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July 13, 2015

Via E-mail (rule-comments@sec.gov)

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: **Comment Letter on the Proposed Rule re: Application of Certain Title VII Requirements to Security-Based Swap Transactions Connected With a Non-U.S. Person's Dealing Activity That Are Arranged, Negotiated, or Executed by Personnel Located in a U.S. Branch or Office or in a U.S. Branch or Office of an Agent; File No. S7-06-15**

Dear Mr. Fields:

The Asset Management Group (the "AMG")[1] of the Securities Industry and Financial Markets Association ("SIFMA") appreciates the opportunity to provide the Securities and Exchange Commission (the "Commission") with comments on the proposed rule regarding Application of Certain Title VII Requirements to Security-Based Swap Transactions Connected With a Non-U.S. Person's Dealing Activity That Are Arranged, Negotiated, or Executed by Personnel Located in a U.S. Branch or Office or in a U.S. Branch or Office of an Agent (the "Proposed U.S. Personnel Rule").[2]

The AMG appreciates the Commission's thoughtful consideration of the cross-border issues implicated by the Proposed U.S. Personnel Rule and use of formal rulemaking to propose applicable standards. While the AMG agrees with the Commission's exclusion of some Title VII requirements for security-based swap ("SBS") transactions executed between two non-U.S. Persons[3] ("Non-U.S. SBS Transactions"), the AMG believes that mandating certain other Title VII requirements of Non-U.S. SBS Transactions will impose unnecessary burdens and have a negative impact on asset managers' non-U.S. clients.

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[1] The AMG's members represent U.S. asset management firms whose combined assets under management exceed 30 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.

[2] 80 Fed. Reg. 27444 (May 13, 2015) (proposal to amend 17 CFR Parts 240 and 242). Title VII, as used herein, refers to Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

[3] The term U.S. Person, as used herein, has the meaning defined in 17 CFR § 240.3a71-3.

Specifically, the AMG fully supports the Commission's decision to not alter Title VII's clearing and execution requirements for SBS transactions where a non-U.S. dealer utilizes their personnel or an agent's personnel located in the U.S. (collectively, "U.S. Personnel") to arrange, negotiate or execute the transaction.

However, the AMG does not support the application of Title VII's business conduct standards to Non-U.S. SBS Transactions. As discussed below, when asset managers execute SBS transactions on behalf of their non-U.S. clients with non-U.S. dealers, non-U.S. clients do not expect U.S. customer protections to apply, nor are the added burdens justified.

The AMG also does not support requiring the reporting of Non-U.S. SBS Transactions that were arranged, negotiated or executed by a non-U.S. dealer's U.S. Personnel. Such a reporting requirement increases transactional burdens upon an already taxed system and, due to the high potential for duplicative reporting, will distort and cloud publicly disseminated information instead of forwarding the G-20's goal of improving transparency for derivatives. Rather than add these duplicative reporting requirements, the AMG strongly urges the Commission to rely on information sharing amongst regulators across the jurisdictions.

For these reasons, stated more fully below, the AMG requests that the Commission not impose Title VII's customer protection requirements on transactions where neither the dealer nor its counterparty is a U.S. Person, and not require reporting and public dissemination in the U.S. for Non-U.S. SBS Transactions that are arranged, negotiated or executed by a non-U.S. dealer's U.S. Personnel.

I. Exclusion of Mandatory Execution and Clearing Requirements Correctly Reflects the Lack of U.S. Interest in Transactions Between Non-U.S. Persons.

The AMG strongly supports the Commission's decision to exclude application of Title VII's mandatory execution and clearing requirements to transactions between non-U.S. Persons that are not guaranteed by a U.S. Person—even where a dealer utilizes U.S. Personnel.[4]

Under the Proposed U.S. Personnel Rule, SBS transactions between two non-U.S. Persons whose transactions are not guaranteed by a U.S. Person would be excluded from Title VII's mandatory execution and clearing requirements. This exclusion would apply even when a dealer or dealers engaged in dealing activity utilizing U.S. Personnel to arrange, negotiate or execute the SBS transaction.

In taking this position in the Proposed U.S. Personnel Rule, the Commission recognized that its prior proposal to impose execution and clearing for "transactions conducted within the United States"[5] did not take into account that the risk of transactions between two non-U.S.

[4] 80 Fed. Reg. 27444, 27481.

[5] Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security, 78 Fed. Reg. 30968, 31077 (May 23, 2013) (proposal to amend 17 CFR Parts 240, 242, and 249).

Persons is held outside the U.S. Given this, the U.S. has little to no interest in those transactions and should not, as a result, impose Title VII requirements. Indeed, as Commissioner Stein explained, mandating the clearing of such transactions in the U.S. may have the effect of *increasing* the risks that the U.S. financial system would bear.[6]

This exclusion from mandatory execution and clearing requirements for transactions between two non-U.S. Persons supports the cost-efficient execution of transactions by asset managers on behalf of their clients. If, for example, an asset manager is establishing an SBS position for a European-based fund, the asset manager does not need to be concerned that its clients' execution and clearing requirements are impacted by a non-U.S. dealer that "passes its book" for after-hours or supplemental coverage by U.S. Personnel, or uses U.S. personnel as backup for power or system outages in other regions. Absent this exclusion, asset managers of non-U.S. clients would need to obtain agreements from dealers to only utilize non-U.S. Personnel. This restriction would likely increase costs for dealers who would have to cover after-hours transactions or emergency backup from non-U.S. locations.

Thus, the AMG agrees with the Commission's decision to not impose its Title VII authority over the execution and clearing of Non-U.S. SBS Transactions and, instead, rely on jurisdictions with greater interests in regulating the conduct.

II. Application of External Business Conduct Standards to Non-U.S. SBS Transactions Imposes Unjustified Burdens on Non-U.S. Persons.

The Proposed U.S. Personnel Rule imposes Title VII's customer protection requirements on transactions where neither the dealer nor its counterparty is a U.S. Person.

By proposing to expand the definition of "U.S. business" to include SBS transactions arranged, negotiated and executed by U.S. Personnel, the Proposed U.S. Personnel Rule converts previously-defined "foreign business" into "U.S. business."[7] This expanded "U.S. business" standard, when applied in the context of the SBS business conduct requirements, results in requiring that the non-U.S. dealer transacting with a non-U.S. Persons:

> (i) Verify that a counterparty meets the eligibility standards for an eligible contract participant; (ii) disclose to the counterparty

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[6] *See* Commissioner Kara Stein, Statement on Proposed Rules for U.S. Personnel and Certain Activities of Non-U.S. Person's Security-Based Swaps Dealing (Apr. 29, 2015) ("[O]ne could argue that the purpose of clearing swaps is to reduce the chain of interconnectedness that could threaten the U.S. swaps marketplace and the U.S. financial system. Thus, if a given security-based swap is booked such that its risk truly is not coming back to the U.S., then would subjecting the transaction to the U.S. clearing mandate actually increase risk to the U.S.?"), available at http://www.sec.gov/news/statement/stein-statement-on-proposed-security-based-swaps-dealing.html.

[7] 80 Fed. Reg. 27444, 27510.

> material information about the security-based swap, including material risks and characteristics of the security-based swap, and material incentives and conflicts of interest of the security-based swap dealer in connection with the security-based swap; and (iii) provide the counterparty with information concerning the daily mark for the security-based swap.[8]

The proposed application of the external business conduct requirements to non-U.S. Persons would burden and frustrate asset managers' servicing of non-U.S. client accounts. For transactions executed by asset managers on behalf of clients, the asset managers as agents for clients would be required to undertake the assessment of business conduct eligibility requirements. Although a dealer's use of U.S. Personnel is outside of the asset managers' control, it has the effect of shifting transactions categorized as foreign business (not requiring compliance with external business conduct standards) into the category of U.S. business (requiring compliance with external business conduct standards), thus, shifting requirements for asset managers to undertake business conduct eligibility assessments. As such, any foreign business can be converted into U.S. business through a dealer's unilateral decision to use U.S. personnel to arrange, negotiate or execute a SBS transaction and, with this conversion, the asset manager's responsibilities change.

Because asset managers may have not verified whether their non-U.S. clients satisfy all requirements of the Commission's business conduct standards, an asset manager would have to reject a trade executed for a non-U.S. Person if a dealer utilized U.S. front office personnel for that trade. Absent this eligibility verification, a trade that would otherwise be capable of being confirmed would not be able to go forward without potentially violating external business conduct standards, as applied under the Proposed U.S. Personnel Rule. Likewise, asset managers would have to separate block trades for U.S. Persons and non-U.S. Persons for whom business conduct eligibility has not been verified and obtain assurances that the dealer's front office personnel handling the latter block trade were not based in the U.S., with potential negative consequences on liquidity and execution price.

While an asset manager could theoretically avoid these results by verifying external business conduct eligibility requirements for non-U.S. Persons, such a step would come at a great cost. In addition, non-U.S. Persons may not want to comply with a U.S. regulation that would be irrelevant to them absent a non-U.S. dealer's use of U.S. Personnel. These non-U.S. clients may be surprised that they need to verify eligibility under the Commission's external business conduct standards when they have instructed asset managers to only trade with non-U.S. dealers. Alternatively, while an asset manager could request that non-U.S. dealers commit to not utilize U.S. Personnel to arrange, negotiate and execute SBS transactions, for the reasons discussed in Section I, such a step is likely to increase the dealer's personnel costs and, relatedly, the transaction costs ultimately borne by asset managers' clients.

The Proposed U.S. Personnel Rule's economic analysis of the expanded application of external business conduct standards does not reflect the realities of a "U.S. business" standard that

[8] 80 Fed. Reg. 27444, 27474.

shifts depending upon whether a non-U.S. dealer utilizes U.S. Personnel. The economic analysis recognizes the "programmatic costs incurred by participants,"[9] but proceeds as if a market participant could easily identify the scope of applicability and comply only for transactions that would be deemed "U.S. business." In reality, an asset manager will not know in advance which non-U.S. Persons transacting with non-U.S. dealers will be captured by this rule and, as such, will need to rely on across-the-board solutions that are burdensome. In addition, the economic analysis only assesses the costs incurred by dealers, not costs incurred by buy-side market participants.[10]

These additional costs and burdens of applying the Commission's business conduct standards to Non-U.S. SBS Transactions are linked to no ascertainable benefit. A non-U.S. Person entering into a transaction with a non-U.S. dealer has no reasonable expectation of customer protections under U.S. law. Rather than looking to the U.S. for counterparty protections, a non-U.S. Person would rely on the jurisdiction in which it or the non-U.S. dealer is located. For example, if an asset manager entered into an SBS transaction for its German pension fund client with a UK dealer, it would be far-fetched to think that the German pension fund would expect disclosures based on U.S. law purely because the UK dealer involved U.S. front office personnel in arranging, negotiating or executing the transaction. Additionally, given the high threshold requirements for counterparties to execute these types of transactions, the application of U.S. customer protections to transactions between two non-U.S. Persons is not warranted.

While the Proposed U.S. Person Rule's economic analysis cites to perceived benefits of uniformity in treatment of participants by dealers, the proposed rule does the precise opposite. A non-U.S. Person transacting with a non-U.S. dealer expects to be held to the standards applicable to their own or the non-U.S. dealer's jurisdictional requirements, as they would in any transaction with the non-U.S. dealer when the non-U.S. dealer does not utilize U.S. personnel and the same as other market participants in that jurisdiction.

For these reasons, the AMG recommends that the Commission not impose Title VII's customer protection requirements on transactions where neither the dealer nor its counterparty is a U.S. Person.

III. Duplicative Reporting and Public Dissemination Burdens Transactions and Undermines the G-20 Commitment to Improve Transparency in the Derivatives Markets.

The Proposed U.S. Person Rule requires the reporting and public dissemination of Non-U.S. SBS Transactions if they are: (i) arranged, negotiated or executed by a non-U.S. dealer's U.S.

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[9] 80 Fed. Reg. 27444, 27495.

[10] *See id*. ("For entities already required to register as security-based swap dealers under current rules, the proposed rules adjust the set of transactions and counterparties to which they must apply external business conduct requirements. To the extent that the proposed rules add counterparties and their transactions to this set, registered security-based swap dealers will incur additional costs for each additional transaction.").

Personnel; (ii) executed on a platform having its principal place of business in the United States; or (iii) effected by or through a registered broker-dealer (including a registered security-based SEF).[11]

The AMG believes that requiring reporting under scenario (i) unduly burdens SBS transactions given the high likelihood that the transaction will already be reported in another jurisdiction, which could share data with regulators in the U.S. The G-20, whose financial markets encompass an overwhelming percentage of swaps trading activity, committed to have derivative contracts reported to trade repositories.[12] As such, most (if not all) of the SBS transactions will be reported to a trade repository consistent with laws implemented and being implemented in each jurisdiction. Given this coverage, reporting in one jurisdiction should cover the Commission's regulatory oversight if information sharing is achieved across the jurisdictions.

The AMG and other trade associations have already stated their strong support for the sharing of derivatives trade data across jurisdictions. As set forth in the June 11, 2015 letter to the Commission and other regulators, "regulators need to continue to work collaboratively to develop a framework that enables appropriate sharing of derivatives trade data across geographic boundaries."[13] Otherwise, market participants and data repositories will be burdened by unnecessary costs caused by reporting the same transactions in differing formats to multiple jurisdiction and duplicating efforts to validate and reconcile data in each jurisdiction.

The duplicative reporting also undermines the quality of the data publicly disseminated due to duplication and errors caused by having to report in multiple jurisdictions. Even without duplicative reporting, problems of quality and usability of data in swaps data repositories persist.[14] By reporting the same transaction to both U.S. and EU repositories, the SBS market may be overstated, depending upon how regulators can manage and reconcile transactions across the jurisdictions. The G-20 commitment to "improve transparency in the derivatives markets" would not be served by obscuring the true volume of the SBS market.

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[11] 80 Fed. Reg. 27444, 27483-27486 and 27511.

[12] *See* Leaders; Statement: The Pittsburgh Summit, September 24-25, 2009, available at: http://www.treasury.gov/resource-center/international/g7-g20/Documents/pittsburgh_summit_leaders_statement_250909.pdf.

[13] *See* http://www.sifma.org/issues/item.aspx?id=8589955067.

[14] *See*, *e.g.*, Remarks of Chairman Timothy Massad before the Global Exchange and Brokerage Conference (New York) (June 3, 2015) ("While we have much better data today than in 2008, we have a lot more work to do to get to where we want to be. One step is revising our rules to bring further clarity to reporting obligations. Later this summer I expect that we will propose some initial changes to the swap reporting rules for cleared swaps designed to clarify reporting obligations and, at the same time, improve the quality and usability of the data in the SDRs. And we are looking at other possible changes as well to improve the data reporting process and usefulness of the information."), available at: http://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-24.

For these reasons, the AMG recommends that the Commission not require reporting and public dissemination in the U.S. for Non-U.S. SBS Transactions that are arranged, negotiated or executed by a non-U.S. dealer's U.S. Personnel.

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For the reasons stated above, the AMG requests that the Commission revise its Proposed U.S. Personnel Rule to not impose Title VII's business conduct and reporting requirements upon transactions between two non-U.S. Persons solely because a non-U.S. dealer utilizes U.S. Personnel to arrange, negotiate or execute an SBS transaction.

The AMG thanks the Commission for the opportunity to comment on the Proposed U.S. Personnel Rule. Should you have any question, please do not hesitate to contact Tim Cameron at 202-962-7447 or tcameron@sifma.org or Laura Martin at 212-313-1176 or lmartin@sifma.org.

Respectfully submitted,

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cc: The Honorable Mary Jo White, Chairman
The Honorable Luis A. Aguilar, Commissioner
The Honorable Daniel M. Gallagher, Commissioner
The Honorable Kara M. Stein, Commissioner
The Honorable Michael S. Piwowar, Commissioner