APG Asset Management

Amsterdam,

Visiting Address
Gustav Mahlerplein,3
1082 MS, Amsterdam

Phone
+31 20 604 8161

Attachment(s)
-

Our reference
-

Your reference
-

Internet
www.apg.nl

E-mail
guus.warringa@apg-am.nl

Mr David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, N.W.
Washington DC 20581
U.S.A.

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington DC 20549-1090
U.S.A.

Subject: Joint Proposed Rules on the Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant" – Release No. 34–63452; File No. S7–39–10.

Secretary Stawick and Secretary Murphy:

APG Algemene Pensioen Groep N. V. ("APG AM") is submitting this letter to the Securities and Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC" and, together with the SEC, the "Commissions") in response to the above-captioned joint definitions proposal ("Definitions Proposal").[1] APG AM supports the Commissions' efforts to reduce risk, enhance transparency, and promote market integrity, as the U.S. Congress intended by enacting Title VII ("Title VII") of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). APG AM appreciates this opportunity to provide comments to the Commissions regarding the Definitions Proposal.

APG AM is a wholly-owned subsidiary of Stichting Pensioenfonds ABP ("ABP"), one of the largest pension funds in the world. APG AM provides administrative and asset management services to a number of collective investment arrangements ("APG Pools")[2] in which ABP and other Dutch pension funds (the "Participating Plans") invest. Only pension funds may participate in this multi-plan investment structure. APG AM currently manages assets in excess of EUR 275 billion.

In 2010 APG AM established the APG Treasury Center B.V. ("APG TC") as a not-for-profit entity indirectly owned by the pension plan assets invested in the APG Pools that is designed to reduce costs and counterparty credit exposures for the Participating Plans in connection with OTC derivatives.
The APG TC is licensed and subject to regulation by the Dutch Financial Markets Authority, *Stichting Autoriteit Financiële Markten* ("AFM"). APG TC enters into derivative transactions (including swaps[3]) with

[1] 75 F.R. 80174 (December 7, 2010).
[2] The APG Pools represent contractual investment arrangements for the investment of commingled pension plan assets between APG AM, as investment manager, a foundation specifically formed to serve as a specific Pool's depositary, and each pension plan that participates in the Pool. The APG Pools are not legal entities. The APG Pools take the form of *fonds voor gemene rekening* (funds for the joint account of the participants), which provide for the *pro rata* allocation of investment returns.
3 Unless the context otherwise requires, references herein to the terms "swap," "swap dealer" and "major swap participant" will include, respectively, "security-based swap," "security-based swap dealer" and "major security-based swap participant."

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(i) Participating Plans pursuant to the Participating Plans' cash management programs and certain APG Pools in accordance with their respective investment objectives and (ii) with U.S. and non-U.S. swap dealers to place net market risks arising from its derivative transactions with the APG Pools and Participating Plans.[4]

Summary

Regulated foreign pension plans and regulated counterparties, whose swap activities are undertaken on behalf of, and with recourse to, the assets of regulated foreign pension plans (collectively, "RPACs"), should not be required to register as Major Swap Participants or Major Security-Based Swap Participants (collectively, "MSPs"). RPACs are major end-users of long dated interest rate, currency and inflation swaps to hedge investment risks. Unlike other types of financial firms, RPACs are required to be managed conservatively and do not pose a risk of default or bankruptcy because (i) participation and contributions to the pension plans are compulsory, and (ii) they can mitigate investment losses by requiring increased contributions or decreasing payments to pensioners.

We believe it is clear that Congress did not intend the MSP regime to capture foreign entities that are required by applicable law to pursue prudent investment strategies and, in connection therewith, constrained by regulation to use swaps primarily for risk management purposes. If such entities were subject to regulation as MSPs, the resulting duplicative and/or conflicting regulations could force them to avoid entering into derivative transactions with U.S. counterparties, which could have an adverse effect on U.S. market liquidity.

Dutch Pension Plan Oversight and Regulation

Dutch pension funds are subject to extensive regulatory oversight pursuant to Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement (the "IORP Directive"), and the Dutch Pension Act and its associated regulations. Article 18 of the IORP Directive imposes broad investment regulations on pension plans that are intended to assure the security of occupational pensions. More particularly, Article 18(d) of the IORP Directive prescribes that investments in derivatives are only allowed if "they contribute to a reduction of investment risks or facilitate efficient portfolio management."

APG TC

APG TC effects transactions with external counterparties for the risk and account of the relevant Participating Plans directly, and indirectly through the APG Pools. In accordance with Article 18(d) of the IORP Directive, derivative instruments are restricted principally for risk management. APG TC reduces risk exposure by pooling and netting down the positions of the APG Pools and Participating Plans. It achieves significant cost savings through economies of scale and the introduction of greater flexibility with respect to the timing of transactions.

In order to assure the creditworthiness of APG TC to external counterparties, the depositaries of the two largest APG Pools (Stichting Depositary APG Fixed Income Credits Pool and Stichting Depositary APG Developed Markets Equity Pool) guarantee APG TC's obligations arising from derivatives.

APG TC is subject to Directive 2004/39/EC of the European Parliament and of the Council of the European Union of 21 April 2004 on markets in financial instruments (the "MiFID Directive"), which has been implemented in Dutch law. In particular, APG TC is (i) an authorized investment firm governed by the Dutch *Stichting Autoriteit Financiële Markten* and (ii) subject to prudential supervision by the Dutch Central Bank (*De Nederlandsche Bank N.V.*). In accordance with such regulation, APG TC has adopted

4 Any resulting timing or other mismatches are subject to strict risk limits and monitoring.

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and maintains policies and procedures for business conduct, conflicts of interest, voice recording, whistle blowing, insider trading, employment screening and incident management. APG TC maintains appropriate internal standards and is subject to regulatory oversight with respect to risk management, financial controls, corporate standards and administrative organization.

MSP REGISTRATION

APG AM believes the Commissions' framework for the definition and registration of MSPs must accommodate the global character of the OTC swap markets and appropriately balance the Commissions' responsibilities with the legitimate interests and responsibilities of non-U.S. regulatory authorities. In addition, this framework must reflect the practical considerations relevant to the effective oversight of large and complex financial entities that are organized, domiciled, operated and regulated outside the United States. Specifically, the Commissions should not require RPACs to register as MSPs because the solvency of RPACs is ensured through appropriate non-U.S. regulations.

The Proposed Rules should not apply to appropriately regulated non-U.S. entities

Congress did not intend to impose unnecessary restrictions on regulated foreign entities who pose little systemic risk to the U.S. financial system.[5] Rather, the MSP definitions are designed to regulate swaps activity that poses "exceptional risks to the U.S. financial system."[6] To express this intent, Congress defined MSPs in Sections 721 and 761 of Dodd-Frank to include persons whose swap positions exceed thresholds to be established by the Commissions for the "effective monitoring, management, and oversight of entities that are systemically significant or can significantly impact the financial system of the United States" or whose "outstanding swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets" (emphases added).

Sections 722 and 772 of Dodd-Frank, in turn, establish the territorial scope of each Commission's jurisdiction with respect to swap activities. For the CFTC, Section 722 provides that the provisions of the Commodity Exchange Act ("CEA") relating to swaps that were enacted by Title VII of Dodd-Frank "shall not apply to activities outside the United States unless those activities . . . have a direct and significant connection with activities in, or effect on, commerce of the United States [or] contravene [CFTC anti-evasion rules]." For the SEC, Section 772 provides that "[n]o provision" of the Securities Exchange Act of 1934 (the "Exchange Act") added by Title VII of Dodd-Frank "shall apply to any person insofar as such person transacts a business in security-based swaps without the jurisdiction of the United States, unless such person transacts such business in contravention of [SEC anti-evasion rules]." These provisions are consistent with existing interpretations and statutory provisions setting forth each of the Commissions' jurisdictions.[7]

As noted above, foreign entities that are appropriately regulated so as to ensure their solvency, such as RPACs and similarly situated entities, do not present the risks sought to be addressed by the Commissions through MSP regulation. For example, under Article 18 of the IORP Directive, EU pension plan managers have fiduciary obligations to plan beneficiaries and are subject to significant restrictions with respect to their investment activity. In general, EU Pension Plans must invest according to the

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[5] Senator Lincoln, for example, observed that "it may be appropriate for the CFTC and the SEC to consider the nature and current regulation of the entity when designating an entity a major swap participant or a major security-based swap participant. For instance, entities such as registered investment companies and employee benefit plans are already subject to extensive regulation relating to their usage of swaps under other titles of the U.S. Code. They typically post collateral, are not overly leveraged, and may not pose the same types of risks as unregulated major swap participants." (Congressional Record, July 15, 2010, S5907).

[6] Definitions Proposal at 80202.

[7] See, e.g., Statement of Policy Regarding Exercise of [CFTC] Jurisdiction Over Reparation Claims that Involve Extraterritorial Activities by Respondents, 49 Fed. Reg. 14721 (Apr. 13, 1984) (whether a person is required to be registered under the CEA may be determined by reference to whether (i) the person is based in the U.S., (ii) the person engages in the prescribed activities with customers in the U.S. or (iii) the prescribed activities take place or originate in the U.S.); In the Matter of Sumitomo Corporation, Comm. Fut. L. Rep. ¶27, 327 (May 11, 1998) (CFTC enforcement action for manipulative copper trading outside the U.S. that directly affected U.S. prices); Exchange Act Section 30(b) (providing that the Exchange Act "shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States").

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"prudent investor rule." More specifically, the IORP Directive prescribes that investments should be properly diversified and predominantly invested on regulated markets. Moreover, pension plans are prohibited from borrowing or acting as guarantor on behalf of third parties. In addition, Article 18(d) only permits derivative transactions "insofar as they contribute to a reduction of investment risks or facilitate efficient portfolio management." It further requires EU pension plan managers to "avoid excessive risk exposure to a single counterparty and to other derivative operations."

These restrictions significantly ameliorate the credit risk that such foreign entities pose to U.S. counterparties. Within these regulatory constraints, EU pension funds mainly use OTC derivatives to manage interest, currency and inflation risk.

In circumstances where appropriate foreign regulation is applicable, practical considerations as well as principles of comity should also be considered by the Commissions. As a threshold matter, foreign regulators are entitled to significant deference in circumstances where they are regulating the activities of locally domiciled entities. That deference is particularly appropriate where the foreign regulatory mandate addresses policy concerns that are comparable to the policy objectives sought to be achieved by the Commissions.

Practical considerations weigh in favor of a similar result. We endorse the CFTC's suggestion that, in computing counterparty credit exposure to a putative foreign MSP, the exposures of non-U.S. entities should not be included. The Commissions are simply not as well positioned as foreign regulators to supervise effectively the activities of foreign domiciliaries, just as European regulators are not well positioned to supervise effectively U.S.-domiciled employee benefit plans subject to ERISA and their collective investment vehicles. Equally relevant, the commitment of agency resources to the regulation of already regulated foreign entities simply is an inherently inefficient and, by implication, costly application of scarce U.S. regulatory resources.

In light of these considerations, APG AM respectfully recommends that the Commissions jointly adopt amendments to the proposed MSP definitions that would entitle RPACs, upon application, to obtain an exemption from MSP registration based on their foreign status and their regulation under laws designed to ensure their solvency.

MSP DEFINITIONS

Non-U.S. positions

In the Proposed Rules on the Registration of Swap Dealers and Major Swap Participants, the CFTC observes – in our view, correctly – that the analysis of whether a non-U.S. entity should register as an MSP should turn upon the swap positions it holds opposite U.S. counterparties or that involve U.S. means or instrumentalities or interstate commerce based on the jurisdictional provisions of the CEA.[8]

In our view, a similar approach should apply to exclude the security-based swap positions of a foreign entity with non-U.S. counterparties. This approach accords with Congress' intent to capture activities that pose a "high degree of risk to the U.S. financial system generally."[9]

In order to reflect this view in the Definitions Proposal, APG AM recommends that the definitions of "aggregate uncollateralized outward exposure" and "potential outward exposure to [security-based] swaps" should be amended to exclude from the computations the outward credit exposures of the computing party to non-U.S. persons.

[8] See Proposed Rules on the Registration of Swap Dealers and Major Swap Participants (75 F.R. 71379, 71382).
[9] Definitions Proposal at 80185.

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Calculation of aggregate uncollateralized outward exposure

Under the Definitions Proposal, the Commissions would recognize and give effect to certain enforceable netting arrangements in the calculation of aggregate uncollateralized outward exposure. The Commissions observe that such netting may involve offsetting exposures under swaps and securities financing transactions (*e.g.*, securities lending and borrowing, securities margin lending and repurchase and reverse repurchase agreements). We agree with the Commissions but would note that other transactions, such as securities options or forwards, among others, may also give rise to offsettable exposures whose netting is legally enforceable under applicable law. For this reason, we recommend that the Commissions clarify that all forms of legally enforceable netting, regardless of the underlying transaction type, can be taken into account in computing aggregate uncollateralized outward exposure.

We further note that the Definitions Proposal would prevent a putative MSP from obtaining the benefit of collateral provided to a counterparty for positions that are not swap positions, regardless of whether the counterparty may (through cross-margining or cross-default provisions, for example) use such collateral to cover any exposure it would have upon the MSP's default. To the extent that, under applicable law, any such collateral may be applied to obligations owed under swaps, and such collateral is in excess of the obligations of the posting party, such excess should also be deducted from an entity's aggregate uncollateralized outward exposure.

The Commissions have stated a reluctance to consider the number of counterparties a putative MSP may have in determining appropriate thresholds for aggregate uncollateralized risk exposure, citing concerns regarding "interconnectedness." We agree that interconnectedness is a highly relevant factor in evaluating and addressing systemic risks. However, interconnectedness is an issue that only becomes acute in the context of large credit concentrations. For example, an entity that presents $5 billion in credit exposure to a single counterparty manifestly contributes more significantly to the risk of a systemic event than does an entity that presents $500 million in credit exposure to each of ten counterparties. As a result, we believe the Commissions should reconsider the relationship between credit concentration and systemic risk and consider an approach that takes into account credit dispersion, an approach that we believe will create further incentives for credit risk diversification and thereby contribute to a further reduction in systemic risk.

Substantial Position Test

Under the Proposed Definitions, the first prong of each MSP definition would permit certain positions to be excluded including, in particular, positions used for hedging or mitigating commercial risk and those maintained by employee benefit plans for the primary purpose of hedging or mitigating risks directly associated with the operation of the plan. As currently phrased, this exclusion would capture the positions of foreign pension plans. There is some uncertainty, however, as to whether the Commissions will treat the positions of regulated counterparties, such as APG TC, whose swap activities are undertaken on behalf of, and with recourse to, the assets of regulated foreign pension plans, as "positions maintained by" such plans.

APG AM urges the Commission to make explicit that all RPACs will be granted equivalent treatment under these exclusions for positions essentially maintained for employee benefit plans.[10] RPACs are generally constrained by regulations substantially similar to those that govern their participant employee benefit plans, including restrictions on the use of leverage or speculation. Moreover, the internal netting and aggregation of positions to reduce credit risk and achieve economies of scale should not be penalized.

[10] The Commission has expressed the view that it is not "proposing to make this type of exclusion available to additional types of entities," but has requested comments on whether to do so.

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In addition, APG AM is of the view that the exclusion of positions used for hedging commercial risk should not be limited to certain asset categories. In particular, there is no indication that Congress intended this exclusion to be limited to swaps where the underlying hedge item is a non-financial commodity. Rather, it would appear that Congress specifically intended financial entities to be able to avail themselves of this prong of the definition. As the Commissions observe, the exclusion for hedging or mitigating commercial risk does not depend on whether the entity is a financial or non-financial entity, in contrast to the very similarly worded end user clearing exception. In light of the foregoing, the CFTC should avoid restricting the applicability of this exclusion to certain asset classes.

Finally, the Commissions have indicated that the word "mitigation" has substantially the same meaning as the word "hedging" and that such words appear to be used "interchangeably." APG AM respectfully disagrees with this statutory construction. It is a fundamental principle of statutory construction that all the words of a statute must be given meaning. Had Congress meant no more than hedging, it would simply not have added the word "mitigating." In light of Congress' decision to add the word "mitigating," however, it is not open to the Commissions to read it out of the statute as superfluous. Rather, it seems clear that Congress was concerned to exclude (so as not to discourage) risk reducing activity generally.

Substantial Counterparty Exposure Test

The second prong of both MSP definitions captures those entities whose outstanding swaps create substantial counterparty exposure that could have serious adverse effects on U.S. financial stability. The Commissions have proposed applying thresholds for this purpose on the sum of an entity's current uncollateralized exposure and potential future exposure with respect to all of its swaps, rather than only on the major categories of swaps. The Commissions have requested comment as to whether this test should exclude "commercial risk and ERISA hedging positions."[11]

APG AM supports the exclusion of positions held by entities such as RPACs for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan. RPACs that are subject to regulatory regimes such as the IORP Directive pose significantly reduced counterparty risk as a result of the restrictions on their investment strategies. This reduced risk should be appropriately recognized in the substantial counterparty exposure analysis. Furthermore, as a practical matter, this approach would facilitate the administration of these definitions by allowing an entity to use the same calculation methods for both the substantial counterparty exposure prong and the substantial position prong.

Highly Leveraged Financial Entity Prong

Dodd-Frank also requires that highly leveraged financial entities register as MSPs if they are not subject to capital requirements by an appropriate Federal banking agency and maintain a substantial position in swaps in any major category. The Definitions Proposal defines "highly leveraged" as the ratio of an entity's total liabilities to equity on the last business day of the quarter, although it does not specify whether the appropriate ratio should be 8 to 1 or 15 to 1.

APG AM has two concerns with these proposed definitions. First, APG AM is of the view that only investment related liabilities, rather than anticipated shortfalls in benefit obligations, should be considered in the definition of "highly leveraged." A plan that is underfunded in relation to its anticipated beneficiary obligations should not be caught in this prong since, from the standpoint of the swap counterparty, those benefit obligations would be subordinated to the claims of swap counterparties and other creditors.

The interests of the beneficiaries in such an instance are more akin to those of equity holders, rather than creditors.

[11] Definitions Proposal at 80198.

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In addition, the Commissions should modify the test for a highly leveraged financial entity in order to take into account investment and other constraints that operate with substantially the same effect as restrictions on leverage. Certain investment limitations are tantamount to or even more effective than the capital requirements of the type imposed by appropriate Federal banking regulators in mitigating insolvency risk. These include the substantial substantive regulation of investments, such as the IORP Directive, to which certain RPACs are subject. Where, as in the case of RPACs and similarly situated entities, such limitations are legally binding upon an entity, regardless of its home jurisdiction, U.S. regulatory relief would be appropriate and should be provided.

TREATMENT OF INTERAFFILIATE TRANSACTIONS

Interaffiliate transactions and guarantees should not be considered when determining whether an entity is an MSP or a swap dealer

APG AM concurs with the decision of the Commission to exclude interaffiliate transactions and guarantees in computing counterparty facing exposures under the MSP definitions. As a matter of policy, regulating such risk management transactions would dramatically raise costs for all entities without providing a corresponding benefit to the financial system. Moreover, with respect to interaffiliate guarantees, including such arrangements would ignore the fact that principal obligors and guarantors pose separate credit risks, which are already “priced in” to both the notional value of swaps and the collateral required by a counterparty prior to execution. Including such guarantees in the assessment of whether an entity is an MSP might negate to a certain extent the exclusion of collateralized positions in the exposure tests discussed above. Furthermore, guarantees are not regulated as swaps and traditionally fall under state jurisdiction. APG AM urges the Commissions to preserve the conceptual and jurisdictional distinctions between swaps and guarantees at this time.

* * *

APG AM appreciates the opportunity to submit these comments in response to the Commissions’ Definitions Proposal. Please do not hesitate to contact the undersigned at (011) 31-20-604-8161, or Edward J. Rosen at (212) 225-2820 or A. Richard Susko at (212) 225-2410 of Cleary Gottlieb Steen & Hamilton LLP, outside counsel to APG AM and APG TC, with any questions regarding the foregoing.

Respectfully submitted,

Guus Warringa

Chief Counsel

Legal, Tax, Regulations & Compliance

APG Algemene Pensioen Groep NV

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