



## asset management group

December 19, 2016

Mr. Christopher Kirkpatrick  
Secretary  
Commodity Futures Trading Commission  
3 Lafayette Centre  
1155 21<sup>st</sup> Street, NW  
Washington, DC 20581

Re: **Comment on the Proposed Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants (RIN 3038-AE54)**

Dear Mr. Kirkpatrick:

The Securities Industry and Financial Markets Association's Asset Management Group (**SIFMA AMG** or **AMG**)<sup>1</sup> appreciates the opportunity to provide its views on the proposed rule on the Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants (the **Proposed Rule**)<sup>2</sup> to the Commodity Futures Trading Commission (the **Commission**). AMG appreciates the Commission's thoughtful consideration of its cross-border framework through this formal rulemaking.

While AMG has specific comments on the Proposed Rule, in general, we urge the Commission, among other derivatives regulators, to make substituted compliance more fully available, thereby promoting international comity and avoiding market disruption. We urge the Commission to reduce cross-border complexity and regulatory burdens by agreeing to defer to foreign jurisdictions and their regulations that achieve equivalent regulatory objectives and to do so on a more holistic basis.

Specific to the Proposed Rule, AMG recommends that additional clarifications are made to the definition of U.S. Person and that the Commission not utilize the "arranged, negotiation or executed" test for determining cross-border application of its requirements.

---

<sup>1</sup> SIFMA AMG's members represent U.S. 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.

<sup>2</sup> 81 Fed. Reg. 71946 (Oct. 18, 2016).

AMG further recommends that sufficient time be provided to implement changes to the Commission's cross-border framework. Market participants, including AMG members and their clients, have established internal systems, procedures and documentation designed to allow them to comply with existing Commission guidance. To the extent that the requirements of the Proposed Rule differ from existing guidance, market participants may face significant re-builds and changes.

AMG appreciates the Commission's efforts to improve the framework for the cross-border application of its rules and hopes that AMG's comments are helpful in finalizing the Commission's approach.

## 1. Proposed Definition of U.S. Person

AMG agrees with the Commission's clarification and harmonization of the definition of U.S. person. The definition of U.S. person in the Proposed Rule improves upon the standard established by the Commission's cross-border guidance<sup>3</sup> by eliminating the catchall phrase in the definition and not including the category "commodity pool, pooled account, investment fund, or other collective investment vehicle that is majority-owned by one or more U.S. persons."<sup>4</sup> The definition in the Proposed Rule is also an improvement in that it is the same as that used in Commission's rule on the cross-border application of the uncleared swap margin rules.<sup>5</sup>

AMG recommends, however, that the definition be clarified to exclude pools, funds or other collective investment vehicles that are publicly offered only to non-U.S. persons and not offered to U.S. persons regardless of their principal place of business. We believe that this exclusion is consistent with the Commission's objectives, given that the Cross-Border Guidance excepted these types of funds,<sup>6</sup> and neither the Proposed Rule nor the Cross-Border Margin Rule offers any empirical support for a change in this approach or the regulatory burdens that this change would entail.<sup>7</sup> Although the category is not expressly included, such entities could

---

<sup>3</sup> 78 Fed. Reg. 45291 (July 26, 2013) (the **Cross-Border Guidance**).

<sup>4</sup> Proposed Rule, 81 Fed. Reg. 71946, 71949 (Oct. 18, 2016).

<sup>5</sup> Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants – Cross-Border Application of the Margin Requirements, 81 Fed. Reg. 34817, 34823 (May 31, 2016) (the **Cross-Border Margin Rule**).

<sup>6</sup> Cross-Border Guidance, 78 Fed. Reg. 45291, 45317 (July 26, 2013).

<sup>7</sup> For a detailed discussion of AMG's concerns, please see SIFMA AMG, Comment Letter on the Exemptive Order Regarding Compliance with Certain Swap Regulations (RIN 3038-AE85) and Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations (RIN 3038-AD85), pp. 5-9 (Aug. 21, 2013); SIFMA AMG, Comment Letter on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants – Proposed Rule on the Cross-Border Application of the Margin Requirements (RIN 3038-AC97), pp. 11-12 (Sep. 14, 2015).

still be caught by other prongs of the definition, specifically the third prong of the proposed definition as identified by the Proposed Rule.<sup>8</sup>

Further, AMG recommends that sufficient time be provided to allow market participants to conform to this new definition. Market participants have structured internal compliance policies, procedures, and systems based on the definition of U.S. person that has been in place since the Cross-Border Guidance was finalized in July 2013. Thus, while AMG believes the definition of U.S. person in the Proposed Rule is an improvement, implementation will carry significant burdens, including outreach to clients explaining regulatory changes.

## 2. **ANE Transactions**

While AMG appreciates and understands the reasoning behind the Commission's inclusion of transactions "arranged, negotiated or executed" by personnel in the U.S. (**ANE Transaction**), AMG continues to have concerns regarding the practical application of this approach. Under the Proposed Rule, an ANE Transaction is defined as a swap transaction that is arranged, negotiated, or executed using personnel (whether personnel of the person entering into the transaction or personnel of an agent) located in the United States.<sup>9</sup> Thus, an ANE Transaction would include a transaction between two non-U.S. persons regardless of why U.S. personnel is used. Asset managers may find it difficult or impossible to track ANE Transactions because such a categorization may arise solely as a result of their non-U.S. dealer "passing the book" to accommodate service after the non-U.S. jurisdiction's business day, or for some other reason. An AMG member trading on behalf of a non-U.S. client may not know whether it has entered into an ANE Transaction to which a particular Dodd-Frank Wall Street Reform and Consumer Protection Act (the **Dodd-Frank Act**) requirement applies until after execution, by which time such AMG member's client could have inadvertently become subject to U.S. regulations. Further, the introduction of the concept of ANE Transactions might motivate non-U.S. swap dealers not to involve appropriately qualified personnel located in the United States, creating adverse incentives that may impact market efficiency or the fees that dealers charge. Aspects of these concerns could be mitigated through the availability of substituted compliance. AMG strongly urges the Commission to make substituted compliance available for ANE Transactions. AMG believes that doing so will comport with the notion of international comity and will avoid unnecessary market disruption and distortion.

Although the Commission has stated that it plans to address the application of various Dodd-Frank Act requirements to ANE Transactions on a requirement-by-requirement basis,<sup>10</sup> AMG cannot comment on the application of the ANE Transaction approach to other requirements without further information. While application on a requirement-by-requirement basis may provide a more nuanced approach to implementing the Commission's regulations, AMG believes it, and other market participants, would be better able to provide more meaningful and helpful comments to the Commission once more specific information is provided on this approach. Additionally, while application of the ANE Transaction concept to

---

<sup>8</sup> Proposed Rule, 81 Fed. Reg. 71946, 71949 n.28 (Oct. 18, 2016).

<sup>9</sup> Id. at 71952.

<sup>10</sup> Id. at 71953.

some, but not other, Dodd-Frank Act requirements may ultimately allow the Commission to avoid exacerbating conflicts with other jurisdictions' regulations, this approach would need to be reviewed in the specific context of each requirement, and AMG is concerned that this piecemeal approach would create unnecessary complexity and confusion in the market.

AMG notes that, pursuant to the Proposed Rule, the definition and application of an ANE Transaction would be linked to the activities that would trigger registration as a "swap dealer."<sup>11</sup> Should the Commission decide to move forward with the inclusion of ANE Transactions under the final rule, AMG recommends that the Commission clarify that only the activities of personnel associated with a Commission-registered swap dealer, and not personnel acting for any other type of entity, may trigger the application of the rules applicable to ANE Transactions.

### **3. External Business Conduct Rules**

AMG does not believe that external business conduct rules should apply to ANE Transactions. Regulatory authorities of the home jurisdiction(s) of the counterparties to a transaction have a greater interest in protecting customers within their jurisdiction, and non-U.S. customers would not expect the U.S. rules to apply to transactions with a non-U.S. dealer. As such, AMG does not believe that adding another layer of regulatory burdens to non-U.S. dealers is warranted.

While AMG recognizes that the Commission has a substantial interest in preventing manipulations of U.S. markets, it is particularly concerned about the application of the fair dealing requirements of 17 C.F.R. § 23.410(c) to ANE Transactions. Complex confidentiality requirements already exist in many jurisdictions, and therefore the risk of conflicting requirements is particularly high and the compliance burden associated with requiring representations to address these rules for countless new clients is particularly concerning to AMG. To the extent the Commission requires application of any external business conduct rules to ANE Transactions, AMG reiterates its strong belief that full substituted compliance should be available. While the Proposed Rule does not allow for the availability of substituted compliance for ANE Transactions,<sup>12</sup> permitting the client's or dealer's home jurisdictions' requirements would potentially help avoid irreconcilable conflicts.

---

<sup>11</sup> Id. at 71952.

<sup>12</sup> Id. at 71961.

\*

\*

\*

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, contact Tim Cameron at 202-962-7447 or [tcameron@sifma.org](mailto:tcameron@sifma.org), or Laura Martin at 212-313-1176 or [lmartin@sifma.org](mailto:lmartin@sifma.org) or Deborah North of Allen & Overy LLP, outside counsel to SIFMA AMG, at 212-610-6408 or [deborah.north@allenoverly.com](mailto:deborah.north@allenoverly.com).

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Tim Cameron', with a long horizontal line extending to the right.

Timothy W. Cameron, Esq.  
Asset Management Group – Head

A handwritten signature in black ink, appearing to be 'Laura Martin', with a long horizontal line extending to the right.

Laura Martin  
Asset Management Group – Managing  
Director and Associate General  
Counsel