sifma

asset management group

November 26, 2024

Mr. Michael Passante
Chief Counsel
Office of Financial Research
U.S. Department of the Treasury
717 14th Street NW
Washington, D.C. 20220

RE: U.S. Department of the Treasury, Office of Financial Research, Ongoing Data Collection of Non-Centrally Cleared Bilateral Transactions in the U.S. Repurchase Agreement Market, 12 CFR Part 1610

The Asset Management Group of the Securities Industry and Financial Markets Association ("**SIFMA AMG**")[1] respectfully submits this letter to the Office of Financial Research ("**OFR**") to seek clarification regarding certain aspects of the above-referenced final rule (the "**Final Rule**") establishing ongoing data collection for certain non-centrally cleared bilateral repurchase agreement transactions ("**NCCBRs**") in the U.S. repurchase agreement ("**repo**") market from certain entities (such entities, "**covered reporters**").[2]

As we stated in our comment letter[3] (the "**Proposal Letter**") on the proposed rule,[4] we support OFR's goal of identifying and monitoring risks to financial stability arising in the U.S. repo market through the collection of relevant market data. However, we expressed concern in the Proposal Letter that OFR had not carefully considered the costs or challenges of applying the NCCBR reporting requirements to investment advisors. We noted in this regard that transaction-level reporting obligations are generally applied only to broker-dealers and banks. Not only do these sell-side institutions have long-running reporting operations that facilitate compliance in a cost-efficient manner, but such firms and their regulators have also settled many of the various interpretive issues and addressed many of the challenges that sell-side reporting raises. By contrast, imposing transaction-level reporting obligations on investment advisors threatens to impose significant costs on investors and create numerous interpretive and compliance challenges.

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[1] SIFMA AMG brings the asset management community together to provide views on U.S. and global policy and to create industry best practices. SIFMA AMG's members represent U.S. and global asset management firms whose combined assets under management exceed $45 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS, and private funds such as hedge funds and private equity funds.

[2] See Ongoing Data Collection of Non-Centrally Cleared Bilateral Transactions in the U.S. Repurchase Agreement Market, 89 Fed. Reg. 37091 (May 6, 2024).

[3] See Letter from William C. Thum, Managing Director and Assistant General Counsel at SIFMA AMG (Mar. 9, 2023) at 1.

[4] See Collection of Non-Centrally Cleared Bilateral Transactions in the U.S. Repurchase Agreement Market, 88 Fed. Reg. 1154 (Jan. 9, 2023).

Unfortunately, the Final Rule has demonstrated that our concerns were well founded. As our members have begun establishing processes and building systems to comply with the Final Rule's requirements, they have identified that the Final Rule leaves a number of critical interpretive ambiguities that need to be resolved. Although we appreciate that OFR has begun issuing FAQs to address some of those ambiguities,[5] there remain a bevy of issues that require further clarification and, on certain issues, the FAQs only perpetuated the ambiguity. Our members have also identified that certain aspects of the Final Rule, including those that OFR cited as important to eliminating undue costs, cannot actually be implemented as a practical matter or would require very cost- and time-intensive efforts that clearly do not correspond to the associated reporting benefit.

Although interpretations or FAQs may address some of these issues, we think their significance and complexity is such as to require a reproposal, especially considering they implicate fundamental aspects of the rule and the OFR's cost-benefit analysis. At the very least, OFR must delay the compliance date of the Final Rule for investment advisors and their funds until the outstanding issues have been settled and firms have had an opportunity to implement the settled requirements.

I. Potential Category 2 Reporters Cannot Calculate the $10 Billion Threshold Due to the Absence of Publicly Available Information Regarding Government Securities Brokers and Government Securities Dealers.

In the preamble to the Final Rule, OFR stated that it "has attempted in the Final Rule to limit duplicative reporting by financial companies" by excluding transactions with broker-dealers, government securities dealers, and government securities brokers (collectively, "**BDs**") from the reporting threshold applicable to financial companies that are not BDs ("**Potential Category 2 Reporters**"). By virtue of this attempt, in order to determine whether it is subject to the Final Rule's requirements, a Potential Category 2 Reporter must calculate whether its average daily outstanding commitments to borrow cash and extend guarantees in NCCBRs with non-BDs over all business days during the prior calendar quarter equals or exceeds $10 billion. It goes without saying that, in order to perform this calculation, a Potential Category 2 Reporter needs to know whether its counterparties are BDs.

However, while there is public database allowing Potential Category 2 Reporters to identify whether a counterparty is a registered broker-dealer, there is no publicly available information that allows a Potential Category 2 Reporter to determine whether a counterparty is a registered government securities broker ("**GSB**") or government securities dealer ("**GSD**"). In addition, many of our members have reported that most personnel at U.S. and non-U.S. banks with whom they deal are not even aware whether their institution is a GSD or GSB. As a result, unless the Final Rule is revised, investment advisors will be unable to calculate whether they are under the

[5] See Frequently asked questions about NCCBR reporting, OFFICE OF FINANCIAL RESEARCH (Aug. 30, 2024), available at https://www.financialresearch.gov/data/collections/nccbr-faq/.

Category 2 threshold. Many of them will therefore be forced to engage in the duplicative reporting that we raised and that OFR purported to address.

This type of challenge is one of the reasons why we recommended in the Proposal Letter that OFR should limit the reporting obligations to sell-side institutions or at the very least expand Category 1 firms to include banks. Indeed, certain banks' parent organizations will need to build the systems necessary for complying with the Final Rule, and expanding those systems to an additional institution will take substantially fewer resources and less time than requiring wholly unaffiliated institutions to build new systems and perform calculations that cannot actually be performed. We therefore recommend that OFR repropose the Final Rule to address this issue. At the very least, OFR should not impose reporting obligations on investment advisors until the information necessary for such firms to perform the threshold calculation is available.[6]

II. It Remains Unclear How Firms Should Report Bunched Trades under the Final Rule.

Under the Final Rule, covered reporters are required to include in their daily reports data elements regarding the identity of the parties to each NCCBR, including the legal names and legal entity identifiers ("**LEIs**") of the cash lender and the cash borrower. The application of this requirement to "bunched trades" remains ambiguous.

By way of background, investment advisors frequently enter into NCCBRs with counterparties on a bunched basis as agent for multiple underlying principals.[7] The reason investment advisors do this is for the benefit of the funds on behalf of whom they act. Bunched transactions limit transaction costs and result in consistent pricing across funds. However, bunched transactions also require the investment advisor to perform an allocation after execution. Through this allocation, the advisor identifies how much of each transaction belongs to each fund. Importantly, this is a record-keeping exercise, not some kind of novation from the adviser to the funds.[8]

It is unclear if, in mandating the reporting of each party's legal name and LEI, the Final Rule requires—either before or after allocation—covered reporters to report the legal name of each underlying fund to whom a transaction is allocated or the investment advisor. We appreciate that OFR sought to address this issue in its recent FAQs.[9] However, in doing so, the OFR introduced greater ambiguity. One of the FAQs describes a dichotomy between (i) repos entered into with one

[6] For example, OFR may publish a list of GSDs and GSBs on its website.

[7] See 89 Fed. Reg. 37097.

[8] See id.

[9] See Frequently asked questions about NCCBR reporting, OFFICE OF FINANCIAL RESEARCH (Aug. 30, 2024), available at https://www.financialresearch.gov/data/collections/nccbr-faq/.

or more funds as counterparties and (ii) those entered into "with an investment adviser as the counterparty." In the case of the latter, the FAQ notes, the repo would be reported as with the investment advisor and

> [t]he investment adviser's other subsequent activities involving transferring the cash or securities delivered by the dealer would not be part of the transaction being considered. In such a case, a covered reporter would report just one repo and include the LEI of the dealer on one side and the LEI of the investment adviser on the other side.

This description seems to suggest that an investment advisor would enter into trades in its principal capacity and then allocate assets to its funds. That is flatly at odds with how allocation functions. As we stated in the Proposal Letter, "[t]rading of fund assets and positions is never executed with the advisor as the principal obligor, but rather must be allocated to the appropriate fund as the principal obligor." Accordingly, we remain deeply confused as to how an investment advisor should report bunched transactions.

We recommend that OFR clarify that, in reporting bunched transactions, a covered reporter need only report the underlying principals under the Final Rule on each business day consistent with the allocation of the bunched transaction or adjustment of prior allocations and should not identify the investment advisor as the cash borrower or cash lender. This would be consistent with the legal and economic reality of the parties' obligations in connection with bunched trades and remove the present ambiguity.

III. It Is Unclear Who Should Report or Count Transactions When Multiple Investment Advisors Are Involved.

Another complication and interpretive ambiguity that arises from the application of transaction-level reporting obligations to investment advisors relates to the fact that an NCCBR may involve multiple investment advisors. More specifically, a given fund may have a general investment advisor that may appoint a sub-advisor, which enters into the transaction on behalf of the fund. OFR did not squarely address this complexity, and so advisors do not know which advisor should count the transaction towards the Category 2 threshold for purposes of the Final Rule.

Requiring both advisors to count the transaction toward the threshold or report the transaction would likely result in the transaction counting towards three thresholds and/or being reported three times: once by the advisor, once by the sub-advisor, and once by the Category 1 reporter. Triplicate reports do not provide any modicum of financial monitoring benefit, and OFR in no way considered the costs of such triplicate reports in adopting the Final Rule. However, if OFR does not revise the Final Rule to exclude investment advisors from the scope of the Final Rule, firms will need clarity regarding which advisor should count the transaction towards the Category 2 threshold.

In our view, and absent further clarifying guidance, if a transaction involves multiple investment advisors and sub-advisors and OFR retains buy-side reporting requirements, the individual advisors should be permitted to attribute the transactions for purposes of the threshold and reporting to the advisor(s) they deem responsible for the transaction. We note in this regard that such subjectivity may result in firms taking different approaches, given different operating models and visibility of sub-advisor trading activity. However, sub-advisors are utilized by market participants for bespoke business purposes and under unique contractual arrangements, and it may be appropriate in some cases to attribute a NCCBR trade to an advisor and in other cases the sub-advisor. In any event, if OFR believes a different solution is appropriate, it should submit that proposal for notice and comment so that it may understand the potential costs, benefits, and complications associated therewith.

IV. It Is Unclear from the Final Rule Whether a Transaction for Which a BD Acts as Custodian or Chaperone Is Considered with a BD

The Final Rule requires a Potential Category 2 Reporter to count towards the threshold transactions "with" counterparties that are not BDs. However, there remains ambiguity as to whether a transaction is "with" a BD if the BD enters into the transaction as agent pursuant to SEC Rule 15a-6 or 17 C.F.R. Section 401.7 (a "**Chaperone**") or if the BD acts as custodian in relation to these transactions. Given that the point of this exception from the threshold is to eliminate needlessly duplicative reporting requirements, OFR should allow investment advisors to exclude both from the threshold calculation and from any actual reporting requirements any transactions in which a BD participates as agent, including by acting as a Chaperone or custodian. In such cases, the BD will be the one reporting such transactions, so there is no benefit to having an investment advisor report the transaction as well. Such reporting simply serves to increase costs and provide OFR with duplicative information.

In the Final Rule, OFR surmised that excluding transactions with BDs from Category 2 reporters' requirements could create a burden for investment adviser firms but provided no analysis or data to support that view. We respectfully request that, if OFR does not have data to support its analysis of the view that two-sided reporting provides lowers costs for firms, it first obtains that data. This is yet another reason a reproposal and further analysis of NCCBR reporting obligations is needed before firms should be required to comply with the Final Rule.

V. OFR Must Provide Greater Clarity as to How It Will Preserve Confidentiality, Anonymization, and Privacy.

In the preamble to the Final Rule, OFR addressed concerns regarding confidentiality by stating that "it will not disclose raw data to the public and that any work product disclosed to the public will consist only of anonymized, aggregated, or otherwise masked data."[10] It is unclear from

[10] 89 Fed. Reg. at 37096.

this language or other language from the Final Rule or its preamble exactly what techniques OFR will employ to ensure that information remains confidential.

Clarity on this point is critical because anonymization alone is not sufficient to ensure confidentiality of data. When data is merely anonymized, it can be relatively easy for others to reverse engineer the identification of such data or its source. For example, under the European Union General Data Protection Regulation ("**GDPR**"), personal data is not considered anonymized unless the data cannot identify the subject via "all the means 'likely reasonably' to be used" to make such an identification.[11] "Generally speaking, removing directly identifying elements in itself is not enough to ensure that identification of the data subject is no longer possible."[12] Depending on their regulatory, organizational, and contractual obligations, investment advisors may not be able to provide information to OFR, especially about UCITS, if it could lead to a violation of GDPR or other privacy laws. We therefore ask OFR to confirm that any information it collects will be held in a manner that does not violate established data protection and privacy laws and to permit firms not to disclose information if they believe that doing so could give rise to a legal violation.

VI. The Final Rule Creates an Undue Competitive Disparity Between U.S. and Non-U.S. Investment Advisors.

The Final Rule, as applied to Potential Category 2 Reporters that are investment advisors, does not distinguish between transactions an investment advisor executes for U.S. versus non-U.S. customers that have no U.S. nexus. However, the Final Rule does make a distinction between transactions entered into by a U.S. fund through a U.S. investment advisor and ones entered into by the same fund through a non-U.S. advisor. These components of the Final Rule threaten to place U.S. investment advisors at a significant, and undue, competitive disadvantage relative to their foreign competitors. Given the greater costs and risks associated with transaction reporting by their investment advisors, both U.S. funds and non-U.S. ones will be incentivized to select foreign investment advisors who will not be required to report identical transactions. The Final Rule does not consider these competitive disparities or how the costs associated with them are justified. We therefore ask OFR to reconsider subjecting U.S. investment advisors to reporting obligations or otherwise take steps to ensure that the competitive field remains level.

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[11] See Opinion 05/2014 on Anonymisation Techniques, European Data Protection Board (Apr. 10, 2014), available at https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp216_en.pdf.

[12] Id.

On behalf of SIFMA AMG, we appreciate the opportunity to respond to the Final Rule and your consideration of our recommendations and requests. If you have any questions or require additional information, please do not hesitate to contact us by calling William Thum at (202) 962-7381 or emailing bthum@sifma.org.

Sincerely,

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William C. Thum
Managing Director and Assistant General Counsel, SIFMA AMG