

**III. *The Collapse of MF Global and Peregrine Financial Group: The Response from the Futures Industry, Regulators, and Customers***

**A. Introduction**

On October 31, 2011, MF Global, Inc. (“MF Global”), a major futures commission merchant (“FCM”), became the eighth-largest bankruptcy in U.S. history.<sup>1</sup> Even more striking than its magnitude, MF Global’s failure marked the first time in history that segregated customer funds vanished from an FCM.<sup>2</sup> Given the industry’s strong track record of protecting segregated funds, the swift collapse of MF Global and the enormity of the customer funds missing has “shaken the very core” of the futures industry.<sup>3</sup>

Ongoing investigations into the underlying causes of the firm’s collapse have identified several key sources of financial trouble.<sup>4</sup> The firm was highly leveraged, engaged in risky proprietary

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<sup>1</sup> MF Global was dually registered with the Securities and Exchange Commission (“SEC”) as a broker-dealer and with the Commodity Futures Trading Commission (“CFTC”) as an FCM; this article focuses on its role as an FCM. *Examining the Futures Markets: Responding to the Failures of MF Global and Peregrine Financial Group: Hearing Before the S. Comm. on Agric., Nutrition, and Forestry*, 112th Cong. (Aug. 1, 2012) [hereinafter *Agriculture Hearing*], available at <http://www.ag.senate.gov/hearings/examining-the-futures-markets-responding-to-the-failures-of-mf-global-and-peregrine-financial-group> (statement of Jill E. Sommers, Comm’r of the CFTC); Matthew Leising & Donal Griffin, *Corzine’s Lack of MF Global Controls Exposed With Missing Customer Money*, BLOOMBERG (Nov. 2, 2011), <http://www.bloomberg.com/news/2011-11-02/corzine-s-lack-of-mf-global-controls-exposed-with-missing-customer-money.html>.

<sup>2</sup> See Press Release, U.S. S. Comm. on Agric., Nutrition, and Forestry, Senator Roberts’ Opening Statement at Ag Hearing on MF Global and Futures Markets (Aug. 1, 2012), available at <http://www.ag.senate.gov/newsroom/press/release/senator-roberts-opening-statement-at-ag-hearing-on-mf-global-and-futures-markets> (“MF Global and Peregrine are no ordinary bankruptcies. Last fall, for the first time in history, the customers of a futures commission merchant’s segregated funds were absconded. Then, what was once unthinkable, actually happened again, with the news from Iowa regarding the Peregrine Financial Group.”).

<sup>3</sup> *Agriculture Hearing*, *supra* note 1 (statement of Terrence A. Duffy, Exec. Chairman and President of CME Group Inc).

<sup>4</sup> See *The Collapse of MF Global: Lessons Learned and Policy Implications: Hearing Before the S. Comm. on Banking, Hous., and Urban*

trading, and used customer funds for repurchase agreements (“repos”).<sup>5</sup> Most notably, MF Global leveraged more than \$1 billion of customer funds into its own enormously risky \$6.3 billion repo bet on European sovereign debt.<sup>6</sup> However, a so-called “loophole” permitted MF Global to conduct the high-risk maneuver off of its balance sheet.<sup>7</sup> Once MF Global disclosed the risky trades on European sovereign debt, revealed associated margin calls, and announced significant financial losses for the quarter, the firm collapsed abruptly with an estimated \$1.6 billion in customer funds missing.<sup>8</sup> Liquidation proceedings in the U.S. and abroad remain ongoing, and many customers continue waiting to learn if and when they will recover their funds.<sup>9</sup>

Less than a year after MF Global’s demise, Peregrine Financial Group (“Peregrine”), another FCM, declared bankruptcy after its sole owner and CEO Russell Wasendorf Sr. confessed in a suicide note to misusing more than \$200 million in customer funds to mask Peregrine’s financial trouble.<sup>10</sup> Apparently, Peregrine provided fabricated bank statements to regulators that massively overstated the capital in its accounts.<sup>11</sup> Indeed, the firm reported a \$218.6 million balance for a bank account containing only \$7.2 million, and regulators failed to detect the ongoing fraud despite ostensibly red flags.<sup>12</sup>

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*Affairs*, 112th Cong. (Apr. 24, 2012) [hereinafter *Banking Hearing*], available at [http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=e1370e7a-6627-4dc9-8ac9-bf69b49992de](http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=e1370e7a-6627-4dc9-8ac9-bf69b49992de) (statement of Jill E. Sommers, Comm’r of the CFTC).

<sup>5</sup> Richard Finger, *Jon Corzine: Criminal Or Just Plain Old-Fashioned Stupid?*, FORBES (Aug. 27, 2012), <http://www.forbes.com/sites/richardfinger/2012/08/27/mr-jon-corzine-criminal-or-just-plain-old-fashioned-stupid>; Leising & Griffin, *supra* note 1.

<sup>6</sup> James B. Stewart, *A Loophole Big Enough To Lose A Billion*, N.Y. TIMES, June 23, 2012, at B1.

<sup>7</sup> *Id.* For further explanation of this “loophole,” see *infra* Part II.B.

<sup>8</sup> Leising & Griffin, *supra* note 1; *Agriculture Hearing*, *supra* note 1 (statement of James W. Giddens, Tr. for the Securities Investor Protection Act Liquidation of MF Global, Inc).

<sup>9</sup> *Agriculture Hearing*, *supra* note 1 (statement of James W. Giddens).

<sup>10</sup> Jacob Bunge & Scott Patterson, *Wasendorf Son Subpoenaed in Peregrine Case*, WALL ST. J., July 31, 2012, at C2.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

In the aftermath of these two high-profile bankruptcies, customers, government officials, and industry analysts are calling for improved customer protection and more effective regulation of FCMs.<sup>13</sup> It is important to consider that, while the futures industry provides a marketplace for speculative and institutional investors, the industry is also the lifeblood for end-users like farmers and ranchers who rely on modest futures accounts to hedge risk.<sup>14</sup> As a consequence, freezing all customer accounts post-bankruptcy has paralyzed many small businesses and family-run operations that cannot compensate for the losses or weather the waiting period.<sup>15</sup>

This article considers the failures of MF Global and Peregrine, the regulatory framework for monitoring FCMs, and proposed measures for protecting customer funds in the futures industry. Part B examines CFTC regulations prior to MF Global's collapse, amendments implemented in response, and recently proposed modifications. Part C evaluates potential mechanisms for protecting customer funds in the future.

## **B. The Regulatory Framework for FCMs: Before and After MF Global and Peregrine**

### **1. The Role of Self-Regulatory Organizations**

The regulatory framework for FCMs has remained fundamentally unchanged over the past several decades, despite rapid industry growth and mounting concerns about insufficient oversight.<sup>16</sup> While the CFTC oversees rule-making and enforcement for the futures industry, the CFTC does not have the resources and

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<sup>13</sup> See Azam Ahmed & Ben Protess, *Clients Question CME Oversight of MF Global*, N.Y. TIMES (Nov. 9, 2011), <http://dealbook.nytimes.com/2011/11/09/clients-question-oversight-by-mf-globals-regulator>.

<sup>14</sup> See *id.*

<sup>15</sup> See *id.* (discussing an end-user customer's claim that MF Global's slow liquidation process was "seriously impeding the day-to-day operations of [his] family-owned business"); Press Release, U.S. S. Comm. on Agric., Nutrition, and Forestry, *supra* note 2.

<sup>16</sup> *Agriculture Hearing*, *supra* note 1 (statement of Gary Gensler, Chairman of the CFTC) (explaining that CFTC resources have not grown in lockstep with the industries it regulates and thus CFTC remains seriously understaffed).

manpower to police the day-to-day activities of FCMs.<sup>17</sup> As a result, designated self-regulatory organizations (“SROs”) must ensure that its member FCMs comply with the CFTC’s capital, segregation, and financial reporting requirements.<sup>18</sup> In this case, the CME Group and the National Futures Association (“NFA”) handled front-line regulation for MF Global and Peregrine, respectively.<sup>19</sup> In the aftermath of MF Global’s demise, some have criticized CME Group for failing to predict and prevent the collapse.<sup>20</sup> Moreover, the bankruptcy has drawn broader questions about conflicts of interest in the self-regulatory structure that may disincentivize SROs to halt questionable, yet profitable, trade practices at the FCMs providing their revenue.<sup>21</sup> In response, CME Group has defended its role in the regulatory structure, arguing that it remains the best situated and motivated entity to monitor FCMs.<sup>22</sup> Reacting to calls for enhanced regulatory oversight, CME Group has proactively instituted its own changes to improve confidence in the futures industry.<sup>23</sup>

## 2. CFTC Regulations Prior to Demise of MF Global and Peregrine

A fundamental principle of futures industry regulation requires firms to segregate their own capital from customer funds.<sup>24</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> *Agriculture Hearing, supra* note 1 (statement of Jill E. Sommers).

<sup>19</sup> *Agriculture Hearing, supra* note 1 (statement of Gary Gensler); Jacob Bunge & Doug Cameron, *MF Global’s Collapse Tars CME Chief’s Exit*, WALL ST. J. (Mar. 12, 2012), <http://online.wsj.com/article/SB1000142405270230453790457727772709744552.html>.

<sup>20</sup> Bunge & Cameron, *supra* note 19.

<sup>21</sup> *See* Bunge & Cameron, *supra* note 19; Gregory Meyer & Hal Weitzman, *MF Global’s fall puts spotlight on CME Group*, FIN. TIMES (Nov. 2, 2011), <http://www.ft.com/cms/s/0/0b722236-0579-11e1-8eaa-00144feabdc0.html>.

<sup>22</sup> *See CME Sees No Need to Revamp Futures Regulation in Post-MF Global Market*, CRAIN’S CHICAGO BUSINESS.COM, Feb. 2, 2012, <http://www.chicagobusiness.com/article/20120202/NEWS01/120209934/cme-sees-no-need-to-revamp-futures-regulation-in-post-mf-global-market>.

<sup>23</sup> *Agriculture Hearing, supra* note 1 (statement of Terrence A. Duffy) (announcing CME’s full cooperation and own efforts at reform); *see infra* Part III.A for an example of CME Group’s efforts.

<sup>24</sup> 7 U.S.C. § 6d(2) (2006) (“Such money, securities, and property shall be separately accounted for and shall not be commingled with the funds of

Additionally, segregated accounts must contain the amount the firm would owe customers upon liquidation.<sup>25</sup> Given these basic regulatory principles, the risk that customers might lose money in an FCM failure once seemed remote.<sup>26</sup> Yet this comingling of assets and subsequent loss of segregated funds is exactly what occurred in the demise of both FCMs. Nonetheless, the actions taken by MF Global may not have been illegal.

CFTC Regulation 1.25 (“Rule 1.25”), a corollary to the segregated funds requirement, permits FCMs to utilize customer funds for certain types of investments for the firm’s benefit.<sup>27</sup> Prior to 2000, Rule 1.25 permitted FCMs to invest segregated funds only in U.S. government and municipal securities, which are low-risk and highly liquid investments.<sup>28</sup> This ostensibly safe and practical exemption balanced the interests of protecting customer funds, while permitting FCMs to use customer funds efficiently for marginal investing.<sup>29</sup> Spurred by industry firms and lobbyists from 2000 to 2005, the CFTC passed a series of amendments to Rule 1.25 that broadened the loophole, allowing FCMs to invest customer accounts in a wide variety of investments.<sup>30</sup> The expanded list permitted FCMs to use customer funds in higher-risk investments like foreign sovereign debt, as well as in commercial paper, in-house transactions, bank certificates of deposit, and money market mutual funds.<sup>31</sup> Ultimately, the regulations permitted MF Global to secure

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such commission merchant . . . .”); see Scott Patterson, *Futures Firms Face Tougher Rules*, WALL ST. J., Dec. 5, 2011, at C3.

<sup>25</sup> Stewart, *supra* note 6.

<sup>26</sup> *CME Charities Hurt by MF Global Collapse*, N.Y. TIMES, Dec. 18, 2011, at B2.

<sup>27</sup> See William D. Cohan, *Tiny Rule Change at Heart of MF Global Failure*, BLOOMBERG (Nov. 15, 2011, 7:00 PM), <http://www.bloomberg.com/news/2011-11-16/tiny-rule-change-was-at-the-heart-of-mf-global-s-failure-william-d-cohan.html>.

<sup>28</sup> *See id.*

<sup>29</sup> *See id.*

<sup>30</sup> *Id.*; see CFTC, PROPOSED RULE ON REGULATIONS 1.25 AND 30.7 REGARDING INVESTMENT OF CUSTOMER FUNDS AND CREDIT RATINGS, [http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/reg125\\_307\\_factsheet.pdf](http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/reg125_307_factsheet.pdf).

<sup>31</sup> Rules Relating to Intermediaries of Commodity Interest Transactions, 65 Fed. Reg. 77,993 (Dec. 13, 2000); Investment of Customer Funds, 69 Fed. Reg. 6,140 (Feb. 10, 2004); Investment of Customer Funds and Record of Investments, 70 Fed. Reg. 28,190 (May 17, 2005); see M. Holland West et

investments with customer collateral, and then reuse the same customer collateral for proprietary trades such as repo bets, which FCMs need not disclose on their balance sheets.<sup>32</sup> In addition, FCMs could use alternative methods to calculate the amount to retain in segregated accounts that significantly underestimated the amount necessary to meet customer obligations in case of bankruptcy.<sup>33</sup> Moreover, Part 30 of CFTC Regulations, applicable to customer accounts traded on foreign exchanges, permitted MF Global to secure such accounts with much less capital than required for domestic accounts.<sup>34</sup> Given the enormous systemic risk these practices can create, many blame MF Global's failure on the interplay between Rule 1.25 exemptions, repurchase agreements, and foreign trades.<sup>35</sup>

### 3. Changes to CFTC Regulations After the Bankruptcies of MF Global and Peregrine Financial Group

Although Rule 1.25 exemptions may not have caused MF Global's collapse, the CFTC reacted swiftly to fortify its regulations in order to protect customer funds and avert a repeat crisis.<sup>36</sup> On December 5, 2011, the CFTC enacted the first round of post-MF

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al., *CFTC Finalizes Amendments to Customer Funds Rule and Addresses Other Dodd-Frank Act Business*, DECHERT ON POINT, 1 (Dec. 2011), [http://www.dechert.com/CFTC\\_Finalizes\\_Amendments\\_to\\_Customer\\_Funds\\_Rule\\_and\\_Addresses\\_Other\\_Dodd-Frank\\_Act\\_Business\\_12-22-2011](http://www.dechert.com/CFTC_Finalizes_Amendments_to_Customer_Funds_Rule_and_Addresses_Other_Dodd-Frank_Act_Business_12-22-2011).

<sup>32</sup> Michael Cohn, *FASB Plans to Revise Repo Agreement Standards*, ACCOUNTING TODAY (Mar. 21, 2012), <http://www.accountingtoday.com/news/FASB-Revise-Repo-Agreement-Standards-MF-Global-Scan-62078-1.html>.

<sup>33</sup> Stewart, *supra* note 6.

<sup>34</sup> 17 C.F.R. § 30 (2012); Stewart, *supra* note 6 (Part 30 permitted FCMs to determine what amount to retain in secured customer accounts using "an 'alternative' calculation of customer assets that vastly understate[d] what firms actually owe.").

<sup>35</sup> Emmanuel Olaoye and Christopher Elias, *MF Global Trustee Reviewing Firm's Practice of Repledging Collateral*, REUTERS (Dec. 21, 2011), <http://blogs.reuters.com/financial-regulatory-forum/2011/12/21/mf-global-trustee-reviewing-firms-practice-of-repledging-collateral>.

<sup>36</sup> *Banking Hearing*, *supra* note 4 (statement of Jill E. Sommers).

Global rule amendments, effective February 17, 2012.<sup>37</sup> The CFTC designed the new regulatory framework to minimize the exposure of customer funds to systemic risk posed by poor credit and illiquidity.<sup>38</sup> Under the Amended Rule 1.25, FCMs may no longer invest customer funds in riskier deals, such as corporate obligations not guaranteed by the U.S.,<sup>39</sup> foreign sovereign securities,<sup>40</sup> or transactions with an FCM's affiliates or derivatives clearinghouse.<sup>41</sup> Additionally, FCMs may only use customer funds for "highly liquid" investments that can be recovered without material loss within one business day.<sup>42</sup> This stringent standard replaced the former, and more lenient, "readily marketable" requirement so that investments could be liquidated more quickly when necessary.<sup>43</sup>

In addition to revising Rule 1.25, the CFTC has amended many other regulations and policies. In a key measure designed to preserve customer funds, the CFTC now constrains FCMs to using a more accurate technique—the net liquidating equity method—for calculating the amount of customer funds that must be retained in secured accounts to satisfy customer obligations.<sup>44</sup> In response to concerns about the self-regulatory structure, the CFTC has tightened its reins on SROs by specifying training and review protocol for SRO inspectors and creating a new division dedicated to overseeing SRO reviews of FCMs.<sup>45</sup> Through these reforms, the CFTC seeks to strengthen and streamline the SROs' oversight of the futures industry and its own oversight of the SROs.<sup>46</sup>

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<sup>37</sup> Investment of Customer Funds and Funds Held in an Account for Foreign Futures and Foreign Options Transactions, 76 Fed. Reg. 78,776 (Dec. 19, 2011).

<sup>38</sup> *Id.*

<sup>39</sup> 17 C.F.R. § 1.25(a)(1)(v)–(vi), (b)(2)(vi) (2012).

<sup>40</sup> 76 Fed. Reg. at 78,781 ("The Commission has decided to . . . [e]liminate foreign sovereign debt as a permitted investment.").

<sup>41</sup> 17 C.F.R. § 1.25(d)(3) (2012).

<sup>42</sup> *Id.* § 1.25(b)(1), (b)(2)(v).

<sup>43</sup> 76 Fed. Reg. at 78,784.

<sup>44</sup> 17 C.F.R. § 1.25(b) (2012); *Agriculture Hearing*, *supra* note 1 (statement of James W. Giddens).

<sup>45</sup> *Agriculture Hearing*, *supra* note 1 (statement of Gary Gensler).

<sup>46</sup> *See id.*

#### 4. **Proposed Amendments to CFTC Regulations for Enhanced Customer Protection**

On October 22, 2012, the CFTC submitted for public comment another reform measure designed to safeguard customer funds and bolster confidence in the futures industry.<sup>47</sup> A cornerstone of the proposal would require FCMs to grant regulators and SROs direct electronic access to FCM accounts.<sup>48</sup> The CFTC tailored this requirement to correct oversight gaps that allowed Russell Wasendorf, Sr. to take advantage of Peregrine's customers without detection by using "Photoshop and a post office box."<sup>49</sup> Under this measure, regulators could ensure "24-7-365" that an FCM keeps customer funds segregated and safe.<sup>50</sup> Additionally, the amendments would increase FCM reporting requirements concerning segregated funds by mandating daily reports on segregated funds and semi-monthly reports describing how the FCM had invested customer funds under Rule 1.25.<sup>51</sup>

The proposed reforms also directly address concerns regarding the protection of customer funds trading on foreign markets.<sup>52</sup> To that end, the CFTC has proposed amendments to Part 30 that would require FCMs to, among other things, "hold sufficient

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<sup>47</sup> Sarah N. Lynch, *US futures regulator unveils customer fund protection plan*, REUTERS (Oct. 23, 2012), <http://www.reuters.com/article/2012/10/23/cftc-customer-protection-idUSL1E8LN2AC20121023>.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Press Release, CFTC, CFTC Proposes New Regulations and to Amend Existing Regulations to Enhance Protections for Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations (Oct. 23, 2012) [hereinafter CFTC Press Release], available at <http://www.cftc.gov/PressRoom/PressReleases/pr6396-12>.

<sup>52</sup> MF Global's collapse shed light on the regulatory loopholes that U.S. customers face when trading on foreign markets. In response, MF Global Trustee James Gidden recommended that the CFTC "[e]liminat[e] the segregated versus secured distinction in CFTC Regulation 30.7, ensuring consistency of customer protection when trading overseas, and monitoring compliance abroad closely." *Agriculture Hearing*, supra note 1 (statement of James W. Giddens). Although CFTC's proposal does not go so far as to prohibit Part 30 secured accounts, it does substantially strengthen protections for customer funds traded in foreign markets.

funds in secured accounts to meet their total obligations to [all] customers trading on foreign contract markets, computed under the net liquidating equity method.”<sup>53</sup> Furthermore, the proposal would require FCMs to adopt certain internal policies governing customer accounts and provide additional disclosures about firm-specific risks to potential investors.<sup>54</sup> In order to reinforce the individual responsibility of FCM managers, the proposed amendments would also require FCMs to obtain pre-approval of management prior to withdrawing 25% or more of excess funds in segregated or Part 30 secured accounts, excepting withdrawals for the benefit of customers.<sup>55</sup> In sum, the proposed amendments to CFTC regulations constitute another layer of customer protections designed to directly address concerns raised by the failures of MF Global and Peregrine.<sup>56</sup>

### **C. Next Steps for Protecting Commodities Customers in the Future**

#### **1. Proposed Creation of a Futures Investor and Customer Protection Fund**

While the Federal Deposit Insurance Corporation (“FDIC”) and Securities Investor Protection Corporation (“SIPC”) offer extensive protection to customer funds entrusted to banks and broker dealers, respectively, in the event of bankruptcy, no such insurance program protects futures customers against FCM collapse.<sup>57</sup> For many years, the futures industry has considered a comparable insurance-type fund for its customers to be impracticable.<sup>58</sup> While opponents of such an insurance program claim it would be prohibitively expensive for an industry seeking to recover from the financial crisis,<sup>59</sup> advocates like MF Global Trustee James Giddens

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<sup>53</sup> CFTC Press Release, *supra* note 51.

<sup>54</sup> *Id.* (laying out strategies for FCMs to strengthen their internal controls and disclose firm-specific risks to investors).

<sup>55</sup> *Id.*; *Agricultural Hearing*, *supra* note 1 (statement of Terrence A. Duffy).

<sup>56</sup> See CFTC Press Release, *supra* note 51; CFTC, Q & A – PROPOSED AMENDMENTS TO ENHANCE CUSTOMER PROTECTION (Oct. 23, 2012), [http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/custom\\_erprotection\\_qa.pdf](http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/custom_erprotection_qa.pdf).

<sup>57</sup> *Banking Hearing*, *supra* note 4 (statement of Jill E. Sommers).

<sup>58</sup> See *Banking Hearing*, *supra* note 4 (statement of Jill E. Sommers).

<sup>59</sup> *Id.*

contend that a “modestly funded” protective fund could be “maintained at a minimal cost” to the industry and cover a large majority of customers.<sup>60</sup>

In light of recent FCM failures, regulators are reevaluating the feasibility of establishing insurance-type protection for futures customers.<sup>61</sup> In the first step towards developing a futures insurance fund, CFTC Commissioner Bart Chilton proposed the creation of a Futures Investor and Customer Protection Fund (“FICPF”) modeled after the SIPC.<sup>62</sup> In the event of an FCM failure, the FICPF would reimburse claims up to \$250,000 in futures liquidation and cash per customer.<sup>63</sup> Chilton recommends funding the FICPF through fees assessed on FCMs in a cost-sensitive and flexible manner that would also incentivize FCMs to continue serving end-user customers.<sup>64</sup>

Shortly after the CFTC released Chilton’s proposal, futures industry leaders and customers convened to discuss the potential of establishing an insurance fund.<sup>65</sup> In general, industry leaders remain largely focused on the negatives of a futures protection fund, such as the high cost, moral hazard risk, and unique challenges that large institutional accounts present.<sup>66</sup> Nevertheless, the CFTC points out that the futures industry appears increasingly open to the concept.<sup>67</sup> In that vein, CME Group took the initiative to organize its own customer protection fund that provides some degree of reimbursement for end-user customers like farmers and ranchers who utilize CME Group’s markets to hedge the future risk of their

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<sup>60</sup> Azam Ahmed, *MF Global Trustee Calls for Fund to Protect Customers*, N.Y. TIMES DEALBOOK (Apr. 24, 2012), <http://dealbook.nytimes.com/2012/04/24/mf-global-trustee-calls-for-fund-to-protect-customers>; Press Release, MF Global Inc. trustee calls for insurance program (Aug. 1, 2012), available at <http://www.futuresmag.com/2012/08/01/mf-global-inc-trustee-calls-for-insurance-program>.

<sup>61</sup> See *Banking Hearing*, *supra* note 4 (statement of Jill E. Sommers).

<sup>62</sup> Bart Chilton, Comm’r of the CFTC, Statement on the Futures Investor and Customer Protection Act (FICPA) Proposal: The Plan, Stan—Moving Forward on a Futures Insurance Fund (Aug. 9, 2012), <http://www.cftc.gov/PressRoom/SpeechesTestimony/chiltonstatement080912>.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Jacob Bunge & Aaron Lucchetti, *Futures Industry Leaders Discuss Insurance Fund*, WALL ST. J., Aug. 16, 2012, <http://online.wsj.com/article/SB10000872396390444508504577593424033950042.html>.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

products.<sup>68</sup> Although the fund did not apply retroactively to MF Global customers, it was fortuitously in place to help mitigate damage to victims of Peregrine's bankruptcy.<sup>69</sup> Similarly, John Roe, co-founder of the Commodity Customer Coalition, recommends a "customer protection fund focused on providing liquidity for the bulk transfer of customer accounts as an FCM collapses into bankruptcy," but not an "SIPC for futures."<sup>70</sup> In essence, Roe proposes modeling a customer protection fund after the mechanisms employed by commodity exchanges to protect themselves against FCM failure.<sup>71</sup> Naturally, the futures industry would prefer to design and implement an adequate solution from within, without need for government intervention.<sup>72</sup>

## 2. Streamlining or Merging the Operations of the SEC and CFTC

With perhaps the most far-reaching proposal after the recent FCM failures, the House Financial Services Subcommittee on Oversight and Investigations (the "Subcommittee") recommended that Congress consider merging the CFTC and SEC into a single regulatory agency for capital markets.<sup>73</sup> Alternatively, the Subcommittee suggested that the two agencies should, at a

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<sup>68</sup> Jacob Bunge, *CME to Open Fund Set Up After MF Global's for Peregrine Clients*, WALL ST. J., (July 11, 2012), <http://blogs.wsj.com/deals/2012/07/11/cme-to-open-fund-set-up-after-mf-global-for-peregrine-clients> (describing CME Group's customer protection fund designed to reimburse customers up to \$25,000 each).

<sup>69</sup> *Id.*

<sup>70</sup> For Roe's argument that a fund modeled after SIPC would not reimburse quickly enough to accommodate the unique needs of futures customers, see Column by John Roe, in Bart Chilton & John L. Roe, *Can an Insurance Fund Make the Once Sacred Segregated Account Safe Again?*, OPALESQUE (Sept. 3, 2012), [http://www.opalesque.com/OFI1292/Can\\_an\\_Insurance\\_Fund\\_Make\\_the\\_Once\\_Sacred292.html](http://www.opalesque.com/OFI1292/Can_an_Insurance_Fund_Make_the_Once_Sacred292.html).

<sup>71</sup> *Id.*

<sup>72</sup> *See id.*

<sup>73</sup> Press Release, H. Fin. Servs. Subcomm. on Oversight and Investigations, *Financial Services Subcommittee Report Finds Decisions by Corzine, Lack of Communication Between Regulators Led to MF Global Bankruptcy and Loss of Customer Funds* (Nov. 15, 2012), available at <http://financialservices.house.gov/news/documentsingle.aspx?DocumentID=312314>.

minimum, streamline their operations to coordinate oversight.<sup>74</sup> The Subcommittee investigated the events preceding MF Global's collapse and identified regulatory inefficiencies with regard to the increasingly large number of firms regulated by both agencies.<sup>75</sup> Specifically, the CFTC and SEC failed to cooperate and share critical information regarding the FCM's activities and financial health.<sup>76</sup> If MF Global's regulators had fully understood the firm's financial instability, the agencies could have better protected customers or perhaps even averted bankruptcy.<sup>77</sup> In light of these findings, the distinct jurisdictions for the CFTC and SEC may be outdated in the modern economy, due to the convergence of financial markets, customers, and products.<sup>78</sup> As a result, a single regulatory agency for capital markets may better serve the financial services industries and their customers.<sup>79</sup>

### 3. Future Developments and Next Steps

In addition to an insurance program or a single-agency regulatory structure, customers, industry leaders, and regulators have proposed numerous solutions to bolster confidence in the safety of futures customer funds. For instance, many support modifying the bankruptcy code to, among other objectives, help futures customers achieve parity with securities investors.<sup>80</sup> Additionally, James Giddens recommends simplifying CFTC rules for bulk transfers in FCM liquidations to expedite the process of returning funds to customers.<sup>81</sup> Looking forward, John Roe suggests that additional

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<sup>74</sup> *Id.*

<sup>75</sup> STAFF OF H. FIN. SERVS. SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, 112TH CONG., REP. ON MF GLOBAL 79-83 (Nov. 15, 2012), *available at* <http://financialservices.house.gov/uploadedfiles/256882456288524.pdf>.

<sup>76</sup> *Id.* at 81.

<sup>77</sup> *See id.*

<sup>78</sup> *See id.* at 81-83.

<sup>79</sup> *Id.*

<sup>80</sup> Press Release, Nat. Grain and Futures Assoc., NGFA Sends Congress, CFTC Proposed Changes to Bankruptcy Code, and Other Measures to Protect Against Future MF Global-Type Liquidations (July 3, 2012), *available at* [http://www.hagstromreport.com/assets/2012/2012\\_0703\\_NGFA\\_CFTC.pdf](http://www.hagstromreport.com/assets/2012/2012_0703_NGFA_CFTC.pdf).

<sup>81</sup> *Agriculture Hearing*, *supra* note 1 (statement of James W. Giddens).

customer protection might stem from more widespread application of alternative methods of account segregation, such as tri- and quad-party models.<sup>82</sup> Although it remains unclear whether any of these proposals will be implemented, the futures industry has certainly not seen the last of the regulatory reforms responding to the failures of MF Global and Peregrine. Ultimately, regulators must balance the value of increased customer protection against the risk of over-regulation that could stifle an industry still reeling from these high-profile bankruptcies.

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<sup>82</sup> See Roe, *supra* note 70.

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