



MANAGED FUNDS
ASSOCIATION



August 21, 2013

Via Electronic Submission: <http://comments.cftc.gov>

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

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Office of the
Secretary
Received
CFTC

Re: **Exemptive Order Regarding Compliance With Certain Swap Regulations
(RIN 3038-AE05)**

Dear Ms. Jurgens:

COMMENT

Managed Funds Association (“MFA”)¹ and the Alternative Investment Management Association² (“AIMA”, and together with MFA, “we”) appreciate the opportunity to provide comments to the Commodity Futures Trading Commission (“Commission”) on matters not fully addressed by its “Exemptive Order Regarding Compliance With Certain Swap Regulations” (“Exemptive Order”).³

We support the Commission’s decision to issue the Exemptive Order to provide further transitional relief with respect to its final “Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations” (“Final Guidance”)⁴ “to avoid unnecessary market

¹ Managed Funds Association represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent and fair capital markets. MFA, based in Washington, DC, is an advocacy, education and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry’s contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, North and South America, and all other regions where MFA members are market participants.

² AIMA is the trade body for the hedge fund industry globally; our membership represents all constituencies within the sector – including hedge fund managers, funds of hedge fund managers, prime brokers, fund administrators, accountants and lawyers. Our membership comprises over 1,300 corporate bodies in over 50 countries.

³ See 78 Fed. Reg. 43785 (July 22, 2013), available at: <http://www.gpo.gov/fdsys/pkg/FR-2013-07-22/pdf/2013-17467.pdf>.

⁴ See 78 Fed. Reg. 45292 (July 26, 2013), available at: <http://www.gpo.gov/fdsys/pkg/FR-2013-07-26/pdf/2013-17958.pdf>.

hundreds of customers to build the reporting infrastructure¹¹ necessary to be the “reporting party” for such a limited period of time (*i.e.*, two-and-a-half-months) and for such a small number of dealer counterparties.¹² Therefore, as described further herein, we urge the Commission to provide appropriate guidance or relief¹³ to relieve this burden while still ensuring the integrity of the swap data reporting process and that all relevant swaps are reported to an SDR.¹⁴ In general terms, we request that, solely with respect to the designation of the “reporting party” under the Reporting Rules, where:

1. An October U.S. Fund’s Non-Registrant Dealer counterparty will register as an SD on December 31, 2013,¹⁵ the Commission not deem the October U.S. Fund to be the “reporting party” for the period prior to when such Non-Registrant Dealer registers as an SD, and thereby, becomes the “reporting party” with respect to swaps with the October U.S. Fund;
2. A Fund’s Non-Registrant Dealer counterparty is not a registered SD, but such dealer has an affiliate that is currently a registered SD, the Commission deem the registered SD affiliate (rather than the Fund) to be the “reporting party”, and thus, the registered SD affiliate would, on the Non-Registrant Dealer’s behalf, report its swaps with the Fund; and

¹¹ We note that to build the necessary infrastructure, a Fund would, for example, need to enter into legal agreements with relevant SDRs, develop connectivity with the relevant SDR(s), develop related reporting templates and workflows, test the systems built, etc., all of which would require the Fund to expend significant time and resources.

¹² The majority of dealers are trading counterparties with Funds that are currently U.S. persons (“U.S. Funds”) or October U.S. Funds are already registered SDs. Therefore, the Non-Registrant Dealers to which our requests would apply represent a small and narrow portion of the overall U.S. swaps market.

¹³ We note that the Commission may determine that our concerns are most appropriately addressed through temporary exemptive relief, interpretive guidance, time-limited no-action relief or other Commission action. Alternatively, the Commission may determine another way to impose the “reporting party” obligations on Non-Registrant Dealers. We would support and appreciate any such solution.

¹⁴ For the avoidance of doubt, we assure the Commission that we are not seeking relief as it relates to any other obligations applicable to Funds, such as mandatory clearing.

¹⁵ See Exemptive Order, Section 1, at 43793, which provides that the temporary interpretation of the term “U.S. person” will be effective until 75 days after publication of the Final Guidance in the Federal Register, which publication took place on July 26, 2013. Therefore, the interpretation of the term “U.S. person” in the Final Guidance (*see supra* note 10) will become effective on October 10, 2013.

See id., Section 5, at 43794, which provides that dealers that exceed the *de minimis* threshold for SD registration due to the October 10, 2013 change in the “U.S. person” definition will not be required to register as SDs until December 31, 2013 (*i.e.*, two months after the end of the month in which such person exceeds the *de minimis* threshold for SD registration).

Therefore, we expect that, the vast majority of non-U.S. dealers in the swaps market that are not currently registered SDs and trade with October U.S. Funds, will exceed the *de minimis* threshold by October 31, 2013 and become subject to SD registration on December 31, 2013.

3. An October U.S. Fund's Non-Registrant Dealer counterparty will not register as an SD on December 31, 2013 and is not an affiliate of a registered SD, the Commission not deem the October U.S. Fund to be the "reporting party" until January 31, 2014, in order to provide the October U.S. Fund sufficient time to be able to comply with its "reporting party" obligations with respect to swaps with its Non-Registrant Dealer counterparty.¹⁶

Separately, we are concerned about the lack of guidance relating to a change in the "U.S. person" status of Funds that are not currently, and will not become, U.S. persons on October 10, 2013 ("Non-U.S. Funds"). We urge the Commission to confirm that, for a Non-U.S. Fund that becomes a "U.S. person" at some point after October 10, 2013, the Non-U.S. Fund and its affected non-U.S. counterparties will have a 75-day phase-in period from the date the Non-U.S. Fund's status changes to comply with the applicable Dodd-Frank requirements.

II. Intersection of Final Guidance, Exemptive Order and Final Reporting Rules

We support increased market transparency and reporting of swap transaction data to regulators for purposes of their oversight of the financial markets. However, the intersection and sequencing of the Final Guidance, the Exemptive Order and the Reporting Rules create concrete problems for Funds because, in certain circumstances, contrary to the Commission's intention, Funds (rather than dealers) would be responsible and liable for reporting swap transactions entered into with dealer counterparties.

In the Final Guidance, the Commission states that, for "swaps between two non-registrants where one (or both) of the counterparties to the swap is a U.S. person (including an affiliate of a non-U.S. person) [("Non-Registrant Transaction")], the Commission's interprets [Commodity Exchange Act] 2(i) such that the parties to the swap generally would be expected to comply with the Non-Registrant Requirements."¹⁷ Further, the Reporting Rules provide standards for determining which party to a swap is the "reporting party" for purposes of complying with those rules and the Final Guidance. With respect to the SDR reporting rules, final §45.8(e) and §46.5(a)(5) each provide that, in a Non-Registrant Transaction where only one counterparty is a U.S. person, the U.S. person is the reporting party.¹⁸ Under the real-time reporting rules, where neither party is an SD, the parties to the Non-Registrant Transaction will designate which party will be the "reporting party".¹⁹ The practical effect of the Reporting Rules is that for a Non-Registrant Transaction where one party is a Non-Registrant Dealer and the other is a U.S. person, the U.S. person becomes the default "reporting party".

¹⁶ See Appendix A for a chart summarizing our requests.

¹⁷ Final Guidance at 45361. See *id.*, where the Commission defines the "Non-Registrant Requirements" as the requirements relating to required clearing, trade execution, real-time public reporting, large trader reporting, SDR reporting and swap data recordkeeping.

¹⁸ See SDR Reporting Release at 2207 and Historical Swap Reporting Release at 35229, respectively.

¹⁹ See Real-Time Reporting Release at 1244, final §43.3(a)(3).

III. Imposition of “Reporting Party” Obligations on Funds

In some circumstances, an October U.S. Fund will transact with a dealer counterparty that is a Non-Registrant Dealer. For such Non-Registrant Transactions, the result of the combined Final Guidance, Exemptive Order, and the Reporting Rules is that the Commission will not subject the Non-Registrant Dealer to the “reporting party” obligations under the Reporting Rules requirements, and thus, will effectively impose the “reporting party” obligations on the Fund.

While Funds, as a practical matter, could attempt to enter into agreements to delegate the relevant reporting obligations to its Non-Registrant Dealer counterparty,²⁰ if its counterparty is unwilling to accept such reporting obligation, the Fund would remain responsible for compliance. In addition, regardless of whether the Fund is able to delegate the reporting responsibility to its counterparty, the Fund would remain liable for its Non-Registrant Dealer counterparty’s failure to fulfill the reporting obligation.²¹ As an alternative, a Fund could cease trading with its Non-Registrant Dealer counterparties until they become registered SDs. However, this alternative is not a practical solution in most cases, and would have the paradoxical effect of reducing a Non-Registrant Dealer’s swap trading activity with U.S. persons such that it might prevent the Non-Registrant Dealer from exceeding the *de minimis* threshold for SD registration.

The Commission’s intent with respect to the Reporting Rules was that SDs or similar dealer market participants generally would fulfill the Dodd-Frank reporting obligations for transactions to which they are a party.²² Therefore, in the ordinary course of implementing the Dodd-Frank reporting requirements, Funds or other customers that are counterparties to SDs would not bear the burden of separately creating a reporting infrastructure.²³ It is only the result of phasing in compliance with the Reporting Rules prior to the complete phase-in of the Final Guidance that certain non-U.S. dealers are not yet registered SDs, and thus, the “reporting party” incongruity arises.

It is logical and necessary to impose the “reporting party” obligations on dealers because, unlike their dealer counterparties, Funds currently do not have the infrastructure in place to comply with such reporting obligations, and did not expect to need to build such infrastructure. Building the necessary infrastructure to be the “reporting party” would be a sizable undertaking

²⁰ See *id.*, providing which party will be the “reporting party”, unless otherwise agreed to by the parties prior to the execution of the publicly reportable swap transaction. See also SDR Reporting Release at 2208, final §45.9. and Historical Swap Reporting Release at 35229, final §46.6, each providing that the reporting party of a swap may contract with third-party service providers to facilitate reporting, which the Commission has confirmed includes the ability to delegate reporting obligations to a Fund’s counterparty.

²¹ See Real-Time Reporting Release at 1199, footnote 151, providing that “a reporting party, SEF or DCM would be liable for a violation of §43.3 if, for example, a third party acting on behalf of a reporting party did not report the appropriate swap transaction and pricing data to an SDR for public dissemination”.

²² See *supra* note 9.

²³ We note that Funds would expect to transact with other customers or buy-side parties only via trading platforms, which would provide the reporting in connection with those transactions.

for a Fund, and would include, for example, entering into legal agreements with SDRs, developing connectivity with the relevant SDR(s), developing related reporting templates and workflows and testing the systems built. Moreover, even once the Fund ceases being the “reporting party” because those obligations fall to its newly registered SD counterparty, the Fund would need to continue to maintain infrastructure and compliance procedures to provide swap continuation data²⁴ for the life of the swap.

For the avoidance of doubt, we emphasize that our goal is to ensure prompt reporting by dealers of swap data subject to the Reporting Rules, and expect that dealer counterparties that transact materially with Funds that are U.S. persons will register as SDs and undertake reporting. We also agree that where a Fund continues to trade with a non-U.S. dealer that will remain a Non-Registrant Dealer after December 31, 2013, it is appropriate to require the Fund to fulfill its “reporting party” obligations, and if necessary, build the related infrastructure. Our request is for narrow, tailored guidance or relief to address what we believe is a temporary, unintended consequence of the intersection of the Final Guidance, the Exemptive Order, and the Reporting Rules.

IV. Swaps with Non-Registrant Dealer Registering as an SD on December 31, 2013

It is likely that, once the “U.S. person” definition in the Final Guidance becomes effective,²⁵ many Funds will become U.S. persons, and thus, many of their Non-Registrant Dealer counterparties will exceed the *de minimis* threshold for registration as SDs in short order. In such cases, an October U.S. Fund would become the “reporting party” under the Reporting Rules on the effective date of the “U.S. person” definition. However, the October U.S. Fund would only be the “reporting party” for the approximately two-and-a-half month period between October 10, 2013 and December 31, 2013 (“**December Interim Period**”), prior to when such Non-Registrant Dealer has to register as an SD.²⁶ As a result, we believe it is unnecessarily burdensome to designate October U.S. Funds as the “reporting party” under the Reporting Rules when, shortly thereafter, many of their Non-Registrant Dealer counterparties will have to register as SDs and would then become the “reporting party” under the Reporting Rules.²⁷

To address the inappropriate imposition of the “reporting party” obligations on October U.S. Funds for such a brief period, we request that the Commission provide appropriate, interim guidance or relief to October U.S. Funds for the December Interim Period. It would apply when

²⁴ See SDR Reporting Release at 2202-3, final §45.4, which sets forth the data that constitutes “swap continuation data” as required by part 45 of the Commission regulations.

²⁵ See Exemptive Order Release at 43793, Section 1, providing that the “U.S. person” definition contained in the Commission exemptive order issued on January 7, 2013 will continue to apply from July 13, 2013 until 75 days after the Final Guidance is published in the Federal Register.

²⁶ See *id.* at 43794, Section 5, providing that a Non-Registrant Dealer that is required to register an SD because of changes to the scope of the term “U.S. person” or changes in the *de minimis* SD calculation or aggregation for purposes of the *de minimis* calculation, is not required to register as an SD until two months after the end of the month in which such person exceeds the *de minimis* threshold.

²⁷ See *supra* notes 9 and 14.

an October U.S. Fund is transacting with a Non-Registrant Dealer that registers as an SD on December 31, 2013.²⁸ The Commission would provide that the October U.S. Fund is not the “reporting party” and is not required to report swaps (including pre-enactment or transition swaps²⁹ between the October U.S. Fund and Non-Registrant Dealer (“**Historical Swaps**”)) during the December Interim Period. However, beginning on December 31, 2013, when the Non-Registrant Dealer counterparty registers as an SD,³⁰ it would be deemed the “reporting party” under the Reporting Rules, for: (a) swaps between the October U.S. Fund and the SD entered into during the December Interim Period; and (b) Historical Swaps between the October U.S. Fund and the SD. As a result, on a going forward basis,³¹ the SD would be responsible and liable for the reporting obligations related to those swaps.

Granting our request will provide sufficient time for SD registration of Non-Registrant Dealers that will exceed the *de minimis* threshold due to the October 10, 2013 changes in the “U.S. person” definition, after which such dealers will become the “reporting party” under the Reporting Rules.

V. Swaps with Non-Registrant Dealer Not Registering as an SD on December 31, 2013

Following the SD registration of many Non-Registrant Dealers on December 31, 2013, it remains possible that some counterparties of October U.S. Funds may remain Non-Registrant Dealers if they were still below the *de minimis* threshold as of October 31, 2013. We acknowledge that, in such circumstances, the October U.S. Fund would be the “reporting party” and would need to comply with its obligations under the Reporting Rules. However, we request that the Commission provide sufficient time to allow October U.S. Funds to determine which of their counterparties will remain Non-Registrant Dealers, and then: (1) decide to cease trading with those dealers, or (2) continue trading with those dealers with the understanding that the October U.S. Fund will be the “reporting party” and will need to report their swaps.

In addition, we believe additional complexity exists with respect to the reporting of Historical Swaps in such a scenario. The SDR reporting rules incorporate the term “U.S. person” into the determination of which party is the “reporting party”.³² However, at the time the

²⁸ We note that there is potential for a number of dealers from non-U.S. jurisdictions to fall within this category, including dealers located in Australia, Canada, the European Union, Hong Kong, Japan or Switzerland. In particular, we are aware that a number of Scandinavian banks meet this criterion.

²⁹ See Historical Swap Reporting Release at 35226-7. It defines a “pre-enactment swap” as “any swap entered into prior to enactment of [Dodd-Frank], the terms of which have not expired as of the date of enactment of that Act”. In addition, it defines a “transition swap” as, “any swap entered into on or after the enactment of [Dodd-Frank] and prior to the applicable compliance date on which a registered entity or swap counterparty subject to the jurisdiction of the Commission is required to commence full compliance with all provisions of this part”.

³⁰ See supra note 15.

³¹ We note that there are continuous reporting obligations for the life of all swaps (including Historical Swaps). Therefore, the party that the Commission deems to be the “reporting party” would remain responsible for such continuous reporting obligations. See supra note 24.

³² See supra note 18.

October U.S. Fund and its Non-Registrant Dealer counterparty entered into the Historical Swaps, they did not know whether the October U.S. Fund would be a “U.S. person” or whether the Non-Registrant Dealer would be a registered SD. Therefore, they could not determine who would be the “reporting party”. The effect of applying the “U.S. person” definition on October 10, 2013 is that it effectively has retroactive application to Historical Swaps.³³ Therefore, an October U.S. Fund will become the “reporting party” for Historical Swaps previously entered into with a Non-Registrant Dealer. The burden to the October U.S. Fund greatly increases if the Commission also requires the Fund to report Historical Swaps that are no longer in existence, but were open positions at the time Dodd-Frank became effective or at the time the Commission finalized the Reporting Rules.

As a result, to address our concerns as it relates to “reporting party” obligations that will remain with October U.S. Funds, we request narrow, interim relief from October 10, 2013 until January 31, 2014 (“**January Interim Period**”) that would apply when an October U.S. Fund is transacting with a Non-Registrant Dealer that does not register as an SD on December 31, 2013. Under our request, the Commission would provide that, although the October U.S. Fund is the “reporting party”, the October U.S. Fund is not required to report swaps (including Historical Swaps) during the January Interim Period. However, beginning on February 1, 2014, the October U.S. Fund would need to fulfill its “reporting party” obligations for: (a) swaps between the October U.S. Fund and the Non-Registrant Dealer entered into during the January Interim Period; and (2) Historical Swaps between the October U.S. Fund and a Non-Registrant Dealer that is not an affiliate of a registered SD that were open positions on October 10, 2013. On a going forward basis, the Fund would thus remain responsible and liable for the reporting obligations related to those swaps. Further, to the extent that the swap trading relationship continues, the Fund would be the “reporting party” for all new swaps (unless at some point in the future, its Non-Registrant Dealer counterparty becomes a registered SD, and thus, becomes the “reporting party”).

VI. Historical Swaps with Non-Registrant Dealer that is an SD Affiliate

We are concerned about a U.S. Fund or October U.S. Fund becoming the “reporting party” for Historical Swaps solely because its Non-Registrant Dealer counterparty has moved its trading business into an affiliated entity (*e.g.*, a registered SD affiliate) and/or has ceased trading altogether such that the Non-Registrant Dealer will remain below the *de minimis* threshold for SD registration. To remedy this situation, we ask the Commission to confirm that, when a U.S. Fund’s or October U.S. Fund’s counterparty, as applicable, is a Non-Registrant Dealer that is an affiliate of a registered SD, the affiliated registered SD (and not the U.S. Fund or October U.S.

³³ See *e.g.*, Historical Swap Reporting Release at 35229, final §46.5(c), providing that “[f]or pre-enactment and transition swaps for which reporting is required, but which have expired or been terminated prior to the compliance date, determination of the reporting counterparty shall be made by applying the provisions of paragraph (a) of this section to the counterparties to the swap as of the date of its expiration or termination (except for determination of a counterparty’s status as an SD or major swap participant (“MSP”), which shall be made as of the compliance date), regardless of whether either or both were original counterparties to the swap when it was first executed.”

In the Final Guidance, the Commission acknowledged our concern and request for clarity with respect to changes in a Non-U.S. Fund's "U.S. person" status.⁴² However, the Final Guidance does not provide any guidance as to how frequently a Non-U.S. Fund must evaluate the "U.S. person" status of its direct or indirect owners or whether a phase-in period is applicable upon such change in status. Because the Commission finalized the "U.S. person" definition and retained majority ownership tests in prongs (vi) and (vii), our practical concerns remain about a Non-U.S. Fund's change in status.

As a result, we would urge the Commission to provide appropriate guidance or relief confirming that, for a Non-U.S. Fund (*i.e.*, a fund that is not a "U.S. person" on October 10, 2013, but subsequently becomes a "U.S. person"), the Non-U.S. Fund and its affected non-U.S. counterparties will have a 75-day phase-in period from the date the Non-U.S. Fund's status changes to comply with the applicable Dodd-Frank requirements. This request for a 75-day phase-in period is consistent with the Commission's phase in of the "U.S. person" definition and related obligations under the Exemptive Order, and is similarly necessary to ease the transition of these new U.S. persons into the Dodd-Frank requirements.

We thank the Commission for the opportunity to provide comments on matters not address by the Exemptive Order. We would welcome the opportunity to discuss our views in greater detail. Please do not hesitate to contact Stuart J. Kaswell or Carlotta King of MFA at (202) 730-2600 and Jiří Król, Adam Jacobs or Wesley Lund of AIMA at +44 (0) 20 7822 8380 with any questions the Commission or its staff might have regarding this letter.

Respectfully submitted,

/s/ Stuart J. Kaswell

/s/ Adam Jacobs

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Adam Jacobs
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cc: The Hon. Gary Gensler, Chairman
The Hon. Bart Chilton, Commissioner
The Hon. Scott D. O'Malia, Commissioner
The Hon. Mark P. Wetjen, Commissioner

⁴² See Final Guidance at 45304, where the Commission cited that "MFA/AIMA and SIFMA AMG stated that the Commission should clarify how frequently an entity should consider (*e.g.*, annually) whether U.S. persons are its direct or indirect majority owners, and provide for a transition period after an entity falls within this prong of the interpretation for the first time".

APPENDIX A

SUMMARY OF REQUESTS FOR SWAP DATA REPORTING OBLIGATIONS

DESCRIPTION	PERIOD OF REQUESTED RELIEF	NATURE OF SWAP	STATUS OF FUND OBLIGATION	HOW THE REPORTING OBLIGATION IS ULTIMATELY SATISFIED
December Interim Period	October 10, 2013 until December 31, 2013	October U.S. Fund is transacting with a Non-Registrant Dealer that registers as an SD on December 31, 2013	The Fund is not the "reporting party" for the December Interim Period. Temporary delay in reporting obligation until Non-Registrant Dealer registers as an SD.	Beginning on December 31, 2013, the SD counterparty is the "reporting party" for: (a) swaps between the October U.S. Fund and the SD entered into during the December Interim Period; and (b) Historical Swaps between the Fund and the SD
January Interim Period	October 10, 2103 until January 31, 2014	October U.S. Fund is transacting with a Non-Registrant Dealer that does not register as an SD on December 31, 2013	The Fund is the "reporting party" for the January Interim Period and on a going forward basis. Temporary delay in Fund reporting obligation until Fund determines that Non-Registrant Dealer did not register as an SD	Beginning on February 1, 2014, the October U.S. Fund must comply with its obligations as the "reporting party" for: (a) swaps between the October U.S. Fund and the Non-Registrant Dealer entered into during the January Interim Period; and (b) Historical Swaps between the October U.S. Fund and the Non-Registrant Dealer that is not an affiliate of a registered SD that were open positions on October 10, 2013
Historical Swaps with Non-Registrant Dealer Affiliated with Registered SD	Beginning on September 30, 2013 for Historical Swaps with U.S. Funds, and on October 10, 2013 for Historical Swaps with October U.S. Funds	Historical Swaps between a U.S. Fund or October U.S. Fund, as applicable, and Non-Registrant Dealer that is an affiliate of a registered SD	The U.S. Fund or October U.S. Fund, as applicable, is not the "reporting party" for the Historical Swaps. No delay in the reporting obligation. The registered SD that is an affiliate of the Non-Registrant Dealer reports the Historical Swaps	Beginning on September 30, 2013 for Historical Swaps with U.S. Funds, and beginning on October 10, 2013 for Historical Swaps with October U.S. Funds, the affiliated registered SD (and not the Fund) is the "reporting party" and, on behalf of the Non-Registrant Dealer, is the "reporting party" for the relevant Historical Swaps