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asset management group

July 27, 2012

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

Re: Comments on Proposed Rulemaking Prohibiting the Aggregation of Orders to Satisfy Minimum Block Sizes or Cap Size Requirements, and Establishing Eligibility Requirements for Parties to Block Trades (RIN 3038-AD84)

The Asset Management Group (the "**AMG**")[1] of the Securities Industry and Financial Markets Association ("**SIFMA**") appreciates the opportunity to provide the Commodity Futures Trading Commission (the "**Commission**") with comments regarding the Commission's proposed rulemaking prohibiting the aggregation of orders to satisfy minimum block sizes or cap size requirements and establishing eligibility requirements for parties to block trades (the "**Proposal**").[2]

The AMG is troubled by the Proposal's requirement that "[a] person transacting a block trade on behalf of a customer must receive prior written instruction or consent from the customer to do so"[3] (the "**Consent Requirement**"). It is possible that the Consent Requirement could require our members, as asset managers, to get consent for each client for which they engage in block trades. We do not understand the purpose of such a requirement, nor do we find any reason to require this under the Dodd-Frank Act.[4] We

[1] The AMG's members represent U.S. asset management firms whose combined assets under management exceed $20 trillion. The clients of AMG member firms include, among others, registered investment companies, ERISA plans, and state and local government pension funds, many of whom invest in commodity futures, options, and swaps as part of their respective investment strategies.

[2] Proposed Rulemaking Prohibiting the Aggregation of Orders to Satisfy Minimum Block Sizes or Cap Size Requirements, and Establishing Eligibility Requirements for Parties to Block Trades, 77 Fed. Reg. 38,229 (June 27, 2012), *available at* http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-15481a.pdf.

[3] Proposal at 38,236, § 43.6(i)(2).

[4] We disagree with the Commission's assertion that the Consent Requirement, as proposed, parallels rules adopted by DCMs in the futures context. The Consent Requirement is described as "substantially similar to the block trading rules maintained by existing DCMs." Proposal at 38,232, § 43.6(i)(2). DCM rules, as a general matter, are applicable to direct members of the DCM and define the

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note that the Proposal allows the Consent Requirement to "be provided in the power of attorney or similar document by which the customer provides the person with discretionary trading authority or the authority to direct the trading in its account."[5] However, it is our understanding that the Proposal would require *specific* consent for block trading. We do not believe it is necessary to require such specific consent; instead a general grant of investment discretion in the investment management agreement, power of attorney or similar document should suffice. While we see no benefit of the Consent Requirement, we believe it would be very costly and burdensome for our members to get specific consent from existing clients. As a result, we believe the Consent Requirement is not justified and should be deleted from the rule.

If the Commission determines that it is necessary to retain client acknowledgment of the inclusion of their positions in block trades in the final rule, the AMG believes that the requirement should be able to be satisfied through notice rather than written agreement. Notice could be provided as part of existing documentation, including disclosure documents. For example, many asset managers provide clients with a Form ADV, which includes a description of the adviser's investment practices, at least 48 hours before entering into an investment management agreement. A description of the use of block trades in the Form ADV or other notification should be sufficient. Allowing this requirement to be met by notice, rather than requiring asset managers to get specific consent from clients as in the current rule, would minimize unnecessary burdens and expense for both the asset manager and its clients.

The AMG has also noticed a potential ambiguity in the prefatory language to proposed section 43.6(h)(6) (the "**Aggregation Rule**"), which, in introducing the conditions under which aggregation of block trades is allowed, states that "except as otherwise stated in this paragraph, the aggregation of orders for different accounts in order to satisfy the minimum block trade size or the cap size requirement is prohibited."[6] This language does not restrict the Aggregation Rule to "block trades," as defined in the final real-time reporting rule as involving a transaction in a swap listed on a swap

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obligations of those direct members to their direct customers. *See, e.g.*, the rules of ICE Futures U.S., Inc., available at https://www.theice.com/publicdocs/rulebooks/futures_us/1_Definitions.pdf . The DCM rules requiring consent for block trades require the direct participant to receive consent from its customers, rather than from those customers' customers. For example, CME Rule 526(C) states that "[a] member shall not execute any order by means of a block trade for a customer unless such customer has specified that the order be executed as a block trade." *See* CBOT Rulebook, Chapter 5. Trading Qualifications and Practices, Rule 526(C) Block Trades. Similarly, Eris Exchange LLC rule 601(b)(4) states that "[a] broker for a Person shall not execute any order by means of a block trade for a Person unless such Person has specified that the order be executed as a block trade." *See* Eris Exchange, LLC, Rule 601(b)(4). The Commission has permitted aggregation in the futures context by investment advisers acting on behalf of their clients, understanding that such investment advisors aggregate trades for operational efficiency and cost advantages in line with fiduciary duties to their clients. As a client consent requirement does not apply to advisers with respect to futures trades, we do not believe that a consent requirement should apply to advisers with respect to swaps trades. In addition, the Securities and Exchange Commission also permits registered investment advisers to aggregate orders for advisory clients without a requirement for specific client consent.

[5] Proposal at 38,236, § 43.6(i)(2).

[6] Proposal at 38,236, 43.6(h)(6).

execution facility ("**SEF**") or designated contract market ("**DCM**").[7] As a result, based on this language, "large notional off-exchange swaps," which include swaps above the minimum block trade size that are not listed on a SEF or DCM,[8] could technically become subject to the Aggregation Rule. We do not believe this is the Commission's intent, as the description of the aggregation rule in the preamble of the release includes the definition of "block trade" but not the definition of "large notional off-exchange swap," and states that:

> While block transactions are conducted pursuant to the rules of a SEF or DCM, by definition these transactions occur away from the SEF's or DCM's trading system or platform, where there is no pre-trade transparency. If too many trades were permitted to be aggregated and thus executable as blocks, the CEA objectives of increased transparency and price discovery for swaps trading could be undermined. By prohibiting aggregation of orders for different accounts to meet the minimum block size requirement, the proposed rule would protect the principles of block trading, and would help to prevent potential circumvention of exchange-trading and of the real-time reporting obligations associated with non-block transactions.[9]

This rationale would not apply to large notional off-exchange swaps. As a result, we ask the CFTC to clarify the prefatory language to the Aggregation Rule by adding the following underlined language: "except as otherwise stated in this paragraph, the aggregation of orders for different accounts in order to satisfy the minimum block trade size or the cap size requirement <u>for block trades</u> is prohibited."

[7] CFTC Regulation 43.2. "Block trade means a publicly reportable swap transaction that: (1) Involves a swap that is listed on a registered swap execution facility or designated contract market; (2) Occurs away from the registered swap execution facility's or designated contract market's trading system or platform and is executed pursuant to the registered swap execution facility's or designated contract market's rules and procedures; (3) Has a notional or principal amount at or above the appropriate minimum block size applicable to such swap; and (4) Is reported subject to the rules and procedures of the registered swap execution facility or designated contract market and the rules described in this part, including the appropriate time delay requirements set forth in § 43.5 of this part."

[8] *Id.* "Large notional off-facility swap means an off-facility swap that has a notional or principal amount at or above the appropriate minimum block size applicable to such publicly reportable swap transaction and is not a block trade as defined in § 43.2 of the Commission's regulations."

[9] Proposal at 38,231.

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The AMG appreciates the opportunity to provide the Commission with the foregoing comments. Should you have any questions, please do not hesitate to call the undersigned at (212) 313-1389.

Respectfully submitted,

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