July 11, 2011

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Board of Governors of the
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Mr. Gary K. Van Meter
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Mr. Robert E. Feldman
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Attention: Comments
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Mr. Alfred M. Pollard
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Attention: Comments/RIN 2590–AA45
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Office of the Comptroller of the Currency
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Mr. David A. Stawick
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Re: Comments on Proposed Rules Related to Margin for Uncleared Swaps
Board: Margin and Capital Requirements for Covered Swap Entities [Docket No. R–1415] (RIN 7100 AD74)
FCA: Margin and Capital Requirements for Covered Swap Entities (RIN 3052–AC69)
FDIC: Margin and Capital Requirements for Covered Swap Entities (RIN 3064–AD79)
FHFA: Margin and Capital Requirements for Covered Swap Entities (RIN 2590–AA45)
OCC: Margin and Capital Requirements for Covered Swap Entities [Docket No. OCC–2011–0008] (RIN 1557–AD43)
CFTC: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants (RIN 3038—AC97)

The Asset Management Group (the "**AMG**")[1] of the Securities Industry and Financial Markets Association ("**SIFMA**") appreciates the opportunity to provide the Board of Governors of the Federal Reserve (the "**Board**"), the Farm Credit Administration (the "**FCA**"), the Federal Deposit Insurance Corporation (the "**FDIC**"), the Federal Housing Finance Agency (the "**FHFA**") and the Office of the Comptroller of

[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.

the Currency (the “**OCC**” and, together with the Board, the FCA, the FDIC and the FHFA, the “**Prudential Regulators**”) and the Commodity Futures Trading Commission (the “**CFTC**”)[2] with comments regarding their proposed rules[3] (the “**Proposals**”) relating to margin requirements for uncleared swaps and security-based swaps,[4] as required by Sections 731 and 764 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“**Dodd-Frank**”).

The AMG believes that (i) variation margin requirements for uncleared swaps should be bilateral and, to the extent the Prudential Regulators or the CFTC require covered swap entities (“**CSEs**”) to collect initial margin, they should also require those CSEs to post margin to the counterparty upon the election of such counterparty; (ii) the initial margin calculation methodology should be substantially revised; (iii) CSEs should not be required to collect initial margin from registered investment companies (“**RICs**”), ERISA funds, government benefit plans or foreign pension plans subject to comparable regulation; (iv) the definition of “low-risk financial end user” should be substantially revised and should automatically include RICs, ERISA funds, government benefit plans and foreign pension plans subject to comparable regulation if initial margin is required from these entities; (v) the maximum allowable uncollateralized threshold for initial margin for “low-risk” financial end users should be increased to $100 million, and uncollateralized thresholds for variation margin should be eliminated; (vi) variation margin should be collected and posted by both swap counterparties on a daily basis, though minimum transfer amounts up to $500,000 should be allowed for all parties; (vii) the classes of eligible collateral should be broadened to include high-quality assets beyond those explicitly allowed by the Proposals; (viii) each party to a swap should be provided a sufficient period of time after execution of the swap to collect margin from its counterparty; (ix) parties to swaps entered into prior to the effectiveness of the margin rules should be permitted to include those swaps in post-effective margin calculations only if both parties agree to do so; (x) uncleared margin collection rules should only become effective once submitted margin models have been reviewed, operational requirements for uncleared margin requirements can be met and, if the CFTC and SEC

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[2] To the extent that different regulators’ final rules vary, the AMG would appreciate clarification that a CSE subject to the CFTC’s rules would not become subject to the Prudential Regulators’ rules by virtue of having its swaps guaranteed by a parent or affiliate subject to regulation by a prudential regulator.

[3] Margin and Capital Requirements for Covered Swap Entities, 76 Fed. Reg. 27,564 (May 11, 2011) (to be codified at 12 C.F.R. pts. 45, 237, 324, 624, 1221) (“**Prudential Regulator Proposal**”), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-05-11/pdf/2011-10432.pdf; Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 76 Fed. Reg. 23,732 (Apr. 28, 2011) (to be codified at 17 C.F.R. pt. 23) (“**CFTC Proposal**”), *available at* http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-9598a.pdf.

[4] For brevity, the term “swap” in this letter refers to both “swaps” and “security-based swaps” when used in reference to the Prudential Regulator Proposal and related statutory requirements. Similarly, the terms “swap dealer” and “major swap participant” will be used to include “security-based swap dealer” and “major security-based swap participant” where appropriate for the context.

phase in swap clearing requirements by category of swap, clearing is required for such category of swap; and (xi) foreign CSEs should not be subject to duplicative and potentially inconsistent margin requirements. Further detail on each of these positions is provided below.

Variation margin requirements for uncleared swaps should be bilateral. To the extent the Prudential Regulators or the CFTC require CSEs to collect initial margin, they should also require those CSEs to post margin to the counterparty upon the election of such counterparty.

The AMG believes that variation margin requirements for uncleared swaps should be bilateral and that, to the extent the Prudential Regulators or the CFTC require CSEs to collect initial margin, they should also require those CSEs to post margin to the counterparty upon the election of such counterparty. Mitigation of credit risk is, in many cases, as important to financial end users as it is to their CSE counterparties. To the extent margin is needed to protect the financial system from cascading cross-defaults, it is important that the obligations of both sides be secured. If financial end users of swaps, such as AMG members, are not allowed to collect margin from CSEs, the failure of even one CSE could cause ripple effects throughout the financial system. However, we believe financial end users should be able to elect whether to collect initial margin from their CSE counterparties as, in some cases, doing so might be operationally difficult or make swaps unnecessarily costly.

Bilateral margin requirements are consistent with significant Dodd-Frank goals. First, Dodd-Frank requires that, in order "to offset the greater risk to the swap dealer or major swap participant and the financial system arising from the use of swaps that are not cleared," the margin rules adopted by regulators must "be appropriate for the risk associated with the non-cleared swaps held as a swap dealer or major swap participant."[5] In the cleared context, both financial end users and CSEs post margin to the clearinghouse. It seems illogical, and contrary to the intent of Dodd-Frank, that more overall collateral would be required to be maintained in the case of cleared swaps than uncleared swaps, yet this would be the result if CSEs were not required to post margin for uncleared swaps. Second, Dodd-Frank imposes swap clearing requirements to protect the financial system and decrease counterparty risk. Unilateral margin requirements could undermine this objective of incentivizing market participants to use cleared swaps, as it would then be in the CSE's financial interest to enter into uncleared swaps for which, in contrast to cleared swaps, they would not be required to post margin. Finally, bilateral margin requirements are consistent with Congress' goal of reducing the systemic risk posed by CSEs, a goal evidenced by the fact that the statutory definition of major swap participant ("**MSP**") in Dodd-Frank includes entities that "create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets."[6] The nearly identical regulation of swap dealers and MSPs indicates that the same concerns apply to all CSEs.

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[5] Commodity Exchange Act § 4s(e)(3)(A) (as amended by Section 731 of Dodd-Frank).

[6] Commodity Exchange Act § 1a(33)(A)(ii) (as amended by Section 721 of Dodd-Frank).

The AMG does not believe that making margin requirements bilateral need cause capital to flow from regulated entities to unregulated entities. Variation margin is meant to cover exposure that one side has to the other and, if the secured party becomes insolvent, its counterparty can set off the variation margin against such exposure. In that sense, variation margin represents the functional equivalent of making payments for accrued, but unrealized, losses that arise from such exposure. This function is reflected in the fact that most clients advised by members of the AMG currently receive variation margin from their swap dealer counterparties. However, as explained in an AMG letter to the CFTC, the AMG would be supportive of a provision in the final rules allowing a financial end user that posts variation margin to elect to have its variation margin held at an independent, third-party custodian.[7]

Dodd-Frank provides a CSE's counterparty the right to to elect to have its initial margin for uncleared swaps segregated at an independent, third-party custodian.[8] If CSEs are required to post margin to their financial end user counterparties, the AMG would support a provision allowing the CSE also to elect to have the initial margin it posts segregated at an independent, third-party custodian.[9]

The initial margin calculation methodology in the Proposals should be substantially revised.

The AMG believes that the initial margin calculation methodology in the Proposals should be substantially revised. Risk offsets should be allowed for both models and grids. Where models are not used, initial margin should be calculated based on the Prudential Regulator Proposal's grid rather than the CFTC's alternative approach. If initial margin is only required from the financial end user counterparty to a swap, that counterparty should be able to choose whether a model or a regulator-approved grid is used to calculate the initial margin on that swap, as both methods will meet the regulators' standards for sufficient margin collection. If both parties post initial margin, they should jointly agree on whether a model or grid is used. Where models are used, they should be independently verifiable and required liquidation time horizons should be shortened. Finally, the grid currently proposed by the Prudential Regulators should be improved as suggested below.

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[7] Letter from Timothy W. Cameron, Managing Director, SIFMA AMG, to David A. Stawick, Secretary, CFTC (Feb. 1, 2011).

[8] Commodity Exchange Act § 4s(l) (as amended by Section 724 of Dodd-Frank).

[9] Both Proposals currently contain provisions requiring, under certain circumstances, an independent third-party custodian holding margin for uncleared swaps to be located in a jurisdiction that applies the same insolvency regime to the custodian as to the CSE for that swap. CFTC Proposal at 23,748, § 23.158(a)(5); Prudential Regulator Proposal at 27,590, § __.7(d). The AMG does not believe that these provisions are meant to apply to swaps between financial end users and CSEs, but would be opposed to any such requirement given the tri-party collateral arrangements that clients of AMG members currently have in place.

A. The AMG believes that initial margin calculations should allow for risk offsets across instruments, asset classes and master netting agreements.

The AMG believes that models and grids for calculating initial margin should allow for risk offsets across instruments (*e.g.*, swaps, futures, other derivatives and cash positions). Currently, the Prudential Regulator Proposal permits an internal initial margin model to include risk offsets for swaps within, but not across, four broad asset class risk categories under the same master agreement.[10] The Prudential Regulators' grid does not allow for any risk offsets.[11] Under the CFTC Proposal, risk offsets under an initial margin model seem to be allowed provided they "have a sound theoretical basis and significant empirical support."[12] The CFTC's proposed alternative calculation only allows for risk offsets across the currency and interest rate asset class under the same master agreement,[13] and does not recognize risk offsets across a broader range of asset classes and instruments or between trades under different master netting agreements.

The AMG believes that the calculation of initial margin should, to the extent legally enforceable, reflect the assessment of risk across asset classes within a trading portfolio. Common trading practices recognize the risk-reducing relationship between cash positions and derivatives on related underliers or a combination of derivative types, each targeting a different component of the individual risks presented by the cash position. The calculation of initial margin should give full recognition to the risk-mitigating benefits arising from related trades across derivatives risk categories as well as across related derivatives and cash positions.

The ability to enter into transactions with risk offsets has long been recognized as an effective means to reduce or eliminate risks posed by any particular transaction. Margin requirements imposed on counterparties should reflect this mitigation of risk. Failing to allow for risk offsets will require financial end users to pledge a greater quantity of capital as margin rather than using it to make new investments, thus reducing those financial end users' overall returns.

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[10] Prudential Regulator Proposal at 27,590, § __.8(d)(3).

[11] Prudential Regulator Proposal at 27,573 ("Appendix A's standardized table is based upon gross notional amounts and recognizes no offsetting exposures, diversification, or other hedging benefits.").

[12] CFTC Proposal at 23,746, § 23.155(b)(2)(v). The AMG requests that the CFTC clarify that risk offsets can be used across all instruments, asset classes and netting agreements.

[13] CFTC Proposal at 23,747, § 23.155(c)(2)(i).

B. The AMG believes that, where models are not used, initial margin calculation should be based on the Prudential Regulator Proposal's grid rather than the CFTC's alternative approach.

The AMG believes that the Prudential Regulators' grid-based approach is superior to the CFTC's alternative calculation option. The CFTC's requirement that the CSE identify an analogous cleared swap or futures contract[14] would be impractical and would result in uncertainty as to whether a CSE's margin calculations are in compliance with regulatory standards. Furthermore, any difference between the Prudential Regulators' and the CFTC's approaches to margin calculation methodology could result in economic disparities and could encourage a financial end user to select a CSE counterparty based primarily on regulatory jurisdiction rather than the CSE's creditworthiness and pricing. The Prudential Regulators' grid, which expresses initial margin requirements as a percentage of the swap notional amount, depending on asset class,[15] has the advantage of relative simplicity and predictability, as counterparties can calculate notional amounts quickly and accurately. Nevertheless, as discussed further in this letter, the AMG believes that improvements, including risk offsets within each asset class and across all asset classes, must be made to the Prudential Regulators' proposed grid.

C. If initial margin is only posted by the financial end user counterparty to a swap, that counterparty should be able to choose whether a model or a regulator-approved grid is used to calculate the initial margin on that swap. If both parties post initial margin, they should jointly agree whether a model or grid is used.

The AMG believes that, to the extent only the financial end user counterparty to a swap posts initial margin for that swap, that financial end user should be able to choose whether initial margin requirements are calculated using a model or regulator-approved grid. As currently written, the Proposals allow a CSE to choose whether initial margin requirements for their counterparties are calculated according to approved initial margin models or according to a specified alternative method.[16] The AMG believes that this option should be at the election of the CSE's counterparty, who is the one required to post the calculated amount. Otherwise, the AMG believes that a unilateral CSE election may be used to maximize the amount of margin collected from financial end users in all cases, regardless of the risk posed. If initial margin is posted by both counterparties, the

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[14] Under the CFTC's alternative method, a CSE would first identify the cleared swap in the same asset class "for which the terms and conditions most closely approximate the terms and conditions of the uncleared swap," or, if no such analogous cleared swap exists, the most closely analogous futures contract. The CSE would then multiply the margin required on the analogous cleared swap by 2 or the analogous futures contract by 4.4 to arrive at the initial margin requirement for the uncleared swap. CFTC Proposal at 23,747, § 23.155(c)(1).

[15] Prudential Regulator Proposal at 27,592, Appendix A.

[16] CFTC Proposal at 23,746, § 23.155(a)(2); Prudential Regulator Proposal at 27,587, § __.2(k).

AMG believes that this option should be made by both counterparties together and should apply to both counterparties.

D. Initial margin models must allow financial end users to independently verify the calculation of initial margin.

The AMG believes that initial margin models, whether CSE models, clearinghouse models or vendor models, must allow financial end users to independently verify the calculation of initial margin. Otherwise, financial end users will face a "black box" that will not allow them to predict their margin requirements. To this end, the AMG supports the provision in the CFTC Proposal that would require all approved models to be "stated with sufficient specificity to allow the counterparty, the Commission, and any applicable prudential regulator to calculate the margin requirement independently"[17] and strongly suggests that the CFTC extend the requirement to clearinghouse and vendor models and that the Prudential Regulators incorporate the same requirement into their rule. This suggestion is consistent with the CFTC's requirement for independently verifiable models for swap valuation in its proposed rule on swap counterparty documentation.[18] The AMG also requests that the CFTC and Prudential Regulators clarify in their respective rules that the use of a model will not in any respect impair the parties' recourse under any contractual dispute resolution provision in the relevant transaction documentation or master netting agreement and will not affect the setoff or netting rights under such agreements.

E. Liquidation time horizons for initial margin models are unnecessarily long and should be shortened.

The AMG believes that the liquidation time horizons for initial margin models are unnecessarily long and should be shortened. The CFTC Proposal requires that initial margin model calculations cover at least 99% of price changes over at least a ten-day liquidation time horizon, [19] while the Prudential Regulator Proposal requires that initial margin model calculations cover at least 99% of price changes over the shorter of a ten-day liquidation time horizon and the remaining maturity of the swap.[20] This time horizon is significantly longer than the one-day time horizon the CFTC has proposed for cleared

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[17] CFTC Proposal at 23,746, § 23.155(b)(2)(viii).

[18] "[T]o promote the 'timely and accurate … valuation of all swaps' under § 4s(i)(1) of the CEA, proposed § 23.504(b)(4) would require that the swap trading documentation include written documentation in which the parties agree on the methods, procedures, rules and inputs for determining the value of each swap at any time from execution to the termination, maturity, or expiration of the swap. The agreed methods, procedures, rules and inputs would be required to constitute a complete and independently verifiable methodology for valuing each swap entered into between the parties." Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 76 Fed. Reg. 6715, 6719 (Feb. 8, 2011) (to be codified at 17 C.F.R. pt. 23), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-02-08/pdf/2011-2643.pdf.

[19] *See* CFTC Proposal at 23,746, § 23.155(b)(2)(vi).

[20] *See* Prudential Regulator Proposal at 27,590, § __.8(d)(1).

swaps traded on a designated contract market[21] and the five-day time horizon the CFTC has proposed for other cleared swaps.[22] The AMG believes, as stated in a recent comment letter to the CFTC,[23] that a one-day liquidation period for cleared swaps executed on either a designated contract market or swap execution facility and a two-day liquidation period for all other cleared swaps is sufficient to allow close-out, offset or other risk mitigation, particularly in light of the relatively high 99% confidence interval required under the Proposals. Similarly, the AMG believes that a three- to five-day period is sufficient to allow close-out, offset or other risk mitigation for uncleared swaps and, accordingly, the liquidation time horizon for uncleared swap margin calculations should be no more than five days. We understand that the ten-day liquidation time horizon is meant to provide sufficient time for the non-defaulting party to replace its swap. However, the AMG believes that whether or not a swap is replaced (as opposed to seeking other risk-mitigation hedging transactions) is a business decision that should not be incorporated into rulemaking.[24]

F. Improvements should be made to the Prudential Regulators' proposed grid.

The AMG believes that certain improvements should be made to the Prudential Regulators' proposed grid. While it would be preferable to include an expanded number of asset classes to focus on precise, rather than generic, categories of swaps, it is impractical to attempt to provide specific prescriptions with respect to each of the almost unlimited number of swaps products. While a more finely calibrated grid would be more risk-sensitive than one in which the categories are overly broad, the AMG expects that the majority of trading relationships will be governed by approved model-based calculations, with the grid only relevant when chosen by the parties to a swap.

Finally, the AMG believes that the CFTC and Prudential Regulators should clarify that no initial margin requirements will apply to a party that has no additional payment obligations under a swap that has not yet matured. For example, no initial margin requirements should apply to the owner of an option who has fully paid the related premium.[25] Because initial margin is meant to serve as a buffer against default of

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[21] Risk Management Requirements for Derivatives Clearing Organizations, 76 Fed. Reg. 3698, 3720 § 39.13(g)(2)(ii) (Jan. 20, 2011) (to be codified at 17 C.F.R. pt. 39), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-01-20/pdf/2011-690.pdf.

[22] *Id.*

[23] Letter from Timothy W. Cameron, Managing Director, SIFMA AMG, to David A. Stawick, Secretary, CFTC (June 3, 2011).

[24] Similarly, we believe that the historical period used to calibrate initial margin models should be agreed upon by the counterparties to the swap. Currently, the Prudential Regulator Proposal and the CFTC Proposal require internal initial margin models to be calibrated using at least one year of historic price data and to incorporate a period of "significant financial stress" that is appropriate for the swaps to which the models are applied. Prudential Regulator Proposal at 27,591, § __.8(d)(11); CFTC Proposal at 23,746, § 23.155(b)(2)(iv).

[25] *See* Prudential Regulator Proposal at 27,573 (requesting comment on whether "swap or security-based swap positions that pose no counterparty risk to the covered swap entity, such as a
(…continued)

the posting party for payment obligations, it is unnecessary when no such obligations do or can exist.

CSEs should not be required to collect initial margin from RICs, ERISA funds, government benefit plans or foreign pension plans.

The AMG believes that CSEs should not be required to collect initial margin from RICs, ERISA funds, government benefit plans and foreign pension plans, as these entities are already subject to comprehensive regulation that significantly mitigates any risk that their swap positions create. Consistent with Dodd-Frank's direction that margin requirements should "be appropriate for the risk associated with the non-cleared swaps held as a swap dealer or major swap participant,"[26] and the Prudential Regulators' statement that the proposed margin requirements for uncleared swaps were intended to limit systemic risk by "reduc[ing] the ability of firms to take on excessive risks through swaps without sufficient financial resources to make good on their contracts,"[27] these highly creditworthy counterparties should not be required to post initial margin as a buffer above and beyond the daily movement of variation margin.

RICs are subject to a number of important regulatory requirements that minimize their risk profile as swap counterparties. Under longstanding interpretations of the Securities and Exchange Commission ("**SEC**") and the staff of the SEC's Division of Investment Management, instruments that create explicit or implicit leverage are deemed prohibited as the issuance of a senior security, unless the RIC (i) segregates or earmarks cash, liquid securities or other liquid assets on its books at its custodian in an amount that, together with amounts deposited as margin, is at least equal to the fund's obligation under such instrument, and marks to market daily, or (ii) holds an offsetting position.[28] This requirement has the effect of limiting the leverage that a RIC can undertake via swaps. RICs are also subject to significant requirements and restrictions relating to their investments, capital structure and governance, including board oversight; counterparty liquidity and diversification requirements; compliance oversight; and disclosure, valuation and reporting requirements. Moreover, RICs are required to calculate and publish their net asset value and must disclose substantial information regarding their investment strategies to the SEC. Finally, RICs' boards of trustees must adopt substantial compliance programs. These regulatory requirements make RICs very low-risk counterparties to swap transactions.

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sold call option with the full premium paid at inception of the trade, [should] be excluded from the initial margin calculation.").

[26] Commodity Exchange Act § 4s(e)(3)(A) (as amended by Section 731 of Dodd-Frank).

[27] Prudential Regulator Proposal at 27,567.

[28] *See* Investment Company Act of 1940 § 18(f); *see also* Securities Trading Practices of Registered Investment Companies, Investment Company Act Release No. 10666 (Apr. 18, 1979) 44 Fed. Reg. 25,128 (Apr. 27, 1979); Merrill Lynch Asset Management, L.P., SEC No-Action Letter, 1996 WL 429027 (July 2, 1996); Dreyfus Strategic Investing and Dreyfus Strategic Income, SEC No-Action Letter, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 48,525 (June 22, 1987).

ERISA funds face a similarly comprehensive regulatory regime that makes them minimally risky swap counterparties. ERISA funds must be prudently diversified. Plan fiduciaries must act solely in the interest of the plan's participants and beneficiaries with the care, skill, prudence and diligence that a prudent person familiar with such matters would use.[29] ERISA plans must be minimally leveraged, must have their assets held in trust,[30] must disclose their holdings annually to the Department of Labor ("**DOL**")[31] and must meet stringent funding requirements under the Pension Protection Act of 2006. Investment managers of ERISA funds are subject to stringent regulations governing fiduciary duties and standards of care.[32] There is no provision under any law for ERISA plans to file for bankruptcy or reorganization to avoid their financial obligations to counterparties, and the filing of bankruptcy by an ERISA plan sponsor or the involuntary termination of the plan does not relieve a plan of its financial obligations to counterparties. The historical stability of ERISA funds is demonstrated by the fact that these funds have met their swap obligations to dealers despite every significant financial event since the adoption of ERISA in 1974. With this comprehensive regime in mind, the CFTC has relied on the pervasive regulation of ERISA plans and plan fiduciaries as a reason that it does not need to regulate these plans and Congress exempted pension trusts from SEC registration and regulation of "investment companies."[33] As a result, ERISA plans are minimally risky swap counterparties. While government benefit plans sponsored by U.S. federal, state and local governments are not subject to ERISA, they are subject to many of the same requirements and constraints under other applicable rules and, as a result, should be treated the same as ERISA plans.

Foreign pension plans are, in many cases, subject to comparable oversight and should therefore also be exempt from initial margin requirements. For example, European Union ("**EU**") pension funds are subject to extensive regulatory oversight pursuant to Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement (the "**IORP Directive**"),[34] as well as the pension acts and associated regulations of each EU Member State. For example, under Article 18 of the IORP Directive, EU pension plan managers have fiduciary obligations to plan beneficiaries[35] and generally must invest according to the "prudent investor rule."[36] More

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[29] ERISA § 404(a)(1)(B).

[30] *Id.* at § 403(a).

[31] *See* Department of Labor Form 5500.

[32] *See* ERISA § 3(38) (describing general requirements for investment managers); *id.* at § 404(a) (detailing investment managers' fiduciary standards); *id.* at § 405 (establishing co-fiduciary liability); *id.* at § 409 (establishing fiduciary liability).

[33] Investment Company Act of 1940 § 3(c)(11).

[34] Council Directive 2003/41/EC, 2003 O.J. (L 235) 10.

[35] *Id.*, art. 18(1)(a), at 18.

[36] *Id.*, art. 18(1), at 18.

specifically, the IORP Directive prescribes that investments should be properly diversified[37] and predominantly invested on regulated markets.[38] Moreover, pension plans are prohibited from borrowing or acting as guarantor on behalf of third parties.[39] With respect to derivatives, Article 18(1)(d) of the IORP Directive restricts EU pension funds from using OTC derivatives for any purpose other than to manage risks associated with their long-term liabilities.[40] In addition, Article 18(1)(d) only permits derivative transactions "insofar as they contribute to a reduction of investment risks or facilitate efficient portfolio management," and it further requires EU pension plan managers to "avoid excessive risk exposure to a single counterparty and to other derivative operations."[41] In addition to the requirements of the IORP Directive, EU pension funds are further subject to Directive 2004/39/EC on markets in financial instruments.[42]

The definition of "low-risk financial end user" should be substantially revised.

The definition of "low-risk financial end user" should be substantially revised. Both Proposals require that CSEs collect initial and variation margin from financial end users but distinguish between "high-risk"[43] financial end users, who cannot benefit from an uncollateralized threshold, and "low-risk" financial end users, who can have an uncollateralized threshold.[44] Under the Proposals, an entity would qualify for treatment as a low-risk financial end user only if it (1) "does not have significant swaps exposure;" (2) "predominantly uses swaps or security-based swaps to hedge or mitigate the risks of its business activities;" and (3) "is subject to capital requirements established by a prudential regulator or state insurance regulator."[45]

The AMG does not believe that these factors appropriately distinguish between low-risk and high-risk financial end users for the purpose of setting initial margin thresholds as required by the statutory mandate to set uncleared margin requirements

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[37] *Id.*, art. 18(1)(e)–(f), at 19.

[38] *Id.*, art. 18(1)(c), at 19.

[39] *Id.*, art 18(2), at 19.

[40] *Id.*, art. 18(1)(d), at 19.

[41] *Id.*

[42] Council Directive 2004/39/EC, 2004 O.J. (L 145) 1.

[43] While the CFTC Proposal does not use the "low-risk" and "high-risk" terminology, the same distinction is made in that Proposal. For simplicity, we use the "low-risk" and "high-risk" terms in this letter to refer to the distinction between types of financial end users, and the resulting margin requirements, made by both the Prudential Regulators and the CFTC.

[44] *See* Prudential Regulator Proposal at 27,587, 27,588, §§ __.2(m), (bb) (establishing initial and variation margin thresholds for low-risk financial end users).

[45] CFTC Proposal at 23,745, § 23.153(c)(1); Prudential Regulator Proposal at 27,587, § __.2(n).

"appropriate for the risk associated with the non-cleared swaps held as a swap dealer or major swap participant."[46] Initial margin for uncleared swaps serves as a buffer against counterparty default and, as a result, should depend on counterparty credit risk.

To better align the "high-risk" and "low-risk" categories with appropriate initial margin thresholds, the AMG suggests the following changes to the categorization.

A. Any financial end user that either does not have "significant swap exposure" or is minimally leveraged relative to net assets should be considered a "low-risk financial end user."

The AMG believes that any financial end user that either does not have "significant swap exposure" or is minimally leveraged relative to net assets should be considered a "low-risk financial end user." Such a test would capture the risk that the entity poses to its counterparty better than the current definition of "low-risk financial end user."

The first prong of the proposed "low-risk" definition looks to the size of a financial end user's swap positions as a direct proxy for the risk the financial entity poses to its counterparties. Under this first prong, a financial end user cannot be "low-risk" if it has "significant swaps exposure," defined in the Proposals as half of the threshold that would make a person an MSP under the second prong of the joint CFTC and SEC proposed definition of "major swap participant."[47] This exposure is merely an aggregate measure of an entity's swap positions and, by itself, does not necessarily make a financial end user "high-risk."[48] Entities that have very little leverage relative to net assets, regardless of the size of their swap book, are less likely to default if the market moves against their position. Consequently, the AMG believes that "low-risk financial end users" should be defined to include financial end users that either do not have "significant swap exposure" or are minimally leveraged relative to net assets.

The AMG also believes that the "low-risk" definition should not depend on whether the financial end user enters into swaps for hedging purposes as stated under the second prong of the Proposals. In using this criterion, the second prong of the proposed definition places a heavy emphasis on the manner in which an entity uses swaps rather than on the entity's creditworthiness, which is what is relevant to the safety of the CSE

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[46] Commodity Exchange Act § 4s(e)(3)(A) (as amended by Section 731 of Dodd-Frank).

[47] Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant", 75 Fed. Reg. 80,174 (Dec. 21, 2010) (to be codified at 17 C.F.R. pt.240) at 80,215, § 1.3(uuu) (defining "significant counterparty exposure").

[48] As the AMG has commented to the CFTC and SEC, the AMG believes that the MSP definitions should be simplified and clarified. Letter from Timothy W. Cameron, Managing Director, SIFMA AMG, to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Feb.22, 2011). To the extent the same tests are incorporated by reference into the Proposals, we have the same comments for the Proposals.

collecting margin. Under the definition as proposed, a party with poor credit quality that uses swaps primarily for purposes of hedging would be treated as low-risk, but a more creditworthy party that uses swaps primarily for exposure would be treated as high-risk.

Finally, the AMG believes that the "low-risk" definition should not depend on whether the financial end user is subject to capital requirements established by a Prudential Regulator or state insurance regulator.[49] This criterion would exclude the majority of the clients of AMG members, many of whom are subject to regulation by the SEC or the DOL, from the low-risk category with little justification. The recent financial crisis illustrated that there is no particular correlation between firms subject to capital oversight by a Prudential Regulator, many of whom faced financial distress, and those that were not, many of whom (including clients of AMG members) were financially sound. As a result, the AMG believes that this requirement should be removed. If, however, the Prudential Regulators and the CFTC choose to retain this part of the test, the AMG believes that it should be broadened to include not only Prudential Regulators or state insurance regulators, but any regulation that establishes capital or funding requirements or restricts the use of leverage, whether U.S. or foreign, including regulation by the SEC, the DOL and comparable regulators and the foreign regulation of UCITS. To the extent that RICs, ERISA funds, government benefit plans and foreign pension plans subject to comparable regulations are not automatically deemed to be "low-risk" financial end users as requested below, the comprehensive regulation of such entities should be sufficient for purposes of this prong of the test.

B. RICs, ERISA funds, government benefit plans and foreign pension plans subject to comparable regulation should automatically qualify as low-risk financial end users.

If initial margin is required from RICs, ERISA funds, government benefit plans and foreign pension plans subject to comparable regulation, the AMG believes that these entities should automatically qualify as low-risk financial end users. The comprehensive risk regulation applied to RICs, ERISA funds, government benefit plans and foreign pension plans, discussed above, makes these entities de facto "low-risk" counterparties. The AMG believes that these entities simply do not pose significant counterparty risk; in fact, the AMG believes they are among the safest counterparties a CSE could have.

The maximum allowable uncollateralized threshold of initial margin for "low-risk" financial end users should be increased to $100 million and there should be no uncollateralized threshold for variation margin.

Under the Proposals, CSEs would be able to set separate initial and variation margin uncollateralized thresholds for their low-risk financial end user counterparties no greater than the lesser of (i) a specific monetary amount in the range of $15 to $45 million or (ii) a percentage of the CSE's capital in the range of 0.1 to 0.3 percent.[50]

[49] Prudential Regulator Proposal at 27,587, § __.2(n).

[50] CFTC Proposal at 23,745, § 23.153(c); Prudential Regulator Proposal at 27,587-88, §§ __.2(m), (bb).

The AMG believes that these initial margin thresholds are too low if "low-risk" is appropriately defined, as discussed above, to reflect credit risk. Instead, we propose that the maximum uncollateralized threshold for low-risk financial end users be set at $100 million based on feedback from the AMG's members that this test is more appropriate. Because the threshold in question would only be available to financial end users that have already been deemed "low-risk," the AMG believes the appropriate threshold number should be sufficiently high to require the posting of margin only when an otherwise low-risk entity has amassed a large enough potential credit exposure to warrant a risk buffer. Furthermore, the AMG believes that the threshold for initial margin should apply only to amounts that financial end users are required to post to CSEs rather than, under a bilateral margin regime as suggested above, to amounts the CSE is required to post to the financial end user. While CSEs are regularly in the business of extending unsecured credit, financial end users generally are not.

On the other hand, the AMG does not believe that variation margin thresholds are necessary. Variation margin reflects actual swap exposure and, unlike initial margin, is not meant to be an additional cushion in case of counterparty default. Today, both parties to a swap typically post variation margin to each other without thresholds. If margin requirements are bilateral as we suggest, AMG members do not think it is appropriate for financial end user counterparties to be less protected under the final margin rules than many are today.

Variation margin should be collected and posted by both parties on a daily basis, though minimum transfer amounts up to $500,000 should be allowed.

The AMG believes that variation margin should be collected and posted by both parties on a daily basis, whether the financial end user is low-risk or high-risk, and that the minimum transfer amount should be increased to $500,000. Because the AMG does not believe variation margin should be subject to uncollateralized thresholds, the AMG recommends raising the minimum transfer amount from $100,000, as is currently proposed,[51] to $500,000. Increasing the minimum transfer amount to $500,000 will avoid the transaction costs that would otherwise accompany the daily transfer of small amounts of margin.

The classes of eligible collateral should be broadened to include assets beyond those explicitly allowed by the Proposals.

The AMG believes that the classes of eligible collateral should be broadened to include high-quality assets beyond those explicitly allowed by the Proposals. Under the Proposals, only certain types of assets may be collected as initial and variation margin,[52] and third-party custodians would only be able to reinvest initial margin in asset classes

[51] Prudential Regulator Proposal at 27,589, § __.4(c); CFTC Proposal at 23,744, § 23.150.

[52] Prudential Regulator Proposal at 27,589, § __.6; CFTC Proposal at 23,747–48, § 23.157.

that qualify as eligible forms of initial margin.[53] The AMG believes that additional margin asset classes could be allowed for both initial and variation margin that are still liquid enough to facilitate the swift resolution of uncleared swap positions in the case of a counterparty default. Restricting collateral only to certain narrow asset classes may create pressure on financial end users to hold different kinds of assets in reserve from what they normally would, artificially skewing their portfolios, introducing a drag on performance through transaction costs and shifting risk between different markets.[54] It might also increase or decrease demand for certain kinds of assets, including Treasuries, causing volatility in price and yield as market participants buy and sell these assets to meet collateral demands.

In particular, the AMG believes that the eligible forms of both initial and variation margin, and hence the asset classes available for reinvestment by custodians,[55] should include liquid, high-quality assets, including high-quality municipal securities, government-sponsored enterprise securities, certificates of deposit, commercial paper, corporate notes and bonds, general obligations of sovereign nations and interests in money market mutual funds, each denominated in any major currency.[56] The types of collateral allowed by the Proposals are inconsistent with, and much more restrictive than, those allowed by CFTC Rule 1.25,[57] for example by not allowing any segregated collateral to be invested in money market fund shares.[58] For purposes of debt, the determination of what is "high-grade" can be determined using option-adjusted spread ("**OAS**"), which generally measures a debt instrument's risk premium over benchmark rates covering a variety of risks and net of any embedded options in the instrument. For a particular fixed-income instrument, the OAS reflects the credit and liquidity risk net of any spread due to option features in the instrument and associated option risk. Because OAS can be calculated in a consistent manner for any fixed-income instrument relative to its benchmark rates, this method allows for comparison of fixed-income instruments

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[53] Prudential Regulator Proposal at 27,589-90, § __.7(c); CFTC Proposal at 23,748, § 23.158(b)(1)(iii).

[54] The AMG is particularly concerned about this issue for some of its clients that primarily hold assets that are not considered eligible collateral under the Proposals, such as equity funds, real estate funds and emerging market debt funds.

[55] While we understand that the considerations surrounding eligible forms of margin and the asset classes available for reinvestment by custodians differ, we treat them together for the purposes of this section because they are so treated in the Proposals.

[56] In addition, the AMG believes that parties should be permitted to bilaterally agree to include other assets typically posted as collateral to OTC swaps, subject to appropriate haircuts, as long as the minimum margin requirements to be established under the Proposals are met.

[57] CFTC Rule 1.25 includes regulations involving permitted investment of customer funds. *See* 17 CFR § 1.25 ("Investment of customer funds").

[58] However, the AMG believes, as noted to the CFTC in our February 1 letter, that the classes of assets for which investment is permissible under Rule 1.25 are themselves too narrow. *See* Letter from Timothy W. Cameron, Managing Director, SIFMA AMG, to David A. Stawick, Secretary, CFTC (Feb. 1, 2011).

across asset classes. The threshold for what constitutes a “high-grade” fixed-income instrument can be determined by setting a threshold OAS that is calculated in accordance with an approved method.

Finally, the AMG believes that the same assets should qualify as eligible margin for both initial and variation margin. In particular, the AMG believes that debt guaranteed by the U.S. government should qualify as variation margin, not just initial margin.

Each party to a swap should be provided a sufficient period of time after execution of the swap to collect margin from its counterparty.

The AMG believes that each party to a swap should be provided a sufficient period of time after execution of the swap to collect margin from its counterparty. The Proposals require that initial margin be collected from financial end user counterparties on or before the date the swap is entered into.[59] The Prudential Regulator Proposal requires that variation margin payments start on the day the swap is executed[60] while the CFTC Proposal requires that variation margin payments begin on the business day after the swap is executed.[61] The AMG believes that this timing, which requires pre-funding of margin or nearly simultaneous swap execution and posting of margin, does not reflect the operational realities of the trading, payment and collateral transfer processes. These processes are far more complex for swaps than for the futures contracts upon which these timing proposals seem to be modeled.

The AMG believes that margin calls for a swap executed on date *T* should not be required until *T + 1*, with the margin not required to be posted until *T + 2*.[62] Parties should, however, be allowed to exchange margin payments prior to these deadlines if they agree to do so. Often, a swap trade executed on *T* is recorded in systems on *T*, although (as is often in the case of asset managers) there may be a delay due to the need to allocate block trades among accounts. The trade executed on *T* is typically not reflected in the portfolio for margin purposes until *T + 1*. The mark-to-market for the trade, used to calculate variation margin payments on *T + 1*, is struck as of the close of business on *T* through an overnight batch process. Margin calls are then generally made in the morning on *T + 1*, and delivery is required by *T + 2*. There must be at least one day between when a margin call is made and when the margin is posted because custodian banks have cutoffs for same-day delivery, some as early as 10:00 a.m. Our suggested timing is consistent with these operational realities and with the existing ISDA framework for margining uncleared swaps.

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[59] Prudential Regulator Proposal at 27,588, § __.3(b); CFTC Proposal at 23,745, § 23.153(a).

[60] Prudential Regulator Proposal at 27,589, § __.4(a).

[61] CFTC Proposal at 23,745, § 23.153(b).

[62] If a margin call is not made until the afternoon of *T + 1*, the posting party should be permitted an additional day (*i.e.*, until *T + 3*) to post the margin.

The need for additional time is especially critical when financial end users in the United States enter into swaps with counterparties in countries, such as Japan and Australia, whose business days have very little overlap with theirs or their custodians' because of time-zone differences. Many of the credit support annexes commonly agreed upon by financial end users and their swap counterparties already take these operational requirements and timing concerns into account.

These timing requirements should not apply when the counterparties to a swap have a *bona fide* dispute over margin calls. ISDA Master Agreements typically provide for dispute rights, under which swap counterparties verify that margin calls are for an expected amount and will contest any margin call with which they disagree while paying the agreed-to sum.[63] Resolving these disputes takes time, and counterparties should not be considered in violation of the Prudential Regulators' or CFTC's rules for not posting the full amount of margin during the pendency of the dispute.

Parties to swaps entered into prior to the effectiveness of the margin rules should be permitted to include those swaps in post-effective margin calculations only if both parties agree to do so.

The AMG believes that parties to swaps entered into prior to the effectiveness of the margin rules should be permitted to include those swaps in post-effective margin calculations only if both parties agree to do so. For each qualifying master netting agreement under which swaps are entered into both before the effective date of the final margin rules and once the rules are in effect,[64] the Prudential Regulator Proposal would allow a CSE to choose unilaterally whether to calculate and collect initial and variation margin pursuant to the Prudential Regulator Proposal for all swaps, regardless of date of execution, or only for swaps entered into after the effective date of the margin requirement.[65] As the election belongs solely to the CSE under the current proposal, the AMG believes that it may be used to maximize the amount of margin collected from financial end users in all cases, regardless of the risk posed and contrary to the original business arrangements of the pre-effective date swaps. Therefore, the decision as to whether to include pre-effective swaps in margin calculations should be made mutually between the parties to the swap.

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[63] For example, if a dealer calls for $3 in margin from a mutual fund, and the mutual fund believes the margin call should be for $2, the mutual fund will usually post $2 in margin while disputing the remaining $1.

[64] While the Prudential Regulator Proposal refers to qualifying master netting agreements under which swaps are entered into "before, on, *and* after" the effective date of the rules, Prudential Regulator Proposal at 27,590, § __.8(b) (emphasis added), we believe the Prudential Regulators did not mean to require that a swap is entered into on the exact day that the rules become effective. We ask the Prudential Regulators to confirm in the final rule that this provision applies to a qualifying master netting agreement under which swaps are entered into "before the effective date of the rules and either on or after that date."

[65] Prudential Regulator Proposal at 27,589, § __.4.

Uncleared margin collection rules should only become effective once submitted margin models have been reviewed and operational requirements for uncleared margin requirements can be met. If the CFTC and SEC phase in swap clearing requirements by category of swap, the uncleared margin collection rules for a given swap should not become effective until clearing is required for that category of swap.

The AMG believes that uncleared margin rules should only become effective once submitted margin models have been reviewed and operational requirements for uncleared margin requirements can be met. If clearing is required before all pending internal models are reviewed by the Prudential Regulators, counterparties to CSEs whose models have been submitted but are awaiting approval by the appropriate regulator will be forced to post initial margin as calculated under the grid approach, which the AMG believes could yield a larger margin requirement. This result would be unnecessarily punitive both to the end user and to the CSE. Accordingly, AMG asks that effectiveness be delayed until all submitted internal models have been reviewed by the Prudential Regulators. In addition, significant operational issues are raised by the Proposals for which sufficient phase-in time is necessary. For example, in order to meet the Proposals' requirements, firms will need to set up tri-party accounts and agreements, develop margin collection and posting systems, develop and test models and develop and test new account systems, to the extent this infrastructure is not already in existence.

In addition, if the CFTC and SEC phase in swap clearing requirements by category of swap, the uncleared margin collection rules for a given swap should not become effective until the regulators have implemented clearing for that category of swap. It will take some time before the complex operational issues related to swap clearing have been worked out and the market has moved to clearing standardized swaps. Subjecting all swaps, including those that the counterparties would like to clear, but cannot, to the margin requirements developed for uncleared swaps is unnecessarily punitive. As a result, we suggest that effectiveness of the uncleared swap margin requirements be delayed until a determination has been made that swap clearing infrastructure is available to allow for a meaningful distinction between those swaps that are cleared and those that are not.[66]

The AMG is concerned that the extraterritorial application of initial margin requirements on foreign CSEs could result in duplicative and potentially inconsistent margin requirements being imposed on U.S. buy-side counterparties.

The AMG believes that financial end users should not be penalized and subject to duplicative and potentially inconsistent initial margin requirements based on their foreign CSE counterparties being subject to initial margin regulation from both their home-

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[66] In addition, if the CFTC and SEC establish different implementation timelines for clearing by different market participants, then the uncleared margin rules should not become effective for a given participant until clearing is mandated for such participant's use of swaps for the particular category. Failing to do so would lead to significant complexities that could be more costly than the initial margin itself. For example, setoff between asset classes and margin models must be tested taking into account which asset classes are cleared and which are not.

country regulators and the CFTC or Prudential Regulators. Instead, the AMG believes that foreign CSEs should be exempt from initial margin collection requirements under the Proposals if subject to home-country margin regulation. Home-country regulators are responsible for the safety and soundness of the entities they supervise and are therefore in a better place to determine what initial margin requirements are necessary to protect the CSE. While we believe that the CFTC should incorporate the Prudential Regulators' exemption from margin requirements for "foreign CSEs" with respect to "foreign non-cleared swaps," we believe that this exemption is too narrow as it does not extend to all foreign CSEs required to collect margin by their home-country prudential regulators.[67]

In addition, the AMG is concerned that application of initial margin requirements to foreign bank CSEs will raise the specter of additional duplicative and potentially inconsistent "safety and soundness" regulation that will discourage foreign bank CSEs from entering into trades with AMG members' U.S. clients.

Finally, we agree with the Institute of International Bankers that "application of Dodd Frank to any such foreign activity could lead to reciprocal extraterritorial application of financial regulation by foreign regulators to U.S. activities" which could result in negative consequences for the swap market and its participants.[68] As Senator Debbie Stabenow and Representative Frank D. Lucas recently expressed in a letter to the Prudential Regulators and the SEC, "extraterritorial application of Dodd-Frank to non-U.S. activities, particularly if it engenders reciprocal foreign regulatory treatment, could deter cross-border participation in markets, fragmenting them and making them less liquid and efficient."[69] To the extent that the Prudential Regulators, CFTC and SEC nevertheless decide that their margin requirements should apply to swaps between U.S. financial end users and foreign CSEs, the AMG believes that the margin requirements of U.S. regulators should be harmonized with those of foreign regulators as much as possible.

In circumstances where appropriate foreign regulation is applicable, practical considerations, as well as principles of comity, should also be considered by the Prudential Regulators and the CFTC. As a threshold matter, foreign regulators are entitled to significant deference in circumstances where they are regulating the activities of locally domiciled entities. That deference is particularly appropriate where the foreign regulatory mandate addresses policy concerns that are comparable to the policy objectives sought to be achieved by the Prudential Regulators and the CFTC.

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[67] Prudential Regulator Proposal at 27,591, § __.9(a).

[68] Letter from Sarah A. Miller, Chief Executive Officer, Institute of International Bankers to representatives of the CFTC and Prudential Regulators in response to the Proposals (July 1, 2011).

[69] Letter from Sen. Debbie Stabenow, Chairman, Senate Comm. on Agriculture, Nutrition and Forestry, and Rep. Frank D. Lucas, Chairman, House Comm. on Agriculture, to the Prudential Regulators and SEC (June 20, 2011).

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The AMG appreciates the opportunity to provide the Prudential Regulators and the CFTC with the foregoing comments and recommendations regarding the Proposals relating to margin requirements for uncleared swaps.

Respectfully submitted,

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