Via Federal eRulemaking Portal (www.regulations.gov)

April 7, 2015

The Treasury Department
Attn: Qualified Financial Contracts Recordkeeping Comments
1500 Pennsylvania Avenue N.W.
Washington, D.C. 20220

Re: Notice of Proposed Rulemaking Regarding Qualified Financial Contracts Recordkeeping Related to Orderly Liquidation Authority

The Asset Management Group (the "AMG") of the Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on the Notice of Proposed Rulemaking regarding Qualified Financial Contracts Recordkeeping Related to Orderly Liquidation Authority (the "Proposed Rule")[2] published by the Secretary of the Treasury (the "Secretary"), as Chairperson of the Financial Stability Oversight Council (the "FSOC") and pursuant to his authority under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[3] The Proposed Rule would create recordkeeping requirements for so-called "records entities" ("Records Entities")[4] with respect to certain "qualified financial contracts" ("QFCs"). In general, such records must be maintained in electronic format in order for a Records Entity to be capable of producing all required information within 24 hours of a request from its primary financial regulatory agency.

The AMG supports the goals of the Proposed Rule and the need to provide the Federal Deposit Insurance Corporation ("FDIC"), as receiver, with the information required to successfully resolve a failing "financial company"[5] under the orderly liquidation authority provisions of the Dodd-Frank Act ("OLA"). However, the Proposed Rule defines its scope by expansive terms that have no demonstrable relationship to its statutory purpose, such as a $50 billion asset threshold. As a result, to the extent that the Proposed Rule may be construed as applying to asset managers, or to the funds they manage, the scope of the Proposed Rule is overly broad and would apply the recordkeeping requirements to entities extremely unlikely to be subject to resolution under OLA. Consequently, if finalized as proposed, the Proposed Rule would impose significant burdens

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1 SIFMA is the voice of the nation's securities industry, bringing together the shared interests of hundreds of broker-dealers, banks and asset managers. SIFMA's Asset Management Group represents 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. For simplicity of reference, we will refer to the AMG members collectively as "asset managers" in this letter. We advocate for effective and resilient capital markets. For more information, visit www.sifma.org.

2 80 Fed. Reg. 965 (Jan. 7, 2015).

3 Pub. L. 111-203, 124 Stat. 1376 (2010).

4 *See* definition of "records entity" in § 148.2 of the Proposed Rule.

5 Dodd-Frank Act Section 201(a)(11), 12 U.S.C. §5381(a)(11).

on asset managers, and the pension plans and other funds or clients that they manage, without providing any compensating benefit to the FDIC in its role as receiver under OLA.

I. Purpose of the Proposed Rule

The stated purpose of—and the statutory authority for—the Proposed Rule is to assist the FDIC as receiver for a "covered financial company" ("Covered Financial Company")[6] in resolution proceedings under OLA. OLA is a resolution framework modeled after the Federal Deposit Insurance Act.[7] However, OLA is specifically designed to be used rarely and only when insolvency proceedings under otherwise applicable insolvency frameworks would create a risk of systemic consequences that the use of OLA would mitigate.

As receiver, the FDIC has authority under Sections 210(c)(8), (9) and (10) of OLA to transfer or repudiate the Covered Financial Company's QFCs with counterparties (and their affiliates) and under Section 210(c)(16) of OLA to enforce QFCs of affiliates of the Covered Financial Company, all within a one-business-day period of the FDIC being appointed as receiver. As required by Section 210(c)(8)(H), the Proposed Rule is intended to provide the FDIC with enough information to exercise effectively its authority to transfer or repudiate QFCs of the Covered Financial Company.

Proceedings under OLA may only be commenced with respect to a financial company if certain conditions are met, including, among other things, that the Secretary determines, in consultation with the President and on the recommendations of applicable regulators, that the failure of the financial company under otherwise applicable insolvency laws would have "serious adverse effects on financial stability in the United States" and actions taken under OLA would mitigate such adverse effects. OLA can also be applied to an affiliate of a financial company that is itself in OLA proceedings but only if the affiliate's resolution under otherwise applicable insolvency laws would also have such "serious adverse effects."

The Dodd-Frank Act requires that in adopting regulations under this authorization, the agencies "shall, as appropriate, differentiate among financial companies by taking into consideration their size, risk, complexity, leverage, frequency and dollar amount of qualified financial contracts, interconnectedness to the financial system, and any other factors deemed appropriate."[8] Consequently, the Dodd-Frank Act specifies that the recordkeeping requirements adopted in a final rule must conform to the defined purpose, as described in this section, while making appropriate distinctions among financial companies.

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6 Dodd-Frank Act Section 201(a)(8), 12 U.S.C. §5381(a)(8).

7 12 U.S.C. §1811, *et seq.*

8 12 U.S.C. §5390(c)(8)(H).

II. Scope of Proposed Rule and Application to Asset Managers and the Funds They Manage

The proposed definition of "records entity" is overbroad in a number of ways. In particular, it provides that any "financial company" that satisfies a threshold criterion of total assets equal to or greater than $50 billion shall constitute a Records Entity. Accordingly, the definition of Records Entity could potentially be construed to apply to some members of the AMG, which are generally asset managers, or to the funds they manage, even though these entities are extremely unlikely to be subject to OLA proceedings.

Since OLA is only intended to be applied rarely and only in cases where resolution under otherwise applicable regimes would cause systemic risk, very few of the companies that satisfy the OLA definition of "financial company" would be resolved under OLA upon their failure. Since the Proposed Rule is designed to assist the FDIC as receiver under OLA, the application of the Proposed Rule should naturally be limited to only that small subset of financial companies that are reasonably likely to be resolved under OLA upon their failure. We believe this subset excludes asset managers and the funds they manage for a number of reasons.

A. *A $50 Billion Asset Threshold Is Not a Suitable Predictor for Resolution Under OLA*

To comply with the stated purpose and statutory authority of the Proposed Rule, the "records entity" definition should encompass only entities that are likely to be subject to resolution under OLA. In the preamble, the Secretary explains that the $50 billion asset threshold prong of the definition in the Proposed Rule is a "useful means for identifying entities that are of a sufficient size that they could potentially be considered for [OLA]."[9] The Secretary asserts that "the stand-alone test of assets equal to or greater than $50 billion is used because that size threshold, by itself, together with other aspects of the definition of records entity is sufficient to differentiate financial companies or their corporate groups that might be subject to orderly liquidation under [OLA]."[10] The Proposed Rule provides no justification for linking simple asset size to the probability of resolution under OLA. To accomplish the goal of the Proposed Rule, a more nuanced assessment of systemic significance is necessary.

The reliance on a $50 billion asset threshold reduces the statutorily required multivariable process for differentiating among financial companies to a simple test of asset size. As a result, it contravenes the express direction in the statutory provision authorizing the Proposed Rule because it makes no effort to differentiate among financial companies by taking into consideration their "risk, complexity, leverage, frequency and dollar amount of QFCs, interconnectedness to the financial system, and any other factors deemed appropriate."[11] The failure to distinguish between financial companies based on other factors particularly relevant to systemic significance-such as complexity and interconnectedness-has produced a Proposed Rule that would apply to financial companies such as asset managers, which have virtually no systemic significance

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9 80 Fed. Reg. at 992.

10 80 Fed. Reg. at 972.

11 12 U.S.C. § 5390(c)(8)(H)(iv).

and no prospect of being material to an OLA resolution or requiring OLA for their own resolution. As a result, the Proposed Rule is disconnected from its expressed purpose of facilitating an FDIC resolution under OLA.

This divergence between purpose and potential application of the Proposed Rule is even clearer to the extent that the rule could apply to the individual investment funds or series of funds managed by an asset manager. Irrespective of the interpretation of "affiliate" for purposes of the Bank Holding Company Act of 1956 ("BHCA"),[12] the statutory purpose of the Proposed Rule would not be served by applying final QFC recordkeeping requirements to individual investment funds.

In contrast, a multivariable analysis is considered in the process for designation of financial companies for heightened supervision by the FSOC. Significantly, the FSOC has not designated any asset managers or the funds they manage for heightened prudential supervision and, lacking such designation, these entities are generally outside the regulatory scope of Title I of the Dodd-Frank Act. Careful consideration of the statutory requirements for designation, and the parallel statutory factors required for differentiation among financial companies for application of the QFC recordkeeping standards, leads to a conclusion that asset managers and the funds that they manage do not meet those requirements. The costs and burdens that would be imposed under the Proposed Rule on the members of the AMG are not justified by a corresponding benefit to the FDIC as receiver, and ignore statutory requirements to tailor the application of the rule based on multiple factors. Further, by applying the Proposed Rule to the members of the AMG without any designation by the FSOC, the Proposed Rule effectively applies prudential regulatory obligations to them without the substantive and procedural protections provided during the FSOC designation process.

We understand that OLA may be applied without any prior designation of a particular company so long as the Secretary determines, among other criteria, that the failure of the financial company and its resolution under otherwise applicable state or federal law would have serious adverse consequences on the financial stability of the United States and that the use of OLA would mitigate those risks.[13] However, many financial companies are not plausible candidates for resolution under OLA. At a minimum, there should be some reasonable likelihood that the financial company may require OLA for its resolution. Certainly, where the company is not part of a financial group that is subject to heightened prudential supervision under the Dodd-Frank Act or that has been designated as potentially systemically important by the FSOC, this relationship is clearly missing. We further note, as explained in detail below, that even where an asset manager or a fund is part of a financial group that is subject to heightened prudential supervision under the Dodd-Frank Act, or is deemed or treated as affiliated with a Records Entity, such an asset manager or fund should nevertheless be exempt from compliance with the QFC recordkeeping requirements since such entities are highly unlikely to be subjected to an OLA proceeding or impact the FDIC's actions with respect to the financial group or affiliated Records Entity. For entities, like asset

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12 12 U.S.C. § 1841, *et seq.*

13 12 U.S.C. § 5383(b).

managers and the funds they manage, that have not themselves been recognized as having potential systemic significance, an asset threshold is not indicative of the potential need to apply OLA in any future insolvency. To date, no asset manager or investment fund has been designated as systemically important by the FSOC and, as a result, none has been made subject to the heightened prudential supervision requirements under the Dodd-Frank Act.

B. *AMG Members Are Highly Unlikely to Be Resolved Under OLA*

The structure and business model of the asset management industry demonstrate that asset managers and their funds are very unlikely to be resolved under OLA, and thus provide a compelling illustration of why the proposed definition of "records entity" is too broad. As explained in more detail in the public comment letter submitted by the AMG and the Investment Adviser Association, dated March 25, 2015,[14] in response to the FSOC's "Notice Seeking Comment on Asset Management Products and Activities" ("AMG Comment Letter"), AMG members structure their businesses and operations in a way that does not contribute to systemic risk. Moreover, existing resolution strategies, as described below, demonstrate that the failure of an asset manager or one of its funds is readily managed under otherwise applicable insolvency laws without causing any "serious adverse effects on financial stability in the United States." Consequently, it is exceedingly unlikely that the FDIC would ever be required to take action under OLA to mitigate such adverse effects.

For these reasons, as set forth in greater detail below, the definition of "records entity" should exclude asset managers and funds that they manage, including with respect to such entities that may (i) have total assets equal to at least $50 billion, (ii) be affiliated with a Records Entity or (iii) be "linked to" a QFC of a Records Entity. In any such case, regardless of how such entities may satisfy the definition of "records entity," the recordkeeping requirements should only apply if that particular entity is a likely candidate for resolution under OLA.

1. *The Structure of the Asset Management Industry Does Not Contribute to Systemic Risk*

Investment funds operate differently than other types of financial entities. Their structural, operational, and behavioral features make it inappropriate to focus on these entities as sources or amplifiers of systemic risk. Moreover, asset managers do not manage all of the assets identically. An asset manager with a large amount of "assets under management" is really a collection of many smaller and diverse accounts, each with its own characteristics, objectives, and risk profiles. Asset managers and funds can shut down or have assets migrate from manager to manager with little market impact, but they very rarely fail. These fundamental attributes of the asset management industry minimize the transmission of credit, liquidity or settlement risk and thereby mitigate systemic risks.

14 Comment Letter in response to Financial Stability Oversight Council Notice Seeking Comment on Asset Management Products and Activities, Docket No. FSOC-2014-0001, available at http://www.sifma.org/comment-letters/2015/sifma-amg-and-iaa-submit-comments-to-fsoc-on-notice-seeking-comment-on-asset-management-products-and-activities/.

It is investors – not the fund or the asset manager – who ultimately own the assets and bear the investment risk in pooled vehicles. Asset managers trade as agents on behalf of a client, not as principals. Asset managers are fiduciaries to their clients, acting as agents of the funds or separate accounts they manage. They provide services in exchange for a fee, take no balance sheet risk with respect to a fund's or an account's investment performance, and have no ability to use a client's assets for their own purposes. Counterparties do not face an asset manager as principal – rather, counterparties separately face each individual fund and account managed by the asset manager. Each client account poses a unique credit and risk profile – each has its own capital structure, investment strategies, assets, and leverage. Client accounts do not cross-guarantee other client accounts. This significantly limits the potential threat to financial stability. If an asset manager leaves the business, its clients' assets will be transitioned to a new manager or managed by the clients themselves, but there is no fundamental economic risk to the underlying client/investor and no threat to the stability of the financial system, especially because investment funds are highly substitutable and not as concentrated as other financial entities. Additionally, investors control their assets and select investment funds with strategies that meet their investment needs.

Because managed assets are held differently, there is ready substitutability of one asset management firm for another. There are various protections afforded to asset management clients, such as the custodial practices and other features described throughout the AMG Comment Letter. Of course, any particular asset manager could have poor investment performance or client service or otherwise fail to obtain or retain clients and investors. At that point, its business may wither, but the rest of the market and the financial system would not be at risk. An asset manager's failure would also be irrelevant to the stability of the financial system since any "interconnectedness does not emanate from the manager's balance sheet."[15]

Finally, asset managers serve as agents for their clients and an investment fund's assets are not available to claim by creditors of the investment fund's manager. In the preamble to the Proposed Rule, the Secretary acknowledges that an entity such as an asset manager does not bear risk for a QFC with respect to which it only acts as agent, noting that "an entity, such as an investment adviser, that acts as agent on behalf of a client and is not a party to that client's QFC or does not support, guarantee or is not otherwise linked to that client's QFC would not be subject to this rule."[16] We urge the Secretary to clarify that this same logic applies to other aspects of the Proposed Rule. For example, if an asset manager or one of its funds could be deemed to fall within the definition of Records Entity through the application of another prong of the definition, i.e., it is affiliated with a Records Entity, but the majority of its positions in QFCs are as agent, such entity should be exempt from the definition.[17]

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[15] *See* AMG Comment Letter at 59 (quoting the FSB/IOSCO Consultative Document – Assessment Methodologies for Identifying Non-Bank Non-Insurer Global Systemically Important Financial Institutions: Proposed High-Level Framework and Specific Methodologies (Jan. 8, 2014), at 30, fn. 36).

[16] 80 Fed. Reg. at 971 fn. 56. Elsewhere in the Proposed Rule, however, this distinction is less clear.

[17] We also urge the Secretary to clarify that any type of entity that falls within the scope of the final rule would not have to maintain the specified records for QFCs with respect to which it is not the financial principal.

2. *Asset Managers May Be Readily Resolved Without OLA*

Due to this ready substitutability, funds and asset managers are essentially self-resolving, as clients can take their assets to another asset manager. When a fund does need to liquidate, it follows an established and orderly process to liquidate its assets, distribute the proceeds pro rata to investors, and wind up its affairs. This process is effected routinely and without consequences to the broader financial system.

More commonly, funds self-resolve or merge as opposed to liquidate. This process is also effected routinely and without consequences to the broader financial system. For example, funds that are registered under the Investment Company Act of 1940 (the "Investment Company Act") may self-resolve in an orderly way through a merger process under well-established practices outlined extensively in existing regulations. Rule 17a-8 of the Investment Company Act governs the merger of affiliated funds and provides safeguards to ensure that the transaction is in the best interests of the shareholders. Under this rule, a merger of a registered investment company and one or more other registered investment companies is exempt from sections 17(a)(1) and (2) of the Investment Company Act if the "Surviving Company" is a registered investment company and if the board of the "Merging Company" determines that the merger is in the "best interests" of the company and that existing shareholder interests will not be diluted as a result. This process happens regularly under Rule 17a-8 and takes place under board oversight. As an additional safeguard, in the event the transaction should happen under extraordinary conditions, the Securities and Exchange Commission (the "SEC") may invoke its authority under Section 22(e) of the Investment Company Act to allow temporary suspension of redemptions. Private funds have even more flexibility to manage such changes without some of the technical requirements of the Investment Company Act. Transitions for separate accounts from one asset manager to another are commonly executed in the ordinary course of business without market disruption.

Because of the minimal systemic risk posed by the day-to-day operations of asset managers and the funds that they manage as well as the well-established resolution strategies available for these entities, it is extremely unlikely that any such entity would be subject to proceedings under OLA. Moreover, in the unlikely circumstance that the insolvency of an asset manager did pose systemic consequences, it is unclear that the tools and strategies developed in connection with the resolution of bank holding companies under OLA would prove effective. Certainly, there have been no discussions with asset managers regarding how OLA could be applied to their resolution. The FDIC also has not publicly identified any OLA strategies for asset managers or the funds that they manage as it has done for bank holding companies and some other financial companies. As there has been no development of an industry or regulatory consensus regarding resolution strategies suited to the resolution of an asset manager under OLA, it is premature to impose recordkeeping obligations intended to facilitate the FDIC's role as receiver in the event of the insolvency of such an entity.

Consequently, the Proposed Rule should not be applied to asset managers or the funds that they manage because there is no demonstrated need for their resolution under OLA and, at a minimum, it is premature to apply the Proposed Rule prior to elaboration of OLA strategies designed for this industry.

C. *Not all Entities in a Group Would Be Eligible for Resolution Under OLA*

While certain large financial groups may be candidates for resolution under OLA, not all of the entities in the group would themselves be placed into resolution under OLA or be material to the entities that were in OLA proceedings. For example, neither an asset management affiliate of a group in resolution nor the pension plan for the group would be relevant to the FDIC's determinations to transfer QFCs of a Covered Financial Company or to override cross-default rights in QFCs of affiliates of the Covered Financial Company. However, because the definition of Records Entity includes all financial company affiliates of an entity that satisfies the $50 billion asset threshold (regardless of whether that entity is itself a Records Entity), entire groups of companies are swept under the Proposed Rule's recordkeeping requirements without any distinction if the affiliates have even just a single open QFC or guarantee, support or are linked to another affiliate's QFCs.[18] This overly broad definition ignores both the fact that most entities within a group would not themselves be eligible for resolution under OLA or relevant to the FDIC's decision making with respect to those entities within the group that are and the statutory requirement to differentiate among financial companies based on systemic-risk factors. Accordingly, we request that the definition of Records Entity be narrowed to only those entities within a group that are likely to be placed into resolution under OLA or that are likely to be relevant to the resolution of such entities.

III. <u>If an Asset Threshold Is Applied, It Should Be Applied Consistently with the Structure and Business Model of Asset Managers</u>

A. *Treatment of "Affiliates" in the Proposed Rule Is Inconsistent with Asset Management/Fund Structure*

If the asset threshold test is maintained, the Proposed Rule should be clarified such that it does not apply to asset managers or the funds that they manage based on the cumulative assets held by different investment funds or series of funds that are managed by an asset manager. In the preamble to the Proposed Rule, the Secretary queried whether it was appropriate to deem each series of the company to be a separate financial company for purposes of the Proposed Rule.[19] The relationship between different funds within a family is fundamentally different from relationships between entities in other financial groups, such as those headed by bank holding companies. As previously discussed, asset managers act as agents or custodians with respect to the assets that they manage, limiting their economic risk profile. The aggregate size of different sub-funds does not increase the scale or scope of systemic importance of the fund or asset manager. For several reasons, it is inappropriate to require affiliated entities in the asset management industry to comply with the requirements of the Proposed Rule.

First, the definition of Records Entity would require all "affiliates" within a corporate group (as determined using definitions and analyses under the BHCA) to comply with the recordkeeping obligations of the Proposed Rule and present consolidated information to the FDIC.

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18 *See* definition of "records entity" in para. (1)(iii)(D) of § 148.2 of the Proposed Rule.

19 80 Fed. Reg. at 977.

Analysis of which entity constitutes an "affiliate" under the BHCA is not appropriate when applied to the asset management industry, particularly if such analysis could be interpreted to potentially require sub-funds or series of funds to comply with recordkeeping obligations even though they hold no assets as principals and their only holdings are on behalf of customers.[20, 21]

In addition, the Proposed Rule notes that for purposes of determining whether a financial company exceeds the $50 billion asset threshold, total assets are calculated based on the "consolidated balance sheet for the most recent fiscal year-end." In the case of asset managers, to the extent this calculation were to include assets under management or consolidated assets of "affiliated" funds, it would misstate the extent to which the financial company poses systemic risks. This is particularly true within the context of potential insolvency proceedings. Assets consolidated on a manger's balance sheet for accounting purposes do not involve principal risk by the asset manager or reflect the "size, risk, complexity, leverage" or interconnectedness of the asset manager to the markets because the consolidated balance sheet may include assets of entities that are loosely affiliated to the financial company but are unrelated from an insolvency perspective.

B. *Asset Managers Should Not Be Subject to the Proposed Rule with Respect to Agent Trades and Assets Under Management*

The Proposed Rule correctly defines a Records Entity by reference to "total assets" that are shown on a financial company's consolidated balance sheet, which generally excludes "assets under management."[22] We endorse this approach and the understanding that "assets under management" is a different concept altogether from assets that are "owned" by a financial institution or consolidated onto its balance sheet. Further, in the discussion about the calculation of total assets, the Secretary explains that:

> [a]n entity, such as an investment adviser, that acts as agent on behalf of a client and is not a party to that client's QFC or does not support, guarantee or is not otherwise linked to that client's QFC would not be subject to the rule.[23]

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[20] In addition, ERISA pension plans affiliated with or served by an asset manager may constitute an "affiliate" of such asset manager when analyzed using the BHCA definitions and requirements applied by the Proposed Rule. However, these ERISA plans would likely fall within the jurisdiction of the Pension Benefit Guaranty Corporation in any liquidation scenario rather than be subject to a proceeding under OLA. Inclusion of ERISA pension plans under the requirements of the Proposed Rule would result in increased costs and expenses for ERISA pension plans, and therefore potentially reduced benefit to participants, while compliance by the pension plan industry arguably provides virtually no benefit to the FDIC as receiver under OLA.

[21] This also applies with respect to asset managers that are affiliated with bank holding companies or other Records Entities. Affiliated asset managers do not have transparency into, and are therefore not able to provide information about, the QFC activities of other entities in a corporate group.

[22] Proposed Rule § 148.2; 80 Fed. Reg. at 997.

[23] 80 Fed. Reg. at 971 fn. 56.

We believe that in this discussion the Secretary has correctly identified that an asset manager that is only acting as an agent for a principal does not bear the economic risk of a QFC position and likewise, any assets attributable to positions with respect to which it acts as agent should not enter the calculation of how much risk an asset manager poses to financial stability. However, to eliminate questions regarding the application of this intent and to the extent an exclusion is not adopted for asset managers and the funds they manage, we request confirmation that this discussion, in conjunction with the stated calculation of "total assets" in the definition of Records Entity is meant to be a carve-out for assets that an asset manager oversees as agent, when determining if it meets the $50 billion asset threshold.

Additionally, the Secretary should clarify that an asset manager that otherwise meets the definition of a Records Entity does not have to comply with the recordkeeping requirements for QFCs unless it is acting as a financial principal to the QFC, and is not merely a party to the QFC for a limited purpose. In certain circumstances, an asset manager will be a party to a QFC of one of its funds or clients, but only for a limited purpose. For instance, an asset manager may be a party to a QFC for purposes of making a qualified professional asset manager representation in respect of an ERISA plan. However, the asset manager would only be a party for the limited purpose of making such representation and would not be a principal under the QFC from a financial perspective. In such context, the asset manager would not be liable for, nor guarantee, the financial obligations of the fund or client it manages. If asset managers are not generally excluded from the scope of the rule, in order to avoid inadvertently subjecting asset managers to recordkeeping requirements merely because they are party to a QFC in a limited capacity, we recommend that the definition of Records Entity and the recordkeeping requirement be limited to entities that are party to QFCs "as financial principal" and the recordkeeping requirements be limited to only such QFCs.

Nevertheless, despite the above discussion, elsewhere in the preamble to the Proposed Rule, the Secretary specifically asks if the calculation of "total assets" for purposes of the definition of Records Entity should exclude "non-proprietary assets that are included on a balance sheet under accounting rules, such as certain types of client assets under management." To the extent that the assets threshold criterion remains as a part of the definition of Records Entity, the AMG believes that the calculation of whether a financial company has $50 billion in total assets should exclude <u>all</u> assets under management, even if those assets are currently reported on a consolidated balance sheet.

As described in more detail above, total assets of a financial company are only useful as a proxy for the risk to financial stability posed by the company to the extent that they represent the size of the company and the potential losses in the event of insolvency, which would not be true of assets under management for asset managers. Asset managers should more appropriately be viewed as agents with respect to assets under management, acting on behalf of the funds that they manage.[24]

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[24] We would note, however, that despite the question posed in the preamble to the Proposed Rule, "assets under management" by an asset manager are not generally reported on such asset manager's balance sheet under standard accounting rules, with certain limited exceptions (e.g., collateralized loan obligations). Regardless, as "assets under

IV. Burden of Proposed Rule

If the members of the AMG are included within the scope of the Proposed Rule, we believe that the requirements of the Proposed Rule would impose considerable compliance challenges and costs to members of the AMG, as outlined below. First, the costs of implementing new recordkeeping systems and protocols to maintain records in a format that is different and often duplicative of current recordkeeping requirements is unjustified, especially considering how unlikely an asset manager or a fund that it manages is to be resolved under OLA and the extensive recordkeeping requirements already applicable to members of the AMG. Second, the specific requirements of the Proposed Rule are excessively detailed and will require substantial effort to comply without providing any benefit to the FDIC as receiver under OLA. Finally, the rule would require maintaining data fields with respect to QFCs and counterparties that members of the AMG may not have access to.

A. *Counterparty Affiliated Information*

1. *Funds as Counterparties to Records Entities*

The Proposed Rule requires Records Entities to identify QFC counterparties that are affiliates of one another as well as to maintain a chart showing the organizational structure of their counterparties. Even if members of the AMG are excluded from the definition of Records Entities, dealers that are "Records Entities" and subject to this requirement will pass these obligations on to asset managers that manage funds invested in QFCs. Because of the broad nature of the analysis of who constitutes an "affiliate" under the BHCA and the constantly evolving nature of corporate organizations, this will present an overly burdensome requirement on counterparties to large dealers without a commensurate benefit to the FDIC. Given the broad definition of affiliates, this requirement goes far beyond the information that asset managers have access to with respect to related funds and corporate clients. We recommend that the Secretary eliminate this requirement. The FDIC as receiver will be able to determine which affiliated corporate groups have QFCs with a Records Entity without needing to understand the detailed corporate organizations of funds, whereas acquiring this information and keeping it constantly updated would be burdensome and unrealistic as an ongoing requirement. In addition, even if the broad definition of "affiliate" could ever be read as applying to separate clients of the same asset manager, there is no basis for considering separate clients to be affiliates for purposes of a final rule for QFC recordkeeping. Each client's account is economically separate and managed independently. The relationships between the asset manager and the separate clients bear none of the hallmarks of the affiliates giving rise to a need for recordkeeping under the Proposed Rule. Therefore, at the least, we recommend that separate clients of the same asset manager should not be considered "affiliates" for these purposes.

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management" are more accurately understood as the assets of each asset manager's clients, they should be irrelevant to the application of any asset threshold for the purposes of the Proposed Rule.

2. *Funds as Records Entities*

Additionally, if a member of the AMG were to be a Records Entity, the Proposed Rule would require it to maintain information about its clients' dealer counterparties that it may not currently have access to and that would be a burden to obtain. Asset managers may not have the ability to request counterparty information with respect to dealers and banking organizations and do not necessarily track the corporate organizations of their counterparties. At a minimum, the Proposed Rule should provide a safe harbor for Records Entities that diligently request information from a counterparty, regardless of whether such counterparty supplies the required information.

B. *Overly Burdensome Data Requirements*

The Proposed Rule requires Records Entities to track and report on information that is not typically relevant to asset managers. AMG members report that their existing databases track only a fraction of the fields presented in Tables A-1 to A-4 in the Proposed Rule, as this information has not previously been deemed significant to the business operations and risk management of these firms.

Additionally, the Proposed Rule imposes requirements with respect to content and format of data that are unnecessary to the FDIC's purposes as receiver under OLA but would require substantial effort to comply with. This includes the requirement to maintain documents in standardized, text-searchable format and to report all data fields in a new format set forth in the Tables in the Proposed Rule. Members of the AMG maintain a variety of recordkeeping systems, and the proposed requirements would result in an obligation to effectively rebuild recordkeeping systems, even though these particular recordkeeping requirements are not clearly beneficial to the FDIC and especially because members of the AMG would not likely be subject to OLA proceedings.

Finally, as discussed in Section III.B above, if an asset manager is only acting as agent for a fund on a QFC or entering into a QFC only for the limited purpose, *e.g.*, giving an ERISA representation, the asset manager should not have to satisfy the recordkeeping requirements for such QFC.

C. *Redundancy with Other Regulatory Requirements*

As the AMG has commented previously, the primary responsibility and expertise for assessing whether new data, regulations or other tools are necessary for asset management industry oversight should remain with the industry's primary regulator, the SEC. The SEC's professional staff in the Division of Investment Management, economists specializing in asset management assessment in the Division of Economic and Risk Analysis, and market experts in the Office of Compliance Inspections and Examinations are best positioned to evaluate whether there may be potential information gaps related to the industry and to propose to the SEC appropriately tailored responses to emerging areas of focus.

In addition, to the extent the recordkeeping requirements are applied to asset managers or the funds they manage, we believe that the scope of information required should be

tailored to reflect the extensive information already available under statutory and regulatory requirements applicable to these entities. Asset managers are required to maintain records pursuant to other applicable regulatory regimes such as the Investment Advisers Act of 1940 (the "Advisers Act") and the Investment Company Act.

Private funds must comply with extensive recordkeeping and reporting obligations under the Advisers Act, which include a requirement to maintain all records relating to asset management business in an easily accessible place.[25] Asset managers already comply with this requirement and would allow the FDIC to review legal documentation relating to QFCs. Likewise, funds registered under the Investment Company Act are required to regularly produce reports showing the amounts and values of their various portfolios, including with respect to derivative holdings.[26] Finally, members of the AMG currently comply with extensive recordkeeping obligations under Commodity Futures Trading Commission Regulations 1.31 and 1.35 relating to their swaps activities. This and broader efforts under Title VII of the Dodd-Frank Act have greatly increased transparency and availability of information to regulators about the derivatives markets.

The information currently provided under these requirements will meet the FDIC's information needs to make decisions as receiver for a Covered Financial Company under Sections 210(c)(8) and 210(c)(16) of OLA. In addition, if the final rule imposes additional and different recordkeeping requirements, it will simply increase the burden on the industry and the potential confusion for primary regulators and the FDIC without any countervailing benefits. If asset managers are included within the scope of a final rule, we urge the Secretary to consider that the records that are already maintained would be sufficient for the purposes identified for the Proposed Rule.

D. *Effective Date and Time Required to Comply*

Given the extent of the requirements, the proposed compliance period of 270 days of the rule becoming effective (or 270 days after a company becomes subject to the rule) is unworkable for asset managers and the funds they manage. This timeframe for compliance is unrealistic and does not give Records Entities enough time to complete the significant work required to build compliant systems. As a result, we recommend that compliance, if required of these entities, be permitted within two (2) years after the effective date of the final rule.

V. Conclusion

We appreciate this opportunity to comment on the Proposed Rule and your consideration of the views expressed in this letter. The AMG and its members support the goals of the Proposed Rule and the need to provide the FDIC, as receiver, with the information required to successfully resolve a failing financial group under OLA. However, as described in our comments, we believe that certain aspects of the Proposed Rule are overly broad and should not be applied to asset managers or the funds they manage or, if applied at all, should be modified as described above

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[25] Advisers Act Rule 204-2(a).

[26] 17 C.F.R. § 270.30e-1.

to better conform to their businesses. In our view, if applied to asset managers or the funds they manage as currently proposed, the Proposed Rule would be very burdensome without advancing its important purpose.

For the reasons detailed above we believe that asset managers and the funds that they manage are inappropriate entities to be subject to recordkeeping obligations as set forth in the Proposed Rule. We urge the Secretary to specifically exclude all such entities from the definition of Records Entity. However, if the Secretary determines that asset managers or the funds they manage should nonetheless be subject to a QFC recordkeeping requirement, we request that the Secretary submit any such proposal for further notice and comment rulemaking in order to provide a full opportunity to comment on the factors that would be relevant before requiring such entities to comply with such a requirement. Alternatively, we urge the Secretary or the relevant regulatory agencies to discuss the recordkeeping obligations of the Proposed Rule with the AMG and its members further before requiring any member to undertake the substantial burden of complying with these requirements.

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If you have any questions or need further information, please do not hesitate to contact me at 202-962-7447 or tcameron@sifma.org.

Sincerely,

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

cc: The Honorable Jacob J. Lew, Secretary of the Treasury, as Chairperson of the FSOC
The Honorable Janet L. Yellen, Board of Governors of the Federal Reserve System
The Honorable Thomas J. Curry, Office of the Comptroller of the Currency
The Honorable Mary Jo White, Securities and Exchange Commission
The Honorable Martin J. Gruenberg, Federal Deposit Insurance Corporation
The Honorable Timothy G. Massad, Commodity Futures Trading Commission
The Honorable Melvin L. Watt, Federal Housing Finance Agency