



June 4, 2013

Gary Barnett
Director of Division of Swap Dealer and Intermediary Oversight
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: Request for Relief Relating to Certain Foreign Exchange Transactions

Dear Mr. Barnett:

The Asset Management Group (the “AMG”)¹ of the Securities Industry and Financial Markets Association (“SIFMA”) and the Investment Company Institute (“ICI”)² request that the Commodity Futures Trading Commission (the “Commission”) extend the date for compliance with the documentation requirements set forth in Commission Regulations § 23.500 through § 23.505 (the “Final Swap Documentation Rules”)³ for foreign exchange swaps and foreign exchange forwards exempted from the definition of swap by the Secretary of the Treasury (“Exempt FX Transactions”) until at least July 1, 2014.

I. Background on Exempt FX Transactions and Final Swap Documentation Rules

The Commodity Exchange Act (“CEA”)⁴ has recognized and continues to recognize the unique status of foreign exchange transactions in the global financial markets. The express recognition of this difference dates back to the “Treasury Amendment” of Section 2 of the CEA adopted in 1974, which excluded from CEA jurisdiction several types of transactions including those in foreign currency.⁵ This historical approach was acknowledged with the passage of the

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 The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$15.2 trillion and serve more than 90 million shareholders.

³ Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 77 Fed. Reg. 55904 (September 11, 2012).

⁴ 7 U.S.C. 1 *et seq.*

⁵ See Philip McBride Johnson & Thomas Lee Hazen, Derivatives Regulation §1.02[8] (2004).

Dodd-Frank Wall Street Reform and Consumer Protection Act (“**Dodd-Frank**”),⁶ which granted authority to the Secretary of Treasury to make a written determination that foreign currency swap and forward transactions should not be regulated as swaps.⁷

On November 20, 2012, the Secretary of the Treasury issued its final determination⁸ in which it concluded that because Exempt FX Transactions “are qualitatively different from other classes of derivatives covered under the definition of ‘swap’ in the CEA” (the “**Final Treasury Determination**”), they could be properly excluded from the definition of “swap.” Based on the certainty of payments at settlement and shorter standard maturities of Exempt FX Transactions, the Secretary of the Treasury was able to conclude that these instruments merited different regulatory treatment than swaps.⁹

Notwithstanding this determination, Section 721 of Dodd-Frank provides that Exempt FX Transactions will remain subject to certain reporting requirements and must also conform to the business conduct standards contained in Section 4s(h) (codified as 6s(h)) of the CEA.¹⁰ We note that Section 4s(h) was created by Section 731 of Dodd-Frank.¹¹ In light of this specific inclusion by Congress of reporting and External Business Conduct Standards for Exempt FX Transactions, it is noteworthy that Section 721 fails to reference any of the other substantive business conduct requirements placed on swap dealers by Dodd-Frank, such as Section 4s(i) (codified as 6s(i)) which sets forth the documentation standards addressed by the Final Swap Documentation Rules. Because of this omission, when the Secretary of the Treasury issued its Final Treasury Determination, many market participants who trade predominantly or routinely in Exempt FX Transactions believed that their responsibilities under Dodd-Frank with respect to these transactions would be limited significantly and that the Final Swap Documentation Rules would not apply to Exempt FX Transactions.

⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

⁷ 7 U.S.C. 1a(47)(e).

⁸ Determination of Foreign Exchange Swaps and Foreign Exchange Forwards under the Commodity Exchange Act, 77 Fed. Reg. 69694 (November 20, 2012).

⁹ Final Treasury Determination at 69696. The Secretary also concluded that Exempt FX Transactions are not structured to evade the requirements of Dodd-Frank or regulations prescribed by the Commission. 7 U.S.C. 1a(47)(e).

¹⁰ Section 721(a) of Dodd-Frank; 7 U.S.C. 1a(47)(E)(iv).

¹¹ 7 U.S.C. 6s(h). This Section requires the Commission to adopt rules requiring each swap dealer and major swap participant to (i) verify that its swap counterparties qualify as eligible contract participants; (ii) make disclosures that allow its swap counterparties to assess a swap’s material risks and characteristics; (iii) provide its swap counterparties with daily marks; (iv) communicate in a fair and balanced manner with counterparties; (v) offer special protections to certain governmental and pension entities; and (vi) refrain from fraudulent, manipulative or other abusive practices involving swaps (collectively, the “**External Business Conduct Standards**”).

However, when the Commission had issued its Final Swap Documentation Rules with respect to confirmation, processing, netting, documentation, and valuation of swaps, it did so under **both** Section 4s(i)¹² and Sections 4s(h)(1)(D) and 4s(h)(3)(D).¹³ As a result of adopting these rules under both Section 4s(i) and Section 4s(h) of the CEA, as well as a footnote embedded in the Final Treasury Determination which references rules adopted under both Section 4s(i) and Section 4s(h) as components of the Commission's "strengthened business-conduct standards,"¹⁴ we understand that the Commission's position is that the Final Swap Documentation Rules apply to Exempt FX Transactions to the same extent as the External Business Conduct Standards, notwithstanding that the specific legislative authority for the Commission to develop documentation standards arises under Section 4s(i).¹⁵ This result was unexpected and went largely unnoticed by market participants until recently.

II. Requested Relief from Final Swap Documentation Rules

Given the lack of market awareness regarding the possible application of the Final Swap Documentation Rules to Exempt FX Transactions, we are concerned that market participants will not be able to meet the regulatory deadlines. Therefore, we request that the staff of the Commission issue interpretative guidance or no-action relief to the effect that it does not intend to bring an enforcement action against a swap dealer or major swap participant for failing to fully comply with applicable documentation requirements with respect to Exempt FX Transactions through at least July 1, 2014.¹⁶ This relief will enable market participants to assess their current

¹² Section 4s(i) authorizes the Commission to issue rules and regulations for swap dealers and major swap participants relating to timely and accurate confirmation, processing, netting, documentation, and valuation of all swaps. 7 U.S.C. 6s(i).

¹³ Notwithstanding the fact that the documentation requirements applicable to swap dealers and major swap participants are set forth in Section 4s(i), and not 4s(h), the preamble to the Final Swap Documentation Rules states that in addition to Section 4s(i), they are being promulgated under Sections 4s(h)(1)(D) and 4s(h)(3)(D) as well. 77 FR at 55904.

¹⁴ Final Treasury Determination at fn. 51.

¹⁵ While we understand that the Commission has interpreted the Final Swap Documentation Rules to apply to Exempt FX Transactions, we respectfully disagree with this interpretation. Section 4s(i) provided complete authority, on its face, for the Commission to issue the Final Swap Documentation Rules. Sections 4s(h)(1)(D) and 4s(h)(3)(D) are general in nature and are meant to enable the Commission to adopt additional business conduct requirements as needed to the extent not otherwise expressly provided for in the legislation. However, these Sections are not needed to give the Commission the authority to issue rules that satisfy all of the documentation requirements envisioned by Dodd-Frank. To interpret Section 4s(h) as part of the statutory authority underlying the Final Swap Documentation Rules essentially renders Section 4s(i) as redundant and meaningless. In addition, as Congress, the Secretary of Treasury and the Commission have all recognized, we believe that Exempt FX Transactions are fundamentally distinguishable from swaps, and therefore, should not be subject to the swap documentation requirements. .

¹⁶ We note that the Commission has previously granted time-limited relief in respect of many External Business Conduct Standards and certain documentation requirements, allowing market participants to turn their attention to the more immediate and pressing issues surrounding mandatory clearing and the various swap reporting requirements. Granting additional time for compliance would be consistent with prior Commission decisions and (...continued)

documentation with respect to Exempt FX Transactions and, if necessary, execute additional documentation with all appropriate counterparties, including with clients of asset managers.

This additional time is necessary for all market participants to comply with the Final Swap Documentation Rules for Exempt FX Transactions. In many cases, Exempt FX Transactions are not memorialized by documentation, particularly shorter-dated Exempt FX Transactions. Although an industry protocol is being implemented, which may facilitate compliance with the Final Swap Documentation Rules, using the protocol may not be a workable solution for all asset managers or for all of their clients to ensure compliance with the Final Swap Documentation Rules by July 1, 2013. Even for those asset managers that intend to use the protocol, it will be necessary in many cases to go back to their third-party clients that engage in Exempt FX Transactions to obtain appropriate representations and consents to enter into the protocol and/or sufficient documentation on their behalf. As asset managers typically manage many accounts for clients that trade Exempt FX Transactions, but not swaps, requiring them to also comply with the Final Swap Documentation Rules for Exempt FX Transactions by July 1, 2013 would present a substantial challenge. Achieving compliance with the Final Swap Documentation Rules will be significantly more difficult for clients that do not trade swaps as they would have even less reason to be aware of the Final Swap Documentation Rules

This additional time would also permit asset managers and other market participants to continue to focus their efforts on compliance with CFTC rules for swaps, including amending existing documentation or entering into new documents to comply with the Final Swap Documentation Rules for transactions other than Exempt FX Transactions, and negotiating documentation for swap clearing and cleared swap execution, as well as complying with CFTC rules that recently have gone into effect for swaps and Exempt FX Transactions on an ongoing basis, such as reporting and External Business Conduct Standards rules. This all requires a considerable allocation of time, effort and resources, and all within a very compressed timeframe.

We believe that granting the requested relief would also be consistent with the fact that the Secretary of Treasury recognized the unique, low-risk market characteristics of Exempt FX Transactions, such as high liquidity, transparency, fixed payment obligations, certainty of payment and shorter maturities, and therefore, there is less urgency to subject these instruments to the same regulations as swaps.¹⁷ Failure to provide this requested relief could result in our members' clients and other end users having a diminished ability to hedge currency risk until such time as they are able to put in place sufficient documentation to comply with the Final Swap Documentation Rules for their Exempt FX Transactions.

(continued...)

would allow market participants to address the required documentation and related requirements set forth in the Final Swap Documentation Rules in an orderly and consistent fashion.

¹⁷ In making his determination, the Secretary of Treasury stated that he was "issuing this determination to exempt foreign exchange swaps and forwards because of the distinctive characteristics of these instruments." Final Treasury Determination at 69695.

III. Need to Address FX Spot Transactions at a Minimum

In the event that the Commission is not willing to grant the relief requested in Section II above, we remain highly concerned about the potential applicability of the Commission's rules to FX spot transactions and request that the Commission, at the very least, provide time-limited relief from the requirements of the Final Swap Documentation Rules for deliverable foreign exchange transactions with a settlement cycle not longer than seven local business days after execution (i.e., T+7) ("**Exempt FX Spot Transactions**"), as the Commission has done for purposes of compliance with the External Business Conduct Standards¹⁸ in response to a letter AMG submitted on April 29, 2013 (the "**April 29 AMG Letter**").¹⁹

For the same reasons cited in the April 29 AMG Letter, we request that the Commission expand this relief to treat Exempt FX Spot Transactions as FX spot transactions through November 1, 2013 for purposes of the Final Swap Documentation Rules if the Commission fails to grant the relief requested in Section II above.²⁰ We note that the Commission provided relief for Exempt FX Spot Transactions for purposes of External Business Conduct Standards through September 1, 2013, despite AMG's request for this relief through November 1, 2013; AMG continues to believe that relief for Exempt FX Spot Transactions through at least November 1, 2013 is warranted as the industry continues to work on solutions for demonstrating that certain FX transactions should be treated as FX spot transactions.²¹ In the absence of the relief requested in Section II above, we believe that this relief for Exempt FX Spot Transactions is necessary in order to provide certainty to the marketplace and remove an unnecessary distraction from complying with Commission rules that will become effective over the next six months such as mandatory central clearing and the Final Swap Documentation Rules and continuing to

¹⁸ See CFTC No-Action Letter 13-13 (May 2, 2013).

¹⁹ See SIFMA AMG Letter to the Commission Request for Relief from External Business Conduct Rules (April 29, 2013), *available at* <http://www.sifma.org/issues/item.aspx?id=8589943530>.

²⁰ As noted in the April 29 AMG Letter, in granting this relief, we believe that the Commission should clarify that parties could still avail themselves of the application of FX spot status to securities conversion transactions and trades in jurisdictions where the standard settlement time is longer than T+7 during this period.

²¹ Our members remain concerned about the definition of Securities Conversion Transactions and AMG intends to address them in a separate comment letter. If the relief requested in Section II above is not granted, the requested temporary relief for Exempt FX Spot Transactions until November 1, 2013 will provide needed time to address these concerns with the definition of Securities Conversion Transactions, including pursuing possible technological solutions for compliance.

comply with rules that recently have gone into effect, such as reporting and External Business Conduct Standards.²²

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²² As stated in the April 29 AMG Letter, “for at least some foreign jurisdictions that we are aware of, the settlement cycle for certain securities transactions, after giving effect to customary extensions, and therefore the settlement period for corresponding foreign currency transactions, can be significantly longer than “T+2;” we believe that “T+7” would give sufficient comfort to the market during the period in which the temporary relief is in effect.”

Based on the foregoing, we respectfully request that the staff of the Commission grant the relief described in this letter. We appreciate your consideration of this request, and stand ready to provide any additional information or assistance that you might find useful. Should you have any questions, please do not hesitate to contact at AMG, Tim Cameron at 212-313-1389 or Matt Nevins at 212-313-1176, or at ICI, Karrie McMillan at 202-326-5815, Sarah Bessin at 202-326-5835, or Jennifer Choi at 202-326-5876.

Sincerely,

/s/ Timothy W. Cameron

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/s/ Matthew J. Nevins

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/s/ Karrie McMillan

Karrie McMillan, Esq.
General Counsel
Investment Company Institute

cc: Hon. Gary Gensler, Chairman, Commodity Futures Trading Commission
Hon. Jill E. Sommers, Commissioner, Commodity Futures Trading Commission
Hon. Bart Chilton, Commissioner, Commodity Futures Trading Commission
Hon. Scott O'Malia, Commissioner, Commodity Futures Trading Commission
Hon. Mark Wetjen, Commissioner, Commodity Futures Trading Commission
Frank Fisanich, Chief Counsel, Division of Swap Dealer and Intermediary Oversight,
Commodity Futures Trading Commission
Eric Juzenas, Senior Counsel to Chairman, Commodity Futures Trading Commission

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Certification Pursuant to Commission Regulation 140.99(c)(3)

As required by Commission Regulation 140.99(c)(3), we hereby (i) certify that the material facts set forth in the attached letter dated June 4, 2013 are true and complete to the best of our knowledge; and (ii) undertake to advise the Commission, prior to the issuance of a response thereto, if any material representation contained therein ceases to be true and complete.

Sincerely,

/s/ Timothy W. Cameron

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