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| asset management group

August 27, 2012

Via Electronic Mail: secretary@cftc.gov

Mr. David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Comment Letter on the Proposed Interpretive Guidance on the Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act (RIN 3038-AD57)

Dear Mr. Stawick:

The Asset Management Group (the "**AMG**")[1] of the Securities Industry and Financial Markets Association ("**SIFMA**") appreciates the opportunity to provide its views to the Commodity Futures Trading Commission (the "**Commission**") on the Proposed Interpretive Guidance on the Cross-Border Application of Certain Swaps Provisions (the "**Proposed Interpretive Guidance**").[2] The AMG recognizes the need among market participants, including its members, for guidance on the cross-border application of Title VII of the Dodd-Frank Act and appreciates the Commission's efforts to provide this

[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 for hedging and risk management purposes 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**").

[2] 77 Fed. Reg. 41213 (July 12, 2012).

much-needed guidance. However, the AMG is concerned that the cross-border application of Title VII as contemplated in the Proposed Interpretive Guidance is overbroad and overly complex. Furthermore, it would result in significant costs, limit investment opportunities for U.S. investors and raise potential competitive disadvantages for asset managers operating in the United States.

SIFMA has provided comments to the Commission on the Proposed Interpretive Guidance (the "**SIFMA Letter**") and on the Commission's Proposed Exemptive Order Regarding Compliance with Certain Swap Regulations (the "**August 13 Letter**").[3] The AMG generally supports the comments and recommendations made in the SIFMA Letter, and in particular, the recommended definition of U.S. person set forth therein and included as Appendix A hereto. This letter highlights several key concerns specific to AMG's members.

- *The Proposed Interpretive Guidance could harm U.S. investors and asset managers.*

AMG members agree with the view expressed in the SIFMA Letter that the Commission should adopt as a basic tenet of its Title VII approach the maintenance of a level playing field for swap market participants wherever possible. We believe this tenet should apply not only to equality between swap dealers or between major swap participants ("**MSPs**"), but also to equality between end users of swaps, including our members' clients. The AMG believes, however, that the Proposed Interpretive Guidance falls short of this goal and, as a result, could harm U.S. investors and market participants operating in the United States.

For example, the Commission's proposed definition of U.S. person would cause a commodity pool, pooled account, or collective investment vehicle the operator of which is required to be registered with the Commission as a commodity pool operator ("**CPO**") to be deemed a U.S. person. This could result in an investment vehicle with a minimal level of U.S. investors—or even no U.S. investors at all—being treated as a U.S. person. We believe this approach does not fulfill the requirement of Section 722(d) of the Dodd-Frank Act that, for an activity outside the United States to be subject to Title VII of the Act, it must have a "direct and significant connection in, or effect on, commerce in the United States."[4] Defining U.S. person in terms of a CPO's registration obligations with the Commission would have the unsound effect of requiring commodity pools with no connection with or effect on U.S. commerce to be considered U.S.

[3] SIFMA Letter to the Commodity Futures Trading Commission on the Proposed Exemptive Order Regarding Compliance with Certain Swap Regulations (Aug. 13, 2012), *available at* http://www.sifma.org/workarea/downloadasset.aspx?id=8589939889.

[4] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 722(d) (2010).

persons.[5] Moreover, conditioning the U.S. person determination on CPO registration could harm U.S. investors, as managers of non-U.S. funds may either refuse to allow U.S. investors to invest in these funds or limit the types of investments they are willing to make on behalf of such investors. Accordingly, U.S. investors may face a diminished ability to make foreign investments in funds that use swaps. Similarly, U.S.-based CPOs may be deprived of opportunities to operate overseas investment funds, even those that are not intended for U.S. investors at all, if CPO registration were a determining factor of U.S. person status.

We strongly believe that an investment vehicle, or any other type of legal entity, should not be subject to categorization as a U.S. person based on the status or location of the entity's commodity pool operator, investment manager or other fiduciary. Furthermore, the U.S. person definition should reflect the statutory baseline for significant U.S. investor participation. The definition for U.S. person attached hereto provides an alternative that more closely reflects these principles, and we urge the Commission to consider the alternative approach described herein and in the SIFMA Letter.

- *The U.S. person definition should consist of objective factors with bright-line tests designed to avoid uncertainty and undue burdens.*

The proposed definition of U.S. person is unclear and unworkable in a number of ways. First, several prongs of the proposed definition could apply to a particular legal entity. Thus, for example, an investment vehicle that is formed as a trust may need to assess its U.S. person status under prongs (ii), (iv), (v), or (vii) of the proposed definition, with the potential for inconsistent results under those prongs. This could lead to confusion among market participants as to their own U.S. person status and, if the definition was interpreted to require testing under each prong, enormous burdens in monitoring their status. We believe that the Commission should take an approach similar to that embodied in its definition of "eligible contract participant" under which a person may rely only on the portion of the definition that is specific to its circumstances. The definition of U.S. person proposed in the SIFMA Letter seeks to achieve this result.

In addition, specific sections of the proposed U.S. person definition are unclear or would be overly burdensome to apply. For example, under prong (iv) of the proposed definition, a commodity pool or other similar investment vehicle would be a U.S. person if a majority of its direct or indirect owners are U.S.

[5] This problem would be exacerbated if the Commission's proposed definition of U.S. person would be interpreted to treat any commodity pool operated by a registered CPO as a U.S. person, regardless of whether the CPO is registered for that pool or not. It is unclear whether that would be the case from the language in the Commission's proposal, but there would be absolutely no connection to the United States for many foreign commodity pools that are not required to have a registered CPO.

persons. The Proposed Interpretive Guidance does not specify whether U.S. person ownership must be monitored on an ongoing basis or periodically, and, if the latter, how often. Absent further guidance, this prong of the definition could be interpreted to require ongoing monitoring of the U.S. person status of an investment vehicle's owners and could result in very frequent changes to the investment vehicle's U.S. person status. Moreover, to compute its U.S. person ownership, an investment vehicle would need to look to interests held by any indirect owner. We believe that indirect ownership by U.S. persons does not constitute sufficient jurisdictional nexus to cause the investment vehicle to be a U.S. person. Thus, the AMG believes that proposed prong (iv) would place an enormous burden on investment vehicles to assess and monitor their direct and indirect owners, with no corresponding regulatory benefit. Prong (iv) would be particularly problematic for investment vehicles that are listed and exchange-traded outside the United States, as their ownership may change on a daily basis without any ability for the investment vehicle or its manager to limit the number of U.S. and non-U.S. investors entering or exiting the vehicle.

Taken to an extreme, if an investment vehicle's U.S. person status fluctuates by virtue of its changing ownership, it could be subject to different treatment over time for margin, external business conduct, and other Title VII regulatory requirements on a transaction-by-transaction basis. Similarly, the investment vehicle would be required to update representations and amend documentation relating to its U.S. person status with each swap dealer or major swap participant with which it transacts each time its status changes. This would be impracticable, if not impossible, for both counterparties. The definition of U.S. person suggested in the SIFMA letter would address these and other concerns by requiring a commodity pool to assess its U.S. person status based on direct ownership by U.S. persons on an annual basis, as of the beginning of each calendar year. The AMG believes that this approach addresses the flaws of the proposed definition while ensuring that persons and entities that do, in fact, have a direct and significant connection to the United States are U.S. persons.

- *Market participants should be able to rely on representations from their counterparties as to their U.S. person status.*

AMG members believe that each market participant is in the best position to determine its own status as a U.S. person, particularly as the information necessary to make that determination generally will not be the sort of information that is monitored or exchanged by counterparties. All swap market participants—including end users—will need to obtain representations as to the status of their counterparties in order to assess what obligations are owed to them, what obligations they must fulfill, and otherwise to determine the regulatory treatment of their swaps.

The AMG strongly believes that the Commission should explicitly provide that a party to a swap may rely on a representation from its counterparty about the

counterparty's status as a U.S. person, and that the party should not be required to conduct diligence beyond obtaining the representation. A requirement for counterparties to conduct diligence on each other's U.S. person status would be overly burdensome, could lead to uncertainty as different determinations could be made for a given counterparty (particularly if the final definition of U.S. person includes criteria that are open to subjective determinations), and would provide no regulatory benefit. These representations should be reaffirmed by counterparties as of the beginning of each calendar year, and the determination of whether a counterparty to a swap is a U.S. person should be made at the inception of a swap based on the most recent updated representation from the counterparty.

- *Market participants should be given sufficient time to comply with a new U.S. person definition and any ongoing requirements stemming from U.S. person status.*

Prior to the Dodd-Frank Act, as no regulatory definition of "U.S. person" existed in the swap market, swap market participants did not monitor compliance with the Commission's proposed definition of U.S. person. While the AMG understands the new need to monitor U.S. person status for swaps purposes, we strongly believe that market participants will need time after a final U.S. person definition is adopted to conduct assessments of their status, to amend documentation and agreements as needed, and to put into place the systems necessary to ensure compliance with requirements that are based on U.S. person status. As this information is not readily available, many AMG members would need sufficient time to perform the necessary diligence as to the U.S. person status of each of their clients and each investor in any funds or fund of funds that they manage. As a result, the AMG supports the recommendation in the SIFMA Letter that the Commission establish an interim definition of "U.S. person" for an interim period based on information currently available to swap market participants.

Furthermore, market participants will need time on an ongoing basis to implement changes to their counterparties' U.S. person status. In addition, asset managers will need to ascertain their clients' U.S. person status and will need to inform counterparties about any changes.[6] On an ongoing basis, asset managers must have sufficient time to process a change of counterparty status for both their clients and their (or their clients') counterparties and implement any necessary changes through amendments to documentation, data capture and internal compliance and other systems. As suggested in the SIFMA Letter, we believe that any change in a party's U.S. person status should apply only to swaps executed with that party 90 days after the party notifies its counterparty of the

[6] As with the representations referenced in the preceding section, we recommend that the requirement to refresh this analysis, and update counterparties, be conducted at the beginning of each calendar year.

change in status. This would ensure that the counterparties are afforded sufficient time to account for any necessary updates and changes.

- *The Commission's approach to substituted compliance should be consistent with its past approach and general principles of comity.*

We agree with the concerns expressed by foreign regulatory authorities, including the European Commission, the U.K. Financial Services Authority, the Swiss Financial Market Supervisory Authority, and the Financial Services Agency of the Government of Japan and the Bank of Japan, with the Commission's approach to substituted compliance.[7] As discussed in more detail in the SIFMA Letter, we believe that the Commission has taken an unnecessarily narrow view of foreign regulatory recognition. We are particularly concerned that the Proposed Interpretive Guidance contemplates that the Commission would engage in a rule-by-rule comparison to establish the relative comparability of foreign regulatory regimes.

Appropriate recognition of foreign regulatory regimes is of critical importance to asset managers and their clients, whose transactions otherwise may be subject to overlapping and potentially conflicting regulatory requirements. We believe that the Commission's substituted compliance concept should entail a principles-based inquiry through direct engagement with foreign regulators, rather than a line-by-line comparison, to establish the relative comparability of foreign regimes. Once a jurisdiction has been deemed comparable (but not necessarily equivalent), the Commission should defer to that jurisdiction's regulations for all transactions in that jurisdiction, regardless of the location or national identity of the counterparty. We believe that this offers the best approach for minimizing systemic risk while avoiding the over-regulation of swap transactions and entities that are subject to comparable regulation.

* * *

[7] Comment letter submitted by the European Commission to the Commodity Futures Trading Commission on the subject of the proposed CFTC rules (Aug. 24, 2012); Comment letter submitted by the Financial Services Authority to the Commodity Futures Trading Commission on the subject of the proposed interpretive guidance and policy statement on cross-border application of certain swaps provisions of the Commodity Exchange Act and proposed exemptive order regarding compliance with certain swap regulations (Aug. 24, 2012); Comment letter submitted by Swiss Financial Market Supervisory Authority to the Commodity Futures Trading Commission on the subject of swap dealers registration under Dodd-Frank Act (Jul. 5, 2012); Comment letter submitted by Financial Services Agency of the Government of Japan and the Bank of Japan to the Commodity Futures Trading Commission on the subject of proposed CFTC cross-border releases on swap regulations (Aug. 13, 2012). These comment letters are available on the Commission's website at http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1234.

The AMG appreciates the CFTC's consideration of these comments and stands ready to provide any additional information or assistance concerning these topics that the CFTC might find useful.

Should you have any questions, please do not hesitate to call the undersigned at 212-313-1389.

Sincerely,

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

Appendix A

The Commission should define "U.S. person" as:

(i) any natural person who is a resident of the United States;

(ii) any plan within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974, excluding any plan maintained outside the United States primarily for the benefit of persons substantially all of whom are nonresident aliens (a "**Plan**");

(iii) any commodity pool, pooled account, collective investment vehicle or other vehicle the assets of which are invested on a collective basis regardless of form of organization (a "**Commodity Pool**"), in each case where:

(a) the Commodity Pool is organized or incorporated under the laws of the United States; or

(b) the Commodity Pool is (1) directly majority owned as of the beginning of a calendar year by U.S. persons or, in the case of ownership by a Commodity Pool, a Commodity Pool that is a U.S. person solely by virtue of clause (a) above, and (2) not a publicly offered Commodity Pool that is initially offered outside the United States (in a manner compliant with Regulation S) and listed principally on an exchange located outside the United States.

(iv) any corporation, partnership, limited liability company, association, joint-stock company, endowment or any form of enterprise similar to any of the foregoing (other than an Estate, Trust, Plan or Commodity Pool), in each case that is either:

(a) organized or incorporated under the laws of the United States or

(b) having its principal place of business in the United States.[1]

(v) any individual account (discretionary or not) (other than an Estate, Trust, Plan or Commodity Pool) where the direct beneficial owner is a U.S. person by virtue of clause (i) or (iv) above in this definition;

(vi) any estate (other than a Trust, Plan or Commodity Pool) ("**Estate**") of which any executor or administrator is a U.S. person by virtue of clause (i) or (iv) above in this definition, except that any such Estate shall not be a U.S. person if (1) an executor or administrator of the Estate who is not a U.S. person has

[1] Counterparties could determine their own principal place of business using information collected as part of CIP/AML procedures.

sole or shared investment discretion with respect to the assets of the Estate and (2) the Estate is governed by foreign law; and

(vii) any trust (other than an Estate, Plan or Commodity Pool) ("**Trust**") of which any trustee is a U.S. person by virtue of clause (i) or (iv) above in this definition, except that any such Trust shall not be a U.S. person if (1) a trustee who is not a U.S. person has sole or shared investment discretion with respect to the Trust assets, and (2) no beneficiary of the Trust (and no settlor if the Trust is revocable) is a U.S. person by virtue of clause (i) or (iv) above in this definition.

We further urge the Commission to implement the recommendation of both the European Commission and the Financial Services Authority that the definition of U.S. person exclude a person that is established in, or is resident in, a jurisdiction that has regulations in force comparable to those under Title VII and the Commission's rules under Title VII.[2]

[2] Comment letter submitted by the European Commission to the Commodity Futures Trading Commission on the subject of the proposed CFTC rules (Aug. 24, 2012); Comment letter submitted by the Financial Services Authority to the Commodity Futures Trading Commission on the subject of the proposed interpretive guidance and policy statement on cross-border application of certain swaps provisions of the Commodity Exchange Act and proposed exemptive order regarding compliance with certain swap regulations (Aug. 24, 2012). These comment letters are available on the Commission's website at http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1234.