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February 13, 2012

Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available To Trade - RIN 3038–AD18

Dear Mr. Stawick:

The Asset Management Group (the "**AMG**")[1] of the Securities Industry and Financial Markets Association ("**SIFMA**") appreciates the opportunity to provide the Commodity Futures Trading Commission (the "**Commission**") with comments regarding their proposed process for determining that a swap is "made available to trade" ("**MAT**") on a swap execution facility ("**SEF**") or designated contract market ("**DCM**").[2]

As stated in our March 8, 2011 letter on the Commission's proposed SEF rules, we believe that the MAT determination ideally should be made by the Commission, rather than by SEFs, to avoid conflicts of interest that might otherwise arise.[3] We thank the Commission for taking this comment into account, along with similar comments by other market participants, in deciding to repropose the process for a MAT determination to include Commission

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[1] The AMG's members represent U.S. asset management firms whose combined assets under management exceed $20 trillion. The clients of AMG member firms include, among others, registered investment companies, ERISA plans, and state and local government pension funds, many of whom invest in commodity futures, options, and swaps as part of their respective investment strategies.

[2] Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade, 76 Fed. Reg. 77,728 (the "**Proposal**") (amending 17 CFR Parts 37 and 38).

[3] Letter from Timothy W. Cameron, SIFMA AMG, to David A. Stawick, Secretary, Commission, March 8, 2011 at 11.

involvement.[4] However, we continue to believe that it would be more appropriate for the MAT determination to be made by the Commission than by SEFs, DCMs or other market participants. While the Proposal increases Commission involvement by subjecting MAT determinations to Commission review, we believe it would be more appropriate for the determination to be made by the Commission, with input from market participants through an open comment period and the formal recommendation process suggested below.

We understand that the Commission may not have sufficient resources at this time to enable it to make MAT determinations on its own initiative. We, therefore, make several alternative recommendations in this letter. In particular, we believe that:

- the Commission should not equate a swap's readiness for SEF or DCM trading with readiness for clearing;

- the Commission should subject MAT determinations and trade execution requirements to a one-year pilot program and then repropose the procedures for MAT determinations;

- the Commission should require SEFs and DCMs to consider all factors in proposed Regulations 37.10 and 38.12 and require that a minimum number of these factors must be satisfied before a MAT determination can be made. Over time, these required criteria should take the form of specific objective levels that a swap must meet before a MAT determination can be made;

- the Commission or National Futures Association ("**NFA**") should create an independent advisory committee (the "**Advisory Committee**") comprised of swap dealer, buy-side, corporate end-user, DCM and SEF representatives. The Advisory Committee would analyze the results of the pilot study, help develop objective criteria for the key MAT determination factors listed above and review proposed MAT determinations to provide formal recommendations to the Commission;

- there should be a public comment period of at least 30 days prior to all MAT determinations;

- market participants should not be required to comply with trade execution requirements until at least 90 days after a swap is

[4] As the Commission states in the Proposal, "[a] key theme to emerge from the SEF NPRM comments is that the Commission should establish a process for determining when a swap is available to trade that includes greater Commission involvement." Proposal at 77,730.

determined to be MAT. If appropriate, this time period could be reconsidered and decreased after two years have elapsed from the date of finalizing the rule and key operational issues have been resolved;

- the Commission should not have a separate "economically equivalent" determination that imposes trade execution requirements;

- the Commission should require that a SEF or DCM list a swap for at least 90 days before determining that the swap is MAT in order to rectify any operational issues that may arise and ensure that the SEF or DCM is capable of supporting all market activity in that swap;

- a SEF or DCM should not be able to make a blanket determination that a group of swaps is MAT unless the SEF or DCM lists each individual swap in the group and is able to make the MAT determination for every such swap;

- SEFs and DCMs should be required to review their MAT determinations quarterly, rather than annually. If a swap has not met the necessary objective criteria over the previous quarter on any SEF or DCM, it should no longer be considered MAT. Market participants should be allowed to petition the Advisory Committee for a more frequent review and, if warranted, the Advisory Committee should be able to suggest to the Commission that the swap no longer be considered MAT;

- the Commission should clarify that trades may be executed bilaterally when all SEFs or DCMs on which a swap is MAT are closed for maintenance or due to an emergency; and

- the Commission should create or cause to be created a centralized online listing of all MAT swaps and, if applicable, swaps economically equivalent to MAT swaps, before any MAT determinations are made.

The Commission should not equate a swap's readiness for SEF or DCM trading with readiness for clearing.

We believe that Congress intended that the determination that a swap must be traded on a SEF or DCM would be separate from and in addition to the determination that the swap is required to be cleared, as evidenced by the fact that Section 2(h)(8) of the Commodity Exchange Act specifies that a swap must be required to be cleared *and* MAT in order to trigger the trade execution requirement. The Commission has itself recognized that there may be swaps that are required to be cleared but not required to be traded on a SEF or DCM in providing separate real-time reporting windows for cleared swaps that are traded on a SEF or DCM and those that are not.[5]

We also do not believe that all swaps that are sufficiently standardized to justify a clearing mandate will necessarily be sufficiently liquid to justify a requirement that they be traded on a SEF or DCM. A swap's readiness for mandatory clearing requires standardization and the ability to price the swap so that the clearinghouse can risk-manage the swap. Price transparency is necessary to calculate appropriate margin levels. Liquidity is less important to the clearing mandate. On the other hand, readiness for SEF or DCM trading requires a swap to be sufficiently liquid and traded frequently enough, particularly on SEFs or DCMs, to support a viable market. A swap may be standardized enough for mandatory clearing but not liquid enough for SEF or DCM trading. This difference is apparent in the fact that there have been a number of viable swap clearinghouses developed, but the cleared swaps are generally not being executed on SEFs or DCMs.

The Commission should subject MAT determinations and trade execution requirements to a one-year pilot program and then repropose the procedures for MAT determinations.

In light of the many changes to the swaps markets that will come into effect over the next year, and the uncertainty as to the effects those changes will have on liquidity in the swaps markets, we believe that the Commission should subject MAT determinations and trade execution requirements to a one-year pilot program and use the results of that pilot program as the basis to repropose the MAT determination process. This suggestion was made by Lee Olesky of Tradeweb at the Commission's public roundtable on January 30, 2012. We believe that such a pilot program would be the appropriate mechanism to enable the Commission and the market to properly assess the MAT determination process and the effects of trade execution requirements.

Under the pilot program, an initial set of highly liquid swaps, chosen either by the Commission or the Advisory Committee described below, would be determined to be MAT. The effects on the market for those swaps would be studied for a year, during which time no additional MAT determinations would be made. The data obtained from the pilot program, and analysis of that data by the Advisory Committee described below, would be useful in determining the appropriate factors to consider in a MAT determination and the objective values those criteria should take. Armed with this knowledge, the Commission could repropose the procedures and criteria for MAT determinations. The pilot program should be integrated into the general Title VII implementation process, as

[5] Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1182 (amending 17 CFR Part 43).

discussed in the joint trade group letter that SIFMA and others submitted to the Commission submitted on November 4, 2011.[6]

The Commission should require SEFs and DCMs to consider all factors in proposed Regulations 37.10 and 38.12 and require that a minimum number of these factors must be satisfied before a MAT determination can be made. Over time, these required criteria should take the form of specific objective levels that a swap must meet before a MAT determination can be made.

We believe that the factors in proposed Regulations 37.10 and 38.12 provide a useful starting point for determining whether a swap should be MAT. However, since all of the factors are potentially relevant in determine whether there is enough liquidity to justify requiring SEF or DCM trading, we believe that SEFs and DCMs should be required to consider and gauge satisfaction of *all* of the factors on the list, rather than only one.[7] This is consistent with the requirement that derivatives clearing organizations ("**DCOs**") and the Commission consider all of a list of criteria in determining whether a swap is clearable or required to be cleared, respectively.[8]

While we believe SEFs and DCMs should be required to consider and gauge satisfaction of all of the proposed factors, we believe that certain key factors are so critical as to justify that a MAT determination cannot be made unless they are met. In particular, we believe that a swap should not be considered MAT unless it is traded at least a specified number of times per day, has a minimum number of market participants actively trading the swap *and* meets a set notional threshold trading volume over the prior three month period. Over time, as stated in our March 8 letter, we believe the Commission should attach objective minimum levels to these criteria.[9] The precise values for these

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[6] Letter from SIFMA, the International Swaps and Derivatives Association, and the Futures Industry Association to David A. Stawick, Secretary, Commission, Nov. 4, 2011.

[7] Specifically, these factors are: (1) whether there are ready and willing buyers and sellers; (2) the frequency or size of transactions on SEFs, DCMs, or of bilateral transactions; (3) the trading volume on SEFs, DCMs or of bilateral transactions; (4) the number and types of market participants; (5) the bid/ask spread; (6) the usual number of resting firm or indicative bids and offers; (7) whether a SEF's trading system or platform or a DCM's trading facility will support trading in the swap; or (8) any other factor that the SEF or DCM may consider relevant. We find factor (8) particularly problematic, which implies that a SEF or DCM could simply submit a MAT application even if none of the specific liquidity criteria described in the seven preceding factors in proposed Regulations 37.10 and 38.12 justify doing so.

[8] Process for Review of Swaps for Mandatory Clearing, 76 Fed. Reg. 44,464 (amending 17 CFR Parts 39 and 140).

[9] March 8 letter, at 11.

objective criteria will differ between and within asset classes, but can be set by the Commission over time in conjunction with market participants and the Advisory Committee discussed below. We believe that such objective criteria will help determine a benchmark against which swap liquidity can be measured, making it easier for SEFs, DCMs, the Commission and the public to know when a swap should be deemed to be MAT.

With respect to the specific factors, we believe that factor (2), which looks at "the frequency *or* size of transactions on SEFs, DCMs, *or* of bilateral transactions,"[10] should be revised to require the SEF or DCM to look at "the frequency *and* size of transaction on SEFs, DCMs, *and* of bilateral transactions." We believe that trade frequency, measured on a daily basis, and size of transactions are both important factors in determining the liquidity of a swap as well as how that liquidity might be impaired if market participants are required to trade the swap on a SEF or DCM. For example, without a complete set of information, incorrect conclusions about liquidity could be drawn where a sizable aggregate swap notional figure was comprised of only a few large trades, or where frequent SEF or DCM trading activity in a swap was comprised of trades with notionals that were very small compared to the average notional for a bilateral trade in the swap. We also believe that SEFs and DCMs should be required to look at SEF, DCM *and* bilateral transactions in assessing whether a trade is MAT. An existing liquid trading environment on SEFs and DCMs could indicate that a MAT determination is justified and unlikely to impair liquidity, while a liquid bilateral market without meaningful SEF or DCM trading may indicate that further inquiry would be warranted as to whether there was an issue with the particular SEF's or DCM's determination.

The Commission or NFA should create an Advisory Committee comprised of swap dealer, buy-side, corporate end-user, DCM and SEF representatives. The Advisory Committee would analyze the results of the pilot study, help develop objective criteria for the key MAT determination factors listed above and review proposed MAT determinations to provide formal recommendations to the Commission.

While we understand that resource constraints may make it impractical for the Commission to independently make MAT determinations, we believe that the Commission should create an Advisory Committee, possibly through the NFA, that would analyze the results of the pilot study, help develop objective criteria for the key MAT determination factors listed above and review proposed MAT determinations to provide formal recommendations to the Commission.[11] The

[10] Emphasis added.

[11] J.P. Morgan submitted a letter to the Commission on March 8, 2011 that proposes a "swap review committee" that would determine a block size for each product for reporting and (…continued)

Advisory Committee would be comprised of market participants with various backgrounds and from various constituencies in order to make it as independent and neutral as possible. For example, we would expect the Advisory Committee to include representatives of swap dealers, various types of buy-side customers, corporate end users, DCMs and SEFs.

During and after the initial one-year pilot study, the Advisory Committee would be charged with analyzing the data collected by the Commission. The Advisory Committee would then use the data to consider key questions including which criteria are most important to determining that a swap should be MAT. In turn, the Advisory Committee would provide formal suggestions to the Commission on how the MAT determination process should be reproposed.

The Advisory Committee would also help determine the appropriate values for the objective MAT criteria described above. The Advisory Committee would do so using the information from the pilot study[12] and information reported publicly and to the Commission as part of the Title VII swap reporting regime. Over time, the Advisory Committee would review the objective criteria and ensure they remain appropriate as market conditions change.

Finally, on an ongoing basis, the Advisory Committee would be responsible for reviewing a SEF's or DCM's determination that a swap is MAT and would provide formal recommendations to the Commission as to whether the determination is appropriate. As part of this process, the Advisory Committee would be responsible for reviewing comment letters submitted by the public to the Commission and providing the Commission with its view of the potential market impact of a MAT determination. As stated below, this review of MAT determinations would also include responses to *ad hoc* requests by market participants to consider whether a swap should no longer be considered MAT.

There should be a public comment period of at least 30 days prior to all MAT determinations.

We believe that a determination that a swap is MAT should be subject to a public comment period of at least 30 days, commencing with publication of the SEF's or DCM's MAT determination on the Commission's website. Under the current Proposal, SEFs and DCMs can choose to submit their determination that a

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(continued…)

execution purposes, in addition to MAT determinations. *See* Letter from Jeremy Barnum and Don Thompson, J.P. Morgan, to David A. Stawick, Secretary, Commission, at 8-10.

[12] In the event that the Commission does not adopt the pilot program that we recommend above, we still believe that the Commission should organize the Advisory Committee to assist in developing these objective criteria.

swap is MAT under the procedure in Regulation 40.5 or the procedure in Regulation 40.6. There is no opportunity for public comment under Regulation 40.5. The public is only allowed to comment under Regulation 40.6 if the Commission stays the determination within the first 10 business days that it is filed with the Commission. As a result, SEFs and DCMs may affirmatively choose to avoid public comment by filing under Regulation 40.5, or the Commission may choose to not provide for public comment under Regulation 40.6.

We do not believe that this is an appropriate way for a MAT determination to be made, given its significant potential effects on the market for a swap. Instead, we believe that the Commission should require that any SEF or DCM determination be open for public comment for at least 30 days prior to the determination that a swap is MAT. The Commission recognized the importance of a public comment period in providing a 30-day public comment period before a swap is required to be cleared.[13]

As a MAT determination will require market participants to trade swaps on a SEF or DCM that may have previously been executed bilaterally, it is important that the Commission be made aware of any deleterious effects of doing so, including potential operational impediments. Market participants must also be afforded the opportunity to comment on whether they believe the objective levels set as minimum thresholds for trade frequency, notional size and number of market participants, as per our suggestion above, are appropriate for the particular swap in question. This will be best achieved through a 30-day comment period during which market participants can provide this information to the Commission.

Market participants should not be required to comply with trade execution requirements until at least 90 days after a swap is determined to be MAT. If appropriate, this time period could be reconsidered and decreased after two years have elapsed from the date of finalizing the rule and key operational issues have been resolved.

The Commission is proposing to provide a minimum of 30 days after a swap is determined to be MAT before trading it on a SEF or DCM becomes mandatory,[14] which is not sufficient for market participants to shift all bilateral

[13] Process for Review of Swaps for Mandatory Clearing, 76 Fed. Reg. 44,464 (proposed Jul. 27, 2011).

[14] *See* Swap Transaction Compliance and Implementation Schedule: Clearing and Trade Execution Requirements under Section 2(h) of the CEA, 76 Fed. Reg. 58,186 (proposed Sept. 20, 2011) (amending 17 CFR Parts 37, 38 and 39) (proposing that the trade execution requirements would become effective the later of 30 days after the swap is determined to be MAT or the swap is required to be cleared).

trading of a swap to a SEF or DCM. Documentation will need to be amended to reflect the changes inherent in moving from bilaterally executed swaps to SEF- or DCM-executed swaps and swap dealers will need to notify and educate all of their regular counterparties that the swap can no longer be executed bilaterally. Moreover, if a SEF or DCM that a market participant currently does not connect to is the only one that lists a swap determined to be MAT, that market participant will need to establish connections to that SEF or DCM, a process that can be operationally and technologically intensive.

In addition to these burdens on potential swap counterparties, a longer transition period is necessary to allow time for SEFs and DCMs, other than the one making the initial MAT determination, to list the swap if they have not already done so. Otherwise, the first SEF or DCM to list a swap will have a marked advantage over other SEFs or DCMs, in some cases requiring all activity in that swap to move onto a single SEF or DCM.

As a result, we believe that the mandatory trade requirement should not become effective for a given swap for at least 90 days after that swap is determined to be MAT. The 90 days should begin on the later of the date the MAT determination is made and the date the swap in question is required to be cleared. We understand that key operational problems may be resolved over time, making the full 90 day period unnecessary. As a result, we believe that the Commission could consider reducing the implementation period after MAT determinations have been made for two years.

The Commission should not have a separate "economically equivalent" determination that imposes trade execution requirements.

We believe that allowing a SEF or DCM to determine that a swap is "economically equivalent" to a MAT swap, and thereby impose trade execution requirements without making a MAT determination, is inconsistent with the trade execution requirements in Dodd-Frank. Section 2(h)(8) of the Commodity Exchange Act states that a swap is not required to be traded on a SEF or DCM unless it is "made available to trade." As a result, we believe that any swap must itself be determined to be MAT before trading on a SEF or DCM is required.

Such a result is necessary because even slight alterations to a swap, which may or may not significantly change the underlying economics of the swap, could distinguish a liquid swap that is suitable for required SEF or DCM execution from one that is not. For example, the liquidity of otherwise identical interest rate swaps may vary dramatically depending on their time to maturity. As a result, allowing SEFs and DCMs to determine that a swap is "economically equivalent" to a MAT swap without the full MAT designation process may lead to an imposition of trade execution requirements on instruments with insufficient liquidity to justify SEF or DCM trading.

The Commission's reasoning for including "economically equivalent" swaps in the trade execution requirements is unclear. If the Commission means to prevent market participants from making slight changes to the terms of a MAT trade in order to avoid the SEF or DCM trading requirement, we believe that the Commissions' anti-evasion authority under the Commodity Exchange Act is a more appropriate tool. If, instead, the "economically equivalent" designation is meant to ease the burden on SEFs or DCMs in making the MAT determination, we reiterate our strong belief that the MAT determination should be made for each swap individually.

If the Commission retains the notion of MAT determinations for "economically equivalent" swaps, we recommend that the Advisory Committee described above should review the designation of such "economically equivalent" swaps and make a recommendation to the Commission about whether such swaps should indeed be deemed "economically equivalent" before they are required to be executed on SEFs or DCMs.

The Commission should require that a SEF or DCM list a swap for at least 90 days before determining that the swap is MAT in order to rectify any operational issues that may arise and ensure that the SEF or DCM is capable of supporting all market activity in that swap.

We believe that a SEF or DCM should only be allowed to determine that a swap is MAT if it has listed the swap for trading for at least 90 days.[15] If one SEF or DCM determines that a swap is MAT, all swap activity[16] must be executed on a SEF or DCM that lists the swap. As a result, listing SEFs or DCMs must be able to demonstrate the operational capability to host all swap execution. A "test period" of at least 90 days, during which the swap is listed but not required to be traded on a SEF or DCM, is necessary to ensure that all operational issues experienced by market participants can be rectified. This "test period" will also provide information necessary to help the Commission and market participants, including the Advisory Committee described above, to make an informed decision about whether such a determination is justified by the swap's liquidity and trading characteristics.

[15] *See* Proposal at 77,733 (asking whether a SEF or DCM should be allowed to make such a determination if it does not list the subject swap for trading).

[16] Other than excepted commercial end-user activity.

A SEF or DCM should not be able to make a blanket determination that a group of swaps is MAT unless the SEF or DCM lists each individual swap in the group and is able to make the MAT determination for every such swap.

In response to the Commission's specific question on the issue,[17] we do not believe that a SEF or DCM should be able to make a blanket determination that a group of swaps is MAT unless the SEF or DCM lists each individual swap in the group and is able to make the MAT determination for every such swap. Swaps that could be characterized as part of a single "group" may have significantly different liquidity and trading patterns, such that one swap may be appropriate for trading on a SEF or DCM while another swap in the same group is not. For example, the liquidity of interest rate swaps differ significantly depending on the time to maturity for the swaps.

SEFs and DCMs should be required to review their MAT determinations quarterly, rather than annually. If a swap has not met the necessary objective criteria over the previous quarter on any SEF or DCM, it should no longer be considered MAT. Market participants should be allowed to petition the Advisory Committee for a more frequent review and, if warranted, the Advisory Committee should be able to suggest to the Commission that the swap no longer be considered MAT.

We believe that annual review of MAT determinations is too infrequent, and that SEFs and DCMs should be required to review their MAT determinations quarterly instead. The liquidity of a particular swap can differ dramatically over the course of a year. For example, once a swap is no longer "on-the-run," liquidity will decrease rapidly. Waiting up to a year for that swap to no longer be considered MAT may make it impossible for market participants to transact in these "off-the-run" swaps, which should be allowed as bilateral transactions. We realize, however, that requiring SEFs and DCMs to review their MAT determinations too frequently could be overly burdensome. We believe that quarterly determinations generally strike the right balance between this increased burden and the necessity for more frequent than annual review.

As objective criteria for MAT determinations are developed, any SEF and DCM on which a swap is MAT should be required to demonstrate as part of these quarterly reviews that the objective criteria are still met. If the objective criteria are no longer met on any SEF or DCM, the swap should no longer be considered MAT. Since swaps that are not MAT may still be listed on a SEF or DCM, we do not believe this process of undoing a MAT determination would be unjustified for SEFs or DCMs in these instances.

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[17] Proposal at 77,733.

In addition, we believe that there are cases in which even a quarterly determination may not be frequent enough. In these cases, we believe that a market participant should be allowed to petition the Advisory Committee described above for an *ad hoc* review of whether a particular swap is MAT, along with supporting evidence. The Advisory Committee would consider the petition and, if it believed justified, would formally suggest to the Commission that the swap no longer be considered MAT.

The Commission should clarify that trades may be executed bilaterally when all SEFs or DCMs on which a swap is MAT are closed for maintenance or due to an emergency.

We request that the Commission clarify that trades may be executed bilaterally if all SEFs or DCMs on which a swap is MAT are closed for maintenance or due to an emergency. Market participants should be required to mark the swap for reporting and submit it to a SEF or DCM that lists it upon that SEF or DCM reopening. Otherwise, when all SEFs or DCMs on which a swap is MAT are closed, market participants will not be able to execute that swap. It is vital that market participants not be required to wait until a SEF or DCM were to reopen. Rather, a clarification by the Commission would allow participants to execute trades bilaterally until the SEF or DCM is able to reopen, and would also permit the Commission to monitor and flag excessive trading that wrongfully occurs after a SEF or DCM has closed for the day.

The Commission should create or cause to be created a centralized online listing of all MAT swaps and, if applicable, swaps economically equivalent to MAT swaps, before any MAT determinations are made.

Since market participants are required to trade all MAT swaps that do not qualify for the commercial end user exception from clearing on a SEF or DCM, we believe it is critical for the Commission to make it easy for market participants to check whether a specific swap is MAT. Otherwise, we believe cases may arise where counterparties are uncertain as to their legal responsibilities. While we understand that all notices and copies of individual rule submissions will be on the website of the relevant SEF or DCM and of the Commission, we believe that the Commission should create or cause to be created, either on its own website or at a third-party online location, such as through a swap data repository's website, a readily accessible, centralized list of all MAT swaps. It is important that such a list be comprehensive to avoid market participants needing to search several lists to piece the information together. To this end, we are encouraged by the Commission's statement that they are "currently assessing the feasibility of posting notices of all swaps that are determined to be available to trade on an easily accessible page on its Web site,"[18] but believe this should be completed before any swaps are designated MAT in order to decrease market uncertainty about trading requirements.

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The AMG appreciates the opportunity to provide the Commission with the above comments. 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

[18] Proposal at 77,733.