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July 2, 2013

Via Electronic Mail: ggensler@cftc.gov

Chairman Gary Gensler
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: CFTC Final Exemptive Order Regarding Compliance With Certain Swap Regulations (RIN 3038-AD85) and U.S. Person Definition

Dear Mr. Gensler:

The Asset Management Group (the "**AMG**")[1] of the Securities Industry and Financial Markets Association ("**SIFMA**") writes to express its ongoing concerns regarding the application of the Commodity Futures Trading Commission's (the "**Commission's**") swap regulatory regime to cross-border swap activities. The AMG and its members, who are among the world's largest asset managers that serve U.S. retail investors, pension funds, U.S. state and municipal governments, and institutional investors, continue to have deep reservations about the Commission's potential approach to the cross-border application of its swaps regulatory regime. If an overly broad definition of U.S. person is adopted by the Commission, it will harm our members' ability to engage in swaps to hedge risks and meet investment objectives for certain clients and will put them at a competitive disadvantage with asset managers outside the United

[1] 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 Employee Retirement Income Security Act of 1974 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 that will be classified as "security-based swaps" and "swaps" under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**").

States. It would also disadvantage U.S. investors who may be shut out from investing in some non-U.S. domiciled funds and hurt the overall competitiveness of U.S. swap markets.

The Commission Should Extend its Final Exemptive Order

For the reasons stated by SIFMA and other trade associations in a letter recently submitted to the Commission,[2] we continue to strongly urge the Commission to extend its Final Exemptive Order Regarding Compliance With Certain Swap Regulations ("**Exemptive Order**") for at least six months, so that it will be in effect until at least January 12, 2014, and to do so as soon as possible. The Commission should take every precaution to prevent whatever action it takes from coming down to the last minute before the expiration of the Exemptive Order on July 12, 2013, as such eleventh-hour actions foster market disruptions and make it extremely difficult for market participants to make business decisions and to plan for and conform their activities to new requirements. Especially at this already late stage, we believe that an extension of the Exemptive Order would provide the time needed for swap market participants to adequately prepare and for the Commission to coordinate appropriately with other domestic and international regulators on the proper scope of its extraterritorial reach.

In particular, as discussed in the Joint-Trade Letter, we believe that it is imperative for the Commission to consider the Securities and Exchange Commission's proposed rules relating to its regulation of cross-border security-based swap activities and the comments received in response before issuing final guidance, so it can consider the full cross-border impact of U.S. swap and security-based swap rules before making a final determination on the extraterritorial application of its rules. As importantly, an extension would provide the Commission with the necessary time to coordinate its cross-border regulatory efforts with those of its counterparts in Europe, Asia, and other jurisdictions—which is necessary to avoid undue uncertainty and overlapping or inconsistent requirements for international swap market participants. As was described in a letter to Chairman Gary Gensler on May 28, 2013, from the European Commission, the expiration of the Exemptive Order, or premature replacement of the Exemptive Order with final cross-border guidance, could jeopardize the productive and cooperative efforts underway towards meeting G20 commitments on an international basis. Like the European Commission, we are concerned that expiration of the Exemptive Order at this time would be counterproductive and disruptive to global swaps markets, and believe that an

[2] Request for Extension of CFTC Final Exemptive Order Regarding Compliance With Certain Swap Regulations, American Bankers Association, ABA Securities Association, Futures Industry Association, Institute of International Bankers, International Swaps and Derivatives Association, and SIFMA (Jun. 6, 2013), *available at* http://www.sifma.org/workarea/downloadasset.aspx?id=8589943947 (the "**Joint-Trade Letter**").

extension of the Exemptive Order for at least six months would provide the necessary time for international conversations to continue towards resolution.

If the Commission is Unwilling to Extend the Final Exemptive Order, the Definition of U.S. Person Adopted by the Commission Should Not Be Overly Broad

In the event that the Commission decides not to extend the Exemptive Order and instead opts to issue final cross-border guidance or an interim final rule on or before July 12, 2013, the Commission should avoid adopting an overly broad, unclear, and difficult to apply definition of U.S. person. The AMG remains concerned about the definition of U.S. person that the Commission has previously proposed[3] and that we understand is being considered for adoption in final cross-border guidance or interim final rule. As discussed with Chairman Gensler and Commission staff at an April 24, 2013 meeting,[4] the AMG is particularly concerned that an overly inclusive U.S. person definition would unnecessarily create a competitive disadvantage for U.S. asset managers relative to their foreign counterparts and foreclose investment opportunities for U.S. investors, without yielding any commensurate benefits in the form of enhanced investor protection or risk mitigation to U.S. markets.

The AMG and its members appreciate the Commission's recognition of these concerns at this meeting and, as requested at the meeting, has been working on developing a recommended approach to the U.S. person definition that addresses the Commission's legitimate need to regulate investment vehicles and other types of entities that have a significant and direct connection with the United States commerce through their swaps activities, and at the same time does not needlessly disadvantage U.S. asset managers, funds, entities or investors.

As we have highlighted in our previous comment letters on this subject,[5] we continue to believe that it is of the utmost importance for the U.S. person

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[3] Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 Fed. Reg 41213 (Jul. 21, 2012), *available at* http://www.cftc.gov/LawRegulation/DoddFrankAct/Dodd-FrankProposedRules/ssLINK/2012-16496a ; Further Proposed Guidance Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 909 (Jan. 7, 2013), *available at* http://www.cftc.gov/LawRegulation/DoddFrankAct/Dodd-FrankProposedRules/ssLINK/2012-31734a ("**Proposed Guidance**").

[4] CFTC External Meetings: Meeting with SIFMA, http://www.cftc.gov/LawRegulation/DoddFrankAct/ExternalMeetings/dfmeeting_042413_2132 (April 24, 2013).

[5] Comment Letter on the Proposed Interpretive Guidance on the Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act (RIN 3038-AD57), SIFMA AMG (Aug. 27, 2012), *available at* *http://www.sifma.org/workarea/downloadasset.aspx?id=8589940055*; Comment Letter on the (…continued)

definition to be practical and not overly complicated or burdensome to implement or test. We believe that our proposed definition of U.S. person, which is attached as Annex A hereto, holds true to these principles and does so in a way that is generally consistent with the positions described in the Previous AMG Comment Letters. We understand that the Commission is particularly concerned about the U.S. person status of investment vehicles that are organized outside the United States but whose swaps activities have a significant and direct connection with U.S. commerce. This could include, for example, an offshore fund that maintains a significant swap exposure to U.S. counterparties.

Our recommended definition of U.S. person, set forth in Annex A, seeks to address the Commission's concerns while balancing the need to avoid unnecessary complexities and reflects the following general premises:

- *Direct and significant connection to U.S. commerce*: If the definition of U.S. person adopted by the Commission includes funds and other collective investment vehicles that are not organized in the United States, then we believe that the definition must incorporate some measure to ensure these entities' swap activities have direct and significant connection to U.S. commerce. With respect to ensuring a significant connection to U.S. commerce, we are proposing an element of the U.S. person definition for funds and other collective investment vehicles that includes a threshold amount of swap usage determined by current aggregate uncollateralized outward exposure to U.S. persons, as calculated under the major swap participant definition.[6] In addition, absent organization in the United States, we believe that a fund's direct connection to U.S. commerce should be demonstrated through direct majority ownership or if the fund is offered to U.S. investors. We believe that this approach covers the types of offshore funds about which the Commission has expressed concern while providing a sufficiently clear direct and significant connection to U.S. commerce, as required by the Dodd-Frank Act.[7]

(continued…)

Further Proposed Guidance Regarding Compliance with Certain Swap Regulations (RIN 3038-AD85) (Feb. 14, 2013), *available at* http://www.sifma.org/workarea/downloadasset.aspx?id=8589942426 ("**Previous AMG Comment Letters**").

[6] 17 C.F.R. 1.3(jjj)(2)(ii). We believe that uncollateralized exposure is the appropriate measure for determining the impact on U.S. commerce, as collateralized exposure does not create significant risk to the financial system.

[7] Section 2(i) of the Commodity Exchange Act.

- *No assessment of indirect ownership*: As we discussed in the Prior AMG Comment Letters, we do not think it is either practical or appropriate to look at indirect ownership of funds or other collective investment vehicles. Although we continue to believe that it is not appropriate to look at ownership levels at all, if the Commission is insistent on adopting a definition that requires an examination of the U.S. person status of investors, this examination should not go beyond direct investors and should only apply to the extent that a fund's or other collective investment vehicle's swap usage exceeds the current aggregate uncollateralized outward exposure threshold. In any event, requiring going beyond direct ownership would not be administratively practical.

- *Carve-out for publicly-offered offshore funds:* We believe that any fund or other collective investment vehicle that is organized or incorporated outside of the United States and publicly-offered to non-U.S. persons should not be treated as a U.S. person ("**Public Non-U.S. Funds**"), and have therefore included a carve-out for such Public Non-U.S. Funds. Importantly, it would be impractical to apply an ownership test to these Public Non-U.S. Funds as their investors typically hold their shares through intermediaries in nominee or street name in omnibus accounts.[8] In addition, foreign privacy laws provide a substantial hurdle to obtaining information on the identity of investors in such accounts.

- *No requirement to look at the sponsor, promoter, operator or adviser (or sub-adviser) of a fund*: Similarly, as highlighted in our Prior AMG Comment Letters, we do not believe that the U.S. person test for funds or other collective investment vehicles should incorporate a requirement to look at whether the sponsor, promoter or operator of a fund or collective investment vehicle is registered with the Commission or an examination of the jurisdiction of the fund's or collective investment vehicle's investment adviser (or sub-adviser). Such a requirement would undoubtedly result in illogical outcomes and entities being considered U.S. persons that do not have significant connections to U.S. commerce. As described in the Prior AMG Comment Letters, it would also result in competitive disadvantages to U.S. investment advisers, fund sponsors and investors.

[8] See OECD, The Granting of Treaty Benefits with Respect to the Income of Collective Investment Vehicles (April 2010), *available at* http://www.oecd.org/tax/treaties/45359261.pdf (paragraph 18).

- *Principal place of business only applying to non-fund entities based on their headquarters*: We understand that the Commission believes that an offshore corporation that has its principal place of business in the United States should be treated as a U.S. person. Our proposal includes a principal place of business test for corporate entities, but not for funds or collective investment vehicles (as we believe the other criteria included in our proposed definition for these vehicles is more appropriate to measure their connection to U.S. commerce). We clarify that an entity's principal place of business for this purpose should be considered its headquarters and not the location, if different from its headquarters, from which the entity or an adviser (or subadviser) solicits, negotiates, or executes swaps. The AMG believes this approach is entirely consistent with the Commission's view that a corporation that operates principally from the United States should be a U.S. person without unnecessarily disadvantaging U.S. asset managers that may be hired to provide advisory services to a corporation that operates principally outside of the United States.

- *Determination Dates and Compliance Period*: As we recommended in the Prior AMG Letters, funds and other collective investment vehicles should only be required to test their U.S. person status on a periodic, rather than an ongoing, basis. We recommend an annual test as of the end of each calendar year. In addition, we continue to believe that it is essential to provide transitional compliance periods to allow an entity to come into compliance with U.S. swap requirements after coming within the ambit of the U.S. person definition. This approach mitigates the concerns of the AMG and its members about disruptions that may result from an entity's U.S. person status frequently changing and the need to provide sufficient time for an entity to prepare for and come into compliance with U.S. swap regulatory requirements.

- *Substituted compliance*: We continue to believe that substituted compliance should be an essential component of any cross-border guidance and its availability should not be limited to swap dealers and major swap participants. No person or entity should have to follow more than one jurisdiction's rules for the same swap transaction. Allowing for the recognition of comparable regulatory regimes will avoid uncertainty caused by overlapping or conflicting regulatory requirements for swap market participants. Accordingly, we recommend that any entity that is subject to a comparable regulatory regime, such as EMIR, should not be deemed to be a U.S. person.

- *Conformance period:* We also recommend a one-year phase-in period for any entity that is not organized within the United States before it has to comply with Commission rules if it would otherwise fall within the U.S. person definition to allow for the development of comparable swap regimes in other jurisdictions and the possibility of substituted compliance.

In addition, if our recommended definition of U.S. person is adopted by the Commission, we believe that all market participants should be able to rely on representations from their counterparties as to their U.S. person status. Similarly, asset managers should be able to rely on representations from their clients and/or investors in the funds or other collective investment vehicles that they manage about their own U.S. person status. AMG members believe that each individual or entity is in the best position to determine its own status as a U.S. person under our recommended definition, particularly as the information necessary to make the determination generally will not be the sort of information that is maintained or exchanged by asset managers or swap counterparties. Therefore, the AMG strongly believes that if our recommended definition of U.S. person is adopted, then the Commission should explicitly provide that parties may rely on a representation from their counterparties, clients or investors about their status as a U.S. person.

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The AMG appreciates the Commission's consideration of these comments and stands ready to provide any additional information or assistance concerning these topics that the Commission might find useful. Should you have any questions, please do not hesitate to call Tim Cameron at 212-313-1389 or Matt Nevins at 212-313-1176.

Sincerely,

Timothy W. Cameron, Esq.
Managing Director, Asset Management Group
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Matthew J. Nevins, Esq.
Managing Director and Associate General Counsel, Asset Management Group
Securities Industry and Financial Markets Association

cc: Hon. Jill E. Sommers, Commissioner
Hon. Bart Chilton, Commissioner
Hon. Scott O'Malia, Commissioner
Hon. Mark Wetjen, Commissioner
Sarah E. Josephson, Director, Office of International Affairs
Carlene S. Kim, Deputy General Counsel, Office of General Counsel
Mark Fajfar, Assistant General Counsel, Office of General Counsel

Annex A: U.S. Person Definition

(1) "U.S. Person" means:
  (a) Any natural person resident primarily in the United States;
  (b) Any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, or any form of enterprise similar to any of the foregoing ("**Corporate Entity**") that:
    (i) is not a Fund as defined in paragraph (1)(d) below; and
    (ii) either:
      (1) is organized or incorporated under the laws of the United States; or
      (2) has its principal place of business in the United States, provided that the entity's principal place of business is the location of its headquarters where officers direct, control and coordinate the Corporate Entity's activities and not the location, if different from its headquarters, from which it or any third-party on its behalf solicits, negotiates, executes or books swaps;
  (c) A pension plan for the employees, officers or principals of a legal entity described in paragraph (1)(b) above unless the pension plan is primarily for foreign employees of such entity; and
  (d) Any entity organized principally for passive investment such as a commodity pool, pooled account, collective investment vehicle, or other similar entity ("**Fund**") that:
    (i) is organized or incorporated under the laws of the United States; or
    (ii) has current aggregate uncollateralized outward exposure, as calculated under 1.3(jjj)(2)(ii) but taking into account only the Fund's outstanding swaps with U.S. Persons, of $1 billion or greater or that is 51% or greater of the Fund's net asset value or liquidation value, as appropriate, each as of the Determination Date as defined in subparagraph 1(d)(iii), and is:
      (1) directly offered to U.S. Persons; or
      (2) at least 51% directly owned by U.S. Persons as of the Determination Date, as defined in subparagraph 1(d)(iii);

    provided that no Fund that is organized or incorporated outside of the United States and publicly-offered to non-U.S. persons shall be deemed to be a U.S. Person under this subparagraph 1(d)(ii) under any circumstance.
    (iii) *Determination Date.* For purposes of subparagraph 1(d)(ii), the Determination Date shall be once annually on January 1, based on relevant information as of the immediately preceding December 31.
(2) *Compliance Period.* A Corporate Entity, pension plan or Fund that becomes a U.S. Person under paragraph (1)(a), (b)(ii)(2), (c) or (d)(ii) will not be treated as a U.S. Person for purposes of the swaps provisions of the

Commodity Exchange Act added by Title VII of the Dodd-Frank Act until 90 days following the Determination Date (the "**Effective Date**"). For the avoidance of doubt, the compliance period shall only apply to any new transactions executed after the Effective Date unless otherwise agreed to by the parties.

(3) *Conformance Period*. Notwithstanding the above, and subject to paragraph (4) below, a Corporate Entity (other than a registered swap dealer, a *de minimis* swap dealer, or a major swap participant), pension plan or a Fund that is not organized or incorporated under the laws of the United States, shall not be deemed to be a U.S. person for the purposes of this [Final Order/Guidance] for the earlier of (i) the one year anniversary of the effective date of this [Final Order/Guidance], and (ii) the date on which the Commission determines that substituted compliance is available in a jurisdiction in which the Corporate Entity, pension plan or Fund is subject to regulation ("**Conformance Date**").

(4) *Substituted Compliance*. A Corporate Entity, pension plan or Fund that is not organized or incorporated under the laws of the United States, on and after the Conformance Date, shall be deemed to not be a U.S. person for the purposes of this [Final Order/Guidance] if it is subject to the requirements of a foreign regulatory regime determined to be comparable by the CFTC. This substituted compliance shall be deemed to be available with respect to, but not be limited to, EMIR.

(5) Any person not included within the definition of U.S. Person in paragraphs 1(a) to 1(d) above is not a U.S. Person.