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May 11, 2015

The Honorable Timothy Massad, Chairman
The Honorable Mark Wetjen, Commissioner
The Honorable Sharon Bowen, Commissioner
The Honorable J. Christopher Giancarlo, Commissioner
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Dear Chairman Massad and Commissioners Wetjen, Bowen, and Giancarlo:

The Asset Management Group of the Securities Industry and Financial Markets Association ("SIFMA AMG")[1] appreciates the hard work and thoughtful analysis in Commodity Futures Trading Commission ("CFTC" or "Commission") Commissioner J. Christopher Giancarlo's White Paper, "*Pro-Reform Reconsideration of the CFTC Swaps Trading Rules: Return to Dodd-Frank*."[2] We applaud Commissioner Giancarlo's efforts to highlight certain adverse market consequences of the current swap execution facility ("SEF") regulatory framework and to suggest changes thereto in order to generally "promote swaps trading under CFTC regulation" while also ensuring "that market participants can choose the manner of trade execution best suited to their swaps trading and liquidity needs."[3]

SIFMA AMG also agrees with Chairman Timothy Massad's recent statements that the goal of the SEF framework should be not only to meet "the Congressional mandate of bringing this market out of the shadows," but also to create "the foundation for the market to thrive" and "permit innovation, freedom and competition."[4] We are encouraged by Chairman Massad and his fellow Commissioners' focus on adjustments or enhancements that should be made to the regulatory framework to promote trading on SEFs and the Commission's recent measures in furtherance of this statutory goal.[5]

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[1] SIFMA AMG's members are primarily U.S.-based asset management firms whose combined assets under management exceed $30 trillion. The global client base of SIFMA AMG member firms include, among others, registered investment companies, endowments, state and local government pension funds, private sector Employee Retirement Income Security Act of 1974 pension funds and private funds such as hedge funds and private equity funds.

[2] J. Christopher Giancarlo, Comm'r, U.S. Commodity Futures Trading Comm'n, *Pro-Reform Reconsideration of the CFTC Swaps Trading Rules: Return to Dodd-Frank* (Jan. 29, 2015) [hereinafter "*White Paper*"], *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/sefwhitepaper012915.pdf.

[3] *Id.* at 4.

[4] *Remarks of Chairman Timothy Massad before the ISDA 30th Annual General Meeting*, U.S. COMMODITY FUTURES TRADING COMM'N, (Apr. 23, 2015), http://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-17.

[5] *See, e.g., CFTC Staff Issue No Action Letters Providing Relief in Connection with Erroneous Swap Trades and Swap Trade Confirmations*, U.S. COMMODITY FUTURES TRADING COMM'N (Apr. 22, 2015),

In response to Commissioner Giancarlo's recent White Paper and in light of the recent public statements made by the Chairman and CFTC Commissioners, SIFMA AMG presents the following comments, which reflect our members' concerns and experiences to date operating under the current swap execution framework and related rules. Given the Chairman's statement that the Commission may make "some adjustments" to the SEF rules "over the coming months,"[6] we provide our thoughts on the key issues raised by Commissioner Giancarlo and related issues. SIFMA AMG appreciates the opportunity to provide the Commission with its members' thoughts and perspectives related to the Commission's SEF regulations.[7]

SIFMA AMG supports Commissioner Giancarlo's positions on the following issues:

1. The made available to trade ("MAT") process should be significantly revamped.

Section 2(h)(8) of the Commodity Exchange Act ("CEA" or the "Act") requires that swap transactions subject to the clearing requirement must be traded on either a designated contract market ("DCM") or SEF, unless no DCM or SEF "makes the swap available to trade." In June 2013, the Commission adopted Regulation 37.10 for SEFs, which allows a SEF to submit a MAT determination to the Commission pursuant to the Commission's Part 40 regulations.

As a preliminary matter, CEA Section 2(h)(8) did not explicitly require a formal rulemaking. Unlike the Act's mandatory clearing requirement, as Commissioner Giancarlo notes, the plain language of the statute does not evidence a congressional intent for the formulation of a MAT process.[8]

Based on the industry's experience with the previous MAT determination filings, we agree with Commissioner Giancarlo's assessment that the CFTC rules for the MAT process have proven "unworkable and have created an unwarranted regulatory mandate."[9] Rather than empowering the

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http://www.cftc.gov/PressRoom/PressReleases/pr7158-15; *see also Statement of Commissioner Mark Wetjen on the Guidance on Financial Resources for Swap Execution Facilities and Other Recent No-Action Relief*, U.S. COMMODITY FUTURES TRADING COMM'N (Apr. 23, 2015), http://www.cftc.gov/PressRoom/SpeechesTestimony/wetjenstatement042315 ("As I have stressed before, I believe that the Commission should take more steps to fulfill Congress' instruction to promote the trading of swaps on SEFs. I hope that the Commission will consider revising or clarifying its rules in order to provide more meaningful and certain relief to SEFs."); *Statement of U.S. Commodity Futures Trading Commissioner Sharon Bowen Regarding Trading Practices on SEFs*, U.S. COMMODITY FUTURES TRADING COMM'N (Apr. 23, 2015), http://www.cftc.gov/PressRoom/SpeechesTestimony/bowenstatement042315 ("This is a dynamic, evolving market and it is in everyone's best interest that we address this subject sooner rather than later.").

[6] *Keynote Address by Chairman Timothy G. Massad Before the Institute of International Bankers*, U.S. COMMODITY FUTURES TRADING COMM'N (Mar. 2, 2015), http://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-13.

[7] 17 C.F.R. pt. 37 (2015).

[8] *White Paper*, *supra* note 2, at 31.

[9] *Id.* at 29.

Commission with the requisite authority to force a SEF to demonstrate sufficient trading liquidity in an instrument submitted for MAT consideration, the current MAT determination process severely thwarts the Commission's ability to deny a MAT application.[10] As a result, in order to garner market share and force the industry to trade instruments exclusively through their platforms, SEFs are incentivized to become first-movers in submitting swaps to be made subject to the MAT determination. This has left market participants in predicaments, especially when forced to execute certain MAT swaps on SEFs without proven liquidity and prior to the industry completing the necessary technological or operational build-outs or enhancements.

We agree with Commissioner Mark Wetjen's position that "independent regulatory agencies should not leave policymaking of this sort to the very commercial entities that stand to benefit most from the trading policies in question."[11] SIFMA AMG believes that MAT determinations should be based upon the Commission's impartial, qualitative analyses of market conditions and clear and demonstrable evidence of the SEFs' ability to support a mandatory trading requirement rather than on one trading platform's unproven assertions.

A single trading platform should not be permitted to unilaterally force a MAT determination (particularly through the Commission's Part 40.6 self-certification rule submission process) for several important reasons. As Commissioner Giancarlo notes, a MAT determination effectively deems a swap a "Required Transaction," which limits the permitted modes of trade execution to an order book or request for quote ("RFQ") system. As a result, one SEF filing a commercially driven MAT application could force the entire swap market to change its practice, disrupting trading and upending the natural evolution of market dynamics. This artificial limitation has resulted in reduced liquidity and fewer options for asset managers working to reduce portfolio risk in a cost-effective manner on behalf of their clients.

Additionally, as Commissioner Giancarlo highlights, the MAT process has created "unnecessary tension" between the mandatory clearing mandate and trading requirement. SIFMA AMG agrees that the analysis of whether there is sufficient liquidity to support a mandatory clearing determination should differ from the trading liquidity evaluation required to support a mandatory execution requirement.[12] Unfortunately, this distinction appears to have been lost and, consequently, we fear that any swaps that become subject to the clearing mandate will also become MAT'd shortly thereafter, thus, leaving the market with very little time to prepare for both requirements. This is evidenced by the debate surrounding the mandatory clearing of non-

[10] *See id.* at 29 n.103 ("It is doubtful that the Commission could find that a MAT submission is inconsistent with the CEA or Commission regulations because neither the CEA nor the regulations contain any objective requirements that a swap must meet for a MAT determination to be valid.").

[11] *See Remarks of Commissioner Mark Wetjen before the Cumberland Lodge Financial Services Policy Summit: The Next Opportunity for Trans-Atlantic Collaboration: Shaping a New Era for Swap Execution*, U.S. COMMODITY FUTURES TRADING COMM'N (Nov. 14, 2014) [hereinafter "*Shaping a New Era for Swap Execution*"], http://www.cftc.gov/PressRoom/SpeechesTestimony/opawetjen-10.

[12] *White Paper*, *supra* note 2, at 30.

deliverable forwards. SIFMA AMG believes swaps that become subject to mandatory clearing should not be automatically presumed to be ripe for mandatory execution on SEFs. Failing to address this concern may have a chilling effect on market support to centrally clear more swap products.

Finally as discussed later in this letter, because package transactions are priced and traded as an integrated unit, SIFMA AMG believes that MAT determinations for package transactions should objectively evaluate each of the six factors set forth in Commission Regulation 37.10 at the package, and not individual component, level.

2. The Commission needs to harmonize its SEF regulations and cross-border guidance with global regulators to avoid market fragmentation.

We agree with Commissioner Giancarlo's characterization that global swaps markets liquidity is fragmenting between U.S. persons and non-U.S. persons and driving away global capital.[13] SIFMA AMG members manage assets on behalf of clients located around the world. As fiduciaries, asset managers commonly trade for global clients with similar strategies on a side-by-side basis. The Commission's cross-border guidance has caused a great divide among available liquidity pools and trading venues based on an entity's U.S. person status. This has led to less competitive pricing, bifurcation of block trades, higher transaction costs, fewer trading efficiencies, more operational complexities and increased systemic risk.

To provide clarity and foster a competitive, global swap market, we urge the Commission to harmonize its rules with other domestic and international regulators and re-consider its cross-border regulatory framework and formalize its approach through an Administrative Procedure Act-compliant rulemaking. We believe this is consistent with Commissioner Sharon Bowen's concerns about regulatory clarity, particularly when "a regulator relies too much on issuing guidance and no-actions letters for previously finalized rules."[14] Undertaking a formal rulemaking, as Commissioner Bowen suggested, "via the ordinary process of notice and comment,"[15] would allow the Commission to (1) analyze the regulatory framework against those of other jurisdictions and (2) more closely harmonize and coordinate its regulations with other jurisdictions in order to prevent liquidity fragmentation and mitigate disincentives for financial firms that are avoiding transactions with U.S. persons and U.S.-based asset managers.

[13] *White Paper*, *supra* note 2, at 49.

[14] *Remarks of CFTC Commissioner Sharon Y. Bowen Before the 17th Annual OpRisk North America*, U.S. COMMODITY FUTURES TRADING COMM'N (Mar. 25, 2015), http://www.cftc.gov/PressRoom/SpeechesTestimony/opabowen-2.

[15] *Id.*

3. The Commission should review its pre-trade credit check and *void ab initio* framework to ensure it promotes execution certainty, particularly for block trades, package transactions, and future MAT swaps.

On September 26, 2013, the Division of Clearing and Risk and the Division of Market Oversight issued joint staff guidance, requiring that SEF transactions undergo pre-trade credit checks ("September Guidance").[16] As part of the Commission's comprehensive review of swap trading on SEFs, SIFMA AMG urges the Commission to examine the efficacy of the framework surrounding Regulation 1.73 and associated no-action letters and interpretive guidance as they relate to block trades, package transactions, and apply to subsequent MAT swaps.

With respect to pre-trade credit checks and block trades in particular, we agree with Commissioner Giancarlo's assessment that the "CFTC's approach is also creating technological challenges for SEFs and futures commission merchants ("FCMs") in facilitating pre-execution credit checks of block trades that occur way from the SEF's platform."[17] Because block trades are effectively required to be privately negotiated and executed "off-SEF," the SEF and FCM are frustrated in their respective abilities to screen these trades for credit prior to execution. We encourage the Commission to consider alternative pre-trade credit approaches that do not negatively impact the ability of market participants to conduct block trades "off-SEF."

From the asset management perspective, depending on how they are conducted (*e.g.*, the "ping," "push," or "hub" approaches) pre-trade credit checks impose operational burdens such as increased latency. Given the significance of the September Guidance, we encourage the Commission to review this regulatory approach through a formal Administrative Procedure Act rulemaking which solicits and considers public comment and includes a comprehensive cost-benefit analysis (rather than through guidance delivered to market participants by telephone calls, email or a complex web of interpretative guidance letters).

SIFMA AMG members share the Commission's concerns about execution certainty and the ability to rely on agreed-upon transactions. Given that the September Guidance establishes that "any trade that is executed on a SEF or DCM and that is not accepted for clearing should be void *ab initio*,"[18] the Commission should consider the impact of this position upon execution certainty, particularly from the asset manager's perspective, if any transaction may be deemed void *ab initio* simply because the clearinghouse fails to accept that trade within the requisite timeframe. For example, more leeway may be appropriate when applying the September Guidance's prescription that swaps not accepted for clearing within 10 seconds must be considered rejected by the clearinghouse. This

[16] U.S. Commodity Futures Trading Comm'n, Staff Guidance on Swaps Straight-Through Processing (Sept. 26, 2013) [hereinafter "September Guidance"], *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/stpguidance.pdf.

[17] *White Paper*, *supra* note 2, at 28 n.91.

[18] September Guidance, *supra* note 2, at 5.

time frame automatically implicates a cumbersome procedure for trades that may have cleared within an immaterial amount of time beyond the 10 second window. Additionally, in some instances, the reason for the rejection can be readily cured, particularly for an RFQ transaction, and the trade can be promptly cleared after the correction is made. In practice, asset managers and other market participants could work out failed trades between counterparties that would otherwise be treated as void *ab initio*.

We agree with Commissioner Giancarlo that "there are less onerous and more direct ways to prevent"[19] breakage agreements between parties and support further Commission efforts to, as Commissioner Wetjen suggested, "consider revising [CFTC] rules to find a more lasting solution."[20] To this point, SIFMA AMG was pleased to see the publication of recent no-action relief with respect to "new trades, old terms" as a temporary method of addressing this complicated issue.[21]

Market participants need certainty at execution. The Commission's pre-trade credit check and *void ab initio* framework should be reviewed to ensure it promotes execution certainty, particularly for block trades and package transactions. Factors that increase latency or decrease execution certainty can lead to less competitive pricing and pose a regulatory disadvantage for swaps compared to futures markets because, among others, of the limited ability to fix legitimate trades that suffer from inadvertent operational or clerical errors. Any costs incurred due to these factors is ultimately imposed on our members' clients, which include retirement and pension plans, through less competitive pricing and increased cost.

4. The Commission should amend the swap block trade regulatory framework.

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") introduced the concept of a block trade for swaps. As Commissioner Giancarlo's White Paper notes, this provision only relates to (i) the "criteria for determining what constitutes a large notional swap transaction (block trade) for particular markets and contracts"; and (ii) "the appropriate time delay for reporting large notional swap transactions (block trades) to the public."[22]

However, in promulgating its regulations on block trades for swaps, the Commission relied upon the futures market block trade definition into its swap reporting rules. Namely, in Regulation 43.2, the Commission adopted a definition for the term "block trade" that means the transaction occurs

[19] *White Paper*, *supra* note 2, at 33-34.

[20] *Testimony of Commissioner Mark Wetjen Before the U.S. House Committee on Agriculture Subcommittee on Commodity Exchanges, Energy, and Credit Subcommittee*, U.S. COMMODITY FUTURES TRADING COMM'N (Apr. 14, 2015) [hereinafter "*Commissioner Wetjen Testimony*"], http://www.cftc.gov/PressRoom/SpeechesTestimony/opawetjen-12.

[21] CFTC No-Action Letter No. 15-24, (Apr. 22, 2015), *available at* http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/15-24.pdf.

[22] CEA § 2(a)(13)(E).

"off-facility."[23] We agree with Commissioner Giancarlo that the "'occurs away' requirement creates an arbitrary and confusing segmentation between non-block trades 'on-SEF' and block trades 'off-SEF.'"[24]

SIFMA AMG further agrees with Commissioner Giancarlo that this "artificial segmentation"[25] of swaps "is a holdover from the futures model"[26] and can pose problems for the trading of large swap transactions. Due to differences between futures and swaps trading, market participants have faced uncertainty as to how a swap block trade could be executed.

In September 2014, the Division of Market Oversight issued time-limited no-action relief, until December 15, 2015, to SEFs from the requirement that a block trade "[o]ccur[] away from the registered [SEF's] or [DCM's] trading system or platform."[27] From the asset manager perspective, the Division's clarification that swap block trades *may* be executed on a SEF or DCM, as well as its confirmation that block trades are not *required* to be executed on a SEF or DCM, is helpful for market participants. SIFMA AMG, however, opposes any interpretation of the block trade regime that would *mandate* the trading of block trades on SEF.

SIFMA AMG appreciates the Division's relief and encourages the Commission to revise its Part 37 and 43 Regulations on this point prior to the expiration of the no-action relief. Further, in keeping with the scope of the relevant Dodd-Frank Act provision, the CFTC should also revise its rules on block trades to solely address the delayed public dissemination of transaction information and cap size limits and not dictate the method of execution or whether the trade must take place on- or off-SEF, especially in relation to package transactions involving one MAT leg that is above the relevant block size threshold and another non-MAT leg which is below the block size limit.

5. Flexible regulation should govern the SEF trading protocols.

Although the Commission sought to adopt a "technology neutral" approach to promulgating Part 37,[28] Commission Regulation 37.9 artificially splits swaps into "Required Transactions" and

[23] 17 C.F.R. § 43.2 ("*Block trade* means a publicly reportable swap transaction that (1) Involves a swap that is listed on a registered swap execution facility or designated contract market; (2) *Occurs away from the registered swap execution facility's or designated contract market's trading system or platform* and is executed pursuant to the registered swap execution facility's or designated contract market's rules and procedures; (3) Has a notional or principal amount at or above the appropriate minimum block size applicable to such swap; and (4) Is reported subject to the rules and procedures of the registered swap execution facility or designated contract market and the rules described in this part, including the appropriate time delay requirements set forth in §43.5 of this part." (emphasis added)).

[24] *White Paper*, *supra* note 2, at 27-28.

[25] *Id.* at 27.

[26] *Id.* at 28.

[27] CFTC No-Action Letter No. 14-118 (Sept. 19, 2014), *available at* http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-118.pdf.

[28] 78 Fed. Reg. 33,501 (Nov. 6, 2013).

"Permitted Transactions." For Required Transactions, only an order book or RFQ platform are permitted for execution (unless the swap exceeds the relevant block size threshold). For Permitted Transactions, market participants may transact through any method of execution.[29]

In addition to the numerous statutory and legal concerns raised by Commissioner Giancarlo in his White Paper,[30] this prescriptive approach has negatively impacted market conditions and has caused fragmentation of the U.S. swap market. The unnecessary restriction on modes of execution, which runs counter to the SEF definition of operating "through any means of interstate commerce,"[31] limits a SEF's ability to foster liquidity and diminishes the venues that asset managers may access for liquid, competitive pricing. For example, the Commission's Part 37 rules fail to make clear that non-order book, non-RFQ platforms (such as auctions and matching sessions) may operate within the current framework. SIFMA AMG strongly agrees with Commissioner Giancarlo's assertion that SEFs should be permitted to offer various flexible execution methods using any means of interstate commerce, provided that market participants have open and impartial access to the SEF that offer them, and believes that this, in turn, will attract liquidity and future technological innovations and promote SEF trading, consistent with the statutory goal for SEFs in the Dodd-Frank Act.

SIFMA AMG encourages the Commission to reconsider the permitted modes of execution and the categorization of swaps. As Commissioner Wetjen noted when the final SEF rules were adopted:

> The Commission, therefore, must remain open to reassessing the policy judgments in these final rules as the markets evolve, as the Commission has provided new information, and as the Commission benefits from its experience overseeing the new SEF market structure. In short, the Commission must remain open to course correction where necessary and ensure that the swap regulatory regime keeps pace with the markets that it governs.[32]

We believe that this perspective applies in this instance and recommend that the Commission amend Regulation 37.9 through public notice and comment to provide for a less prescriptive, principles-based approach that ensures transparency, competition, and fosters liquidity through a flexible rule set.

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[29] 17 C.F.R. § 37.9.

[30] *See White Paper*, *supra* note 2, at 22-25.

[31] CEA § 1a(51).

[32] Transcript of Open Meeting on the 29th Series of Rulemakings Under the Dodd-Frank Act, U.S. Commodity Futures Trading Comm'n (May 16, 2013), *available at* http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission_051613-trans.pdf.

6. **The Commission should not overcomplicate post-trade confirmation protocols.**

Pursuant to Commission Regulation 37.6, SEFs are required to "provide each counterparty to a transaction that is entered into on or pursuant to the rules of the [SEF] with a written record of all of the terms of the transaction which shall legally supersede any previous agreement and serve as a confirmation of the transaction."[33] Footnote 195 in the preamble to the final SEF rules explains that a SEF's written confirmation should incorporate by reference the privately negotiated terms of a freestanding master agreement for these types of transactions.[34]

The Division of Market Oversight has recently re-issued no-action relief on these provisions for uncleared swaps,[35] in part because of the confusion stemming from the originally-granted relief which required that SEFs "glean" all confirmation data from the terms of the incorporated documents and report the confirmation data to an SDR.[36]

We agree with Commissioner Giancarlo that the "CFTC policy is increasing legal uncertainty"[37] and that, absent simplification, "SEF confirmation requirements will continue to be an obstacle for the trading of uncleared swaps on SEFs."[38] The Commission should undertake a comprehensive review of the SEF confirmation and SDR confirmation data reporting rules. SIFMA AMG urges the Commission to carefully inventory existing private market solutions and workflows that address SEF confirmations and SDR reporting. The Commission should not invent a new framework that duplicates or arbitrarily contradicts the current infrastructure. To that end, the CFTC should reevaluate the "largely illusory benefits against the almost impossible burden of requiring a SEF to confirm and report 'all of the terms' of a trading relationship to which it is not a party, especially terms from agreements that do not affect the fundamental economic terms of the transaction."[39]

SEFs are merely execution venues. As Commissioner Giancarlo notes, "SEFs do not know or have access to all of these terms and corresponding documentation." SEFs should not confirm, or be asked to confirm, any information beyond the economic terms of the transaction that they facilitate. The obligation to confirm ancillary, non-economic terms should be left to market participants.

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[33] 17 C.F.R. § 37.6.

[34] 78 Fed. Reg. 33,491.

[35] CFTC No-Action Letter No. 15-25 (Apr. 22, 2015), *available at* http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/15-25.pdf.

[36] CFTC No-Action Letter No. 14-108 (Aug. 18, 2014), *available at* http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-108.pdf.

[37] *White Paper*, *supra* note 2, at 35.

[38] *Id.* at 36.

[39] *Id.*

Market participants and SEFs have worked with third-party solution providers to assist in the production and reporting of confirmation data to SDRs. Many swap counterparties, including asset managers, have devoted significant resources in developing technology to comply with the current rules. In amending this framework to reallocate responsibilities or recreate the trade reporting mechanism, the Commission should not force market participants to abandon the investments made to date without outlining the clear, countervailing benefits for an alternative approach.

SIFMA AMG's position differs from Commissioner Giancarlo's on the following issues:

1. **Impartial access should allow consistent access to SEFs through fair, transparent, and objective standards.**

CEA Section 5h(f)(2)(B) requires each SEF to establish eligibility criteria that "provide market participants with impartial access to the market." Commission Regulation 37.202(a) promulgates this CEA provision though, in our members' experiences, it falls short of Commissioner Wetjen's characterization that "firms can impartially access all-to-all markets."[40]

We appreciate Commissioner Giancarlo's thoughtful explanation of how the two-tiered OTC market has evolved due to liquidity characteristics. However, we respectfully disagree that the Dodd-Frank Act does "not require or support the alteration of the present swaps market structure."[41] As others have observed, in the future, liquidity provision in OTC markets may not rely solely on banks, as other financial market participants may step in to also serve this role.[42]

While we could debate whether Congress *required* or *supported* a change to current market structure, there is agreement that Congress sought to promote a transparent, competitive OTC market landscape where participants vie for business on price, service, and other commercial factors. As asset managers representing pension funds, institutional clients, and public and private funds, our ability to hedge risk depends on our ability to access deep, liquid, and competitive markets and ensure we are executing transactions at the best price available for our clients.

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[40] *Shaping a New Era for Swap Execution*, *supra* note 11.

[41] *White Paper*, *supra* note 2, at 32.

[42] *See* Managed Funds Ass'n, Position Paper: Why Eliminating Post-Trade Name Disclosure Will Improve the Swaps Market (Mar. 31, 2015), *available at* https://www.managedfunds.org/wp-content/uploads/2015/04/MFA-Position-Paper-on-Post-Trade-Name-Disclosure-Final.pdf ("Impartial access has contributed to the health and vitality of several other significant markets . . . By contrast, the two-tier swaps market structure perpetuates traditional dealers' control of liquidity and entrenches their role as exclusive 'price makers'. . . . Such structural limitations on liquidity provision and risk transfer will increase the likelihood of market volatility and instability over the long term. The willingness and capacity of traditional dealers to allocate balance sheet to swaps market-making activities is diminishing. This trend will likely continue over time as traditional dealers continue to restructure their businesses post-financial crisis and adapt to new capital, leverage, and liquidity requirements under Basel III and similar rules.").

Precluding membership to certain SEFs based solely on the type of market participant does not produce sound public policy or comply with the spirit of the Dodd-Frank Act. We encourage the Commission to take steps to ensure that SEFs establish objective eligibility criteria for any market participant to satisfy in order to become a member and gain access to their markets. These standards should not discriminate or simply rely on historical precedent.

2. The Commission should not impose individual "professionalism" licensure requirements on top of the existing SEF framework.

SIFMA AMG appreciates Commissioner Giancarlo's thoughtful approach "to raise standards of professionalism in the swaps market by setting standards of conduct for swaps market personnel."[43] As we understand, the White Paper proposes to establish standards for those engaged in swaps execution, including SEF employees, such as voice brokers and associated SEF staff. The increased costs to ensure appropriate and competent levels of "knowledge, skills, professionalism, ethics and conduct"[44] should be weighed against the potential regulatory costs and burdens imposed on SEFs, market participants, and, ultimately, end-user clients, including pension and retirement funds.

Because asset managers are already bound by a fiduciary duty to our clients, it would be inappropriate to subject asset managers to a new swap market personnel professionalism standard, as it would largely be duplicative of existing duties, obligations and registration requirements. Additionally, the SEF rules already require SEFs to establish trade practice and disciplinary rules,[45] rule enforcement programs to detect and investigate abusive trading practices and rules violations,[46] and disciplinary procedures and sanctions for any violations of SEF rules.[47] The increased professionalism of SEF participants and employees could be achieved through a SEF's existing rules and regulatory requirements rather than requiring additional licensing exams or rules to apply to swaps trading.

<u>SIFMA AMG believes the following related issues merit significant evaluation and analysis</u>:

1. The Commission should extend relief for package transactions and, during that time, review the associated regulatory framework.

On November 17, 2014, the Division of Market Oversight issued Letter No. 14-137, which extended certain components of existing no-action relief related to mandatory SEF trading of these

[43] *White Paper*, *supra* note 2, at 70.

[44] *Id.* at 73.

[45] *See* 17 C.F.R. § 37.201(b)(3); *see also* 17 C.F.R. § 37.201(b)(5).

[46] 17 C.F.R. § 37.203.

[47] 17 C.F.R. § 37.206.

products pursuant to Section 2(h)(8) of the CEA.[48] Specifically, the Division of Market Oversight established six categories of package transactions and provided varying amounts of time for those categories to be subject to the trade execution requirement.

Based on our experience in connection with the expiration of relief for certain package transactions on February 15, 2015,[49] SIFMA AMG strongly believes that, absent additional relief, the upcoming expirations on May 15, 2015 (for MAT/Agency MBS Package Transactions) and November 14, 2015 (for MAT/Futures Package Transactions) will irreparably harm market liquidity, to the detriment of asset managers and other market participants.

The impact of the May 15, 2015 expiration becomes even more acute for certain package transactions, specifically the MAT/Agency MBS Package Transaction. For example, asset managers will not be able to transact in all MAT swaps, nor will SEFs support all Agency MBS transactions. At this time, with respect to these package transactions, the only MAT swap that SEFs will make available is a spot-starter swap and the only SEF-supported Agency MBS transaction is the 'to be announced' ("TBA"). Package transactions involving all other Agency MBS products as well as the established market agreed coupon ("MAC") swap vs TBA will not be offered. SEFs are not likely to provide trading capabilities for the universe of MAT/Agency MBS Package Transactions after the expiration of the no-action relief. Without further relief and/or clarification from the Commission, asset managers may be forced to "break" such packages into their individual legs and trade each component separately, assuming risk for each leg of the trade. We will be left in the unfortunate position whereby we may no longer be able to trade these package transactions and our clients will pay the price for legging into transactions or trade each component separately simply because the scope of the MAT determination does not match the universe of products available to trade on a SEF.

Market participants have yet to resolve the impediments that prevent SEFs and DCMs from "offer[ing] the capability to transact swap components of such package transactions via competitive means of execution."[50] As Commissioner Giancarlo noted in his White Paper, package transactions "are ill-suited to Order Book or RFQ System execution given their limited liquidity and complex characteristics."[51] The imposition of SEF trading of package transactions should not be set by arbitrary deadlines, but rather should reflect a careful consideration of factors such as market liquidity, technology, market participant readiness, and execution and clearing service providers' preparedness. Preferably, the Commission will consider this issue when it conducts a

[48] CFTC No-Action Letter No. 14-137 (Nov. 10, 2014), *available at* http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-137.pdf.

[49] On February 15, 2015, no-action relief expired for the following transaction types: MAT/Non-MAT Uncleared Package Transactions, MAT/Non-Swap Instruments Package Transactions, and MAT/Non-CFTC Swap Package Transactions.

[50] CFTC No-Action Letter No. 14-137, *supra* note 2, at 4.

[51] *White Paper*, *supra* note 2, at 26.

comprehensive review of the swap trading rule set and considers ways to, as Commissioner Wetjen suggested, "formalize making some of this temporary relief permanent in order to provide more certainty and flexibility for [package] transactions."[52]

Consistent with our October 2014 letter, SIFMA AMG continues to believe that the Commission should extend package trades no-action relief "for an indefinite period until a sufficient showing of liquidity can be made for the integrated package transaction,"[53] or at least for a period of no less than six months for the MAT component of all package transactions that would otherwise be mandated for SEF or DCM execution.

SIFMA AMG maintains that all package transactions should be considered for potential MAT determinations on an integrated basis, looking at the package transaction as a whole rather than at its individual component parts. Package transactions are priced and traded together as an integrated unit. Prior to subjecting package transactions to SEF trading, any MAT determination in this regard should objectively evaluate each of the six factors set forth in Commission Regulation 37.10 at the package, and not individual component, level.

Automatically subjecting a MAT component of a package transaction to SEF execution simply because that component on its own would be subject to a MAT determination (1) ignores the status of a package transaction as unique from its component parts and (2) obviates the entire MAT process under Commission Rule 37.9 by including other transactions where a sufficient showing of the MAT factors has not been made.

SIFMA AMG urges the Commission—particularly for the MAT/Futures Package Transactions frequently relied upon by asset managers to hedge risk—to assess market participants' readiness for SEF trading of these products in advance of the expiration of any no-action relief.

Additional, significant questions remain about certain package transactions. For example, for MAT/Futures Package Transactions, both CME and ICE have adopted rules that would disqualify package transactions containing futures from Exchange for Related Positions status on these exchanges if the MAT component is executed on or pursuant to the rules of a SEF or DCM.[54] As a result, a future mandatory trade execution requirement for MAT /Futures Package Transactions would seemingly conflict with these exchange rules, force these packages to be broken into their component parts, and raise associated issues related to mandatory membership to certain DCMs and

[52] *Commissioner Wetjen Testimony*, *supra* note 2.

[53] SIFMA AMG, Request for Further Relief from Trade Execution Requirement for Package Transactions (Oct. 21, 2014), *available at* http://www.sifma.org/comment-letters/2014/sifma-amg-submits-letter-to-cftc-requesting-further-relief-relating-to-the-execution-of-package-transactions.

[54] See CME Rule 538, *available at* http://www.cmegroup.com/rulebook/files/ra1311-5r.pdf; *see also* ICE Rule 4.06, *available at* https://www.theice.com/publicdocs/rulebooks/futures_us/4_Trading.pdf.

lack of competition or choice of venue (potentially fostering a monopoly on one product's trading) to execute these transactions.[55]

Similarly, coordination is still needed among the Commission and regulators with jurisdiction over other products frequently "packaged" with swaps and priced and executed together. Guidance and clarity is still needed on the appropriate trading protocols and requirements for packages involving, for example, securities, security-based swaps, options, and other non-swap products.

These unresolved topics hinder market participants from trading package transactions and negatively impact the liquidity and pricing associated with these trades. For these reasons, SIFMA AMG encourages the Commission to appropriately extend relief with sufficient prior public notice in order to avoid any negative impact on market conditions before the current expiration dates. Market participants require regulatory certainty when planning their business and conducting activity in swap markets. Sufficient transparency with respect to the treatment of package transactions, and any implementation deadlines that comport with market conditions, will help ensure that SEF trading succeeds in the new regulatory environment.

2. Revisions to Commission Regulation 1.35 must be finalized to reduce recordkeeping burdens.

As noted in our previous comment letter, SIFMA AMG appreciated the publication of a proposed rule to amend Commission Regulation 1.35 in November 2014. SIFMA AMG strongly supports the Commission's proposals to: (i) exempt commodity trading advisors ("CTAs") from the oral recordkeeping requirements under Commission Regulation 1.35(a), (ii) clarify that records of oral and written communications leading to the execution of a transaction in a commodity interest and related cash or forward transactions are not required to be kept in a form and manner that allows for identification of a particular transaction, and (iii) exclude "Unregistered Members"[56] from the requirements to retain text messages and to maintain written records in a manner that would comply with the "searchable" and "identifiable by transaction" requirements.

Our comments included several additional changes to the proposed 1.35 which we continue to support and urge the Commission to incorporate prior to adoption of a final amendment to Regulation 1.35. In particular, SIFMA AMG further urges the CFTC to expand the proposed exclusion from the requirement that written records regarding "communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading and prices that lead to

[55] Although this issue has been raised with the Commission in the past, the conflict has not yet been resolved. *See, e.g.*, SIFMA, CFTC Comment Regarding Industry Filing IF 14-003; Request for Package Transactions to be Treated Independently for "Made Available to Trade" Determinations" (Apr. 23, 2014), *available at* http://www.sifma.org/issues/item.aspx?id=8589948877.

[56] The Notice defined this group as "members of DCMs or SEFs that are not required to register with the Commission in any capacity." Records of Commodity Interest and Related Cash or Forward Transactions, 79 Fed. Reg. at 68,142 (Nov. 14, 2014).

the execution of a transaction in a commodity interest and related cash or forward transactions" be "kept in a form and manner that allows for identification of a particular transaction" to cover all records maintained by CTAs and commodity pool operators ("CPOs") as well as other Asset Managers[57] to which the rules would otherwise apply.[58]

3. SIFMA AMG has concerns about the practice of name give up for swaps traded anonymously on an order book and immediately cleared.

Market participants have vigorously debated, for order book-traded, immediately cleared swaps, whether SEFs should be allowed to provide customers with the identity of their counterparties following execution.

SIFMA AMG members are concerned that post-trade counterparty disclosures may leave open the possibility for, among other things, information leakage and reverse engineering of trading strategies, and some members have elected not to transact on certain order books as a result of this concern (as well as other issues). Notwithstanding those concerns, we respect the Commission's principles-based approach to regulation and think in the long run the markets are best served by allowing the option of multiple trading venues with unique liquidity formation characteristics and non-discriminatory terms.

We believe it would be prudent for the Commission to examine these practices to determine if they are inhibiting open and competitive SEF trading. Such a review by the Commission in and of itself may encourage SEFs to adopt certain limitations and restrictions on such post trade disclosures that could result in greater market participation.

4. The Commission should review the "Embargo Rule" to promote liquidity formation and the trading of swaps on SEF.

We agree with Commissioner Giancarlo's assessment that the "delays in transaction and pricing data disclosure" caused by the embargo rule in Commission Regulation 43.3, "has hindered U.S. markets from continuing a well-established and crucial global trading mechanism" and acts as an "unbalanced restraint on swaps liquidity."[59] However, this concern should be balanced against the important role of public SDR dissemination of real-time price-forming information. Furthermore, removal of the embargo rule might encourage market participants to increasingly focus their trading strategies on speed. As seen in other markets, high frequency trading can introduce a new risk to OTC swaps markets that does not currently exist.

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[57] See comment letter, where the term "Asset Managers" is used to mean regulated investment advisers, including those registered with the Commission (i.e., as a CTA or CPO), the Securities and Exchange Commission (the "SEC"), and a U.S. state or a foreign regulatory authority.

[58] 17 C.F.R. § 1.35(a) would apply to these entities to the extent the entities were members of a designated contract market or swap execution facility.

[59] *White Paper*, *supra* note 2, at 37.

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We look forward to continued engagement with the Commissioners and CFTC staff to ensure that the regulatory landscape remains "principles-based" and comports with the Commodity Exchange Act's goals of "promot[ing] the trading of swaps on swap execution facilities and [promoting] pre-trade price transparency in the swaps market."[60]

Should you have any questions, please do not hesitate to contact Tim Cameron at 202-962-7447 or tcameron@sifma.org or Lindsey Keljo at 202-962-7312 or lkeljo@sifma.org.

Sincerely,

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cc: Mr. Vincent McGonagle, Director, CFTC Division of Market Oversight

[60] CEA § 5h(e).