asset management group

5 December 2016

European Securities and Markets Authority
CS 60747
103 rue de Grenelle 75345
Paris Cedex 07 France

Re: Response to discussion paper regarding the trading obligation for derivatives under MiFIR

Dear Sirs and Madams:

The Securities Industry and Financial Markets Association's Asset Management Group ("SIFMA AMG" or "AMG")[1] appreciates the opportunity to respond to the European Securities and Markets Authority's discussion paper regarding the trading obligation for derivatives under MiFIR. AMG's members—U.S. and multinational asset management firms with clients that include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds—have had extensive experience with the mandate for central execution of swaps in the United States and hopes that AMG's comments, which are informed by this experience, are helpful to ESMA's finalization of the trading obligation ("TO") standards in Europe.

SPECIFIC RESPONSES TO TRADING OBLIGATION DISCUSSION PAPER

Q1. ***Do you agree that the level of granularity for the purpose of the trading obligation should apply at the same level as the one used for calibrating the transparency regime of non-equity instruments? If not, which level of granularity for the TO would you recommend and why? Would that differ by asset class and type of instrument?***

AMG agrees with ESMA's proposed approach to initially make the TO more granular than the transparency regime. AMG considers that ESMA's plan to only assess the liquidity of contracts based upon tenors provides the level of precision necessary for determining which derivative contracts should initially be subject to the TO. As has been the case for the CFTC's first series of MAT determinations in the U.S., not all tenors currently have the requisite

[1] SIFMA AMG's members represent U.S. and multinational asset management firms whose combined global assets under management exceed $34 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds.

characteristics to mandate trade execution on trading venues. ESMA's proposal will serve to ensure that only tenors with the requisite liquidity profile will initially be subject to the TO.

In considering differences between the granularity of the transparency regime and the TO, AMG urges ESMA to remember that the transparency regime and the TO are different obligations and that their effect on market participants and markets, when implemented, will differ. The pre-trade transparency requirements are a burden on systematic internalisers ("**SIs**") and requires them to make public firm quotes even where they have not been prompted by clients to do so. TO determinations affect a broad range of market participants and require them to onboard with trading venues and/or direct market access providers.

In its alignment of the transparency regime and the TO, ESMA should not assume that a class of derivatives will be liquid under the TO simply because such class has been found liquid for the purposes of the transparency regime. Whilst AMG is supportive of ESMA's use of the Classes of Financial Instruments or "COFIA" approach for the purposes of assessing which derivatives should be subject to the TO, AMG urges ESMA to consider the assessment of liquidity for both regimes separately, and not transpose the results of the transparency obligation into the results of the liquidity assessment carried out for the purposes of the TO. On this note, AMG is pleased to see that ESMA appears to only be considering interest rate derivatives with an unbroken tenor for the purposes of assessing which derivative contracts should be subject to the TO. The transparency regime, on the other hand, includes all derivative contracts in its assessment irrespective of their maturity date.

Additionally, AMG encourages ESMA, when deciding which derivative contracts should be subject to the TO, to consider current trading activity in cleared derivatives both on-venue and bilaterally. Ultimately this will ensure that a class of derivatives has proven liquidity to support a TO determination. This data should be readily available from TRs and CCPs and AMG strongly encourages ESMA to make use of data from both sources to complement each other and give a fuller picture of trading activity both on- and off-venue. AMG discusses data sources that ESMA should rely upon in greater detail at Q3 below.

AMG would like to stress the importance of ESMA finalizing its TO RTSs with an eye towards the need to grant equivalence and to pre-empt the market fragmentation that occurred as a result of the U.S./E.U. standoff over CCP equivalency. Fortunately, MiFIR envisages ESMA consulting with third-country competent authorities ahead of preparing the RTS to address the TO. Moreover, the MAT determination process is currently under review by the CFTC following problems that market participants encountered in the U.S. when mandatory execution on swap execution facilities ("**SEFs**") became effective, providing an opportune time for the E.U. and U.S. regulators to work together to implement their own mandatory trading obligations to, as CFTC Chairman Massad described it, "avoid regulatory arbitrage" and "harmonize the rules as much as possible." In this regard, AMG urges ESMA to consult

with the CFTC to benefit from its experience with the MAT regime. Alignment of both the U.S. and E.U. regimes at an early stage will aid ESMA with any determinations of equivalence which will need to be considered in relation to the U.S. MAT regime pursuant to Article 33 of MiFIR.

AMG members are asset managers who represent a wide base of clients both in the E.U. and U.S. who have trades executed in one or both jurisdictions. Alignment of the E.U. and U.S. trading obligation standards will help prevent market fragmentation. At the same time, AMG understands that it will be difficult to ensure complete alignment between the two regimes, and notes that certain aspects of the EU regime—in particular, the lack of any restrictions on the execution methods for products subject to the TO—may be different as the EU has decided to provide broader means of execution and the U.S. has, to date, been more restrictive. That said, equivalency should be evaluated based on the ends achieved by each respective jurisdiction's regulations, and not the means of accomplishing those ends. AMG urges ESMA and the CFTC to open up an ongoing dialogue regarding the aspects of each regime which cannot be aligned and, in doing so, address equivalency at an early stage.

Failure to align the two regimes such that cross-border transactions are subject to conflicting or duplicative regimes would be detrimental to well-functioning global markets. Without mutual equivalency of regimes, fragmentation along jurisdictional boundaries will inevitably occur. If a class of derivatives is subject to a trading obligation in one jurisdiction and not another, regulatory arbitrage could lead EU participants to trade on only EU platforms to avoid the more restrictive execution methods required of SEFs. Alternatively, if a class of derivatives is subject to a trading obligation in both jurisdictions, cross-border market participants will be unable to satisfy their respective trading obligation requirements, unless a trading venue is dually-registered. To date, SIFMA AMG notes that many trading venues have prevented certain market participants, based on domicile, from trading in order to avoid dual registration.

Ultimately U.S. market participants will want the ability to satisfy the U.S. MAT obligations via the use of E.U. trading venues and E.U. market participants will, likewise, want the ability to satisfy the E.U. TO via the use of SEFs. In this vein, the CO provides for the recognition of third country CCPs by ESMA for the purposes of mandatory clearing. Recognition of a third country CCP by ESMA allows in-scope entities subject to the CO to satisfy their clearing obligations via the use of third country CCPs which are recognised. AMG urges ESMA to take a similarly streamlined approach to SEFs and trading venues. Given the number of SEFs operating in the U.S., granting certain SEFs recognition by virtue of them being regulated as a SEF in the U.S. would be a simple way of allowing market participants to satisfy a trading obligation that is in effect for a given instrument in either the E.U. or U.S. (or both) by executing a trade in such instrument on either an E.U.-registered trading venue or U.S.-registered SEF.

Q2. Do you agree that all derivatives currently subject to or considered for the CO are admitted to trading or traded on at least one trading venue? If not, please explain which classes of derivatives are not available for trading on at least one trading venue.

AMG urges ESMA to ensure that "admitted to trading" means that derivative contracts are actually traded. This is, ultimately, a question of fact. Subsequently, if a derivative contract is considered liquid simply because it is subject to the CO and able to be traded on a venue then, where it is in fact not actively traded on a trading venue, it could result in a false view of liquidity being assumed by ESMA in relation to that derivative contract. Additionally, if classes of derivatives which are able to be traded on-venue but are not actually traded on-venue are declared subject to the TO then this may result in certain types of derivative contract being forced to be traded on-venue where it is not appropriate to do so.

Q3. How should ESMA determine the total number of market participants trading in a class of derivatives? Do you consider it appropriate to carry out this assessment with TR data or would you recommend other data sources?

AMG would like to express its concerns about ESMA's proposed use of, and reliance upon, TR data. AMG urges ESMA to consider other sources of information which AMG considers to be more likely to provide an accurate and reliable view of the liquidity of a class of derivatives. Most significantly, AMG wishes to encourage ESMA to consider relying on data sourced from CCPs as a primary source of evidence for assessment of the TO. Due to the possibility of duplicative reporting or unmatched trade reports, TR data may understate or overstate liquidity (as acknowledged by ESMA in the Discussion Paper and discussed further at Q16). Subsequently there is a real danger that relying solely on TR data will give an inaccurate view of market liquidity.

AMG is encouraged to see from the Discussion Paper that ESMA is aware of the issues surrounding TR data. Given the unique role of CCPs in the cleared derivatives market it should be self-evident that CCPs are in the best position to provide ESMA with necessary data to further assess the liquidity of a class of derivatives. CCPs will not only have detailed records of the derivatives they clear but will also have information concerning the trading venues where swaps cleared through that particular CCP are executed. By complementing data sourced from TRs with CCP data, ESMA will receive a more accurate and comprehensive data set than one pieced together from, for example, each individual trading venue. Subsequently, data collected from CCPs will not only eliminate the issue of duplicative and unmatched trade reports but should also make ESMA's task of collecting accurate data less time consuming. In spite of this, AMG wishes to point out that trading venues and NCAs can also be reliable and up-to-date sources of information and urges ESMA to use this data to double-check information collected from CCPs.

In noting the difficulties faced by ESMA in its proposed use of TR data, AMG is of the view that ESMA's difficulties are also compounded by EMIR's dual sided reporting requirement. AMG therefore wishes to take this opportunity to encourage ESMA to consider a single sided reporting regime under EMIR, a change that would be welcomed by AMG members and many other market participants. Pursuant to Article 85(1) of EMIR and following a public hearing for stakeholders, the European Commission is currently undertaking a review of EMIR. AMG therefore encourages ESMA to identify this issue to the European Commission and urges the European Commission to introduce a single sided reporting regime in the E.U. as part of the EMIR review.

Finally, AMG understands that the dataset which ESMA intends to analyse for the purposes of determining whether or not a derivative is liquid will be collected between 1 July 2015 and 31 December 2015. AMG urges ESMA to update and review information gathered for the purposes of assessing liquidity on a rolling basis. In AMG's experience the liquidity of derivative classes varies from time to time and so a derivative class which may be liquid at the time it is declared subject to the TO may later become illiquid and vice versa. Relying on historical data will give an inaccurate view as to which derivatives are being traded presently and on which venues. This data may, therefore, give an inaccurate view of liquidity if relied upon. Additionally, AMG urges ESMA to ensure it has the ability to easily amend the RTS setting out which classes of derivatives are subject to the TO in order to remove classes of derivatives from the TO which ultimately become illiquid. Forcing market participants to trade illiquid derivatives on-venue will be harmful to the market and may result in market participants being unable to hedge exposures.

Q4. In your view, what should be the minimum total number of market participants to consider the following classes of derivatives as sufficiently liquid for the purpose of the trading obligation? i) OTC interest rate derivatives denominated in EUR, U.S.D, GBP and JPY; ii) OTC interest rate derivatives denominated in NOK, PLN and SEK; iii) Credit default swaps (CDS) indices? Should you consider that this assessment should be done on a more granular level, please provide your views on the relevant subsets of derivatives specified in 1.-3.

AMG would like to reiterate its belief that the liquidity assessment for classes of derivatives should be principle-based and that all liquidity criteria should be taken into account by ESMA when making a TO determination. Consequently, whilst AMG endorses a threshold for the minimum number of trading venues and liquidity providers (as discussed in Q6 and Q8), it believes a threshold for the minimum number of market participants should not be based on a pre-set number. A pre-set threshold would not take into account the actual volumes of trades being traded by market participants. Therefore, if set too rigidly, a threshold may result in an inflated view of liquidity where low volumes of a derivative contract are traded by the requisite number of market participants or, on the contrary, a high volume is traded by a low number

of market participants as such participants are almost the only users of the contract. Where the latter is the case, this class of derivative would wrongly be excluded from being liquid because it does not meet the threshold for the number of market participants.

AMG understands that the Discussion Paper addresses the general application of the liquidity assessment for the purposes of the TO and that, prior to an individual class of derivatives being made subject to the TO, ESMA will carry out a public consultation to gather market participants' views on the suitability of such class of derivatives to be subject to the TO. Given the novel and complex issues associated with each class of derivatives, AMG encourages ESMA to form, and consult with, an advisory committee on a frequent basis regarding the application of the TO to each new class of derivatives. This committee should be composed of leading market participants, representing a wide demographic of the market, who will be able to provide ESMA with product and trading expertise, as well as an insight into the viability of imposing the TO in relation to certain classes of derivatives. Given the market-wide impact that TO designations will have, AMG believes that market participants' opinions should inform ESMA's entire decision-making process.

Q5. Do you agree with this approach? Do you consider alternative ways to identify the number of trading venues admitting to trading or trading a class of derivatives as more appropriate?

To an extent AMG agrees with ESMA's view that the more trading venues that trade a class of derivatives, the more liquid that class can be considered, AMG is concerned that ESMA should not conclude that a derivative class is liquid based solely upon the fact that a trading venue offers such derivative contract for trading. If a derivative contract is offered for trading by a venue which does not have actual trading volumes of that derivative then AMG considers that such a venue is not ready to support mandatory trading at that time for the class of derivative. In addition, similar to the point made in Q4, ESMA should take into account the ratio of trades executed against the number of trading venues. For example, where there is a low trading volume across multiple venues, ESMA should not automatically consider a derivative contract to be liquid solely because it fulfils the trading venue threshold. ESMA should ensure it approaches thresholds holistically.

AMG referred in its response to Q3 to the sources of data which ESMA should rely upon for determining factual matters relevant to the TO. We consider, in this instance, that information should be gathered from CCPs and trading venues.

Also, when identifying the number of trading venues for this purpose, it is important that ESMA ensures the technological readiness of a trading venue to trade derivative contracts subject to the TO. Technological readiness is a fundamental pre-requisite for a TO given that once such determination is effective, market participants will no longer be able to trade in-

scope derivative contracts bilaterally. Understandably therefore, a system failure or incompatibility with regards to a certain class of derivative could have disastrous consequences for market participants and certain sections of the OTC derivative market. It is vital that ESMA ensures that, prior to the TO going live, all relevant trading venues are at the necessary level of technological readiness and market participants have established connectivity. On this point, AMG would again urge ESMA to consult with the CFTC for lessons learned from the transition to mandatory SEF trading.

Further, ESMA should consider in its TO determination whether the trading venues which trade derivative contracts to be made subject to the TO provide non-discriminatory access to all market participants. At present, the two-tier market system prevents all market participants from accessing available liquidity as dealer counterparties transact with each other on exclusive interdealer venues whilst the remaining market participants can only trade on specified dealer-to-customer venues or bilaterally with each other.

AMG strongly encourages ESMA to further address issues relating to non-discriminatory access to trading venues, as precluding membership to certain market participants goes against the intention of MiFID II (i.e. fostering competition in open and transparent markets). As asset managers representing pension funds, institutional clients, and public and private funds, the ability of an AMG member to trade on behalf of these clients, including the hedging of risk, depends upon the ability to access deep, liquid and competitive markets.

To the extent that the issues regarding non-discriminatory access are not addressed with regards to certain venues, AMG urges ESMA not to include such venues in its assessment of whether a derivative contract is sufficiently liquid. To include liquidity on such venues would be unfair as not all market participants who will be mandatorily required by law to trade products on-venue, will be allowed access to such venues.

Q6. On how many trading venues should a derivative or a class of derivatives be traded in order to be considered subject to the TO?

In order to give an accurate view of liquidity, AMG considers that there should be a minimum number of five liquidity providers trading a class of derivative at any one time across at least two trading venues. Ultimately these minimum thresholds will give a clearer view of the liquidity of a class of derivatives and prevent a monopoly developing in the market where market participants must use one trading venue for a certain class of derivatives.

Another benefit of trading on at least two trading venues is that trading disruption in the event of any technological or other issues with a single trading venue can be avoided. In addition, a two or more trading venue requirement encourages competitive pricing and deeper pools of liquidity as market participants would have a wider choice of venues on which to trade.

Q7. What would be in your view the most efficient approach to assess the total number of market makers for a class of derivatives? Where necessary, please distinguish between: i) The phase prior to the application of MiFID II (i.e. before January 2018); ii) The phase after the application of MiFID II (i.e. after January 2018).

Q8. How many market makers and other market participants under a binding written agreement or an obligation to provide liquidity should be in place for a derivative or a class of derivatives to be considered subject to the TO?

AMG assumes that ESMA means liquidity providers when it refers to "market makers and other market participants under a binding written agreement or an obligation to provide liquidity" as it is AMG's understanding that no such person is under a binding written agreement or obligation. Accordingly, certain market participants, acting as liquidity providers, trading OTC derivative contracts on-venue will be "market makers" by virtue of their business activities, not via a binding written agreement or obligation to provide liquidity. Consequently, AMG has taken this question to be referring to such liquidity providers.

Based on this assumption, AMG urges ESMA to consider a class of derivative as liquid only where at least five liquidity providers are available on the relevant number of trading venues.

Q9. Do you agree with the proposed approach or do you consider an alternative approach as more appropriate?

In general, AMG agrees that "high liquidity and a high number of market participants or low liquidity and only a few market participants will give a clear indication on whether the relevant class of derivatives should be subject to the trading obligation." However, ESMA should bear in mind that levels of liquidity will fluctuate over time and, therefore, this information should be assessed on a rolling basis to allow for illiquid derivatives which have become liquid to be included in the TO and once liquid derivatives which have become illiquid to be removed from the scope of the TO.

AMG would also like to take this opportunity to emphasise the point it made in Q3 and encourage ESMA to source data relating to the size and frequency of trades from CCPs and, to a lesser extent, trading venues who will have accurate and indisputable data readily available. Relying on TRs alone, or as a primary source of data, could give an inaccurate view of liquidity and cause derivative contracts which are not sufficiently liquid to fall within scope of the TO or vice versa.

Q10. Do you agree that the criterion of average size of spreads, in particular in case of absence of information on spreads, should receive a lower weighting than the other liquidity criteria? If not, please specify your reasons.

AMG urges ESMA to not place too much weight on this criterion. Experience has demonstrated that by virtue of being traded on a trading venue, a derivative's liquidity may improve because it becomes available to a wider market on a global platform, rather than just the subject of bilateral trades. Accordingly, AMG requests ESMA to bear this point in mind when considering the average size of spreads to assess the liquidity of derivatives contracts which it wishes to make subject to the TO. Additionally, as mentioned in our response to Q1, for the purposes of assessing liquidity, ESMA should assess cleared trades which are traded both on-venue and bilaterally in order to receive a complete view of which derivative contracts are liquid enough to be subject to the TO.

Q11. Which sources do you recommend for obtaining information on the average size of spreads by asset class?

AMG acknowledges that CCP data, which it has previously urged ESMA to rely upon for the purposes of assessing liquidity, will not be useful for obtaining information on the average size of spreads. Consequently, AMG urges ESMA, in this instance, to look to trading venues for this information.

Q12. What do you consider as an appropriate proxy in case of lack of information on actual spreads?

AMG wishes to discourage ESMA from relying on proxies to obtain information on the average size of spreads. In AMG's view, the use of a proxy indicates that a derivative contract is illiquid and therefore, *prima facie*, should not be subject to the TO.

Q13. Do you agree with the suggested approach? If not, what approach would you recommend?

Q14. Do you agree that trades above the post-trade large in scale threshold should not be subject to the TO? If not, what approach would you suggest? Should transactions above the post-trade LIS threshold meet further conditions in order to be exempted from the TO?

AMG notes that ESMA is currently proposing in its Discussion Paper to set the post-trade LIS threshold for IRS and CDS contracts under MiFIR at the higher percentage of the transactions corresponding to the 60th trade percentile or 70th trade percentile, respectively. AMG is encouraged to see that ESMA has set this threshold lower than that of the transparency regime which exempts trades at the higher of the 90th percentile, 70th volume

percentile or a "threshold floor." Adopting such a proposal should mean that if a derivative contract is considered LIS for the purposes of the transparency regime and is, therefore, exempt, it will necessarily be exempt from the TO. This will ensure a closer alignment of the TO and transparency regime, which we discuss in further detail at Q15.

Consistent with its comments in Q1, AMG wishes to encourage ESMA, as far as possible, to co-ordinate with the U.S. on the CFTC determination of post-implementation block trade sizes. The CFTC exempts block trades post-implementation from the execution requirement on SEFs or designated contract markets ("**DCMs**") where a transaction has a notional or principal amount greater than the 67th volume percentile for that class of derivatives. AMG acknowledges that the current thresholds proposed by ESMA are similar to the CFTC threshold but, for ease of trading, as its members trade in both the U.S. and E.U., AMG urges ESMA to consider a more precise alignment of the block trade and LIS thresholds to ensure that market participants will not be required, under the TO, to trade derivative contracts that are exempt under the CFTC MAT regime.

AMG would like to take this opportunity to reiterate that ESMA should, to the fullest extent possible, consult with the CFTC (as envisaged by MiFIR) when drafting the RTS setting out the TO in order to ensure complete harmonisation between the two regimes.

Q15. How highly should ESMA prioritise the alignment of the TO with transparency? What would be the main consequences for the market if some instruments are covered by transparency and not by the TO or vice versa? If the two are not fully aligned, would a broader scope for the TO or for transparency be preferable, and why? In case of a broader or narrower scope for the TO (compared with transparency), how should the two liquidity thresholds relate to each other?

AMG supports ESMA's intention to align the transparency regime and the TO and believes that the TO should only apply to a subset of instruments in a given sub-class that has been deemed liquid for the purposes of the pre-trade transparency requirements.

AMG understands that ESMA intends to apply a stricter liquidity test for the purposes of the TO than the transparency regime in order to try and align the two regimes. AMG considers this method inappropriate as the liquidity tests for the purposes of the TO and transparency regime are very similar and, by virtue of the waiver which is able to be granted to derivatives subject to the transparency regime that are not subject to the TO under Article 9(1)(c) of MiFIR, the transparency requirements can be waived for any derivatives not subject to the TO. Subsequently, if ESMA applies a stricter liquidity test to the TO it may, inadvertently, be applying a stricter liquidity test to the transparency regime too given the ability to waive transparency with respect to derivatives not subject to the TO.

Consequently, AMG urges ESMA instead to align the two liquidity tests. Under the TO, the threshold of 10 trades-per-day is applied to a smaller data set than that reviewed for the transparency regime, which applies to sub-classes in a benchmark tenor and broken tenors. AMG urges ESMA to calibrate the two tests by reducing the trades-per-day threshold for the purposes of the TO in order to account for the fact that the TO data set is smaller than the data set used for transparency purposes. The end result of this should be the convergence of the TO and the transparency regime and will ensure that OTC derivatives that are liquid enough to be included in the scope of the TO, will not inadvertently be omitted.

Another disparity between the two regimes that is of concern to AMG is that under MiFIR, NCAs have the power to temporarily suspend the transparency obligation for derivative contracts in the event of an emergency. Although AMG recognizes that an event which would constitute an "emergency" is remote, the fact that it could possibly occur identifies the problem that a similar power does not exist for NCAs in respect of the TO.

In the U.S. the CFTC is able to grant "no-action relief" during which, for legitimate reasons, market participants are granted a period of non-enforcement by the regulator's staff from certain regulations. With regard to the U.S. MAT regime, the CFTC has granted a number of no-action relief letters which have been intended to afford market participants and SEFs additional time to adapt to the MAT regime and ensure they have the correct procedures, policies and technology in place to address their new obligations. AMG understands that no-action relief is not a power that is within ESMA's remit, but AMG strongly encourages ESMA to request a similar suspension power for NCAs under the TO to allow for the suspension of the obligation where market participants or trading venues experience problems for which they are not culpable.

In light of this, AMG reiterates its point made in Q1, regarding the alignment of the TO and the CFTC's MAT regime. Whilst alignment of the transparency regime and TO should be a priority for ESMA, AMG's members trade on a global basis including in the E.U. and U.S. and therefore many AMG members are already subject to, and familiar with, the MAT regime. Alignment between the CFTC's MAT regime and the TO will foster a global competitive market and enable market participants, such as AMG members, to more easily comply with their obligations under both regimes simultaneously.

In its response to Q1 AMG makes reference to Article 33 of MiFIR which empowers ESMA to declare third country trading obligations equivalent to the TO under MiFIR. A declaration of equivalency permits E.U. market participants to satisfy their obligations under the TO by complying with third country regimes found to be equivalent. AMG is concerned that if ESMA construes Article 33(3) of MiFIR too strictly then E.U. counterparties may lose the benefit of equivalency where they transact under the U.S. MAT regime with, for example, a Cayman Fund that is U.S. Person for the purposes of Dodd-Frank. This is because Article

33(3) requires a counterparty to be "established" in the jurisdiction deemed equivalent in order to benefit from equivalence. Subsequently, in the example given, if Article 33 is read too literally, an E.U. counterparty cannot comply with the U.S. MAT regime where it transacts with a Cayman Fund because neither counterparty is technically "established" in the U.S. Ultimately, AMG urges ESMA to construe this article in accordance with the intention behind the text rather than literally.

Q16. Do you agree with the proposed methodology to eliminate duplicated trades or would you recommend another approach? Do you agree with selecting Option 2?

In the Discussion Paper ESMA admits to struggling to make sense of data received from TRs due to duplicative transaction reports giving a false view of liquidity of certain derivative contracts. AMG is encouraged to see that ESMA recognises the problems associated with placing reliance upon TR data and applauds ESMA for seeking a way to clean such data. However, AMG does not agree with the proposed approach suggested in the Discussion Paper of only taking into account trade reports relating to the client-facing leg of a cleared transaction ("Option 2" in the Discussion Paper). Such an approach overlooks the fact that clearing members can enter into trades on their own account (e.g. "house" or proprietary trades). Plainly speaking, clearing members do not enter into transactions solely due to client cleared transactions under the principal-to-principal clearing method. As a result of this oversight, ESMA is at risk of "over-cleansing" TR data if it uses this approach, which would erase all dealer-to-dealer trades and thereby provide an inaccurate view of the liquidity of the derivative in question.

In light of the above, once again AMG urges ESMA to rely on data from CCPs when assessing the liquidity of derivative contracts and to complement this with information from NCAs and trading venues. AMG considers that data obtained from such sources will give ESMA a more accurate picture of exactly which derivative contracts are being traded by whom and on which venues.

Q17. Do you agree with the approach taken with regard to calculating tenors?

Q18. Do you agree with the reasons mentioned above or is there another explanation for the significant number of trades outside of benchmark dates?

Q19. Does this result reflect your assessment of liquidity in fixed-float IRS? If not, please explain on which subclasses you disagree and why.

As previously discussed, a primary concern of AMG is the alignment of the CFTC's MAT regime with the TO. AMG notes that despite some similarities between the proposals in ESMA's Discussion Paper and the CFTC's MAT regime, the output of the respective methodologies differs significantly. Most notably, ESMA intends to declare far fewer fixed-

to-floating IRS contracts denominated in GBP subject to the TO, than the CFTC has declared subject to MAT. A similar difference exists for USD denominated fixed-to-floating IRS.

The disparity between the two regimes is perplexing. AMG is concerned that the dataset being assessed for the purposes of the TO may be incorrect or inadequate. For example, the CFTC has declared fixed-float IRS products denominated in GBP with a tenor of 2, 3, 4, 5, 6, 7, 10, 12, 15, 20 and 30 years subject to the MAT regime. Conversely, ESMA appears to be proposing to apply the TO only to fixed-float IRS products denominated in GBP with a tenor of 5, 10 and 30 years. AMG is keen to ensure cross-border harmonisation and struggles to understand how derivative contracts whose market is primarily located in the E.U. can be illiquid by ESMA's standards, but deemed liquid by the CFTC for the purposes of the U.S. MAT regime. AMG urges ESMA and the CFTC to compare the respective liquidity assessments and datasets to determine whether either are relying upon inaccurate data or inadequate sources, or whether the operative principles are not aligned.

Q20. What thresholds would you propose as the liquidity criteria? What minimum number of counterparties would you consider appropriate for introducing the TO?

Q21. What further specifications (e.g. payment frequency, reset frequency, day count convention, trade start type) would you consider necessary for specifying the trading obligation for fixed-float IRS? How would you determine these additional specifications?

Q22. Does this result reflect your assessment of liquidity in OIS? If not, please explain on which subclasses you disagree and why.

Q23. What thresholds would you propose for the liquidity criteria? What minimum number of counterparties would you consider appropriate for introducing the TO?

Q24. What further specifications (e.g. payment frequency, reset frequency, day count convention, trade start type) would you consider necessary for specifying the trading obligation for OIS? How would you determine these additional specifications?

Q25. Do you agree that due to the specificities of the FRA-market, FRAs should not be considered for the TO? Do you agree that the majority of FRAs transactions serve post-trade risk reduction purposes rather than actual trades.

Q26. In case you consider FRAs should be considered for the TO, which FRA sub-classes are in your view sufficiently liquid and based on which criteria? How should a TO for FRAs best be expressed? Should it be based on the first (effective date) or the second period (reference date)? Apart from the tenor, which elements do you consider necessary for specifying the TO for FRAs and why?

Q27. Would you consider the two index CDS as sufficiently liquid for being covered by the TO?

Q28. Do you agree that the TO for CDS should cover the on-the-run series as well as the first thirty working days of the most recent off-the run-series? If not, please explain why and propose an alternative approach.

Q29. Apart from the tenor, which elements do you consider indispensable for specifying the TO for CDSs and why?

Q30. Do you agree with the proposed application dates? If not, please provide an alternative and explain your reasoning.

Primarily, AMG wishes to point out that the phase-in date for many other aspects of MiFID II is set to be 3 January 2018. In light of this, AMG strongly encourages ESMA to push back the phase-in date of the TO altogether in order to avoid a conflict with the implementation of various other obligations under MiFID II resulting in a "big bang" effect. AMG is concerned that by phasing in the TO as well as many other aspects of MiFID II on the same date, ESMA will inundate market participants with new obligations all at once. Typically, the individuals within firms dealing with the implementation of MiFID II will be the same individuals dealing with the implementation of the TO. A sudden onslaught of new obligations will increase not only the compliance costs for in-scope entities but the chances of non-compliance by overwhelmed market participants. Subsequently, AMG strongly urges ESMA to have, at minimum, a nine-month delay between the phase-in of MiFID II and the TO in order to allow market participants to put into operation the relevant obligations under MiFID II and then turn to the TO.

Currently, ESMA is proposing that the first phase-in date for all derivatives subject to the TO is 3 January 2018 provided that the CO for the derivative contract in question applies to a party at such time. Such a phase-in date extends to include entities in Category 1 and 2 for IRS contracts denominated in G4 currencies. AMG is concerned that making this number of market participants trade on-venue at the same time will affect counterparties who would need to have in place the correct internal systems and on-board at trading venues, and throw up extensive KYC issues for trading venues who would have to carry out KYC checks on a large number of new market participants all at once. The creation of a potential bottleneck could disrupt the possibility of an orderly transition to mandatory trading.

As such, AMG urges ESMA to consider phasing in the TO at a slower pace. AMG considers that not only will this allow market participants more time to comply with the requirements of individual trading venues and onboard at such venues, but it will also allow for any "teething

problems" associated with the trading of new derivative products on-venue to be ironed out prior to trading on-venue becoming compulsory for all market participants.

Subsequently, if clearing members are required to trade on-venue first as Category 1 entities, any issues concerning the trading of IRS products denominated in G4 currencies can be dealt with during this phase-in period. This is beneficial as clearing members are more likely to be able to resolve any technical problems thrown up by mandatory trading of certain derivative contracts on-venue as they are sophisticated market participants and will have greater resources to address on-venue trading than Category 2 entities. If ESMA can implement the TO effectively and efficiently for one category of market participants, it is more likely to be able to do so for the remaining categories, ensuring a smooth and consistent transition onto trading venues for market participants.

In addition to the importance of a gradual phase-in, AMG urges ESMA to follow the CFTC which recently extended no-action relief to SEFs and DCMs to correct errors that are clerical or operational and result in a swap being rejected for clearing and thus becoming void (it is likely that the CFTC will make this relief permanent by revising the relevant regulation). AMG urges ESMA to build a similar mechanism into the TO in order to allow for trades which are rejected by trading venues, as a result of clerical or operational errors, to be corrected during the phase-in period. Market participants require certainty at execution; an inability to correct inadvertent operational or clerical errors for legitimate trades could lead to less competitive pricing and pose a regulatory disadvantage for the OTC derivatives market when compared to other markets.

Q31. Do you consider necessary to provide for an additional phase-in for the TO for operational purposed and to avoid bottlenecks? If yes, please provide a proposal on the appropriate length of such a phase-in for the different categories of counterparties and explain your reasoning.

Q32. Which types of package transactions are carried out comprising components of classes of derivatives that are assessed for the purpose of the TO, i.e. IRD and/or CDS? Please describe the package and its components as well as your view on the liquidity of those packages.

Q33. Are there packages that only comprise components of classes of derivatives that are assessed for the purpose of the TO? Do you consider those package transactions to be standardised and sufficiently liquid?

Q34. Do you agree that package transactions that are comprised only of components subject to the TO should also be covered by the TO or should the TO only apply to categories of package transactions that are considered liquid? If not, please explain.

It is widely understood that the liquidity of package transactions is hard to analyse. In AMG's experience with the U.S. MAT regime, mandating on-venue execution for package transactions without requiring the package itself to be assessed as liquid can cause disruptions to trading and expose market participants to unnecessary risks. AMG therefore encourages ESMA to appropriately tailor the application of the TO so that it only covers those packages that are themselves liquid and traded on-venue.

AMG urges ESMA to not split package transactions for the purposes of assessing their liquidity into each component part, but assess the liquidity of the package as a whole. Package transactions are priced and traded together as an integrated unit and the purpose behind them is to achieve better pricing and minimize risk for market participants by aligning hedge strategies. Splitting a package transaction and forcing its components onto a trading venue not only ignores the status of the package as unique from its component parts but will result in worse pricing for market participants and increase the risks involved in certain trades that would have been hedged if executed as a package.

With regards to package transactions that are declared subject to the TO, ESMA should make certain that the venues offering such packages for trade have the correct infrastructure in place to ensure the smooth transition of package transactions onto trading venues. In this respect, ESMA should consult with the CFTC which witnessed great difficulty with the onboarding of certain package transactions onto trading venues under the MAT regime and was forced to grant no-action relief to restrict the scope of the mandate to certain package transactions, while exempting others. Learning from this, ESMA should be wary of forcing package transactions to trade on-venue where the package as a whole is not sufficiently liquid or supported by trading venues.

In light of the above, AMG is encouraged to see that ESMA has noted the issues experienced by the CFTC in the application of the MAT regime to package transactions in its recent consultation paper regarding package orders. AMG is pleased that ESMA is considering international consistency with regards to the treatment of package transactions under the transparency regime and strongly encourages ESMA to take a similar approach when deciding which package transactions should be subject to the TO. In light of the potential revision of the CFTC regime referred to in Q1, AMG urges ESMA to coordinate closely with the CFTC when selecting which packages are subject to the TO. With certain package transactions potentially subject to permanent no-action relief under the CFTC regime, ESMA should ensure it attempts to align the TO with MAT to ensure global consistency in mandatory trading of packages.

Q35. How should the TO apply for package transactions that include some components subject to the TO, whereas other components are not subject to the TO?

Please see AMG's response to Q34.

* * *

If you have any questions or would like to discuss, please do not hesitate to contact Tim Cameron at 202-962-7447 or tcameron@sifma.org, or Laura Martin at 212-313-1176 or lmartin@sifma.org.

Respectfully submitted,

Timothy W. Cameron, Esq.
Asset Management Group – Head
Securities Industry and Financial Markets Association

Laura Martin, Esq.
Asset Management Group – Managing Director and Associate General Counsel
Securities Industry and Financial Markets Association