



| asset management group

February 14, 2013

Via Electronic Mail: secretary@cftc.gov

Ms. Melissa Jurgens
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Comment Letter on the Further Proposed Guidance Regarding Compliance with Certain Swap Regulations (RIN 3038-AD85)

Dear Ms. Jurgens:

The Asset Management Group (the “**AMG**”)¹ of the Securities Industry and Financial Markets Association (“**SIFMA**”) appreciates the opportunity to provide its views to the Commodity Futures Trading Commission (the “**Commission**”) on the Further Proposed Guidance Regarding Compliance with Certain Swap Regulations (the “**Further Proposed Guidance**”).² In particular, the AMG wishes to comment on the definition of “U.S. person” contained in the Further Proposed Guidance.

The AMG believes that, rather than looking to the complex, unclear, and difficult-to-apply definition of U.S. person described in the Further Proposed Guidance, the Commission should adopt a more streamlined and straightforward

¹ The AMG’s members represent U.S. asset management firms whose combined assets under management exceed \$20 trillion. The clients of AMG member firms include, among others, registered investment companies, endowments, state and local government pension funds, private sector Employee Retirement Income Security Act of 1974 pension funds and private funds such as hedge funds and private equity funds. In their role as asset managers, AMG member firms, on behalf of their clients, engage in transactions that will be classified as “security-based swaps” and “swaps” under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “**Dodd-Frank Act**”).

² Further Proposed Guidance Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 909 (Jan. 7, 2013) (“**Further Proposed Guidance**”).

definition of U.S. person similar to the one contained in the Final Exemptive Order Regarding Compliance with Certain Swap Regulations (the “**Final Exemptive Order**”).³ As described in detail below, the AMG believes the Final Exemptive Order provides a more appropriate U.S. person definition.

In any case, we urge the Commission to reconsider several aspects of the U.S. person definition discussed in the Further Proposed Guidance that are of concern to our members. This letter provides comments on the new, alternate proposals contained in the Further Proposed Guidance. It also reiterates certain of the comments contained in our previous comment letter (the “**Previous AMG Letter**”)⁴ filed in response to the Commission’s Proposed Interpretive Guidance on the Cross-Border Application of Certain Swaps Provisions (the “**Proposed Interpretive Guidance**”).⁵ We refer the Commission to the Previous AMG Letter for additional discussion of the AMG members’ concerns relating to the Proposed Interpretive Guidance.

I. The Final Exemptive Order’s Streamlined and Straightforward U.S. Person Definition

The Final Exemptive Order provides a simplified and streamlined version of the U.S. person definition contained in the Proposed Interpretive Guidance. The AMG believes that the U.S. person definition in the Final Exemptive Order provides market participants with needed clarity in determining whether they, or their counterparties, are U.S. persons.

The AMG strongly supports several positive steps taken by the Commission in providing the more streamlined and straightforward U.S. person definition in the Final Exemptive Order. More specifically, the Final Exemptive Order’s U.S. person definition does not contain prongs (iv) and (v), relating to commodity pools and commodity pool operators, from the Proposed Interpretive Guidance’s version of the definition.⁶ As discussed in the Previous AMG Letter, those prongs would have caused unnecessary confusion and uncertainty regarding

³ Final Exemptive Order Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 858 (Jan. 7, 2013) (to be codified at 17 C.F.R. Ch. I) (“**Final Exemptive Order**”).

⁴ SIFMA AMG, Comment Letter on the Proposed Interpretive Guidance on the Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act (RIN 3038-AD57) (Aug. 27, 2012), available at <https://www.sifma.org/workarea/downloadasset.aspx?id=8589940055> (“**Previous AMG Letter**”).

⁵ Proposed Interpretive Guidance on the Cross-Border Application of Certain Swaps Provisions, 77 Fed. Reg. 41213 (July 12, 2012).

⁶ Prong (iv) of the Proposed Interpretive Guidance’s definition included “any commodity pool, pooled account or collective investment vehicle (whether or not it is organized or incorporated in the United States) of which a majority ownership is held, directly or indirectly, by a U.S. person(s).” Prong (v) of the Proposed Interpretive Guidance’s definition included “any commodity pool, pooled account or collective investment vehicle the operator of which would be required to register as a commodity pool operator under the CEA.”

the U.S. person status of commodity pools and would have resulted in undue administrative burdens on commodity pools and their managers. The AMG also supports the omission of commodity pools from prong (ii)(B) of the Final Exemptive Order's U.S. person definition, which requires an entity to look to its principal place of business to determine its U.S. person status. In addition, the AMG appreciates the clarification that market participants may reasonably rely on the representations of their counterparties to determine their U.S. person status.

The AMG urges the Commission to adopt the changes made to the U.S. person definition that were included in the Final Exemptive Order. We believe this more straightforward, streamlined approach to the U.S. person definition is more appropriate and addresses many of the concerns expressed by the AMG in the Previous AMG Letter.

II. Concerns with the U.S. Person Definition under the Proposed Interpretive Guidance and Further Interpretive Guidance

If the Commission determines not to adopt the Final Exemptive Order's U.S. person definition as the final definition, we urge the Commission to ensure that the final U.S. person definition employs only objective factors with bright-line tests to provide market certainty and consistency as to its application. The final U.S. person definition should seek to achieve a level playing field for swap market participants wherever possible.

The U.S. person definition under the Further Proposed Guidance and the Proposed Interpretive Guidance falls short of these goals. We provide several examples of issues raised by the proposed U.S. person definition, which are similar to the concerns described in the Previous AMG Letter.

- *An entity should not be required to look to the level of its U.S. person ownership to determine its U.S. person status.*

The Further Proposed Guidance sets out alternative formulations for prongs (ii)(B) and (iv) of the U.S. person definition in the Proposed Interpretive Guidance. These alternative prongs retain the problematic requirement in the original proposal that a commodity pool would need to assess, on an ongoing basis, its direct and indirect owners to determine its U.S. person status. This requirement would place an enormous burden on commodity pools to assess and monitor their direct and indirect owners, which they are not now required to track in this manner, with no corresponding regulatory benefit.

The AMG respectfully submits that the proportion of U.S. person ownership as compared to non-U.S. person ownership of a commodity pool does not correlate to whether that commodity pool has a “direct and significant connection in, or effect on, commerce in the United States.”⁷ Any connection or

⁷ Section 2(i) of the Commodity Exchange Act.

effect on U.S.–domiciled swap dealers would be accounted for through the rules applicable to those swap dealers, regardless of whether the commodity pool is treated as a U.S. person or not. Further, ownership by U.S. persons should not be viewed as a sufficient jurisdictional nexus to cause a commodity pool to be a U.S. person. Commodity pool operators and managers often do not have regular transparency as to the investors in each of the pools that they operate or manage (or to changes in their investors).⁸ In many cases, commodity pool operators or managers would need to obtain ownership information from the pool itself (or from its transfer agent or other intermediary), which could be time consuming and difficult. Requiring a commodity pool to determine its U.S. person status based on its ownership also could result in the pool’s U.S. person status changing over time. As discussed in more detail below, a changing U.S. person status could result in significant administrative and operational difficulties for a commodity pool and its manager. For these reasons, the AMG supports the Final Exemptive Order’s approach in determining the U.S. person status of a commodity pool based on its place of incorporation rather than the composition of its direct or indirect investors.

The Further Proposed Guidance and the Proposed Interpretive Guidance, however, reflect the position that the extraterritorial reach of the Commodity Exchange Act’s swap regulatory provisions extends beyond U.S.–domiciled entities. If the Commission maintains that position, then the Commission should adopt a U.S. person definition that holds true to the statutory mandate that only those commodity pools that have a “direct and significant connection” to the United States are included as U.S. persons. If the Commission intends to look at the location of investors in making this determination, then the AMG recommends that “U.S. persons” include only commodity pools (1) that are organized in the United States or (2) that are (A) directly offered to U.S. persons and (B) directly majority owned by U.S. persons. This definition should apply to both privately and publicly offered commodity pools.⁹

- *The proposed U.S. person definition is overly complicated and could cause undue confusion and administrative burdens.*

The Commission’s approach to the U.S. person definition—both procedurally and substantively—has caused confusion among market participants,

⁸ Obtaining timely shareholder information would be difficult, for example, for funds that use transfer agents or other intermediaries to keep records of their shareholders, particularly when those shareholders hold their shares through omnibus accounts, which is fairly common for registered investment companies. It would also be an issue for managers that sub-advise sleeves of a commodity pool for third-party clients.

⁹ We acknowledge the Further Proposed Guidance’s effort to address the issues raised by proposed prong (iv) as it relates to investment vehicles that are listed and exchange traded outside the United States, and we support an exclusion from the U.S. person definition for such investment vehicles. However, alternative proposed prong (iv) would not exempt a commodity pool that is “indirectly” offered to U.S. persons, which we would find problematic.

particular those operating largely outside the United States. As Commissioner O’Malia noted in concurring to the adoption of the Final Exemptive Order, the various U.S. person definitions that have been proposed and adopted by the Commission and its staff over the past six months show “a regrettable lack of consistency for a concept that is so central to foreign swap market participants’ ability to determine their compliance obligations.”¹⁰

The various proposed prongs of the U.S. person definition that may implicate commodity pools provide an illustration of the complexity and uncertainty that market participants face in determining their U.S. person status. The proposed definitions include at least four different prongs that could implicate a commodity pool, as follows, and these prongs employ different and inconsistent terminology to refer to commodity pools:

- Prong (ii) under the Proposed Interpretative Guidance and the alternative prong (ii) proposed in the Further Proposed Guidance include “funds or any form of enterprise similar to the foregoing” and would require these entities to look to their principal places of business in determining their U.S. person status, while the Final Exemptive Order excludes “funds or collective investment vehicles” from that requirement.
- Prong (iv) under the Proposed Interpretative Guidance includes any “commodity pool, pooled account, investment fund, or other collective investment vehicle (whether or not incorporated in the United States),” while alternative prong (iv) under the Further Proposed Guidance covers a “commodity pool, pooled account, investment fund, or other collective investment vehicle that is not described in prong (ii).”
- Prong (v) under the Proposed Interpretative Guidance includes any “commodity pool, pooled account or collective investment vehicle.”
- Investment vehicles that are formed as trusts could also be required to assess their status under prong (vii) under the Proposed Interpretive Guidance.

Market participants likely will be unable to discern the differences, if any, between the formulations in these different prongs of the definition and could potentially have to assess their status under each of the prongs, which will cause confusion without serving any discernible regulatory purpose. As discussed in the Previous AMG Letter, we urge the Commission to adopt a final U.S. person definition under which a commodity pool—and any other type of market participant—would not need to assess its status under multiple prongs of the

¹⁰ Final Exemptive Order at 882.

definition (especially where those prongs use different formulations to refer to commodity pools).

Another example of the potential for unnecessary confusion and undue burden relates to circumstances under which the criteria for determining an entity's U.S. person status would change on an ongoing basis as its investors change. Under prong (iv) of the proposed definition, a commodity pool would be a U.S. person if a majority of its direct or indirect owners are U.S. persons. The Proposed Interpretive Guidance did not specify, and the Further Proposed Guidance did not clarify, whether U.S. person ownership must be monitored on an ongoing basis or periodically, and, if the latter, how often. Absent further guidance, and if the requirement to monitor the U.S. person status of a commodity pool's direct and/or indirect owners remains in the final U.S. person definition, this requirement could result in changes to the commodity pool's U.S. person status as the status of its underlying investors changes.

U.S. person status of a commodity pool changing on a continual basis based upon the composition of its investors could be highly disruptive to the operations of commodity pools. In addition to the administrative impracticability of assessing direct and indirect owners of a commodity pool as discussed above, a commodity pool's U.S. person status could affect the applicability of various regulatory requirements with respect to its swap transactions, including compliance with swap dealer external business conduct requirements, margin, mandatory clearing, and swap documentation, among others, and may also need to be taken into account by non-U.S. counterparties in assessing their status as swap dealers under the Regulation 1.3(ggg)(4) *de minimis* threshold. If the U.S. person status of a commodity pool had to be reassessed each time the entity enters into a swap, the commodity pool's asset manager and its counterparties would need to reevaluate compliance with each of these regulatory obligations, which would result in added cost, inefficiencies and unnecessary delay in effecting transactions. In many cases, continually reassessing U.S. person status for purposes of these rules would be impossible. The Commission should, therefore, explicitly provide that market participants may assess their U.S. person status on a pre-determined periodic basis (*e.g.*, annually) rather than on an ongoing basis.

To the extent that the U.S. person status of any entity changes, the new status should only apply to trades entered into after the date of the status change.¹¹ In addition, we believe that following a change in U.S. person status, market participants should be given a transition period to get into compliance with its new regulatory obligations resulting from the change in status.

¹¹ Such an approach is consistent with the one taken by the Commission in other contexts and would ensure that parties would not be required to terminate a swap based solely on a change in the counterparty's status during the term of the swap. *See* Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties, 77 Fed. Reg. 9,734, 9,757 (Feb. 17, 2012) (codified at 17 C.F.R. pt. 23).

- *A commodity pool's U.S. person status should not be determined based on the status of its operator, manager or fiduciary.*

The Commission should not adopt a U.S. person definition that would result in a commodity pool being deemed to be a U.S. person by virtue of its operator being required to be registered with the Commission as a commodity pool operator (“CPO”). Such a requirement could result in an investment vehicle with a minimal level of U.S. investors—or even no U.S. investors at all—being treated as a U.S. person.¹² We believe that this approach is inconsistent with Section 2(i) of the Commodity Exchange Act and also with the Commission’s efforts to exclude “legal entities that have negligible U.S. ownership” from the U.S. person definition.¹³

As discussed in the Previous AMG Letter, we believe that this approach would place U.S. asset managers and U.S. investors at a significant disadvantage, without furthering the Commission’s regulatory goals of ensuring that swap activities with a “direct and significant connection” with U.S. commerce are subject to Commission regulation.¹⁴ Conditioning the U.S. person determination on the CPO registration of the operator could harm U.S. investors, as managers of non-U.S. funds may then either refuse to allow U.S. investors to invest in these funds or limit the types of investments they are willing to make on behalf of such investors. Accordingly, U.S. investors may face a diminished ability to make foreign investments in funds that use swaps. Similarly, U.S.-based CPOs may be deprived of opportunities to operate overseas investment funds, even those that are not intended for U.S. investors at all, if CPO registration were a determining factor of the commodity pool’s U.S. person status.

We reiterate our view that a commodity pool should not be subject to categorization as a U.S. person based on the status or location of the entity’s commodity pool operator, investment manager or other fiduciary. It is not uncommon for a global entity to have multiple investment managers or fiduciaries, and its status as a U.S. person should not change based on their locations or principal places of business. Furthermore, the U.S. person definition should reflect the statutory baseline of “direct and significant” U.S. investor participation.

¹² This problem would be exacerbated if the Commission’s proposed definition of U.S. person would be interpreted to treat any commodity pool operated by a registered CPO as a U.S. person, regardless of whether the CPO is registered for that pool or not. It is unclear whether that would be the case from the language in the Commission’s proposed guidance, but there would be absolutely no connection to the United States for many foreign commodity pools that are not required to have a registered CPO (but are operated by an entity that is otherwise registered as a CPO).

¹³ Further Proposed Guidance at 912.

¹⁴ Section 2(i) of the Commodity Exchange Act.

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

As discussed in the Previous AMG Letter, the AMG strongly believes that market participants will need time after a final U.S. person definition is adopted to conduct assessments of their status, to amend documentation and agreements as needed, and to put into place the systems necessary to ensure compliance with requirements that are based on U.S. person status. The Commission should provide market participants with sufficient time to come into compliance with any final U.S. person definition, as well as any changes to their U.S. person status.

- *The Commission should coordinate with U.S. and international regulators on the definition of U.S. person.*

Given the international nature of the swaps market, we believe that coordination among regulators, both within the United States and internationally, is essential to the successful implementation of new swap regulatory regimes. An overbroad, inconsistent or unclear definition of U.S. person could result in market participants being subject to overlapping or conflicting regulatory regimes. Particularly in jurisdictions where substituted compliance may not be available or where mutual recognition does not yet exist, market participants may be unable to meet the requirements of both regulatory regime. Overlapping requirements may lead to significant regulatory uncertainty as market participants must assess how to comply with duplicative or inconsistent requirements in a manner that avoids confusion and mitigates negative economic impacts. We urge the Commission to consider the significant negative impact on market participants that could arise from a lack of coordination with international regulators and to adopt a U.S. person definition that avoids unnecessary overlap or conflicts with other regulatory regimes.

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

Should you have any questions, please do not hesitate to call Tim Cameron at 212-313-1389 or Matt Nevins at 212-313-1176.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tim Cameron', with a long horizontal flourish extending to the right.

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

A handwritten signature in blue ink, appearing to read 'Matt Nevins', with a long horizontal flourish extending to the right.

Matthew J. Nevins, Esq.
Managing Director and Associate General Counsel, Asset Management Group
Securities Industry and Financial Markets Association