February 22, 2011

Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties (RIN 3038-AD25)

Dear Mr. Stawick:

The Asset Management Group (the "**AMG**") of the Securities Industry and Financial Markets Association ("**SIFMA**") appreciates the opportunity to provide the Commodity Futures Trading Commission (the "**CFTC**") with our comments regarding the proposed rules (the "**Proposal**"),[1] published on December 22, 2010, regarding business conduct standards for swap dealers and major swap participants ("**MSPs**"), particularly with respect to Special Entities.[2]

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 ERISA 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 for hedging and risk management purposes that will be

[1] Commodity Futures Trading Commission, Business Conduct Standards for Swap Dealers and Major Swap Participants, 75 Fed. Reg. 80638 (Dec. 22, 2010).

[2] The Dodd-Frank Wall Street Reform and Consumer Protection Act defines "Special Entities" to include government agencies, employee benefit plans under the Employee Retirement Income Security Act of 1974, governmental plans as defined in ERISA, endowments and municipalities. SIFMA has submitted a separate letter to the CFTC dated February 17, 2011. The AMG agrees with the views set forth in that letter. This letter reflects the views of SIFMA's buy-side membership and highlights our specific concerns regarding the Special Entity provisions and their consequences for investment advisers whose clients consist of Special Entities.

classified as "swaps" under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**").

The Proposal is of paramount importance to AMG members that manage accounts of Special Entities for several reasons. First, we are concerned that the Proposal could result in unintended harm to Special Entities by severely restricting Special Entities' ability to enter into swaps due to the consequences that swap dealers and MSPs would face under the Proposal and other applicable laws, such as the Employee Retirement Income Security Act of 1974 ("**ERISA**") and the Investment Advisers Act of 1940 (the "**IAA**"). We believe that an exclusion from the business conduct rules for transactions with Special Entities that are represented by an entity that is a qualified (a "**QF**") is necessary to avoid these unintended consequences. We propose that QFs would include any entity that has acknowledged that it is a fiduciary to a Special Entity and has the power to manage, acquire or dispose of any asset of the Special Entity, provided that such entity is either an investment adviser registered under the IAA or under state law or a bank or insurance company (or otherwise authorized to act as a fiduciary to a Special Entity under ERISA).[3]

Second, we believe that the Proposal introduces unfair burdens and risks for investment advisers to Special Entities. For example, the restriction on "material business relationships" with swap dealers and MSPs imposed on asset managers to Special Entities is unnecessarily duplicative given existing regulation. This restriction would preclude Special Entities from retaining certain asset managers who currently advise them on swaps or that they otherwise wish to employ in the future. Finally, the AMG has concerns regarding the potential application of the Proposal to collective investment vehicles as well as regarding the pay-to-play provisions that are applicable to municipal entities.

The broad definition of advisory activity subject to the "best interests" standard and the requirements imposed on swap dealers and MSPs will cause them to refrain from transacting in swaps with Special Entities.

Under section 23.440(b) of the Proposal, a swap dealer that is deemed to act as an advisor to a Special Entity must consider the Special Entity's best interests in a manner akin to a fiduciary standard. In doing so, a swap dealer "shall make reasonable efforts to obtain such information as is necessary to make a reasonable determination"[4] regarding whether a particular swap or trading strategy is in the best interests of a Special Entity[5] or rely on a written

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[3] Although this definition is based upon the ERISA definition of "investment manager," we ask that this definition be applied to advisers to all Special Entities, irrespective of whether they are ERISA plans. See 29 U.S.C. § 1002(3)(38).

[4] Proposal, at 80660.

[5] Proposal § 23.440(b)(2), at 80659–60.

representation by the Special Entity that meets certain enumerated requirements.[6] The scope of activities that constitute "acting as an advisor" is very broadly drawn and would include "making a recommendation." Under the Proposal, "recommendation" would include any "information [provided] to a counterparty about a particular swap or trading strategy that is tailored to the needs or characteristics of the counterparty."[7] Many of the marketing and negotiation activities that are routinely carried out by swap dealers seeking to act as trade counterparties to asset managers representing Special Entities would be advisory activities under the Proposal. An essential part of selling a financial product is explaining to the potential customer how the product may help address a problem that the customer might have. Thus, it is common in the course of ordinary selling efforts for swap dealers to respond to potential counterparties with information that is in some respects tailored to the circumstances of the potential customer. The few activities that clearly are not advisory under the Proposal include providing quotes in response to requests, providing general market information and transacting anonymously with counterparties on a designated contract market or swap execution facility in which a swap dealer or MSP would not know its counterparty's identity prior to execution.[8]

The AMG believes that, due to the application of the "best interests" standard to such a broad range of normal commercial activities, swap dealers and MSPs will, at best, limit their interactions with Special Entities or provide them only with generic information and, at worst, refrain from trading covered swaps with Special Entities. Special Entities and their investment advisers will be provided less trade and market information from swap dealers and MSPs or may even be precluded from trading with their swap counterparties.

The AMG also suggests that the CFTC modify the Proposal to provide that, absent an explicit agreement or understanding that information provided by a swap dealer or MSP to a Special Entity would be used as the primary basis for an investment decision, the swap dealer or MSP should not be deemed to be engaged in advisory activity subject to the "best interests" standard. Such an agreement would be reflected in trade documentation, including standard master agreements, between the parties but, when a potential counterparty does not have such pre-existing trade documentation in place, the required understanding could be established on the basis of a notice provided by the swap dealer or MSP.

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[6] Proposal § 23.440(b)(3), at 80660.

[7] Proposal, at 80647. Swap dealers and MSPs could reasonably be concerned that providing "general market information" might, through questions by potential Special Entity counterparties, evolve into a conversation that would make the swap dealer or MSP an advisor.

[8] Proposal, at 80650.

In addition, a "best interests" duty effectively puts a swap dealer or MSP counterparty in the posture of backstopping the decisions of the Special Entity's investment adviser. Under the Proposal, a swap dealer or MSP that acts as counterparty to a Special Entity also would be required, among other things, to provide expanded disclosure to the Special Entity and perform diligence to ensure that the Special Entity has a representative that is adequately qualified and independent from the swap dealer or MSP.[9] The swap dealer or MSP would have the discretion to find a Special Entity's representative unqualified and submit a written record for review by a chief compliance officer.[10] The discretion of a Special Entity to hire an asset manager would effectively be trumped by swap dealers and MSPs, an illogical result, particularly in the context of ERISA plans, which are required to have their own fiduciaries. In addition, for transactions that ultimately do not favor Special Entities, a non-waivable liability may attach under the theory that a swap dealer or MSP failed in its obligation to evaluate the adequacy of the advisor.[11] A customer or a QF could bring a lawsuit against a swap dealer or MSP for any decisions made in connection with these evaluations. A swap dealer also might be exposed to potential liability for the performance of a transaction even when it performs its advisory role as anticipated, but the end result of the transaction does not ultimately favor the Special Entity. We understand that swap dealers would be unwilling to tolerate such open-ended potential liabilities.

Furthermore, if swap dealers and MSPs will be deemed "advisors" under these rules subject to a "best interests" standard when transacting with Special Entities, swap dealers and MSPs would acquire fiduciary status and responsibilities under statutes such as ERISA, the IAA and the Commodity Exchange Act of 1936, as amended (the "**Commodity Exchange Act**"), jeopardizing the ability of Special Entities to execute swaps with dealers. The CFTC Proposal notes that the meaning of the "best interests" standard will vary from case to case[12] but will be informed by established statutory principles and related case law.[13] The potential liabilities associated with importing fiduciary responsibilities from these other authorities into the interpretation of the "best interests" standard would discourage swap dealers and MSPs from entering into swap transactions with Special Entities such as federal and state agencies, employee benefit plans, governmental plans and endowments. This result would

[9] Proposal § 23.450(b), at 80660.

[10] Proposal § 23.450(e), at 80661.

[11] SIFMA February 17, 2011 letter, at 4.

[12] Proposal, at 80650.

[13] ERISA, the IAA and the Commodity Exchange Act would be among the possible sources of these principles.

be especially troubling when swap dealers and MSPs would not otherwise be deemed fiduciaries under those statutes.[14]

Safe Harbor for Special Entities Represented by QFs

While AMG members regularly undertake heightened duties as investment advisers for clients that are Special Entities, the AMG does not believe that such a standard of conduct should apply to a swap dealer or MSP that acts solely as counterparty to QFs and their clients. The AMG proposes that the CFTC adopt a safe harbor exclusion for transactions in which QFs act on behalf of Special Entity clients. A QF has a fiduciary duty to act in the best interests of its clients and to make fair disclosure of conflicts between its interests and those of its clients.[15] Accordingly, when undertaking a new advisory relationship for a client, a QF carefully discloses its proposed investment strategy and risks and considers whether such strategy is appropriate for the needs of the client. An advisory relationship is then documented to define the scope of advice being provided to an advisory client. By contrast, when a Special Entity retains its own QF, it does not intend to rely on the swap dealer or MSP that is its counterparty to a swap transaction for such fiduciary advice.

Under the safe harbor that we propose, any information a swap dealer or MSP provides to a Special Entity that is advised by a QF would not be deemed a recommendation. In addition, the swap dealer or MSP would be able to rely on representations from these QFs to form a reasonable basis to believe the QF is qualified and meets other requirements applicable to representatives of Special Entities, unless the swap dealer or MSP affirmatively knows that such representations are untrue.

Pragmatic Concerns and Congressional Intent

It is imperative that asset managers to Special Entities maintain the ability to engage in swap transactions on behalf of their clients. Rules that would discourage swap dealers or MSPs from engaging in these swap transactions would significantly limit the ability of asset managers to execute trades on behalf of their Special Entity clients for hedging and risk-mitigation purposes. This limitation would force Special Entities to assume greater levels of credit and interest rate risk in their investment portfolios. By making swap transactions less accessible to them, Special Entities would become more susceptible to risk. A lack of Special Entity participation in covered swaps could also decrease market liquidity.

[14] For example, under ERISA, a dealer must provide investment advice that it and the plan mutually agree will form a primary basis for the plan's investment decision to be viewed as investment advice under ERISA. See discussion of the ERISA five-part test on page 6 below.

[15] IAA § 206, as amended.

The AMG believes that applying a "best interests" standard in the circumstances and manner proposed by the CFTC to swap dealers transacting with Special Entities is contrary to Congressional intent and the legislative history of the Dodd-Frank Act. Specifically, the rejection of a fiduciary standard for swap dealers demonstrates that Congress drafted the statute in a manner that would not designate swap dealers as fiduciaries of Special Entities.[16] The Proposal effectively reintroduces this concept by requiring swap dealers to undertake a "best interests" standard of care with respect to activity that, though defined as advisory, is characteristic of typical arm's-length commercial relationships. This could effectively cause a swap dealer to be a fiduciary to a Special Entity under other legal standards, which would be an inappropriate result and could limit or preclude Special Entities' access to swaps. Accordingly, we request that the CFTC revise the "best interests" standard to only require a duty of fair dealing and not import the fiduciary rules of ERISA or other statutes.

The potential characterization of swap dealers and MSPs as ERISA fiduciaries will result in swaps with Special Entities being prohibited transactions under ERISA.

Under current ERISA rules, a party that provides advice to an ERISA fund or account in a manner that meets all the elements of a five-part test is a "fiduciary" under the meaning of ERISA. Under that test, an entity is a fiduciary if it (a) renders advice as to the purchase, sale or value of securities or other property (b) on a regular basis (c) pursuant to a mutual understanding, written or otherwise, (d) that the advice will serve as a primary basis for investment decisions with respect to plan assets and (e) will be individualized to the particular needs of the plan.[17] Where a swap dealer engages in a transaction with an ERISA counterparty, it might be difficult to determine whether the dealer's fulfillment of its duties under the "best interests" requirement of the Proposal would cause it to be deemed to be providing advice to the counterparty under the above ERISA rules, particularly where the dealer has an ongoing trading relationship with the ERISA counterparty.

Recently, the Department of Labor (the "**DOL**") proposed to significantly broaden the scope of the definition of investment advice under ERISA[18] by substituting for the conjunctive five-part test a disjunctive list of characteristics,

[16] Drafts of the Dodd-Frank Act included provisions that would render a swap dealer a fiduciary, but this language was not enacted. H.R. 4173, 111th Cong. § 4s(h)(2)(B) (as amended by Senate, May 20, 2010) ("A swap dealer that provides advice regarding, or offers to enter into, or enters into a swap with a pension plan, endowment, or retirement plan shall have a fiduciary duty…").

[17] 29 C.F.R. § 2510.3–21.

[18] The DOL proposed changes to the definition of the term "Fiduciary" under ERISA, 75 Fed. Reg. 65263 (Oct. 22, 2010)("**DOL Proposal**").

any of which would constitute investment advice.[19] The DOL's proposed definition would significantly broaden the types of communications that could constitute investment advice and cause a party to be deemed a fiduciary under ERISA. This would exacerbate the uncertainties in the CFTC Proposal. For example, satisfying the proposed daily mark requirement,[20] which would require swap dealers and MSPs to provide ongoing valuations to their counterparties, would trigger fiduciary status under the DOL's proposal. Furthermore, the DOL's proposed definition includes an exception for advice provided by a party in the context of sales or purchases of securities or other property, provided that the ERISA plan knows, or under the circumstances reasonably should know, that the party is providing the advice in its capacity as an adverse seller or purchaser (the "**DOL Transaction Exception**").[21] However, there remains uncertainty as to whether the DOL Transaction Exception will apply to swap transactions and, if so, whether it will be available in all potential transaction scenarios.

Prohibited Transactions Triggered under ERISA

If a swap dealer were deemed an ERISA fiduciary, it would be required to adhere to ERISA's fiduciary standards.[22] Most significantly, under the prohibited transaction rules of ERISA and parallel provisions of the federal tax code, fiduciaries are deemed disqualified persons[23] that are prohibited from entering into transactions with an ERISA plan due to conflicts of interest. If a swap dealer were deemed to be an ERISA fiduciary, any swap transaction it enters into on a principal basis with a Special Entity would be a prohibited transaction under ERISA.

When a prohibited transaction occurs, the fiduciary must reverse the transaction when detected and put the plan in the same position it would be in had the transaction not occurred.[24] Both the investment adviser to the ERISA plan, as well as the swap dealer, could be subject to liability if the swap dealer is deemed to be an ERISA fiduciary. Parties that enter into prohibited transactions are

[19] DOL Proposal § 2510.3–21(c)(1)(i).

[20] Proposal § 23.431(c), at 80659.

[21] DOL Proposal § 2510.3–21(c)(2)(i).

[22] Under ERISA, fiduciaries are prohibited from dealing with the assets of a plan in their own interest or for their own account. 29 U.S.C. § 1106(b)(1). ERISA fiduciaries are also prohibited from acting in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan. 29 U.S.C. § 1006(b)(1)–(2). The ERISA fiduciary duty of loyalty prohibits a fiduciary from acting with respect to a plan in situations where it has a conflict of interest. A fiduciary that breaches these duties must restore any losses incurred by the plan or disgorge any profits earned as a result of the breach. 29 U.S.C. § 1109(a).

[23] 26 U.S.C. § 4975(e)(2).

[24] 29 U.S.C. § 1109(a).

subject to a 15% excise tax for every full or partial calendar year that the transaction is outstanding.[25] If a prohibited transaction is not corrected promptly upon enforcement action by the DOL or the Internal Revenue Service, the tax is raised to 100% of the amount involved.[26] This substantial penalty would serve as a serious disincentive for swap dealers and MSPs from engaging in swap transactions with Special Entities subject to ERISA.

Legislative Intent

Congress did not intend to categorically prohibit or preclude ERISA funds from entering into swap transactions. One need look no further than section 4s(h) of the Commodity Exchange Act, which contemplates Special Entities entering into swap transactions with swap dealers and MSPs as counterparties. Yet, the very activities that the Proposal requires swap dealers and MSPs to carry out would have the unintended consequence of turning such transactions into prohibited transactions under ERISA. Nor did Congress intend to set up a rulemaking process that would require the DOL to adopt special swaps exceptions in order to avoid problems caused by overbroad CFTC rules. Rather, as evidenced by the legislative history, we believe that Congress must have understood that applying the "best interests" standard to swap dealers in this context is unnecessary, as ERISA already provides extensive protections for investments by ERISA plans and sets forth stringent requirements for ERISA fiduciaries to act in the best interests of an ERISA plan.

Formal Coordination between the CFTC and DOL Necessary

In the Proposal, the CFTC seems to recognize the potential for ERISA fiduciary obligations to arise and cites its "informal" consultation with the DOL to conclude that there is no per se prohibition on swap dealers acting as principals.[27] The AMG respectfully submits, however, that the interplay of the current and newly proposed DOL definitions of fiduciary and the "best interests" provisions of the Proposal *effectively* prohibit swap dealers from transacting as principals with ERISA counterparties.[28] The DOL could modify its newly proposed rules to alleviate this concern.[29] However, the DOL's proposed rules have provoked

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[25] 26 U.S.C. § 4975(a).

[26] 26 U.S.C. § 4975(b).

[27] Proposal § 23.450(a)(2), at 80660.

[28] The DOL's fiduciary definition is a functional one. The DOL, however, may clarify that ERISA fiduciaries will not include swap dealers and MSPs.

[29] For example, the exception could include a carve out providing that (1) when a swap dealer or MSP acts as an advisor under the CFTC Proposal, it shall have no impact on whether the swap dealer or MSP is a fiduciary under ERISA and (2) a swap dealer or MSP will not be a fiduciary under ERISA solely by virtue of fulfilling its duties under the CFTC Proposal.

considerable debate. It is unclear whether the DOL will move forward with these proposed rules and, if so, whether it will be able to coordinate these rules with the CFTC's rulemaking.

Given the significant potential financial consequences to swap dealers, MSPs, asset managers and ERISA plans, the AMG believes the CFTC and the DOL must undertake formal coordination of their rulemakings. The CFTC and the DOL should not finalize either the CFTC's business conduct standards or the DOL's fiduciary regulation until they are harmonized in a manner that does not result in swap dealer and MSP counterparties to ERISA plans being deemed fiduciaries under ERISA. At a minimum, the CFTC should request that the DOL issue guidance in the form of an interpretive bulletin clarifying that compliance with the CFTC business conduct standards does not trigger fiduciary status under ERISA or otherwise implicate prohibited transactions. Such coordination would be consistent with President Barack Obama's recent Executive Order, in which he requested that federal agencies undertake greater coordination to avoid redundant, inconsistent or overlapping regulations.[30]

The Proposal would introduce unfair burdens and risks on investment advisers for Special Entities and would result in execution delays to the detriment of Special Entities.

The AMG believes that the Proposal would introduce unfair burdens and risks on investment advisers for Special Entities in several ways. First, per-transaction requirements would create execution delays. Second, information gathering and disclosure requirements would create competitive inequalities. Third, the "material business relationship" prohibition would result in harmful unintended consequences to Special Entities.

Delays Associated with Transaction-by-Transaction Disclosure

The requirements relating to transaction-by-transaction disclosure and information gathering are inconsistent with the manner in which investment advisers actually serve their clients. In practice, investment advisers make decisions on behalf of clients without receiving an explicit transaction-by-transaction sign-off from their clients on each transaction entered into. This sign-off requirement would cause delays in the execution of swaps, and such delays could result in subsequent losses to the detriment of Special Entities. Imposing such transaction-by-transaction requirements would therefore create significant burdens for investment advisers and their Special Entity clients in contravention of the Dodd-Frank Act.

[30] Executive Order, "Improving Regulation and Regulatory Review" (Jan. 18, 2011). Although the CFTC is not technically bound by this order, the importance of regulatory coordination described therein seems highly relevant in this instance.

Competitive Inequalities Associated with Information Gathering

The requirement that swap dealers and MSPs assess the adequacy of an investment adviser acting as an independent representative[31] might impose an obligation on swap dealers and MSPs to obtain proprietary information from the investment adviser, including confidential client portfolio information. Among the factors that swap dealers and MSPs must consider in their evaluations of independent representatives are whether an independent representative has sufficient knowledge to evaluate transactions and risks[32] as well as the appropriateness and timeliness of the independent representative's disclosures.[33] The diligence required to make such an assessment could require investment advisers to open their books to swap dealers or MSPs and create competitive inequalities when such information is used by swap dealers or MSPs and their affiliates. Swap dealers already have an information advantage by virtue of entering into both sides of transactions, and the diligence requirements would exacerbate this informational imbalance.

Swap dealers and MSPs would also have access to additional information regarding their counterparties based on sections of the Proposal that are not limited to Special Entities. For example, swap dealers and MSPs would have access to information necessary to, among other things, evaluate a counterparty's previous swaps experience, financial wherewithal and flexibility and trading objectives and purposes under the Proposal's know your counterparty rules.[34] The suitability standards under the Proposal[35] would also permit swap dealers and MSPs to obtain additional information regarding counterparties.[36] Thus, the ability of swap dealers or MSPs to obtain information regarding counterparties would give them negotiating leverage over investment advisers to Special Entities.

One aspect of this shift in negotiating power is the Proposal's requirement that swap dealers and MSPs evaluate the adequacy of an advisor. A swap dealer or MSP should not be allowed to void or terminate a contract based on information provided in connection with the required representations. The CFTC should clarify that a breach of these representations would not provide additional rights, such as early termination, rescission or monetary compensation, to any party to a swap transaction. A swap dealer or MSP should be able to rely on an

[31] Proposal § 23.450(b), at 80660.

[32] Proposal § 23.450(b)(1), at 80660.

[33] Proposal § 23.450(b)(5), at 80660.

[34] Proposal § 23.402(c), at 80657.

[35] Proposal § 23.434, at 80659.

[36] See discussion in SIFMA February 17, 2011 letter, at 25–27.

investment adviser's representation unless the swap dealer or MSP has information to the contrary.

Consequences of the "Material Business Relationship" Prohibition

The Proposal's exceedingly broad definition of "material business relationship"[37] for purposes of the prohibition on such material business relationships between an asset manager and swap dealer or MSP with whom it is transacting would also inappropriately preclude investment advisers from many transactions. Some large investment advisers are affiliated with banks and broker-dealers that would also be, or be affiliated with, registered swap dealers or MSPs. The Proposal would preclude such investment advisers from entering into trades with many swap dealers or MSPs on behalf of their customers.

The "material business relationship" prohibition will have a number of harmful unintended consequences for Special Entities. First, Special Entities will have fewer choices among asset managers and will not be able to use certain asset managers to advise them on swap transactions merely because the asset manager has an unrelated business relationship with swap dealers or MSPs, such as fund distribution. Second, the prohibition will require non-asset-manager fiduciaries to Special Entities to devote resources to evaluating the materiality of relationships between asset managers and dealers when trading in swaps, even when swaps make up a small portion of a Special Entity's portfolio. Third, the Proposal creates a time and resource barrier to entry for Special Entities in swaps trading that does not apply to other market participants. Placing this burden on Special Entities such as pension plans, government entities and endowments would be inappropriate. Finally, Special Entities could be subjected to liability for any determination that a relationship between an investment adviser and a swap dealer or MSP is not a "material business relationship" that is later deemed inaccurate. The negative unintended consequences described above do not translate into protections for Special Entities. Accordingly, the AMG believes that the "material business relationship" restriction should be removed from the final rule. At a minimum, we recommend that the CFTC consider alternative definitions of "independence" that apply more workable standards of ownership in lieu of the proposed "material business relationship" standard.[38]

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[37] The Proposal defines a material business relationship as "any relationship with [a swap dealer or MSP], whether compensatory or otherwise, that reasonably could affect judgment or decision making of the representative, provided however, that material business relationship does not include payment of fees by the [swap dealer or MSP] to the representative at the written direction of the Special Entity for services provided by the representative in connection with the swap executed between the Special Entity and the [swap dealer or MSP]," subject to a one-year look back. Proposal § 23.450(a)(1), at 80660.

[38] For example, since 1984, the DOL has applied a standard of independence under the "QPAM" exemption, which addresses this issue for ERISA plans. Department of Labor, Prohibited Transaction Class Exemption 84-14, as amended. For consistency, we ask the CFTC to
(…continued)

Moreover, the Proposal's requirement that any compensation received over the prior year by the Special Entity's representative from the swap dealer, even if unrelated to swap transactions, be disclosed to the Special Entity and agreed to in writing before a swap transaction may be executed is not workable.[39] Even if such a disclosure requirement could be implemented among dealers, representatives and Special Entities, the process would result in significant delays in execution and increased transaction costs.

A "Look-Through" to Collective Investment Vehicles Would Be Inappropriate.

In the Proposal, the CFTC has requested comments regarding the appropriateness of a "look-through" approach to evaluating whether a collective investment vehicle falls into the category of a Special Entity.[40] The AMG believes that the application of a "look-through" to collective funds is inappropriate. Had Congress intended to define Special Entities to include collective investment vehicles containing a specific ownership interest, it would have included such a requirement in the text of the Dodd-Frank Act.

From a pragmatic standpoint, it would be highly impractical to discharge heightened duties on the broad range of investors that participate in collective investment vehicles.[41] Sifting through the identities and relative assets of each investor in a collective investment vehicle would be unworkable.[42] The complexity associated with collective investment vehicles would make it impracticable to carry out suitability and diligence requirements under the Proposal. Applying the heightened standards for Special Entities to collective investment vehicles would inappropriately subject them and their investors, which could include Special Entities and non–Special Entities, to the increased costs, decreased efficiency and execution delays described above. Therefore, collective investment vehicles should not be subject to the heightened requirements for Special Entities.[43]

(continued…)

apply these long-standing criteria of independence for the purpose of these business conduct standards.

[39] Proposal § 23.450(c)(3), at 80660.

[40] Proposal, at 80649.

[41] SIFMA February 17, 2011 letter, at 29.

[42] For example, as many as 100 or more plans may have assets in a given collective investment vehicle.

[43] A possible exception could be master trusts containing multiple plans of a single employer.

Finally, the AMG believes that a "look-through" provision could ultimately limit Special Entities' non-swap investment options. Collective investment vehicle managers will either limit or prohibit investments by Special Entities to avoid limitations on their swap trading activities. Such managers might also be concerned that other non–Special Entity investors may redeem or not invest their assets if they believe a fund may be subject to restrictions on trading activities due to investments in the fund by Special Entities.[44] Accordingly, no "look-through" should apply.

The Pay-to-Play Provisions Could Adversely Affect Certain Special Entities.

The Proposal prohibits swap dealers and MSPs from entering into swap transactions with municipal entities if they, or one of their covered associates, have made a contribution to an official, including incumbents, candidates and successful candidates for elective office of a municipal entity, within a two-year period.[45] To comply with this prohibition, entities must carefully monitor their personnel's political contributions to ensure that contributions do not exceed the *de minimis* contribution threshold[46] and that they do not violate the two-year bar on entering into swaps or trading strategies following any forbidden contributions.

The Proposal defines "municipal entity" to include "any plan, program or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof."[47] This would trigger heightened requirements for certain state-established plans that are run by third-party investment advisers, such as 529 college savings plans. The heightened compliance requirements imposed upon entities facing those plans and their managers could discourage swap dealers and MSPs from entering into swap transactions with them, drying up liquidity in the swaps market for such plans. Accordingly, we recommend that the CFTC specifically exclude these plans from pay-to-play provisions.

At a minimum, however, the CFTC should create a safe harbor from the pay-to-play provision where a Special Entity is represented by a QF and the QF affirmatively selects the swap dealer. Under these circumstances, investment advisers would select swap dealers or MSPs as counterparties based on the most favorable terms for their Special Entity clients. This safe harbor would protect

[44] We also recommend that the CFTC specify that Special Entities do not include foreign plans, including foreign governmental plans.

[45] Proposal § 23.451(b)(1), at 80661.

[46] The Proposal provides an exception for de minimis contributions by personnel totaling $350 for contributions to candidates for whom he or she may vote and $150 for contributions to candidates for whom he or she may not vote. Proposal § 23.451(b)(2)(i), at 80661.

[47] Proposal § 23.451(a)(3)(ii), at 80661.

municipal entities and their investment advisers by preserving their ability to execute swap transactions.

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The AMG thanks the CFTC for the opportunity to comment on the proposed rulemaking regarding business conduct standards for swap dealers and MSPs under Title VII. The AMG would welcome the opportunity to further discuss our comments with you. Should you have any questions, please do not hesitate to call the undersigned at 212-313-1389.

Respectfully submitted,

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

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