



February 28, 2011

Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants (RIN 3038-AC96)

Dear Mr. Stawick:

The Asset Management Group (the “**AMG**”) of the Securities Industry and Financial Markets Association (“**SIFMA**”) appreciates the opportunity to provide the Commodity Futures Trading Commission (the “**CFTC**”) with our comments regarding the proposed regulations (the “**Proposed Rules**”), published on December 28, 2010, regarding the establishment of requirements for swap confirmation, portfolio reconciliation, and portfolio compression for swap dealers and major swap participants (“**MSPs**”). For purposes of this letter, we have simplified our presentation to refer to swap dealers and major swap participants, collectively, simply as “**SDs/MSPs**.”

The AMG’s members represent U.S. asset management firms whose combined assets under management exceed \$20 trillion. The clients of AMG member firms include, among others, registered investment companies, endowments, state and local government pension funds, private sector ERISA pension funds and private funds such as hedge funds and private equity funds. In their role as asset managers, AMG member firms, on behalf of their clients, engage in transactions for hedging and risk management purposes that will be classified as “swaps” under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “**Dodd-Frank Act**”).

As described below, the AMG has several suggestions with respect to the Proposed Rules. First, the AMG believes that counterparties should retain the right to choose whether to use electronic or non-electronic forms of confirmation. Second, disclosure of non-pricing-related terms of a swap transaction should be made available to an SD/MSP’s counterparties prior to execution to facilitate timely confirmation, except where such terms have been otherwise agreed to. Third, the confirmation should not be required to supersede any preexisting agreements negotiated by the parties. Fourth, the requirement that swap transactions be confirmed on the same day as execution is too

restrictive, particularly for late-day trades, complex or customized uncleared swaps and block trades. Fifth, some of the other time periods contemplated by the rules are unnecessarily short. Sixth, the CFTC should explicitly allow counterparties to use existing third-party service providers for portfolio reconciliation. Finally, non-SD/MSP market participants should not be required to engage in portfolio compression exercises.

Counterparties should retain the right to choose whether to use electronic or non-electronic forms of confirmation.

While AMG members generally recognize the benefits of electronic trade confirmation, we are concerned that effectively mandating its use at this time with respect to uncleared swaps will have significant adverse impacts on the swap markets. Unless market participants have the legal right to determine whether their uncleared swap trades are confirmed electronically or manually, SDs/MSPs could insist on electronic confirmation, effectively forcing the client onto the one currently available electronic confirmation platform.¹ This result could require market participants to accept unfavorable, non-negotiable provisions with respect to fees, indemnifications and other material requirements.

The AMG believes that, absent direct oversight by the Commission (such as that which will apply in the context of the execution and clearance of cleared swaps), it is not in the public interest for the proposed rules directly or indirectly to require the use of electronic confirmations. The AMG urges the CFTC to include a requirement that, with respect to any uncleared swap, a non-SD/MSP counterparty shall have the right to elect whether the confirmation for that swap will occur electronically or manually.

All terms of a swap (other than pricing-related terms) should be required to be disclosed in writing to an SD/MSP's counterparty prior to execution, except where the non-pricing-related terms have been previously agreed to by the parties.

The AMG supports the Commission's objectives in developing regulations to prevent unreasonable delays in confirming swap transactions. Delays can occur when written confirmations contain specific terms, conditions or representations that were not discussed and agreed upon prior to the time of execution. Asset managers sometimes have to deal with the very practical reality that sales desks of SDs/MSPs often address only the basic pricing terms of a swap transaction while additional terms that the SD/MSP believes are standard for all of its trades (but have not been considered or accepted by the counterparty) are later provided by a separate documentation group. This can result in delays in confirming trades and extended negotiations.

¹ In a letter to the Federal Reserve Bank of New York with respect to credit default swaps ("CDS"), certain dealers, large asset managers and hedge funds committed to requiring their CDS counterparties to use a particular confirmation service provider. Letter from Major Dealers to Timothy Geithner, Federal Reserve Bank of New York (Oct. 4, 2005). However, the experience in the CDS market does not necessarily reflect other swaps markets, such as the interest rate swap market. Therefore, the Commission should not extrapolate purely from the CDS market to conclude that the same deadlines and processes are appropriate for other swap markets.

The AMG therefore recommends that, in all cases except where the parties have previously agreed to the non-pricing-related terms to apply to the trade, prior to execution of any swap transaction, the SD/MSP shall be required to furnish to a prospective counterparty (or receive from a prospective counterparty) documentation specifying all terms of the swap transaction, other than the applicable pricing-related terms to be expressly agreed upon at the time of execution. Such a requirement will reduce the possibility that parties to a swap transaction will fail to meet the applicable confirmation deadlines that are ultimately adopted. The delivery of such pre-execution documentation could be made in a manner that would not result in unnecessary delay or trade-by-trade disclosure where the non-pricing-related terms of the trade have previously been established between the parties. Accordingly, where the SD/MSP and the counterparty have already agreed on the non-pricing-related terms of a specific type of trade, there is no need to re-deliver those non-pricing-related terms prior to execution of other trades of the same type. When the non-pricing-related terms of a trade have not been previously agreed or if the SD/MSP wishes to modify the previously agreed non-pricing-related terms, the SD/MSP should disclose in writing those terms prior to execution.

The proposed rules should not require that a confirmation supersede previous agreements between the parties.

Under the Proposed Rules, a confirmation would “legally supersede any previous agreement (electronically or otherwise).”² The AMG requests that the Commission eliminate this proposed requirement as unnecessary and potentially confusing. Most swap confirmations utilize standard ISDA form agreements that incorporate the terms of an ISDA Master Agreement between the swap counterparties. In addition, certain clients to asset managers may require the managers to trade on the client’s swap agreements and limit the ability of asset managers or SD/MSP counterparties to change the terms negotiated by the client. In such cases, the client requires that the confirmation *cannot supersede* the client’s Schedule to the ISDA Master Agreement in the event of conflict between a confirmation and the Schedule to the ISDA Master Agreement. In addition, many market participants include provisions in swap agreements that state the swap agreement’s terms govern unless the parties explicitly otherwise agree in writing to modify the terms. We request that the Commission clarify or modify proposed rule 23.500(c) in such a manner that would eliminate the implication that a confirmation necessarily supersedes other agreements entered into between the parties. Instead, the express terms of the contractual arrangements agreed on by the parties should control.

The CFTC’s “same day” confirmation requirement for financial entities is too restrictive.

Proposed rule 23.501(a)(3) would require that an SD/MSP “establish, maintain, and enforce written policies and procedures reasonably designed to ensure that it executes a confirmation for each swap transaction that it enters into with a counterparty that is a

² Proposed rule 23.500(c).

swap dealer, major swap participant, or financial entity *within the same calendar day as execution* and with a counterparty that is not a swap dealer, major swap participant, or a financial entity not later than the next business day after execution.” (Emphasis added.)

This proposed rule raises concerns for AMG members for multiple reasons. First, the proposed time periods may not be appropriate in all cases, particularly for complex or customized uncleared swaps. These time periods should be extended so as not to place undue burdens on market participants. For example, the proposed time period would be inappropriate for asset managers who must allocate block trades among their respective clients.³

Second, financial entities should be treated no worse than commercial end users under the proposed rule. Many financial entities are not frequent traders in the swap market and may not have the back-office or operational resources to meet the demands to turn around swaps documentation in the short timeframes proposed by the CFTC. To require all financial entities to have such operational capacity would be costly and ultimately would discourage some market participants from using swaps.⁴ Consistent with the “policy choice made by Congress in Dodd-Frank to place lesser burdens on non-dealer counterparties,”⁵ we request that the Commission revise proposed rule 23.501(a)(3) to give non-SD/MSP counterparties that are financial entities the same timeframes that are provided to other end users.

Third, the proposed rule appears likely to discourage late-day trading between SDs/MSPs and financial entities. The rule effectively could require SDs/MSPs to agree on confirmations with certain market participants within hours, or even minutes, if trades are made late in the day. At a minimum, parties should be given no less than 24 hours following execution, rather than “within the same calendar day as execution,” to execute confirmations.

Finally, the regulations should contemplate that it is permissible for there to be a delay in the delivery of confirmations if there is a legitimate outstanding dispute between the parties, provided that the parties are seeking to resolve such dispute in a timely fashion.

³ See Letter from Timothy W. Cameron, SIFMA, to David A. Stawick, CFTC, “Comments on CFTC Proposed Rule on Real-Time Public Reporting of Swap Transaction Data (RIN 3038-AD08); CFTC Proposed Rule on Swap Data Recordkeeping and Reporting (RIN 3038-AD19); and CFTC Proposed Rule on Swap Data Repositories (RIN 3038-AD20)” (Feb. 7, 2011), at 3.

⁴ The processes highlighted in the release would require a significant investment of capital and technological resources for counterparties to the SDs/MSPs. Some firms may find this process prohibitively expensive and not justified given that, while these asset managers may have fairly large notional amounts of swaps, they often do not have sufficiently large volumes of swap transactions to support large operational and technological outlays.

⁵ 75 Fed. Reg. 76579.

The time periods for actions required under the proposed rules are unnecessarily short.

Each SD/MSP must send an acknowledgment in a time period ranging from fifteen minutes after execution to within the same business day of execution. Each SD/MSP must adopt written policies and procedures requiring portfolios with non-SDs/MSPs to be reconciled no less frequently than: (1) once each business day for portfolios including 500 or more swaps; (2) once each week for portfolios including more than 100 but less than 500 swaps; and (3) once each calendar quarter for portfolios including no more than 100 swaps at any time during the calendar quarter. Finally, SDs/MSPs are obligated to establish procedures to resolve valuation discrepancies within a timely fashion (within one day with respect to transactions with other SDs/MSPs). This latter requirement is not consistent with the recently adopted ISDA dispute resolution protocols or other methodologies typically incorporated into bilateral swap agreements. It is unrealistic to expect serious valuation disputes to be resolved within a short, mandated time period. The consequences of failing to resolve the dispute within that time frame are also unclear.

The AMG believes that these deadlines are unnecessarily short and do not bear a reasonable relationship to the systemic risk goals of the statute. Further, these rules should not be applied to all swaps, because such an imposition would create burdensome requirements for uncleared swaps, which merit more individualized treatment by SDs/MSPs. In addition, it is possible that these required frequencies could impose excessive costs on swaps market participants.

“Reconciliation by qualified third parties” should permit counterparties to use their existing service providers.

Proposed rule 23.502(b)(1) would require a SD/MSP to agree in writing with each of its counterparties on the terms of the portfolio reconciliation. Under proposed rule 23.502(b)(2), portfolio reconciliation could be performed either by the counterparties or by a “qualified third party.” When read together, we are concerned that these two rules may raise uncertainty as to (1) whether both counterparties would have to agree upon a third party before that third party could be used for portfolio reconciliation purposes and (2) whether each party could use its own third-party service provider to work with the other party or their service provider. We request the CFTC to amend proposed rule 23.502(b)(1) (and conforming changes to proposed rule 23.502(b)(2)) to explicitly permit counterparties to use their respective third-party service providers for reconciliation purposes and to provide that, if a single third-party service provider is used for portfolio reconciliation, that such a third-party service provider must be selected by an agreement of the parties.

The AMG notes that the proposed regulations do not provide any guidance regarding what entities would be deemed to be a “qualified third party.” We are concerned that the regulation could be interpreted in a manner which would result in asset managers having to replace their existing service providers. We suggest that the CFTC should allow market participants to determine whether their service providers are

qualified. To avoid any ambiguity, we also suggest that the CFTC delete the word “qualified” from any final rulemaking.

Non-SD/MSP market participants should not be required to engage in portfolio compression exercises.

In the portfolio compression proposal in proposed rule 23.503, the Commission does not mandate portfolio compression exercises for swaps where one or more counterparties are not SDs/MSPs. However, in proposed rule 23.503(d)(2), the Commission would require SDs/MSPs to maintain written policies and procedures for periodically terminating fully offsetting swap and periodically engaging in compression exercises with counterparties that are not SDs/MSPs. In addition, the Commission asks whether financial entities should be subject to the portfolio compression requirements being proposed for SDs/MSPs.

While the AMG believes that it may be appropriate for market participants to voluntarily engage in compression in many circumstances,⁶ we believe that market counterparties should never be mandated to compress their positions. Portfolio compression may not be appropriate for all swap trading conducted by clients of AMG members. For example, some clients may engage different managers, each of whom may have a different trading strategy and manage certain assets of the client without knowing the positions or trading strategies of the other managers of the client. This can result in a manager entering into a swap on behalf of a client that technically is offsetting a swap entered into by another manager for the same client, with both swaps necessary for the managers to accomplish their respective strategies.

More generally, we are concerned that the proposal to require SDs/MSPs to maintain written policies and procedures for terminating fully offsetting swaps and engaging in compression exercises with non-SDs/MSPs would force counterparties to compress trades that, for legitimate portfolio management reasons such as hedging, asset managers would choose to keep separate in the best interest of their clients. Similarly, we are concerned that swaps held by affiliated counterparties (or separate divisions within the same counterparty) could be deemed to be offsetting and required to be compressed by SDs/MSPs, despite the counterparties’ desire to maintain separate positions on behalf of separate entities or divisions. In addition, counterparties may disagree with SDs/MSPs in determining which trades should be deemed to be offsetting or the settlement values of the proposed compressed trades. Notably, no such compression requirement exists for participants in the futures markets. Accordingly, we strongly believe that SDs/MSPs must be required to obtain a non-SD/MSP swap counterparty’s prior written consent, which may be provided or withheld in the counterparty’s sole discretion, before requiring the compression of any swap transactions with such counterparty. For these reasons, we believe that financial entities should not be subject to regulation that mandates portfolio compression.

⁶ Some market participants currently compress their swap positions in order to manage risk.

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The AMG thanks the CFTC for the opportunity to comment on the proposed rulemaking regarding the establishment of requirements for swap confirmation, portfolio reconciliation, and portfolio compression for swap dealers and major swap participants. The AMG would welcome the opportunity to further discuss our comments with you. If you have any questions, please do not hesitate to call the undersigned at 212-313-1389.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'T. Cameron', with a long horizontal line extending to the right.

Timothy W. Cameron, Esq.
Managing Director, Asset Management Group
Securities Industry and Financial Markets Association

cc: Chairman Gary Gensler, CFTC
Commissioner Bart Chilton, CFTC
Commissioner Michael Dunn, CFTC
Commissioner Scott D. O'Malia, CFTC
Commissioner Jill E. Sommers, CFTC
Chairman Mary L. Schapiro, SEC
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