around 5:30 pm, and receipt of the disc was reported to the [CH DSIO Audit Team Leader Supervisor] by phone. Interviews with CFTC staff indicate that documents were received piecemeal, with MFGI sending by email what they could, and the rest being furnished to CFTC staff at the end of the day on a disc, because the thumb drive used by CFTC staff was not compatible with MFGI’s systems.<sup>104</sup>

CFTC staff told us they reviewed the disc after they received it and used the records to complete testing for Wednesday’s cap, seg, and secured statement. Staff told us the supporting documentation appeared to be in order; however, CFTC staff later learned that there were transactions that were not booked and not included. Therefore, it appears CFTC received documentation for a cap, seg, and secured statement that was inaccurate.

The Trustee’s report is enlightening on this point. According to the Trustee, as of October 26, MFGI erroneously reported to CFTC and others excess seg funds of more than \$116 million rather than revealing a seg deficiency exceeding \$298 million.<sup>105</sup> And, of course, by the

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<sup>101</sup> Email dated October 28, 1:03 pm (EST). Author: [NY DMO Staff 1]. Recipient: [MFGI Employee 16]. Cc: [MFGI Employee 17].

<sup>102</sup> Email dated October 28, 1:26 pm (EST). Author: [NY DMO Staff 1]. Recipient: [MFGI Employee 18]. Cc: [MFGI Employee 17] and [MFGI Employee 19] (confirming receipt of the file).

<sup>103</sup> The CME timeline differs; it indicates that the [CH DSIO Audit Team Leader Supervisor] was also on site on October 28. (CME timeline, supra fn. 5, at page 12 of the .pdf.)

<sup>104</sup> CFTC staff told us that secure thumb drive compatibility issues are not unusual.

<sup>105</sup> The Trustee’s report described the error as follows (at page 122, footnote omitted):

The Trustee’s investigation has revealed that, while some personnel may have believed they were still in regulatory compliance, MFGI experienced a shortfall in 4d customer funds beginning during the day on Wednesday October 26. When the Segregation Statement was prepared on October 27 as of the close of business on October 26, it showed an excess of \$116,164,133. A review by the Trustee’s professionals, however, revealed that MFGI had failed to deduct \$415 million of outgoing wires from the segregated assets, which overstated the cash balances that day by \$415 million. (See Annex D.) When that error is taken into account, there is a deficiency of Customer

time CFTC on Friday, October 28th, received MFGI's documentation for Wednesday's erroneous seg balances, the seg deficiency had grown.

The [CH DSIO Audit Team Leader Supervisor] spoke with the [CH DSIO Audit Team Leader], Grace Vogel, and the [HQ DSIO Supervisory Auditor] throughout the day.

Saturday, October 29

On Saturday, October 29, nobody from CFTC attended the MFGI Offices in Chicago or New York. In the morning the Chairman spoke briefly with Terry Duffy, CME, regarding customer funds. Around 10:45 am, the [HQ DSIO Senior Supervisory Auditor] emailed the [HQ DSIO Supervisory Auditor] and let her know he had been in communication with [SEC Senior Auditor 2]; he asked the [HQ DSIO Supervisory Auditor] to update SEC with all current information.<sup>106</sup> Around 12:30 pm, the [HQ DSIO Supervisory Auditor] let the [HQ DSIO Senior Supervisory Auditor] and others know that CFTC and SEC were keeping the lines of communication open and that the [CH DSIO Audit Team Leader Supervisor] would be speaking with CME later that day. Essentially, everyone was waiting for the sale to take shape and agreed to email notice of any significant new developments, with the ultimate purchaser likely to be known on Sunday. An update call was scheduled for 10 am on Sunday.<sup>107</sup>

Around 4:00 pm on Saturday, Ananda Radhakrishnan notified staff and management at CFTC that the Chairman had spoken with Mary Miller<sup>108</sup> and learned that the NY Fed revoked MFGI's primary dealer license. Ananda also informed staff and management that MFGI retained Sullivan and Cromwell to advise regarding the possible sale and possible bankruptcy.<sup>109</sup> The [HQ DSIO Supervisory Auditor] let people know that Bloomberg was reporting that the holding company was discussing options for sale.<sup>110</sup>

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Segregated funds in the amount of \$298,835,867 on October 26. This deficiency continued and increased throughout the week.

<sup>106</sup> Email dated October 29, 10:44 am (EST). Author: the [HQ DSIO Senior Supervisory Auditor]. Recipient: the [HQ DSIO Supervisory Auditor].

<sup>107</sup> Email dated October 29, 12:26 pm (EST). Author: the [HQ DSIO Supervisory Auditor]. Recipients: the [HQ DSIO Senior Supervisory Auditor], the [CH DSIO Audit Team Leader Supervisor], Gary Barnett, and Ananda Radhakrishnan.

<sup>108</sup> Mary Miller, Under Secretary for Domestic Finance, U.S. Treasury.  
<http://www.treasury.gov/about/organizational-structure/Pages/miller-e.aspx>.

<sup>109</sup> Email dated October 29, 4:10 pm (EST). Author: Ananda Radhakrishnan. Recipients: [HQ DCR Deputy Director], the [HQ DCR Senior Supervisory Attorney], [CH DCR Supervisory Risk Analyst], the [HQ DSIO Senior Supervisory Auditor], the [CH DSIO Audit Team Leader Supervisor], the [HQ DSIO Supervisory Auditor], Gary Barnett; cc: [HQ DCR Supervisory Attorney], [Chairman's Office Attorney 1].

<sup>110</sup> Email dated October 29, 4:31 pm (EST). Author: the [HQ DSIO Supervisory Auditor]. Recipients: Ananda Radhakrishnan, the [HQ DSIO Senior Supervisory Auditor], the [CH DSIO Audit Team Leader Supervisor], Gary Barnett.

The Chairman called the **[HQ DCR Senior Supervisory Attorney]** at 7 pm on Saturday evening. He didn't reach him immediately, but on Saturday evening the Chairman spoke with him, along with Gary Barnett, and Ananda Radhakrishnan, got a status update, and again asked for documentation of the tri-party repo and for verification of MFGI's assertion on Friday that the Part 30 funds would be increased from the alt method amount to the net liq amount. He also wanted Friday's cap, seg and secured numbers. He did not want to wait until Monday at noon for the Friday cap, seg, and secured statement. Separately, the Chairman learned from Grace Vogel that **[a Sullivan and Cromwell Attorney]** was representing MFGI in connection with the possible sale and possible bankruptcy.

Around 9 pm on Saturday the Chairman spoke with **[the Sullivan and Cromwell Attorney]**. The Chairman asked if CFTC staff could get briefed on any bankruptcy contingency plans, and **[the Sullivan and Cromwell Attorney]** agreed. Around 10:30 pm the Chairman spoke with Chairman Mary Schapiro of the SEC to discuss status. After the 10:30 pm phone call, the Chairman called **[the Sullivan and Cromwell Attorney]** a second time to discuss the probability of a bankruptcy filing. At 11:30 pm on Saturday, Chairman Gensler received a call from CFTC staff and at their request joined an ongoing conference call with Laurie Ferber, Brad Abelow, the **[HQ DCR Senior Supervisory Attorney]**, and Gary Barnett, and others. This call was the briefing on bankruptcy contingency plans for the holding company, with a companion sale of the FCM MFGI. Chairman Gensler had requested this briefing of **[the Sullivan and Cromwell Attorney]** earlier in the evening. In addition, MFGI representatives updated the participants on the ongoing portfolio liquidation.

Around 11 pm the **[HQ DCR Senior Supervisory Attorney]** notified Ananda Radhakrishnan, Dan Berkovitz, **[HQ DCR Deputy Director]**, **[OGC Attorney 1]**, an attorney in OGC charged with bankruptcy duties (the OGC Attorney), Gary Barnett, and **[OGC Deputy]** that, based on information received from the Chairman, the holding company would likely file for bankruptcy on Sunday, and there might also be a SIPC proceeding with respect to MFGI.<sup>111</sup> The OGC Attorney later replied he would be available on Sunday.<sup>112</sup> Later still, MFGI arranged a conference call for the next day to begin at 10 am to discuss bankruptcy contingency plans.<sup>113</sup>

#### Sunday, October 30

On October 30, status calls among CFTC employees began around 7 am EST. Gary Barnett let the **[HQ DSIO Senior Supervisory Auditor]** and the **[HQ DSIO**

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<sup>111</sup> Email dated October 29, 11 pm (EST). Author: the **[HQ DCR Senior Supervisory Attorney]**. Recipient: Ananda Radhakrishnan. Cc: Dan Berkovitz, **[HQ DCR Deputy Director]**, the OGC Attorney, Gary Barnett, **[OGC Deputy]**.

<sup>112</sup> Email dated October 30, 1:49 am (EST). Author: the OGC Attorney. Recipient: the **[HQ DCR Senior Supervisory Attorney]**. Cc: Dan Berkovitz, **[HQ DCR Deputy Director]**, Gary Barnett, **[OGC Deputy]**.

<sup>113</sup> Email dated October 30, 1:58 am (EST). Author: Laurie Ferber. Recipient: Gary Barnett.

**Supervisory Auditor**] know that there were multiple calls the night before, and that nothing was finalized with regard to a sale of MFGI, a bankruptcy petition for the holding company, or the outcome of portfolio auctions. Gary Barnett stated that MFGI personnel in Treasury could not confirm that funds had been deposited to increase the secured funds, but they promised an update that day.<sup>114</sup> The [**CH DSIO Audit Team Leader Supervisor**] spoke with the [**HQ DSIO Supervisory Auditor**] on Sunday during the morning.

During the morning of the 30th, Chairman Gensler learned that CFTC was still waiting for supporting documentation for the Friday cap, seg and secured balances, as well as documentation that the 30.7 funds had been increased to net liq levels on Friday, and documentation of the tri-party agreement with MF Securities. Chairman Gensler spoke with [**the Sullivan and Cromwell Attorney**] and did not mince words regarding his concern about the level of cooperation from MFGI in these matters.

Around 10 am Gary Barnett requested a post-meeting with Laurie Ferber following the previously scheduled conference call for that morning, to discuss “hard facts” and the requested cap, seg, and secured amounts (with documentation) for Friday, stating that the Chairman was requesting this information “and wants us to pursue it using all possible means.”<sup>115</sup> At 10:47 am (EST) [**MFGI Attorney 2**]<sup>116</sup> emailed Edith O’Brien and [**MFGI Employee 3**] as follows: “We must email the [**CH DSIO Audit Team Leader Supervisor**] at CFTC in 5 minutes” and instruct whether the cap, seg, and secured numbers for October 28 will be provided by noon.<sup>117</sup>

Around noon (EST), [**MFGI Attorney 2**] let the [**CH DSIO Audit Team Leader Supervisor**] and others at CFTC know that 2 pm (EST) was the estimated time that Friday’s cap, seg, and secured numbers would be available because of a scheduled system test performed by FIA that delayed the receipt of data.<sup>118</sup> MFGI employees understood that CFTC was giving them until 2 pm (EST) (or 1 pm CST) to supply the seg and secured numbers for close of business Friday.<sup>119</sup>

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<sup>114</sup> Email dated October 30, 7:12 am (EST). Author: Gary Barnett. Recipient: the [**HQ DSIO Supervisory Auditor**]. Cc: the [**HQ DSIO Senior Supervisory Auditor**].

<sup>115</sup> Email dated October 30, 10:00 am (EST). Author: Gary Barnett. Recipient: Laurie Ferber.

<sup>116</sup> [**MFGI Attorney 2**] was a former Director for the CFTC Division of Enforcement (1983-1995). See, Crawford, W. (1995, Mar. 9), CFTC Chief Reorganizes Enforcement Staff, *Chicago Tribune*. (Available at: [http://articles.chicagotribune.com/1995-03-09/business/9503090162\\_1\\_cftc-mary-l-schapiro-enforcement](http://articles.chicagotribune.com/1995-03-09/business/9503090162_1_cftc-mary-l-schapiro-enforcement)).

<sup>117</sup> Email dated October 30, 10:47 am (EST). Author: [**MFGI Attorney 2**]. Recipients: Edith O’Brien and [**MFGI Employee 3**].

<sup>118</sup> Email dated October 30, 12:11 pm (EST). Author: [**MFGI Attorney 2**]. Recipient: the [**CH DSIO Audit Team Leader Supervisor**]. Cc: the [**HQ DCR Senior Supervisory Attorney**], Gary Barnett, and Laurie Ferber.

<sup>119</sup> Email dated October 30, 12:05 pm (CST). Author: [**MFGI Employee 3**]. Recipients: [**MFGI Employee 5**] and [**MFGI Accountant 1**].



Throughout the day, CFTC staff deployed to the MFGI Offices in New York<sup>120</sup> and Chicago, and to CFTC's Offices:

- At around 11 am (CST) Mr. Barnett and Mr. Radhakrishnan determined during a conference call with staff that **[CH DSIO Audit Team Leader Supervisor]** should go to the MFGI Chicago Office. She arrived at MFGI around 1 or 1:30 (CST).
- The **[HQ DSIO Supervisory Auditor]** called **[NY DSIO Audit Team Leader 2]** around noon, EST time, and who in turn called **[NY DSIO Audit Team Leader 1]**. The New York Team Leaders got to the MFGI Offices in New York about 2:00-2:30 pm (EST).<sup>121</sup>
- The **[CH DSIO Audit Team Leader Supervisor]** called the **[CH DSIO Audit Team Leader]**; the **[CH DSIO Audit Team Leader]** arrived at the Chicago MFGI Office around 3 pm (CST).
- The Chairman called **[NY Enforcement Senior Supervisory Attorney]** at 1 pm (EST), but did not immediately reach him. The **[NY Enforcement Senior Supervisory Attorney]** arrived at the CFTC NY Offices around 3:30 to 4 pm (EST).
- The **[HQ DCR Senior Supervisory Attorney]** was at his desk at CFTC headquarters by 10 am (EST).
- The OGC Attorney received a call at 10 am (EST) and went to CFTC headquarters (with luggage).

CME arrived at MFGI in Chicago around 2 pm (CST).<sup>122</sup> CME staff arrived at MFGI in NY after 3 pm (EST).<sup>123</sup> CFTC staff saw SEC staff on site in New York.

When she arrived, MFGI Chicago staff told the **[CH DSIO Audit Team Leader Supervisor]** they were not aware of the 1 pm (CST) deadline to provide Friday's cap, seg and

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<sup>120</sup> We presume NY CFTC staff trekked in on Sunday not without some difficulty. On October 30, 2011, "millions of people across the Northeast were without power after an unusual storm dumped record amounts of snow." See, Maslin, S. (2011, Oct. 30), Storm Leaves More Than 2 Million Without Power, *The New York Times*. (Available at: [http://www.nytimes.com/2011/10/31/us/storm-leaves-more-than-2-million-without-power.html?pagewanted=all&\\_r=0#](http://www.nytimes.com/2011/10/31/us/storm-leaves-more-than-2-million-without-power.html?pagewanted=all&_r=0#))

<sup>121</sup> Email dated Sunday October 30, 1:23 pm (EST). Author: **[NY DSIO Audit Team Leader 2]**. Recipients: **[MFGI Attorney 2]**, the **[HQ DCR Senior Supervisory Attorney]**, Edith O'Brien. Cc: the **[CH DSIO Audit Team Leader Supervisor]**, Gary Barnett, the **[HQ DSIO Supervisory Auditor]**, **[NY DSIO Audit Team Leader 1]**.

<sup>122</sup> CME Timeline, *supra fn. 5*, at page 14 of the .pdf.

<sup>123</sup> Id.

secured numbers, and that they would have them by 2 pm (CST). This assertion of course was inaccurate, as Chicago MFGI employees had previously acknowledged the deadline.<sup>124</sup> MFGI missed the 2 pm (EST) deadline to provide the cap, seg, and secured numbers for Friday, and MFGI assured the [HQ DCR Senior Supervisory Attorney] that the information would be provided at 3 pm (EST). Around 2 pm (CST), [MFGI Accountant 1] indicated to the [CH DSIO Audit Team Leader Supervisor] there was a potential seg problem.<sup>125</sup>

About 2:25 pm (CST), the [CH DSIO Audit Team Leader Supervisor] documented the missed deadline and asked MFGI to “[p]lease provide a firm time when the segregated, secured and capital computations for Friday, October 28<sup>th</sup> ... will be provided.”<sup>126</sup> At 3:40 (EST) the [HQ DCR Senior Supervisory Attorney] informed MFGI that “the lack of data is driving adverse inferences” and stressed CFTC’s need to receive the information and underlying support immediately.<sup>127</sup> At 2:46 pm (CST) [MFGI Employee 3] of MFGI promised to send the preliminary daily net capital for Friday “shortly,”<sup>128</sup> and at 3 pm (CST) MFGI gave the [CH DSIO Audit Team Leader Supervisor] net cap figures for Friday and they were fine.<sup>129</sup> At 4:16 pm (EST) Laurie Ferber apologized for not contacting the [HQ DCR Senior Supervisory Attorney] sooner, promised an update “soon,” and stated that the [CH DSIO Audit Team Leader Supervisor] is working with MFGI and progress was being made.<sup>130</sup>

In New York, the New York Team Leaders first spoke with the [CH DSIO Audit Team Leader Supervisor] and the [HQ DSIO Supervisory Auditor], and learned that Chicago staff was working on getting the cap, seg and secured numbers for Friday and documentation. And initially, around 2:30 to 3 pm (EST), they asked for the cap, seg and

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<sup>124</sup> See fn. 119 and accompanying text.

<sup>125</sup> The CME timeline differs; it asserts that the [CH DSIO Audit Team Leader Supervisor] let CME know at 2pm that she had reviewed a draft of the October 28 cap, seg, and secured statement and it showed a deficiency in segregated funds. (CME timeline, *supra* n.4, at page 14 of the .pdf.)

<sup>126</sup> Email dated Sunday, October 30, 2:35 pm (CST). Author: the [CH DSIO Audit Team Leader Supervisor]. Recipients: [MFGI Attorney 2] and Edith O’Brien. Cc: Gary Barnett, the [HQ DSIO Supervisory Auditor], Ananda Radhakrishnan, and the [HQ DCR Senior Supervisory Attorney].

<sup>127</sup> Email dated October 30, 3:40 pm (EST). Author: the [HQ DCR Senior Supervisory Attorney]. Recipients: [MFGI Attorney 2], Edith O’Brien, [MFGI Employee 3], and Laurie Ferber. Cc: Gary Barnett, the [HQ DSIO Supervisory Auditor], Ananda Radhakrishnan, and the [CH DSIO Audit Team Leader Supervisor].

<sup>128</sup> Email dated October 30, 2:46 pm (CST). Author: [MFGI Employee 3]. Recipients: the [CH DSIO Audit Team Leader Supervisor], [MFGI Attorney 2], and Edith O’Brien. Cc: Gary Barnett, the [HQ DSIO Supervisory Auditor], Ananda Radhakrishnan, the [HQ DCR Senior Supervisory Attorney].

<sup>129</sup> Email dated October 30, 2:47 pm (CST) (with attachment). Author: [MFGI Accountant 1]. Recipients: the [CH DSIO Audit Team Leader Supervisor], the [CH DSIO Audit Team Leader], [CME Auditor 2]. Cc: [MFGI Employee 5], [MFGI Employee 3], [MFGI Employee 15].

<sup>130</sup> Email dated October 30, 4:16 pm (EST). Author: Laurie Ferber. Recipients: the [HQ DCR Senior Supervisory Attorney], [MFGI Attorney 2], and Edith O’Brien. Cc: Gary Barnett, the [HQ DSIO Supervisory Auditor], Ananda Radhakrishnan, and the [CH DSIO Audit Team Leader Supervisor].

secured statements for Friday in New York. About an hour later [MFGI Employee 2] of MFGI spoke with them; although they saw Corzine and Bradley Abelow, [MFGI Employee 2] was their contact throughout the day. They reviewed the outline for a sales agreement and other documents throughout the day and into the evening. The [NY Enforcement Senior Supervisory Attorney] arrived at the CFTC NY Office around 3:30 or 4 pm (EST). The [NY Enforcement Senior Supervisory Attorney] later spoke with the Chairman, who said he had wanted him to “show his badge” and get the documents CFTC was requesting.<sup>131</sup>

Around 3:50 pm, CST, the [CH DSIO Audit Team Leader Supervisor] forwarded the 4 pm (CST) CME conference call invite to the New York Team Leaders and the [CH DSIO Audit Team Leader], and invited them to join an upcoming conference call,<sup>132</sup> and about 4:00 pm (CST), CME began a conference call with multiple participants on only 10 minutes’ notice. Invitees to this call included representatives from CME, SEC, the Kansas City Board of Trade, the Intercontinental Exchange, the NASDAQ, the OCC, FINRA, CCX, and other entities, and also the [HQ DSIO Senior Supervisory Auditor], the [HQ DSIO Supervisory Auditor] and the [CH DSIO Audit Team Leader Supervisor].<sup>133</sup> The Chairman participated in this call at the request of the SEC Chairman, and expressed concern about the level of cooperation from MF Global regarding document requests from CFTC, as well as the need to document MFGI’s increase in secured funds on Friday to satisfy the net liq method, and the tri-party repo with MF Securities. This conference call continued all night long, and the phone line remained open until 9 am on Monday, October 31. Regulators from time to time discussed regulatory matters privately, asking the non-regulator participants to hang up during these discussions.

Around 4:20 pm (CST) on Sunday, October 30, the [CH DSIO Audit Team Leader Supervisor] let MFGI and CFTC officials know that MFGI was continuing to “reconcile seg and secure numbers” and that “final numbers have not been provided.” In addition, CFTC staff on site in Chicago were working with MFGI’s Treasury group to review asset balances and locations, and would ask for the preliminary seg and secured numbers “and continue to work with MF Global staff to identify discrepancies.”<sup>134</sup> [NY DSIO Audit Team Leader 2]

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<sup>131</sup> There is some disagreement whether this conversation took place on Sunday or Monday. Other CFTC staff also mentioned the Chairman told people to show their badge on Sunday.

<sup>132</sup> Email dated October 30, 4:51 pm (CST). Author: the [CH DSIO Audit Team Leader Supervisor]. Recipients: the New York Team Leaders and the [CH DSIO Audit Team Leader].

<sup>133</sup> Email dated October 30, 3:49 pm (CST). Author [CME Auditor 2]. Recipients: [24 addressees at CME, SEC, the Kansas City Board of Trade, the Intercontinental Exchange, the NASDAQ, the OCC, FINRA, CCX, and other entities], the [HQ DSIO Senior Supervisory Auditor]; the [HQ DSIO Supervisory Auditor]; the [CH DSIO Audit Team Leader Supervisor]; [SEC Senior Auditor 4]; [SEC Employee 3]; [SEC Senior Auditor 1]; [SEC Senior Auditor 5]; [SEC Senior Auditor 2]; [SEC Employee 5]; [CME Manager 1]. See also, CME timeline, *supra* fn. 5, at page 14 of the .pdf.

<sup>134</sup> Email dated October 30, 4:20 pm (CST). Author: the [CH DSIO Audit Team Leader Supervisor]. Recipients: Laurie Ferber, the [HQ DCR Senior Supervisory Attorney], [MFGI Attorney 2], Edith O’Brien, and [MFGI Employee 3]. Cc: Gary Barnett, the [HQ DSIO Supervisory Auditor], Ananda Radhakrishnan, and the [CH DSIO Audit Team Leader].

asked if there was anyone in the MFGI New York Office who could help the process,<sup>135</sup> and the [CH DSIO Audit Team Leader Supervisor] responded that MFGI was “huddling now” and she would let him know if there was a “New York connection.”<sup>136</sup>

At 6:04 pm, CST, the [CH DSIO Audit Team Leader Supervisor] updated CFTC with the preliminary secured calculation, which showed excess secured funds under the alt and the net liq methods; however, the preliminary segregated calculation showed a \$900 million deficit in seg funds, with MFGI reviewing bank statements and manual entries to identify data entry errors. The [CH DSIO Audit Team Leader Supervisor] furnished this information to the [HQ DCR Senior Supervisory Attorney], Gary Barnett, Ananda Radhakrishnan, the [HQ DSIO Supervisory Auditor], the [CH DSIO Audit Team Leader], and the New York Team Leaders.<sup>137</sup> The [CH DSIO Audit Team Leader Supervisor] had previously shared this information with the [HQ DSIO Supervisory Auditor] by phone around 5 pm, CST.

Back in New York, CFTC staff told us that at some point during the day, visiting CFTC staff became incensed at the delay for cap, seg, and secured numbers, with a New York Team Leader strongly demanding to see the numbers now. After the New York staff learned of the shortfall in customer seg in the preliminary numbers for Friday at around 7 pm (EST), [MFGI Employee 2] of MFGI assured in a conference call that the shortfall was due to errors in bookkeeping which was not current with all updates, and assured that the numbers would be reconciled with no seg deficiency. CFTC staff told us that the [CH DSIO Audit Team Leader Supervisor] challenged that assertion, telling [MFGI Employee 2] in New York that MFGI staff in Chicago were panicked because they did not know what was causing the shortfall, and stating she did not think it was a bookkeeping error. [MFGI Employee 2] was nonplussed to hear this and left the room, stating he would find out what the problem was. [MFGI Employee 2] never came back, so the New York Team Leaders went to look for him. They found him with Corzine and others, and [MFGI Employee 2] again told them that MFGI was working to reconcile the segregation calculation for Friday. [MFGI Employee 2] never came back to update the New York Team Leaders on the seg shortfall.

CME reported that sometime after 7 pm (CST), the [CH DSIO Audit Team Leader] gave the disc she received from MFGI on Friday to representatives of CME, and that Ananda Radhakrishnan spoke with CME.<sup>138</sup>

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<sup>135</sup> Email dated October 30, 4:25 pm (CST). Author: [NY DSIO Audit Team Leader 2]. Recipients: the [CH DSIO Audit Team Leader Supervisor], [NY DSIO Audit Team Leader 1], the [CH DSIO Audit Team Leader].

<sup>136</sup> Email dated October 30, 4:30 pm (CST). Author: the [CH DSIO Audit Team Leader Supervisor]. Recipients: the New York Team Leaders. Cc: the [CH DSIO Audit Team Leader].

<sup>137</sup> Email dated October 30, 6:04 pm (CST). Author: the [CH DSIO Audit Team Leader Supervisor]. Recipients: the [HQ DCR Senior Supervisory Attorney], Gary Barnett, and Ananda Radhakrishnan. Cc: the [HQ DSIO Supervisory Auditor] and the [CH DSIO Audit Team Leader].

<sup>138</sup> CME Timeline, *supra fn. 5*, at page 15 of the .pdf.

Around 8 pm (EST), the Chairman updated Commissioners Sommers, Chilton, O'Malia, and Wetjen. Chairman Gensler informed that MFGI was working with Interactive Brokers Group "to transfer all of MF Global customer positions and collateral a.s.a.p." He stated: "If matters develop as MF is now indicating, staff will put together an email memo for each of you on further deal details as well as a summary of a staff no-action letter that may be needed for the bulk transfer of accounts."<sup>139</sup> In response to a reply from Commissioner Chilton, Chairman Gensler further explained that the Commissioners would need to issue an "absent objection" that DSIO will be giving a no-action letter to MF on their bulk transfer of customer positions and collateral without the 10 day notice in CFTC rules.<sup>140</sup>

At 9 pm (EST), the regulators gave Laurie Ferber a list of six requirements necessary in order to obtain the regulators' approval of any sale of the FCM/broker-dealer. Chairman Gensler reviewed a draft sale agreement during the evening and made suggestions pertaining to matters of concern to CFTC pertaining to the transfer of customer funds and the "topping up" of the secured funds to the net liq amount if necessary. MFGI prepared a press release to announce the pending sale.

The [CH DSIO Audit Team Leader Supervisor] remained at MF Global and continued to review bank statements into the evening.<sup>141</sup> Eventually the [CH DSIO Audit Team Leader Supervisor] told the CFTC employees in New York that she believed the shortfall in customer seg was real. Accounts differ on when the New York staff went home for the night; the [HQ DSIO Supervisory Auditor] approved their departure sometime between 9 and 11 pm (EST). The [HQ DSIO Supervisory Auditor] approved the [CH DSIO Audit Team Leader Supervisor] and staff to leave the Chicago MFGI Offices around midnight (CST).

Back in Washington, the [HQ DCR Senior Supervisory Attorney] during the day worked on issues attendant to customer account transfers. He participated in conference calls, and worked on no-action relief under Commission Regulation 1.65 with Gary Barnett and Ananda Radhakrishnan. He was aware of the preliminary seg shortfall of over \$900 million, but believed it was a reconciliation problem.

The OGC Attorney also worked on document review. He kept Dan Berkovitz and [OGC Deputy] in the loop. He did not know of the shortfall Sunday evening, and learned of the shortfall around 2:00 am (EST) on October 31.

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<sup>139</sup> Email dated October 30, 7:52 pm (EST). Author: Chairman Gensler. Recipients: Commissioner Sommers, Commissioner Chilton, Commissioner O'Malia, and Commissioner Wetjen. Cc: Ananda Radhakrishnan, Gary Barnett, the [HQ DCR Senior Supervisory Attorney], Dan Berkovitz, the [HQ DSIO Supervisory Auditor], and the OGC Attorney.

<sup>140</sup> Email dated October 30, 8:31 pm (EST). Author: Chairman Gensler. Recipient: Commissioner Chilton. Under CFTC Rule 1.65, 17 C.F.R. § 1.65, an FCM must give customers and the Commission notice prior to transferring accounts. This requirement may be waived.

<sup>141</sup> Email dated October 30, 2011, 9:38 pm (CST). Author: [MFGI Employee 20]. Recipient: the [CH DSIO Audit Team Leader Supervisor]. Cc: Edith O'Brien.

Gary Barnett worked on the purchase agreement, the no-action relief to permit the transfer of customer accounts, and other drafts. He was aware that the preliminary seg numbers for Friday October 30, showed a shortfall of over \$900 million, and believed MFGI was treating it as a reconciliation problem. Ananda Radhakrishnan remained in the loop, communicating with regulators, MFGI, and CME, and was aware of the email from the **[CH DSIO Audit Team Leader Supervisor]** indicating MFGI was treating a preliminary \$900 million seg shortfall as a reconciliation error Sunday evening. He worked on issues pertaining to account transfers.

Around 11 pm (EST) on Sunday, Chairman Gensler spoke with representatives of MF Global and the company currently negotiating to purchase MFGI, Interactive Brokers, regarding the six regulator requirements and got confirmation that Interactive Brokers was on board with the six requirements. The CFO of Interactive was on the open phone line during this discussion, as well as the CFTC General Counsel, and representatives of the SEC and FSA. Chairman Gensler exited the conference call after this conversation. Chairman Gensler wrote a note of thanks to Commission staff working over the weekend on the MFGI matter, and wrote, "Feel free to wake me if there is anything I can be helpful on as the night develops further."<sup>142</sup>

At midnight (EST) review of draft documents pertaining to the anticipated sale of MFGI was ongoing among CFTC staff and management.<sup>143</sup>

#### Monday, October 31

CFTC employees remained in communication with MFGI, CME, and the other regulators overnight. CME reports that the **[HQ DSIO Supervisory Auditor]** was in communication with CME at 2 a.m. (CST), discussing the possibility of permitting MFGI to transfer funds into segregation.<sup>144</sup>

CME's timeline informs that MFGI continued to claim they were finding possible errors in the seg reconciliation up until midnight (CST), and between midnight and 1 am the sale with Interactive Brokers was moving toward completion with regulatory signoffs. CME further reports that MFGI was claiming, even if the seg deficiency were real, MFGI may have sufficient funds to top up segregated funds. In addition, Interactive Brokers and MFGI were "aligned on

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<sup>142</sup> Email dated October 30, 10:54 pm (EST). Author: Chairman Gensler. Recipients: Ananda Radhakrishnan, Gary Barnett, the **[HQ DCR Senior Supervisory Attorney]**, the **[HQ DSIO Supervisory Auditor]**, and the OGC Attorney. Cc: Commissioner Sommers, Commissioner Chilton, Commissioner O'Malia, Commissioner Wetjen, and Dan Berkovitz.

<sup>143</sup> Email string dated October 30, 11:12 pm (EST). Author: **[SEC Senior Auditor 3]** (attaching draft purchase agreement). Recipients: Bob Cook (SEC), **[SEC Employee 3]**, **[SEC Senior Auditor 2]**, **[SEC Employee 4]**, and the **[HQ DCR Senior Supervisory Attorney]** (who forwarded it to Gary Gensler, Ananda Radhakrishnan, Gary Barnett, the **[HQ DSIO Senior Auditor]**, the **[CH DSIO Audit Team Leader Supervisor]**, **[NY DSIO Audit Team Leader 2]**, and the OGC Attorney. Further email among the CFTC recipients continued to at least 1 am.

<sup>144</sup> CME Timeline, *supra fn. 5*, at page 16 of the .pdf.

the importance of the transfer occurring promptly.”<sup>145</sup> CFTC employees were aware that time was of the essence; not only did MFGI have to show seg and secured compliance (and continuing net capital compliance as liquidity continued to dry up) in order to permit customer trading on Monday, it had to show seg and net capital compliance in order to open in London which was 4 hours earlier (due to daylight savings).

At 2:30 am (EST) Chairman Gensler got a call from the [HQ DCR Senior Supervisory Attorney], who asked him to join the conference call again. Participating were Mr. Steenkamp, Ms. Ferber, and other MF Global executives, CFTC officials and others. The Chairman learned of the \$900 million shortfall in customer seg funds, and MF Global executives explained what they knew at that time regarding the origins of the shortfall, but also continued to suggest that they should be able to find the error, and that funds might be transferred into the seg accounts sufficient to permit MFGI to open and to save the deal with Interactive Brokers. Chairman Schapiro joined the call around 4 am (EST). Around 4 am (EST) Kimberly Taylor of CME joined the conversation.<sup>146</sup> Sometime after 4:30 am (EST) the deal with Interactive Brokers collapsed.<sup>147</sup> Between 5 and 6 am (EST) the decision was made that a SIPC proceeding would be filed.

Around 6:00 am (EST), the Chairman sent an email to the other Commissioners, letting them know that a deficiency in customer segregated funds had been discovered and that the deal with Interactive Brokers had fallen through.<sup>148</sup> He did not disclose the size of the deficiency. [CH DCR Supervisory Risk Analyst]<sup>149</sup> gave a status update on public reports of MF Global to CFTC staff and management, and Ananda Radhakrishnan let staff and management know that there might be a SIPC filing.<sup>150</sup> The [HQ DSIO Supervisory Auditor] reminded CFTC staff and management that SIPC information was not public.<sup>151</sup> At 6:00 am (EST), the [HQ DCR Senior Supervisory Attorney] and the OGC Attorney were on a

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<sup>145</sup> Id.

<sup>146</sup> CME Timeline, *supra fn. 5*, at page 17 of the .pdf.

<sup>147</sup> CME Timeline, *supra fn. 5*, at page 17 of the .pdf.

<sup>148</sup> Email dated October 31, 5:58 am (EST). Author: Chairman Gensler. Recipients: Commission Sommers, Commission Chilton, Commissioner O’Malia, Commissioner O’Malia, and the OGC Attorney. Cc: Ananda Radhakrishnan, Gary Barnett, the [HQ DCR Senior Supervisory Attorney], Dan Berkovitz, [DCR Supervisory Attorney], [three attorneys in the Chairman’s Office], and Gary Barnett.

<sup>149</sup> [CH DCR Supervisory Risk Analyst] is [a Supervisory Risk Analyst].

<sup>150</sup> Email dated October 31, 6:00 am and 6:12 am (EST). Authors: [CH DCR Supervisory Risk Analyst], Ananda Radhakrishnan. Recipients: the [HQ DSIO Supervisory Auditor], Ananda Radhakrishnan, [HQ DCR Deputy Director], the [HQ DCR Senior Supervisory Attorney], the [HQ DSIO Senior Supervisory Auditor], the [CH DSIO Audit Team Leader Supervisor], Gary Barnett, [HQ DCR Supervisory Attorney], and [Chairman’s Office Attorney 1].

<sup>151</sup> Email dated October 31, 6:18 am (EST). Author: [HQ DSIO Supervisory Auditor]. Recipients: [CH DCR Supervisory Risk Analyst], [HQ DSIO Supervisory Auditor], Ananda Radhakrishnan, [HQ DCR Deputy Director], the [HQ DCR Senior Supervisory Attorney], the [HQ DSIO Senior Supervisory Auditor], the [CH DSIO Audit Team Leader Supervisor], Gary Barnett, [HQ DCR Supervisory Attorney], [Chairman’s Office Attorney 1].

train to New York City in order to participate in the bankruptcy that would likely be filed that day. At 7:00 am (EST), the Chairman went to his office at CFTC headquarters. He found a message when he arrived that Mr. Flowers had called and wanted to speak with him. He called [the Sullivan and Cromwell Attorney] and spoke briefly and for the last time, then spoke with Mr. Flowers and Mr. Steenkamp, [MFGI Employee 2], Mr. Goldfield, and others.<sup>152</sup>

CME reports that MFGI continued to identify assets that it could move into segregation; however, its efforts were not successful and the deal with Interactive Brokers collapsed sometime before 6:45 am (CST).<sup>153</sup>

Shortly after 8:00 am EST, the New York Team Leaders returned to the MFGI Offices in New York, and notified the [CH DSIO Audit Team Leader Supervisor] of their arrival.<sup>154</sup> The [CH DSIO Audit Team Leader Supervisor] let them know she would arrive at the MFGI offices in Chicago in about an hour.<sup>155</sup> Around 9:00 am EST, the [HQ DCR Senior Supervisory Attorney] and the OGC Attorney arrived at the CFTC NY Offices. The [NY Enforcement Senior Supervisory Attorney] called Enforcement trial attorney [NY Enforcement Staff Attorney], and he arrived at the New York Office around 9 am EST. The [CH DSIO Audit Team Leader Supervisor] arrived at the MF Global Offices in Chicago around 9:00 am CST, after finishing some business at the CFTC Chicago Office.<sup>156</sup> She joined the [CH DSIO Audit Team Leader] and two staff auditors, who had arrived on site at MFGI earlier that morning.

The Trustee reported that, on Monday around 11 am, CST:

MFGI in-house counsel [MFGI Attorney 1] informed Ms. Ferber, "I'm here in Edith O'Brien's office with Serwinski, CFTC and the CME. No wires out of any sort from MF firms. We are ordered to move as much from the BD to the FCM immediately, without regard to CFTC 1.25."<sup>157</sup>

The Staff Report of the House Financial Services Investigative Subcommittee on MF Global stated:

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<sup>152</sup> Mr. Flowers and Mr. Goldfield are discussed in detail at pages 53 - 54, and accompanying footnotes.

<sup>153</sup> CME Timeline, *supra fn.* 5, at page 3-4 of the .pdf.

<sup>154</sup> Email dated October 31, 8:13 am (EST). Author: [NY DSIO Audit Team Leader 2]. Recipients: the [HQ DSIO Supervisory Auditor] and the [NY DSIO Audit Team Leader Supervisor]. Cc: [NY DSIO Audit Team Leader 1], the [CH DSIO Audit Team Leader Supervisor], the [CH DSIO Audit Team Leader], and the [HQ DSIO Senior Supervisory Auditor].

<sup>155</sup> Email dated Monday October 31, 7:17 am (CST). Author: the [CH DSIO Audit Team Leader Supervisor]. Recipient: [NY DSIO Audit Team Leader 2].

<sup>156</sup> Email dated Monday October 31, 7:17 am (CST). Author: the [CH DSIO Audit Team Leader Supervisor]. Recipient: [NY DSIO Audit Team Leader 2].

<sup>157</sup> Trustee's report page 120.



Before the markets opened on Monday morning, Serwinski sought to identify assets that MFGI could deposit in the company's customer segregated accounts in order to mitigate any shortfall. Among other assets, Serwinski identified approximately \$220 million in excess company funds deposited in a reserve account, which the company maintained for its securities customers. Though the SEC had expressed concern to MF Global about the calculation of excess funds in the reserve account and cautioned the company against transferring these funds, MFGI transferred the full amount of the perceived excess to its segregated FCM customer accounts.<sup>158</sup>

The Staff Report stated that "the director of the SEC's Division of Trading and Markets related that an SEC staff member had heard from MF Global's General Counsel, Laurie Ferber, that the CFTC had pressured MF Global to make the transfer," and this was "unacceptable" to the SEC Chairman.<sup>159</sup> The Staff Report stated that Ms. Serwinski recalled that no one communicated to her an instruction or caution from regulators that MF Global not transfer excess funds from the securities customer account.<sup>160</sup>

In OIG interviews, CFTC staff stated that overnight and into the morning of Monday October 31, MFGI was attempting to locate funds that could be moved into customer seg. While staff admitted that they wanted all funds possible to be deposited to customer seg, they denied instructing or pressuring MFGI to move funds from broker-dealer regulated customer accounts to FCM customer seg.

Around 11 am EST, [Chairman's Office Attorney 1] emailed David Meister, Director of Enforcement, and the [NY Enforcement Senior Supervisory Attorney], and requested "a couple guys" to back up CFTC staff at the MFGI Offices in New York and Chicago.<sup>161</sup> [CH Enforcement Supervisory Attorney 1] in the CFTC Chicago Office, sent a Chief Trial Attorney and a Chicago Enforcement investigator.<sup>162</sup>

Around 11 am or noon, EST, the [NY Enforcement Senior Supervisory Attorney] sent trial attorney [NY Enforcement Staff Attorney], who was already on site at CFTC, to the MF Global Office in New York. [NY Enforcement Staff Attorney] was to deliver a document preservation letter to MFGI and to be on site as eyes and

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<sup>158</sup> House Staff Report page 71.

<sup>159</sup> House Staff Report at page 72.

<sup>160</sup> House Staff Report at page 71, fn. 430.

<sup>161</sup> Email dated Monday October 31, 10:48 am (EST). Author: [Chairman's Office Attorney 1]. Recipients: David Meister and the [NY Enforcement Senior Supervisory Attorney]. David Meister looped in [CH Enforcement Supervisory Attorney 1] and [HQ Enforcement Deputy Director]. [CH Enforcement Supervisory Attorney 1] looped in [CH Enforcement Senior Supervisory Attorney].

<sup>162</sup> Email dated Monday October 31, 10:07 am (CST). The Chief Trial Attorney had 24 years CFTC experience and the investigator had two years with CFTC.

ears. When he arrived, [NY Enforcement Staff Attorney] was put in a windowless room with the New York Team Leaders, along with representatives of the SEC, CME, and CBOT, some of whom had been there all night. [NY Enforcement Staff Attorney] learned of the seg shortfall for the first time after he arrived. He delivered the letter and waited for updates in the room with the other regulators.

Back in Washington, at noon EST the Commission held an emergency closed meeting on MFGI.<sup>163</sup> The participants sounded noticeably tired. The Chairman opened the meeting; he and Ananda Radhakrishnan dominated the meeting, each speaking more than any other speakers that day. The [HQ DCR Senior Supervisory Attorney] gave an overview of SIPC proceedings. The Commission voted an Order of Investigation to the Division of Enforcement prior to adjourning. The Chairman moved the vote and voted in favor of the Order of Investigation.

The [CH DSIO Audit Team Leader Supervisor], participating by phone from the MFGI Chicago Office, continued to receive updates on deposits to customer seg by MFGI during the meeting. Just prior to the close of the 90 minute meeting, she stated that she had received word during the meeting that \$222 million had been wired to customer seg. She did not discuss the source of the funds. She also said she heard the broker-dealer had identified \$400 million in unencumbered assets that they planned to move into seg, and she said she was not sure whether the transfer would take place or that she “[didn’t] know whether there’s anything anybody can do to make it happen.” She said these additional funds would not cure the shortfall.

Ananda Radhakrishnan explained:

Ananda Radhakrishnan This is the free credit in the 15c3-3<sup>164</sup> funds and the trouble is, the SEC doesn’t even track that computation.

[CH DSIO Audit Team Leader Supervisor] Right.

Ananda Radhakrishnan That’s the issue. I don’t blame them. Cause they’re saying, you know, there’s a certain amount of credit in the securities account, so –

Chairman Gensler Um, so what’s ... Mark, anything? Are there any other thoughts or –what’s that?

At this point, the Chairman remarked on Commissioner Wetjen’s eventful first week as a CFTC Commissioner, and the Commissioners and the Chairman thanked staff for the weekend’s work, discussed the possibility of future emergency meetings, and closed the meeting.

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<sup>163</sup> The Sunshine Act notice for this meeting is here: 76 FR 68167 (November 3, 2011). Available at: <http://www.gpo.gov/fdsys/pkg/FR-2011-11-03/pdf/2011-28607.pdf>.

<sup>164</sup> 17 C.F.R. § 240.15c3-3.

Back in New York, the Enforcement staff attorney on location at the MFGI New York Office learned that the trustee was headed to the court house to file the SIPC proceeding, and called the [NY Enforcement Senior Supervisory Attorney] and the [NY Enforcement Supervisory Attorney], with the news. The [NY Enforcement Senior Supervisory Attorney] immediately got the [HQ DCR Senior Supervisory Attorney] and they ran, literally, to the courthouse, which was four-tenths of a mile away from the CFTC NY Office. They were able to meet the trustee's attorney at the courthouse before filing.

The [HQ DCR Senior Supervisory Attorney] earlier that day had been in contact with SIPC because he wanted to know who would be the trustee and wanted to see the form of the order. The prior Friday he had emailed to SIPC the provisions that CFTC would need in any bankruptcy filing. The [HQ DCR Senior Supervisory Attorney] did not see the pleading until he met the SIPC attorney at the courthouse; the provisions were not there. The SIPC attorney permitted the [HQ DCR Senior Supervisory Attorney] to make the following changes in various paragraphs (noted in red below), to specify that the bankruptcy stay would not apply to CFTC:

VIII. ORDERED that the stays set forth above shall not apply to:

- A. any suit, action or proceeding brought or to be brought by the United States Securities and Exchange Commission ("Commission"), the Commodity Futures Trading Commission ("CFTC"), or any self-regulatory organization of which the Defendant is now a member or was a member within the past six months; or provided that notice and prompt and periodic accountings are provided to the trustee; or  
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- C. the exercise of a contractual right of any securities clearing agency to cause the liquidation of a securities contract as defined in 11 U.S.C. § 741(7) and the contractual right of any derivatives clearing organization ("DCO") to cause the liquidation of a commodity contract as defined in 11 U.S.C. § 761(4); or  
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- F. any setoff or liquidating transaction undertaken pursuant to the rules or bylaws of any securities clearing agency registered under section 17A(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q-1(b), or any DCO registered under the Commodity Exchange Act ("CEA"), or by any person acting under instructions from and on behalf of such a securities clearing agency or DCO; or  
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- H. any transfer or delivery to a securities clearing agency or DCO by a bank or other depository, pursuant to instructions given by such clearing agency or DCO, of cash, securities, or other property of the Defendant held by such bank or depository subject to the instructions of such clearing agency or DCO and constituting a margin payment as defined in 11 U.S.C. § 741(5) or 11 U.S.C. § 761(15); or
- I. the exercise of a contractual right, as such term is used in 11 U.S.C. § 555, in respect of (i) any extension of credit for the clearance or settlement of securities transactions or (ii) any margin loan, as such term is used in 11 U.S.C. § 741(7), by a

securities clearing bank, or the exercise of a contractual right as such term is used in 11 U.S.C. § 556 in respect of any extension of credit for the clearance or settlement of commodity contracts by a commodity broker as defined in 11 U.S.C. sec. 101. As used herein, “securities clearing bank” refers to any financial participant, as defined in 11 U.S.C. § 101(22A), that extends credit for the clearance or settlement of securities transactions to one or more Primary Government Securities Dealers designated as such by the Federal Reserve Bank of New York from time to time.

In addition, the [HQ DCR Senior Supervisory Attorney] altered the proposed order to authorize MFGI to not only conduct its securities and commodity futures and options business, but also its swaps and securities-based swaps businesses as necessary and appropriate for the orderly transfer of customer accounts and related property.<sup>165</sup>

In Chicago, CFTC staff spent the rest of the day requesting and reviewing bank statements, updating cap, seg and secured balances for the previous week, and updating CFTC management. The final email updating CFTC staff and management on MFGI cap, seg, and secured numbers was sent after 10 pm CST.<sup>166</sup>

#### Tuesday, November 1 – Thursday, November 3

On November 1, things were back to normal for the New York Team Leaders, who returned to the CFTC NY Office for their usual work day.<sup>167</sup> The [CH DSIO Audit Team Leader Supervisor] and her team returned to MFGI’s Chicago office to continue reviewing records.<sup>168</sup>

At 10 am on November 2, the Chairman called a second emergency closed Commission meeting to discuss MFGI.<sup>169</sup> This meeting lasted approximately 32 minutes. Ananda Radhakrishnan gave an update on the current state of seg balances at MF Global, stating that current estimates put the seg deficiency at \$589 million or possibly \$800 million. Mr. Radhakrishnan stated that the \$589 million deficiency calculation included in existing seg a

<sup>165</sup> The original filing, complete with the [HQ DCR Senior Supervisory Attorney]’s handwritten amendments, is here: <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/sipcvvmfg103111.pdf>.

<sup>166</sup> Email dated October 31, 10:16 pm (CST). Author the [CH DSIO Audit Team Leader Supervisor], recipients the [HQ DSIO Supervisory Auditor], the [HQ DCR Senior Supervisory Attorney], and Gary Barnett. Cc: the [CH DSIO Audit Team Leader]. At 7:17 am (CST) the next day, the [CH DSIO Audit Team Leader Supervisor] forwarded the update to the New York Team Leaders.

<sup>167</sup> Email dated November 1, 8:43 am (EST). Author: [NY DSIO Audit Team Leader 2]. Recipients: the [HQ DSIO Supervisory Auditor]. Cc: the [CH DSIO Audit Team Leader Supervisor], the [NY DSIO Audit Team Leader Supervisor], [NY DSIO Audit Team Leader 1].

<sup>168</sup> Email dated November 1, 7:48 am (CST), author [CH DSIO Audit Team Leader Supervisor]. Recipients: [NY DSIO Audit Team Leader 2], and the [HQ DSIO Supervisory Auditor]. Cc: the [NY DSIO Audit Team Leader Supervisor], [NY DSIO Audit Team Leader 1], and the [CH DSIO Audit Team Leader].

<sup>169</sup> 64 FR 68429 (Nov. 4, 2011), available here: <http://www.cftc.gov/ucm/groups/public/@lfederalregister/documents/file/2011-28773a.pdf>.

transfer of \$220 million that took place on October 31 from a broker-dealer customer account. He said that these funds were believed to be available to transfer to the 4d seg account, but now MFGI cannot guarantee that the funds were available to transfer. Mr. Radhakrishnan said that he had been in contact with Robert Cook about this transfer, and said that if the \$220 million properly should be subtracted from the seg balance existing at MFGI's close of business, the seg deficit would stand at closer to \$800 million rather than \$589 million. The status of the \$220 million was not yet resolved.

The rest of the discussion dealt with disclosure issues, specifically what information the Commissioners could currently include in public disclosures and discussions regarding both Enforcement matters and developments with the seg deficiency calculation as new information came to light. [HQ Enforcement Deputy Director] discussed disclosure issues of concern to Enforcement, but Enforcement activities were not discussed. The Chairman closed the meeting, noting that MF Global would next be discussed on November 4 at the regularly scheduled closed Commission meeting to discuss surveillance and Enforcement matters.

Later on November 2, the [CH DSIO Audit Team Leader Supervisor] received an email from the SEC stating that \$111 million of the \$220 million transferred into customer seg on October 31 was moved in error; it had been taken from customer fund accounts on the broker-dealer side and represented customer funds, not firm excess.<sup>170</sup> She immediately forwarded this information to the [HQ DSIO Supervisory Auditor] and the [CH DSIO Audit Team Leader].<sup>171</sup> The [HQ DSIO Supervisory Auditor] passed the news on to Gary Barnett, Ananda Radhakrishnan, and the [HQ DSIO Senior Supervisory Auditor], indicating they might get a call from Robert Cook of the SEC, furnishing the [CH DSIO Audit Team Leader Supervisor]'s contact information for fuller detail, and stating that it was possible that the entire \$220 million was not excess 15c3-3 funds.<sup>172</sup> Later in the day, the [CH DSIO Audit Team Leader Supervisor] sent the estimated cap, seg, and secured statement for MFGI as of November 1, showing a negative seg balance of \$593,912,844.

On Thursday, November 3, Gary Barnett forwarded the updated cap, seg, and secured statement showing a negative seg balance of \$593,912,844 to the Chairman, and the Chairman asked him to come up for a meeting.<sup>173</sup> Later on Gary Barnett, the [HQ DSIO Supervisory

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<sup>170</sup> Email dated November 2, 3:42 pm (EST). Author: [SEC employee 1]. Recipient: the [CH DSIO Audit Team Leader Supervisor]. Cc: [SEC employee 2].

<sup>171</sup> Email dated November 2, 4:53 pm (CST). Author: the [CH DSIO Audit Team Leader Supervisor]. Recipients: the [HQ DSIO Supervisory Auditor] and the [CH DSIO Audit Team Leader].

<sup>172</sup> Email dated November 2, 5:21 pm (EST). Author: the [HQ DSIO Supervisory Auditor]. Recipients: Gary Barnett, Ananda Radhakrishnan, the [CH DSIO Audit Team Leader Supervisor], and the [HQ DSIO Senior Supervisory Auditor].

<sup>173</sup> Email dated November 3, 8:28 am (EST). Author: Gary Barnett. Recipients: Chairman Gensler, Ananda Radhakrishnan, and [Chairman's Administrative Assistant].

**Auditor**], and others prepared for a briefing with the Chairman anticipated for November 4 that would include a timeline or chronology of CFTC's activities relating to MFGI.<sup>174</sup>

The Chairman withdrew from participation in matters involving MFGI on November 3.

Friday, November 4 – Friday, November 11

On November 4, the Commission held its regularly scheduled closed Commission meeting to discuss surveillance and enforcement matters. Commissioner Chilton led the meeting, stating that the Chairman would join the meeting "at some point," and that Commissioner Sommers was not attending. Chairman Gensler's decision to withdraw from participation in matters involving MF Global was not mentioned. Our review of a recording of the meeting indicates the Chairman never joined this meeting. The Chairman's decision to withdraw from participation was not mentioned. With regard to MFGI, there was a detailed discussion of MFGI's proprietary positions at the close of business and an update on coordinated efforts to facilitate the transfer of MFGI customer positions to their new account homes. Enforcement matters were not discussed in any detail.

On November 7, the Office of General Counsel issued a litigation hold notice to all CFTC employees identified as possessing information relevant to potential litigation involving MFGI, and giving specific instruction regarding the retention of information. The litigation hold notice included the Chairman.<sup>175</sup> In addition, on November 7, the General Counsel let Commissioner Sommers know that steps were being taken to formalize her appointment and duties with regard to MF Global.<sup>176</sup>

On November 8, the Chairman issued his statement of non-participation.<sup>177</sup> On November 9, the Commission approved the appointment of Commissioner Sommers to oversee the Commission in matters pertaining to MF Global (Chairman Gensler not participating). On November 9, Commissioner Sommers conducted a closed meeting of the Commission to discuss matters relating to MF Global. During that meeting, status of the \$220 million transfer of

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<sup>174</sup> Email dated November 3, 5:55 pm (EST). Author: Gary Barnett. Recipient: the [HQ DSIO Supervisory Auditor].

<sup>175</sup> Here is the list: the New York Team Leaders, the [NY DSIO Audit Team Leader Supervisor], the [CH DSIO Audit Team Leader Supervisor], the [HQ DSIO Supervisory Auditor], the [CH DSIO Audit Team Leader], the [HQ DCR Senior Supervisory Attorney], Gary Barnett, Ananda Radhakrishnan, the OGC Attorney, Gary Gensler, and Enforcement personnel who were consulted over the last weekend and on October 31.

<sup>176</sup> Email dated November 7, 10 am (EST). Author: Dan Berkovitz. Recipients: [Commissioner Sommers' Attorney 1], David Meister, Ananda Radhakrishnan, and Gary Barnett. Cc: [Commissioner Sommers' Attorney 2].

<sup>177</sup> The Chairman's Statement of Non-Participation apparently is not posted to the public CFTC website, but may be found on Senator Roberts' website: [http://www.roberts.senate.gov/public/?a=Files.Serve&File\\_id=3feb48b5-cb1c-47bc-8bbb-5e2e0447750a](http://www.roberts.senate.gov/public/?a=Files.Serve&File_id=3feb48b5-cb1c-47bc-8bbb-5e2e0447750a) (page 3 of the .pdf).

broker-dealer customer funds that took place on October 31 was discussed.<sup>178</sup> The Commissioners asked to be refreshed on the details of this issue, and asked for status. The [HQ DSIO Senior Supervisory Auditor] explained that at present he believed that when the transfer was made, MF Global believed the funds represented firm excess in a broker-dealer 15c3-3 customer account, but the SEC is confident that \$110 million should not have been transferred, and review of the remaining transferred funds was ongoing. He stated that SEC staff and CFTC staff were on site at the firm, going through records.

On November 11, the Commission announced Ms. Sommers' appointment as Senior Commissioner with authority to exercise certain authorities of the Chairman with respect to MF Global.<sup>179</sup>

### The Chairman's Use of Personal Email to Accomplish Official CFTC Business

Several CFTC employees mentioned in the course of our work for this review that the Chairman used his personal email to perform official business during the final week of MFGI. We decided to take a closer look.

We are aware of no specific federal law criminalizing or prohibiting the use of personal email to conduct official business. CFTC email policy instructs, "[d]o not email or forward sensitive information to a personal email address or a personal device."<sup>180</sup> Nevertheless, the use of personal email to conduct official business raises a number of issues. The National Archives and Records Administration (NARA) has stated:

44 U.S.C. § 3102 requires Federal agencies to provide effective controls over the creation, maintenance and use of records in the conduct of current business. Further, according to 36 C.F.R. § 1236.22(b), "Agencies that allow employees to send and receive official electronic mail messages using a system not operated by the agency must ensure that Federal records sent or received on such systems are preserved in an appropriate agency recordkeeping system."<sup>181</sup>

In addition to record retention issues, use of personal email to conduct official federal business can also involve other alleged wrongdoing, such as secret policy-making,<sup>182</sup> concealment of improper communications,<sup>183</sup> and other potential misconduct.<sup>184</sup>

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<sup>178</sup> The \$220 million transfer is discussed or mentioned in the Trustee's report at pages 119-120, 122 n.86, and 123. It is identified in Cash Transactions charts in the annex to the report as "BD – Reserve Cash 15C33." The \$220 million is not identified as customer funds.

<sup>179</sup> The Commission's notice is posted to the public CFTC website and may be found here: <http://www.cftc.gov/PressRoom/PressReleases/pr6140-11>.

<sup>180</sup> CFTC Policy: Email (February 2011).

<sup>181</sup> NARA letter to Department of Energy, September 20, 2012. Available here: [http://www.citizensforethics.org/page/-/PDFs/Legal/Letters/9-20-12\\_NARA\\_letter\\_to\\_DOE.pdf?nocdn=1](http://www.citizensforethics.org/page/-/PDFs/Legal/Letters/9-20-12_NARA_letter_to_DOE.pdf?nocdn=1).

<sup>182</sup> *Bobby Jindal Aides Use Personal Email To Strategize On Medicaid Cuts*, by Melinda DeSlatte, Associated Press, Dec. 10, 2012. <http://bigstory.ap.org/article/top-jindal-aides-use-personal-email-strategize>.

When we searched the MF Global database for a tally of the number of times the Chairman used his personal email address, we found 7,005 instances. This total – 7,005 – included cc:'s, duplicates, and email copied repeatedly in an email chain. We learned the Chairman used his personal email at least beginning in 2010 (i.e., the earliest date in the database). We emphasize that the MF Global database did not contain all Agency email and therefore likely did not contain all personal email authored by the Chairman and related to official business. We therefore have not reviewed all of the Chairman's personal email relating to official business; however, the MF Global database did include some apparently errant email not pertaining to MFGI, and some of the Chairman's 7,005 personal email pertained to CFTC business but did not involve MFGI.

We found that the Chairman used his official email addresses far more frequently, with the database indicating 74,409 email sent to or from the Chairman's official email address (including duplicates, cc:'s, email chains, and email encountered in the MF Global database that had no relation to MFGI). Some email used both addresses for the Chairman.

We narrowed down the 7,005 by honing in on email specifically addressing MFGI, and Senator Shelby's issues, and reviewed hundreds of separate email entries in the database listing a personal email address for the Chairman as author or recipient. We looked for improper communications.

We found no patterns among subject matter, recipients, or any other detail pertaining to the Chairman's use of personal email. We found personal email used for both substantive discussion and administrative matters (such as scheduling meetings). Our review did not reveal personal email used to communicate or transmit proprietary or trade position or personal information.<sup>185</sup> We encountered discrete conversations and drafts of official documents that we would presume CFTC would treat as privileged and confidential, but we found no indication that the Chairman disclosed privileged or confidential information to individuals outside the Agency or to Agency employees lacking a need to know.

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<sup>183</sup> *Energy Program Staff Was Told Not to Use Personal E-mail*, Carol D. Leonnig & Joe Stephens, Washington Post, section A, pg 2, August 15, 2012. [http://articles.washingtonpost.com/2012-08-14/politics/35490043\\_1\\_personal-e-mail-e-mails-email](http://articles.washingtonpost.com/2012-08-14/politics/35490043_1_personal-e-mail-e-mails-email). (Federal officials were warned to avoid using personal email addresses in email containing official email addresses to avoid subpoena of personal email accounts, allegedly because it might lead to disclosure of personal email that was improper.)

<sup>184</sup> *EPA Official Quits Amid E-Mail Scrutiny*, Juliet Eilperin, Washington Post, Section A, pg. 3, February 20, 2013. [http://www.washingtonpost.com/national/health-science/epa-official-quits-amid-e-mail-scrutiny/2013/02/19/2ee812a4-7af6-11e2-9a75-dab0201670da\\_story.html](http://www.washingtonpost.com/national/health-science/epa-official-quits-amid-e-mail-scrutiny/2013/02/19/2ee812a4-7af6-11e2-9a75-dab0201670da_story.html). (It is alleged that a former EPA administrator used a secret government email account for official business under an alias named after the family dog.)

<sup>185</sup> Section 8 of the Commodity Exchange Act, 7 U.S.C. § 12, provides (among other things): “[T]he Commission may not publish data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers: Provided further, that the Commission may withhold from public disclosure any data or information concerning or obtained in connection with any pending investigation of any person.”



We found no indication that the Chairman was attempting to hide the use of his personal email from other CFTC employees in an attempt to conduct “secret” official business. The Chairman used his personal email account routinely to contact various officials within CFTC, including the General Counsel and other Commissioners, all at their official CFTC email addresses.<sup>186</sup>

Before we began our review, representatives of CFTC OGC and CFTC’s Office of Data Technology visited the Chairman’s home on two occasions in order to satisfy for themselves that they had retrieved all CFTC-related email from the Chairman’s personal computer equipment for record retention purposes. We have only reviewed email items that were included in the MFGI database. We received no complaints regarding possible misuse of personal email by the Chairman to conduct official business until the demise of MFGI.

We asked the Chairman why he did it. He told us he did not know how to access his work email from his personal computer at home and didn’t have a CFTC-issued laptop, so when he was at home he used his personal email for CFTC business. He also told us that he used his personal email to communicate with CFTC officials regarding his pending appointment before he was sworn in as Chairman (and therefore before he received his official email address); some CFTC officials continued using the personal email address afterwards out of force of habit. We asked him how he accessed his official email from his personal email accounts while he was at work. He told us he retrieved it from his personal smart phone, which he carried alongside his CFTC phone holding his official email.

The Chairman told us he no longer uses his personal email to conduct official business. Occasionally an email pertaining to official CFTC business will arrive in his personal email account; he will ask the sender to use his official address. We note with approval the Agency’s efforts to obtain all personal email communications by the Chairman, as well as the change in email practices by the Chairman, though we note that no referral was made to our Office at the time. Because our review of hundreds of emails to or from the Chairman’s personal email address did not give us reason to suspect violations of criminal statutes, we made no referrals.

### The Chairman’s Recusal

#### An Analysis of Whether CFTC Chairman Gary Gensler’s Decision to Recuse Himself from Matters Relating to the MFGI Investigation is Consistent with the CFTC’s Official Recusal Policy

CFTC has no official recusal policy. While there is online ethics guidance for CFTC employees that includes links to applicable regulations and the OGE, as well as contact information for personalized counseling, there is nothing on the internal website for CFTC employees that addresses when an employee must recuse himself or herself from official business, or seek guidance in that regard. The General Counsel and the assistant Designated Agency Ethics Official both represented that CFTC complies with applicable regulations and

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<sup>186</sup> However, the Chairman did communicate with Mr. Goldfield with no other CFTC employee cc’d. See fn. 211 and accompanying text.

OGE guidance regarding recusals, but treats each situation on a case by case basis, and there is no official policy on recusals.

During the final days of MFGI, the Chairman did not seek advice from the Designated Agency Ethics Official. The Chairman spoke with MFGI executives in New York on Saturday October 29, Sunday October 30, and Monday October 31. He was in frequent communication with CME, SEC, FINRA, NY Fed, and other entities. In these conversations, as previously discussed, the Chairman requested status information on an ongoing basis, and other information. The Chairman spoke separately with MFGI's outside counsel. The Chairman updated Commissioners on MFGI status and solicited acquiescence with anticipated no-action relief that would waive the customer notice requirement for bulk transfer of MFGI accounts if MFGI were able to find a buyer for the firm.

When the firm collapsed, the Chairman led an emergency closed meeting to update the Commissioners, made a motion to approve an Order of Investigation into MFGI, and voted in favor of the Order of Investigation. On November 2, the Commission participated in a hearing in the SIPC proceeding to permit the first bulk transfer of customer accounts; the Chairman was fully briefed following the hearing. Also on November 2, the Chairman again led a second emergency closed Commission meeting to discuss MFGI.

Throughout, the Chairman remained well informed and led all Commission meetings pertaining to MFGI. The Chairman was aware of MFGI's investments of customer funds, as well as the proprietary trading strategies at the parent level, and understood the effect the ratings downgrade could have on the parent and MFGI. The Chairman continuously expressed concern and sought reassurance that customer seg and secured funds were documented at the firm. At no point did the Chairman, in any closed meeting, email, or otherwise, state that he believed he might be a distraction to the Commission's work regarding MFGI.

On November 3, the Chairman for the first time sought guidance regarding whether he should recuse himself from matters involving MFGI. The General Counsel and Designated Agency Ethics Official<sup>187</sup> told him that he was not required to withdraw from participation in MFGI as a result of his prior relationship with Mr. Corzine.<sup>188</sup> The Chairman decided to recuse himself notwithstanding the advice of the Office of General Counsel and Designated Agency Ethics Official. The General Counsel or Assistant Designated Agency Ethics Official advised that, if that were the Chairman's decision, it would be more appropriate to term this course of

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<sup>187</sup> At CFTC, the General Counsel and the Designated Agency Ethics Official are the same person. See 76 FR 33066, 33111 fn. 2 (June 7, 2011) ("As used in this subpart, 'General Counsel' refers to the General Counsel in his or her capacity as counselor for the Commission and designated agency ethics official for the Commission, and includes his or her designee and the alternate designated agency ethics official appointed by the agency head pursuant to 5 C.F.R. § 2638.202.") (<http://www.cftc.gov/LawRegulation/FederalRegister/ProposedRules/2011-12270>.)

<sup>188</sup> The significance of an opinion from the Agency Designated Agency Official is indicated at section 2635.107(b) of the OGE regulations, 5 C.F.R. § 2635.107(b), which provides: "Disciplinary action for violating [the Standards of Ethical Conduct] or any supplemental agency regulations will not be taken against an employee who has engaged in conduct in good faith reliance upon the advice of an agency ethics official, provided that the employee, in seeking such advice, has made full disclosure of all relevant circumstances."

action a decision not to participate rather than a recusal. The Office of General Counsel began to prepare a formal statement for use by the Chairman.

On November 4, Senator Grassley issued the following statement:<sup>189</sup>

The chairman of the U.S. Commodity Futures Trading Commission is supposed to look out for investors. MF Global's case is a big collapse that requires a lot of work from the commission to try to figure out what went wrong and minimize further investor losses if possible. It's hard to see how the commission chairman could be completely objective in looking out for wronged investors when he has such strong ties to the principal of the failed firm. It seems recusal would be the best outcome for investors.

Senator Grassley made his statement "in light of media reports outlining close, longstanding ties between Gensler and Corzine. Media reports say Gensler and Corzine 'rose through the ranks' together at Goldman Sachs Group, Inc. for 18 years and collaborated on Capitol Hill when Corzine was a senator and Gensler was a staffer."<sup>190</sup> It was reported that Representative Frank indicated recusal was not presently advisable; Representative Frank was quoted as saying, "Knowing somebody is way too broad a reason for recusal."<sup>191</sup>

The Chairman publicly stated his reasons for determining to withdraw from participation on a few occasions. On November 8, the Chairman issued a Statement of Non-Participation.<sup>192</sup> The Chairman stated that he would not participate "in any enforcement matter involving specific parties MF Global, MF Global Holdings, Ltd., MF Global, Inc., or J.C. Flowers & Co." The Chairman did not describe the reasons for his decision not to participate, and did not describe his relationship to any of the entities listed. Furthermore, the Chairman did not state he would refrain from participation in any enforcement matter involving any officers, directors, or employees of the four listed entities; however, we presume they were included. The Chairman's statement follows below:

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<sup>189</sup> Senator Grassley's statement is available here:

[http://www.grassley.senate.gov/news/Article.cfm?customel\\_dataPageID\\_1502=37718](http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=37718).

<sup>190</sup> Id.

<sup>191</sup> David S. Hilzenrath and Peter Whoriskey, "Gensler-Corzine relationship complicates CFTC probe of MF Global," *The Washington Post*, November 4, 2011 (available here: [http://articles.washingtonpost.com/2011-11-04/business/35281044\\_1\\_gary-gensler-cftc-probe-jon-s-corzine](http://articles.washingtonpost.com/2011-11-04/business/35281044_1_gary-gensler-cftc-probe-jon-s-corzine)).

<sup>192</sup> See fn. 177.



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### STATEMENT OF NON-PARTICIPATION


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.

Accordingly, I have determined that I will not participate personally and substantially in any enforcement matter involving specific parties MF Global, MF Global Holdings Ltd., MF Global Inc., and J.C. Flowers & Co (the "specific parties"), and any matter directly related thereto. I will advise my principal subordinates of my decision not to participate in these matters. I also will instruct my principal subordinates that all inquiries and comments involving any of the matters described above should be directed to Dan Berkovitz, the General Counsel of the CFTC who will act on my behalf, without my knowledge or involvement.

In order to help ensure that I do not inadvertently participate personally and substantially in any particular matter that could have a direct or predictable effect on the specific parties with respect to such matters described above, I am directing Mr. Berkovitz to seek assistance from the alternate designated agency ethics official if he is ever uncertain whether or not I may participate in a matter.

I have instructed David Stawick, the Secretary of the Commission, to screen all CFTC matters directed to my attention that involve outside entities or that require my participation, to determine if they involve any of the specific parties and matters listed above. If Mr. Stawick determines that a matter involves any of the specific parties and matters, he will refer it to the appropriate official to take action without my knowledge or involvement.

  
\_\_\_\_\_  
Gary Gensler, Chairman

  
\_\_\_\_\_  
Date

On December 1, 2011, the Chairman testified before the Senate Committee on Agriculture, Nutrition, and Forestry and when asked why he chose to withdraw from participation on November 3, testified as follows:

I had conversations directly with the General Counsel and through my staff with the ethics officer and himself throughout those days and they had indicated that it was warranted for my involvement to stay participating. I indicated to the General Counsel on that Thursday [Nov. 3] that I thought that it could be a distraction to the very important work, of pursuing where was the cash, where was the money, get the money back, and any investigation or enforcement matter.<sup>193</sup>

When questioned further, the Chairman testified:

Really as of that Thursday of the week, there's been a transition from, uh, a registrant had gone into bankruptcy, and there was an ongoing investigative matter, and that Friday there was going to be an open [sic] surveillance meeting to discuss those matters, and I turned to General Counsel Berkowitz, and asked him what I needed to do, and he said you don't need to do anything different, and I said, let me tell you that I think it could be a distraction to the very good work of the government.<sup>194</sup>

On December 13, 2011, the General Counsel and Designated Agency Ethics Official issued a detailed, 14-page memo to the Chairman (the OGC memo) addressing whether Chairman Gensler's participation in matters involving MFGI leading up to the determination to cease participation (without seeking ethics advice) was permissible.<sup>195</sup> The memo solely addressed matters before the Commission prior to and at the time of the Chairman's election not to participate,<sup>196</sup> and based on the facts relayed in the memo concluded as follows:

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

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<sup>193</sup> *Continuing Oversight of the Wall Street Reform and Consumer Protection Act*, 112<sup>th</sup> Congress, December 1, 2011, beginning at 2:18:15 of the recording (available at: <http://www.ag.senate.gov/templates/watch.cfm?id=c5590145-5056-a032-52a3-4ffaa4613b7d>). Information about the hearing, including published testimony, is available here: <http://www.ag.senate.gov/hearings/continuing-oversight-of-the-wall-street-reform-and-consumer-protection-act>.

<sup>194</sup> Id. at 2:21:45 of the recording.

<sup>195</sup> The OGC memo is available here: <http://www.cftc.gov/ucm/groups/public/@freedomofinformationact/documents/file/participationmattersmfg.pdf>.

<sup>196</sup> OGC memo, page 15, fn. 46.

ethical perspective, Chairman Gensler's participation in Commission matters involving MFGI would not be improper.<sup>197</sup>

The OGC memo analyzed the Chairman's participation under section 2635.502 of the OGE regulations, 5 C.F.R. § 2635.502. Part 2635 houses the Standards of Ethical Conduct for Employees of the Executive Branch; section 502 is located under Subpart E, which addresses impartiality in performing official duties in instances where personal or business relationships exist. Section 502 governs the conduct of federal employees in connection with "particular matters" that are likely to have a direct and predictable effect on the financial interest of a member of the employee's household or an individual with whom the federal employee has a "covered relationship."<sup>198</sup> A federal employee may not participate in a particular matter with a member of his household or with any person who is a "covered relationship" unless he has informed the agency designee of the appearance problem and received authorization from the agency.

The OGC memo concluded that the Chairman did not have a covered relationship with the following individuals:

Jon Corzine – Chairman Gensler worked with Jon Corzine during his last 6 years at Goldman Sachs (1991-1997). During two of those years, Chairman Gensler reported directly to, among others, Mr. Corzine; and during four additional years Mr. Corzine was Chairman Gensler's second line supervisor. Though he has encountered Mr. Corzine variously over the

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<sup>197</sup> OGC memo at 15.

<sup>198</sup> 5 C.F.R. § 2635.502 provides that a federal employee has a covered relationship with the following people:

- (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;

Note: An employee who is seeking employment within the meaning of § 2635.603 shall comply with subpart F of this part rather than with this section.

- (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.

years at professional events, Chairman Gensler does not have a personal relationship with Mr. Corzine.<sup>199</sup> Duration of acquaintance: approximately 20 years. Jon Corzine was CEO and Chairman of the Board of MFGI's parent corporation, and was on the board of MFGI.

Bradley I. Abelow – Bradley Abelow joined Goldman Sachs in 1989<sup>200</sup> and made partner in 1998.<sup>201</sup> Chairman Gensler worked with Bradley Abelow at Goldman Sachs and had a weekly to bi-weekly working relationship. Mr. Abelow retired from Goldman Sachs in 2004, and later worked with Corzine while he was Governor of New Jersey.<sup>202</sup> Chairman Gensler had no social relationship with Mr. Abelow and saw him only at occasional professional events. They possibly spoke during the presidential primary season in 2008.<sup>203</sup> Duration of acquaintance: approximately 20 years. Mr. Abelow was President and Chief Operating Officer of MFGI's parent corporation, and also Chief Operating Officer of FINCO, and was on the board of MFGI.

Christopher Flowers – Mr. Flowers worked with Chairman Gensler at Goldman Sachs from 1979 until 1991, but did not work together on any specific deals. They might have had lunch once while Chairman Gensler was at the Treasury Department. On October 31, 2011, Mr. Flowers tried to reach Chairman Gensler at CFTC headquarters, and Chairman Gensler returned the call to Mr. Flowers, and spoke with him in a conference call with other MFGI Officials, including Jacob Goldfield, Henri Steenkamp, and others. Duration of acquaintance – approximately 20 years. In 2008, JC Flowers & CO. invested \$150 million in MF Global in exchange for preferred shares and a seat on the parent company's board.<sup>204</sup>

Laurie Ferber – Ms. Ferber worked at Goldman Sachs from 1987 to 2008 where she served in a number of capacities, including General Counsel of J. Aron & Company and Co-General Counsel of the Fixed Income, Currency and Commodities Division; she also headed the Goldman Sachs Derivatives Legal Group, and served as Chief of Staff of the Global Business

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<sup>199</sup> The OGC memo states that Chairman Gensler and Mr. Corzine generally have met when they both were present at a function presented by others, and do not attend each other's professional and personal major life events, such as inaugurations, weddings, or religious events. OGC memo at 7-8.

<sup>200</sup> *A Career in the (Budget) Balance*, The Star-Ledger, Final Edition, News, Pg. 1, March 20, 2006.

<sup>201</sup> *With Stock Issue Ahead, Goldman, Sachs Names 57 as Partners*, The New York Times, Late Edition-Final, Section C, Page 1, Column 2, October 21, 1998.

<sup>202</sup> *Corzine to Nominate a Former Colleague as State Treasurer*, The Star Ledger, Final Edition, New Jersey, pg. 15 (January 13, 2006).

<sup>203</sup> OGC memo at 9.

<sup>204</sup> Trustee report at page 57, n.55.

Selection and Conflicts Group.<sup>205</sup> Chairman Gensler may have spoken with Ms. Ferber on one or more compliance matters when he was at Goldman Sachs. Length of acquaintance – possibly 20 years. Ms. Ferber was General Counsel of MFGI's parent corporation and was on the board of MFGI.

Jacob Goldfield – The OGC memo reported that Chairman Gensler met Mr. Goldfield in late 1991 or early 1992, when both were in Fixed Income at Goldman Sachs. They had some overlapping responsibilities, and they may have served together on the Goldman Sachs Risk committee. They met once at CFTC headquarters since Chairman Gensler was sworn in; no official business was discussed.<sup>206</sup> Length of acquaintance – about 20 years.

Mr. Goldfield was not like the others. He was not employed at MFGI leading up to the last week of October, but David Schamis, a Director at MF Global Holdings, Ltd., called Mr. Goldfield on Tuesday, October 25, seeking assistance with MFGI during its final week.<sup>207</sup> Mr. Goldfield was on site at MFGI's New York Office during that last week; he conveyed his greetings to Chairman Gensler during a conference call between MFGI and regulators on Sunday October 30 and he participated in a conference call on Monday morning, October 31.

In addition, the Chairman exchanged email with Jacob Goldfield on October 30 and October 31; the email was previously described in the OGC memo:

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.<sup>208</sup>

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<sup>205</sup> Business Week Executive Profile of Laurie R. Ferber, Esq., available at <http://investing.businessweek.com/research/stocks/people/person.asp?personId=53017963&ticker=MFGILQ>.

<sup>206</sup> OGC memo at 11.

<sup>207</sup> OGC memo at 11.

<sup>208</sup> OGC memo at 10-11.



Mr. Goldfield and Mr. Gensler also shared banter presumably regarding Mr. Goldfield's reputed expertise with financial catastrophe,<sup>209</sup> with Mr. Gensler remarking of Mr. Goldfield, "[e]ver present you are," and Mr. Goldfield replying, "[t]he Zelig<sup>210</sup> of crises."<sup>211</sup>

The OGC memo noted that, when Chairman Gensler left Goldman Sachs in 1997, there were approximately 190-200 partners at Goldman Sachs. The large number of former partners gives some perspective as to the rationale for not requiring non-participation in matters involving former business colleagues where no covered relationship exists, as does the passage of time from the working relationships at issue, all of which terminated in 1997.

The General Counsel and Designated Agency Ethics Official concluded that the individuals described above had no covered relationship to the Chairman under section 2635.502, stating: "both during their partnership and afterwards, the relationship between Chairman Gensler and Mr. Corzine was exclusively a professional relationship."<sup>212</sup>

The OGC memo also opined that the facts in this matter did not give rise to a situation that, under section 2635.502, would cause a reasonable person with knowledge of the relevant facts to question the Chairman's impartiality with regard to MFGI:

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.

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

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<sup>209</sup> Mr. Goldfield's financial crisis expertise is newsworthy. See *The Last Days of MF Global*, by Peter Elkind and Doris Burke, Fortune Magazine/CNN, June 4, 2012, available here: <http://finance.fortune.cnn.com/2012/06/04/the-last-days-of-mf-global/>.

<sup>210</sup> *Zelig*, Dir. Woody Allen. Perf. Woody Allen, Mia Farrow, Patrick Horgan. Orion, 1983. Film.

<sup>211</sup> Email dated October 30, 1:10 pm EST. Author: Jacob Goldfield. Recipient: Chairman Gensler.

<sup>212</sup> In the course of our review we encountered no other individuals related to MFGI who had a covered relationship with the Chairman.

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, Goldman Sachs, or its partners, beyond the factors that would establish a covered relationship; i.e., facts in addition to Chairman Gensler's partnership at Goldman Sachs some 14 years ago. However, the facts regarding Chairman Gensler's relationship with Mr. Corzine and others at Goldman Sachs who are now associated with MFGI -- both during the time that Chairman Gensler worked at Goldman Sachs and afterwards -- are insufficient to provide such indicia.<sup>213</sup>

The General Counsel and Designated Agency Ethics Official's determination that there were no appearance issues was made after consultation with the Office of Government Ethics.<sup>214</sup> The OGC memo fully explained why there was no reason to refrain from participation, and offered no considerations that might weigh in favor of non-participation.

On December 14, 2011, the Chairman addressed the non-participation decision in a letter addressed to Representative Neugebauer. He generally described his participation during in the final days of MFGI, and stated that his decision to not participate was motivated by his determination that his continued participation could be a distraction to the Commission. The Chairman opined that the fact that MFGI had evolved into an Enforcement matter, mattered to him, and --

...as it turned to a specific enforcement matter that could involve not just the company but specific individuals, I informed the General Counsel of my decision on November 3 that I would not participate. My decision was in order to ensure that my participation did not serve as a distraction from the Commission's important duties to locate customer funds and conduct an enforcement matter. Subsequently, I executed a "Statement of Non-Participation" to document my decision.<sup>215</sup>

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<sup>213</sup> OGC memo at 13-14 (footnotes omitted). We agree with this memo insofar as it relates to the Chairman's relationship with the named individuals subsequent to his departure from Goldman Sachs, but we do not address or express agreement with the statement that the Chairman's relationships with the named individuals during his time at Goldman Sachs "were insufficient to provide such indicia."

<sup>214</sup> We would note that OGE has instructed all federal employees:

Although using the procedures provided for in 5 C.F.R. § 2635.502 is encouraged and recusal may be appropriate in certain situations not expressly identified in the regulation, employees should keep in mind that they have a responsibility to act on matters that are within the scope of their duties whenever they are not disqualified by conflicts or appearance concerns.

OGE 98x9, April 26, 1999, *Regarding Recusal Obligation and Screening Arrangements*. <http://www.oge.gov/OGELegal-Advisories/99x8--Recusal-Obligation-and-Screening-Arrangements/>.

<sup>215</sup> Chairman Gensler's letter to Representative Randy Neugebauer, December 14, 2011.

On March 13, 2012, the Chairman again discussed the non-participation decision in a letter to Representative Neugebauer, this time stating:

As this matter turned to a possible civil or criminal enforcement matter that could involve not just the company but specific individuals, I informed the General Counsel of my decision on November 3 that I would not participate. The General Counsel advised me that I was not required to withdraw from participation. Fourteen years ago when I left Goldman Sachs & Co., I was a partner of Mr. Corzine's. During part of my tenure at the firm, he also was my supervisor. At the time of my decision, he was the CEO of MFG. I did not want my previous relationship with him to be a distraction from the agency's important mission to locate customer funds and bring enforcement actions as appropriate.<sup>216</sup>

The Chairman told us that, as he was on the Agency's litigation hold list for litigation matters involving MFGI, he did not feel comfortable participating in Enforcement matters regarding MFGI.

We considered whether the Chairman's inclusion on the Agency's litigation hold list for potential MFGI-related litigation required recusal under OGE regulations or guidance.<sup>217</sup> It is clear that the Chairman participated in discussions with outside counsel for MFGI and other MFGI officials, including Corzine,<sup>218</sup> during MFGI's final days. Requests for status or documents, without more, should not require non-participation by a Commissioner or Chairman in Agency litigation pertaining to MFGI.<sup>219</sup>

We also take note that the Chairman has made similar calls to other market professionals during his tenure at CFTC. In fact, in the days following the collapse of MFGI, the Chairman assisted with the limited review of FCMs performed by the CFTC, CME and NFA, making direct calls to CFTC registrants as deemed necessary.<sup>220</sup> In short, it does not appear that

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<sup>216</sup> Chairman Gensler's letter to Representative Randy Neugebauer, March 13, 2011.

<sup>217</sup> The OGE has addressed non-participation in the context of Agency adjudicatory proceedings, using the recusal statute for federal judges (28 U.S.C. § 455) as a guide; however, the OGE has recognized in the context of administrative adjudications a "rule of necessity" which may operate to authorize or perhaps require participation where recusal would otherwise be mandated, for instance where a recusal would eliminate the presence of a quorum where no other decision-maker is available. See, OGE 85x14, Sept. 23, 1985 (<http://www.oge.gov/OGE-Advisories/Legal-Advisories/85x14--Appearance-Issues-Arising-from-Financial-Interest-of-Government-Employee%e2%80%99s-Sibling/>); OGE 83x18, Nov. 16, 1983 (<http://www.oge.gov/OGE-Advisories/Legal-Advisories/83x18--Recusal-of-a-Commissioner-when-Son-s-Law-Firm-Represents-a-Party/>).

<sup>218</sup> In a letter to Representative Neugebauer, Chairman Gensler described his actions during the final days of MFGI: "Though it was not always apparent which representatives from MFG were present on these calls, to the best of my knowledge and recollection, Mr. Corzine was on the line for at least part of one of these calls, and discussed matters regarding MFG's European bond positions." Chairman Gensler letter to Rep. Neugebauer, Dec. 14, 2011.

<sup>219</sup> See 28 U.S.C. § 455(b)(1) (recusal is required where a federal judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding").

<sup>220</sup> More information about the limited review may be found here: <http://www.cftc.gov/PressRoom/PressReleases/pr6171-12>.

Chairman Gensler treated MFGI differently than he generally treats any other registrant, if his assistance is needed.<sup>221</sup> However, the Chairman has not issued a non-participation statement in any other Enforcement matter.

An Analysis of Whether and How a Decision by CFTC Chairman Gary Gensler to Recuse Himself from Previous Matters Relating to MFGI Would Have Been Consistent with the CFTC's Official Recusal Policy

We do not believe the Chairman was required to recuse himself from previous matters relating to MFGI under applicable OGE regulations. CFTC has not adopted more detailed policies.

It is public knowledge that the Chairman has spoken with numerous CFTC registrants and their representatives in the context of the numerous rulemakings undertaken by the Commission pursuant to Dodd-Frank and otherwise. External meetings held in connection with Dodd-Frank rulemaking efforts are documented on the CFTC's website.<sup>222</sup> It is well established that matters of general application, such as rule makings, are generally not subject to disqualification.<sup>223</sup> Certainly if a CFTC official colluded with a former professional colleague to corrupt the rulemaking record, that would be actionable, but of course it would be equally improper if the parties were total strangers. Communicating with former professional colleagues in connection with rulemaking efforts of general application that are relevant to both generally is not improper for any federal employee.

With regard to the Chairman's participation in phone calls and other matters during the MFGI's final days, the Chairman's participation was consistent with the advice he later received from the General Counsel and Designated Agency Ethics Official.

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<sup>221</sup> Governmentwide standards of conduct require that "[e]mployees shall act impartially and not give preferential treatment to any private organization or individual." 5 C.F.R. § 2635.101. In addition, employees must ensure there is no appearance of giving preferential treatment to friends. 5 C.F.R. § 2635.702(d) ("To ensure that the performance of his official duties does not give rise to an appearance of ... giving preferential treatment, an employee whose duties would affect the financial interests of a friend, relative or person with whom he is affiliated in a nongovernmental capacity shall comply with any applicable requirements of § 2635.502").

<sup>222</sup> <http://www.cftc.gov/LawRegulation/DoddFrankAct/ExternalMeetings/ExternalMeetingsAll/index.htm>.

<sup>223</sup> OGE 06 x 9, October 4, 2006, *Regarding "Particular Matter Involving Specific Parties," "Particular Matter," and "Matter."* (<http://www.oge.gov/DisplayTemplates/ModelSub.aspx?id=2147483853>).

## Conclusion

We have undertaken to answer in detail eight questions posed by Senator Shelby. In the aftermath of MFGI, a number of regulatory and industry initiatives have taken place to increase the safety of customer funds, including increased reporting requirements, notification requirements for large transfers of customer funds out of protected accounts, changes to permissible investments that may be made with customer segregated funds, and a prohibition against internal transactions among affiliates with customer funds.<sup>224</sup> We were not asked to make recommendations, and make none here.

Nevertheless, we do have observations based on our fieldwork. In some instances, our fieldwork raised or revealed issues that could not be addressed in the context of our response to

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<sup>224</sup> The regulatory response to MFGI includes:

Jan 18, 2012 -- Futures industry self-regulatory organizations (CME Group, National Futures Association (NFA), InterContinental Exchange (ICE), the Kansas City Board of Trade (KCBOT) and the Minneapolis Grain Exchange (MGEX)) formed a joint committee to address customer segregation issues. <http://www.nfa.futures.org/news/newsRel.asp?ArticleID=3944>.

February 17, 2012 -- The Commission proposed to amend Commission Rule 1.25 in December 2011 to, among other things, prohibit the investment of customer segregated funds in foreign sovereign debt, and transactions with affiliates. The new rule, which also included other investment prohibitions and other provisions, became effective February 17, 2012. 76 Fed. Reg. 78,776 (Dec. 19, 2011). <http://www.gpo.gov/fdsys/pkg/FR-2011-12-19/pdf/2011-31689.pdf>.

May 1, 2012 -- Enhanced reporting implemented. CME Group Advisory Notice: Enhanced Customer Protections (April 2, 2012), <http://www.cmegroup.com/tools-information/lookups/advisories/clearing/AIB12-04.html>.

May 24, 2012 -- FCMs are now required to file daily cap, seg, and secured statements. See CME Group Advisory Notice: Daily Segregated, Secured 30.7 and Sequestered Statements (May 24, 2012), [http://www.cmegroup.com/tools-information/lookups/advisories/clearing/Daily\\_Segregatedx\\_Secured\\_30.7\\_and\\_Sequestered\\_Statements.html](http://www.cmegroup.com/tools-information/lookups/advisories/clearing/Daily_Segregatedx_Secured_30.7_and_Sequestered_Statements.html).

July 13, 2012 – CFTC approved new financial rules submitted by the NFA to strengthen the protection of customer funds held by FCMs. This includes restrictions on removing funds from customer accounts. The CFTC's press release is available here: <http://www.cftc.gov/PressRoom/PressReleases/pr6303-12>. NFA's rule submission is available here: [http://www.nfa.futures.org/news/PDF/CFTC/FR\\_Sec\\_16\\_ProtectionCustomerFunds\\_IntNotc\\_0517.pdf](http://www.nfa.futures.org/news/PDF/CFTC/FR_Sec_16_ProtectionCustomerFunds_IntNotc_0517.pdf). Further information is available here: <http://www.nfa.futures.org/news/newsNotice.asp?ArticleID=4116>.

August 16, 2012 – NFA approved a new requirement for FCMs to provide its DSRO with view-only access via the Internet to account information for each of the FCM's customer segregated fund accounts maintained and held at a bank or trust company. NFA's press release is available here: <http://www.nfa.futures.org/news/newsRel.asp?ArticleID=4092>. NFA's notice to CFTC is available here: [http://www.nfa.futures.org/news/.%5CPDF%5CCFTC%5CFR\\_Sec\\_4\\_OnLineAccessToFCMCustomerBankInfo\\_082012.pdf](http://www.nfa.futures.org/news/.%5CPDF%5CCFTC%5CFR_Sec_4_OnLineAccessToFCMCustomerBankInfo_082012.pdf).

October 23, 2012 -- CFTC proposed to adopt new regulations and amend existing regulations to require enhanced customer protections, risk management programs, internal monitoring and controls, capital and liquidity standards, customer disclosures, and auditing and examination programs for futures commission merchants ("FCMs"). 77 FR 67866 (Nov. 14, 2012) (available here: <http://www.cftc.gov/LawRegulation/FederalRegister/ProposedRules/2012-26435>). The comment period closed on February 15, 2013. 78 FR 4093 (Jan. 18, 2013) (available here: <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2013-00820a.pdf>).

Senator Shelby, and may be suitable for further review by CFTC OIG. Our concerns are detailed briefly below.

We are concerned with the FCM oversight processes in place in October 2011 by the Examinations Branch. There were no manuals. The reports created by the Examinations Branch did not conform to audit standards, and it does not appear that the Examinations Branches were subject to peer reviews or other detailed internal examination. This does not *ipso facto* mean that the Examinations Branch performed poorly; we stress that we did not formally audit or review the Examinations Branch's overall operations in the course of our fieldwork, and we understand that improvements in Examinations Branch processes are ongoing.

In retrospect, it is clear that customer funds were in jeopardy even while CFTC staff was on site at MFGI Offices in New York and Chicago during the firm's final days. We are concerned that CFTC staff were not able to obtain same day access to all documentation for MFGI's cap, seg, and secured statement on October 27. With CFTC's higher ranking supervisory auditor in Chicago teleworking on both Thursday and Friday of MFGI's final week, we wonder if the request was not taken as seriously as it might have been had she been on site with staff (especially on Friday after failing to obtain the requested documents on Thursday), both by virtue of her position and because she took a leadership role in the MFGI Chicago Office on Sunday. Her absence did not alter MFGI's obligations under Commission regulations nor did it alter any other legal obligations. However, for a matter of this importance, we believe the attendance of the higher ranked supervisory auditor would have conveyed a stronger message to MFGI. We are also concerned at the lack of procedure (formal or informal) in place to guide the process of requesting documentation of a cap, seg, and secured statement, and to address delays in production. We are concerned that the staff document request, in the end, was not an effective mechanism to assure the Commission that customer funds were protected. We are concerned that CFTC staff and management did not learn that MFGI was experiencing a run on the bank until after the fact.

During the final days of MFGI, it appears that multiple regulators were making duplicative requests for status and information from MFGI, and from each other. Better coordination likely would not have changed the eventual fate of MFGI, but certainly would have been desirable. We are concerned that the lack of coordination wasted both time and effort by all involved.

We are concerned at the lack of communication between CFTC and CME. We learned that CME and CFTC did not formally coordinate efforts during the last week of MFGI, and that they were both on site on Thursday and over the weekend apparently by coincidence. That better coordination could improve performance is an obvious observation.

We are also concerned with the lack of communication between CFTC and SIPC. But for a conversation overheard on site at MFGI on Monday October 31, CFTC staff would not have known that the SIPC trustee was on the way to the courthouse, and the SIPC filing as drafted did not protect the interests of MFGI's FCM customers.

We are concerned with the Chairman's use of personal email to conduct official business. Our review of the Chairman's personal email was limited; we examined email related to MFGI as necessary to address the issues raised by Senator Shelby.

Finally, we are concerned with the Chairman's determination to withdraw from participation. Because OGE regulations as interpreted by the General Counsel and Designated Agency Ethics Official did not require a recusal in this situation,<sup>225</sup> whether to refrain voluntarily from participation in order to avoid improper appearances involved a significant judgment call, as prominent voices expressed support for both continued involvement and immediate recusal at the time. Therefore, a decision to participate or to recuse would subject the Chairman to potential criticism.

Nevertheless, seeking ethics advice only when the matter became a public sensation – after both leading the Agency's response to the ongoing crisis and voting to authorize the Enforcement investigation – was not the most desirable course. While seeking guidance at the outset would have been preferable, we agree with the General Counsel and Designated Agency Ethics Official that the Chairman violated no OGE regulations by waiting until after he began to participate to seek advice. It is the extent of his participation prior to requesting advice that is troubling.

Moreover, after requesting guidance from the General Counsel and Designated Agency Ethics Official, the Chairman's actions ran counter to the legal advice he received. Determining to withdraw from participation on November 3 disadvantaged the Commissioner who now had to take on this work at a late stage, possibly without the same level of industry experience as the Chairman. Moreover, the Commissioner was not as involved as the Chairman in the intricacies of the MFGI situation. A learning curve potentially loomed. We stress this was a potential possibility rather than a certainty.

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<sup>225</sup> OGC memo at 15 (approving the Chairman's participation prior to November 3); fn. 188 and accompanying text (the General Counsel and Designated Agency Ethics Official on November 3 advised the Chairman that recusal was not required at that time).