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MANAGED FUNDS
ASSOCIATION



September 28, 2012

The Honorable Timothy F. Geithner
Secretary
United States Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Re: FX Forwards and FX Swaps Determination

Dear Mr. Secretary:

The undersigned trade associations¹ are submitting this letter to request the Department of Treasury (the “Treasury”) to promptly make a final determination on its

¹ The Asset Management Group (“AMG”) of the Securities Industry and Financial Markets Association’s members represent U.S. asset management firms whose combined assets under management exceed \$20 trillion. The clients of AMG member firms include, among others, registered investment companies, endowments, state and local government pension funds, private sector Employee Retirement Income Security Act of 1974 pension funds and private funds such as hedge funds and private equity funds.

The Investment Company Institute (“ICI”) is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (“ETFs”), and unit investment trusts (“UITs”). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$13.3 trillion and serve over 90 million shareholders.

The Managed Funds Association (“MFA”) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry’s contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, the Americas, and Australia.

The Investment Adviser Association (“IAA”) is a not-for-profit association that represents the interests of SEC-registered investment adviser firms. Founded in 1937, the IAA’s membership consists of more than 530 firms that collectively manage in excess of \$10 trillion for a wide variety of individual and institutional investors, including pension plans, trusts, investment companies, private funds, endowments, (...continued)

proposal to exempt foreign exchange forwards and foreign exchange swaps (collectively, the “FX Products”) from the definition of “swap” under the Commodity Exchange Act (“CEA”) prior to October 12, 2012. If the Treasury Secretary will be unable to do so, we request that he issue an interim determination that FX Products should be exempt from the swap definition. As discussed below, failure to do so will have substantial and unintended consequences on the impending registration and compliance deadlines for commodity trading advisors (“CTAs”), commodity pool operators (“CPOs”) and major swap participants (“MSPs”), as each such term is defined under the CEA.

Background

Our members represent asset management firms that advise registered investment companies, private funds and accounts, endowments, state and local government pension funds and private sector pension funds and accounts subject to the Employee Retirement Income Security Act of 1974 and other institutional clients. In their role as asset managers, our member firms, on behalf of their clients, may engage in transactions that will be classified as “foreign exchange forwards” or “foreign exchange swaps”² under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”).

Under the Dodd-Frank Act and the final product definition rules (the “Swap Definition”)³ adopted by the Commodity Futures Trading Commission (the “CFTC”) and the Securities and Exchange Commission, these FX Products are included in the definition of swap unless and until the Treasury Secretary determines that they should be excluded. The Swap Definition, which becomes effective on October 12, 2012, triggers the effectiveness of other new rules recently promulgated pursuant to the Dodd-Frank Act and other rule amendments recently adopted by the CFTC.⁴ These rules will result in many entities being required to register with the CFTC because of transacting in swaps. As a result of these new regulations, three CFTC registration categories—CTA, CPO and MSP—and the extensive regulatory duties that accompany them, depend critically upon calculations of the amount of swap activity engaged in by an entity. These calculations depend decisively, in many cases, upon whether the Treasury Secretary exempts FX Products from regulation as swaps. Consequently, our members are actively reviewing

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foundations, and corporations. For more information, please visit our website:
www.investmentadviser.org.

² An asset manager may engage in transactions involving FX Products on behalf of their clients for a variety of reasons, including to offset portfolio risk from exposure to currency risk from a foreign investment.

³ 77 Fed. Reg. 48207 (Aug. 13, 2012).

⁴ These rule amendments include certain revisions to the exemptions from CPO registration under CFTC Rules 4.5 and 4.13 adopted by the CFTC earlier this year that impact registered investment companies and private funds and their advisers. Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed. Reg. 11252 (Feb. 24, 2012).

their clients' swaps portfolios to determine whether they or their clients will need to register with the CFTC as CTAs, CPOs or MSPs. In order to perform this analysis, it is necessary for our members to develop systems for monitoring compliance with the revised rules. Due to the impending effective dates of these rule changes, our member firms are preparing for compliance now. However, these systems will need to be revised if FX Products, contrary to the Treasury's proposed exemption, were required to be treated as swaps. Accordingly, *all asset management firms* that trade FX Products on behalf of their clients will be burdened with increased costs and compliance obligations if Treasury's final determination is delayed beyond October 12, 2012.

Commodity Trading Advisor Registration. Of particular concern to our members are the amendments to the terms "commodity trading advisor" and "commodity pool operator," and related terms in the CEA, to incorporate swaps. The CFTC has also incorporated swaps into the thresholds under the relevant exemptions from CTA and CPO registration. As a result of these statutory amendments and rule changes, and given ambiguities in the compliance schedule under the CFTC's new rules, investment advisers that trade swaps on behalf of their clients will need to examine the swap positions in the investment portfolios that they manage to determine whether they will remain eligible after October 12, 2012 for CTA registration exemptions that they currently rely on.⁵ If swap activity in these portfolios will cause advisers no longer to qualify for the available CTA registration exemptions, they may be required to register with the CFTC on that date.

If the Treasury Secretary has not made a final determination to exempt FX Products from the definition of swaps by October 12, 2012, advisers may be required to include these instruments in their registration or exemption analysis beginning on that date. Absent prior action by the Treasury Secretary, certain advisers may need to register with the CFTC as CTAs and be in compliance with applicable substantive rules and requirements of the CFTC and National Futures Association (the "NFA") by October 12, 2012 because of their use of FX Products in the portfolios they manage. For investment advisers that would not otherwise have to register, CTA registration and compliance would be an unintended, unnecessary and costly burden to bear. Similarly, using resources for this purpose would not be in the best interest of clients, nor the regulators involved in incorporating new registrants into their regulatory programs, if the Treasury Secretary ultimately exempts FX Products from the definition of swaps.

Commodity Pool Operator Registration. Some pool operators that engage in swap transactions could be required to register and be in compliance with substantive CFTC and NFA requirements by October 12, 2012. As with the CTA registration exemption analysis, the operators of such funds may need to include FX Products in their swap positions when assessing whether CPO registration is necessary, in the absence of a

⁵ For example, investment advisers may provide commodity trading advice without registration if, among other things, their trading advice is limited in accordance with Section 4m(1) (fifteen client exemption) or Section 4m(3) (primary business exemption) of the CEA or with CFTC Rule 4.14(a)(8) (exemption for advice to qualifying entities incidental to securities advice).

final determination from the Treasury Secretary by October 12, 2012. While most pool operators that are impacted by the CPO rule changes will not be required to register as CPOs until December 31, 2012, registration could be required by October 12, 2012 for some entities that would later be entitled to withdraw if the Treasury Secretary subsequently issues a final determination to exclude FX Products.

CTA and CPO Assessment, Registration, and Compliance. Investment advisers and pool operators are now in the midst of building systems for evaluating swap positions in their portfolios for compliance with all of the new CPO rules and assessing their impact on CTA and CPO registration exemptions. CPO and CTA registration is a tremendous undertaking that involves significant lead time, particularly for first-time registrants.⁶ In order to afford these advisers and pool operators sufficient time to prepare for registration, it is imperative that the Treasury Secretary act as expeditiously as possible on a final determination relating to FX Products.⁷

Major Swap Participants. Although MSP registration will not be required until early 2013, swap users will need to determine whether they are MSPs based on calculations done in the fourth quarter of 2012. The MSP tests are based on averages over each business day in a fiscal quarter. There remains ambiguity as to how market participants would calculate daily exposure positions at the end of the fourth quarter of 2012 if the Treasury Secretary makes a determination to exclude FX Products after October 12, 2012. If the Treasury Secretary does not exclude FX Products before these calculations begin, an entity may need to monitor daily data relating to its FX Products positions and significant incongruities and unnecessary costs could arise. Some entities could be required to register as MSPs based on positions in FX Products in early 2013

⁶ Among other things, new CPO and CTA registrants are required to register their “Associated Persons” with National Futures Association (“NFA”), submit filings on behalf of their “Principals” with NFA and adopt compliance programs covering the entire set of applicable CFTC and NFA rules. Comment letter submitted by the AMG to the CFTC on Compliance Dates for New CPO and CTA Registrants as a Result of Rescission of Regulation 4.13(a)(4) and Amendments to Regulation 4.5 (Aug. 3, 2012), on file with CFTC and available upon request from AMG; Letter submitted by the ICI to the CFTC on Compliance with Registration Requirements Under Amended Rule 4.5 (May 21, 2012), available at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58729&SearchText=58729KarrieMcMillian.pdf>; Letter submitted by the AMG to the CFTC on the Amendment to Commodity Pool Operator Exemption under Rule 4.13 and Exclusion under Rule 4.5 (May 3, 2012), available at <http://www.sifma.org/workarea/downloadasset.aspx?id=8589938635>; Letter submitted by the MFA, IAA, and Alternative Investment Management Association to the Commodity Futures Trading Commission on the Request for an Extension of Time for Compliance with Registration as a Result of the Amendments to § 4.13 (Apr. 30, 2012), available at https://www.managedfunds.org/wp-content/uploads/2012/05/Jt_Trades_CFTC_Extension_04302012.pdf.

⁷ We also note that if the Treasury does not make a final determination until after December 31, 2012, our concerns would be greatly exacerbated, as *all* operators of commodity pools and CTAs could then be required to include FX Products in calculating their compliance with the relevant exemptions. In addition, one of the most commonly used CTA exemptions, CFTC Rule 4.14(a)(8), is only available for an advisor that provides advisory services to a commodity pool that relies on a CPO exemption or exclusion, and its availability would be severely impaired if the Treasury’s final determination has not been made by December 31, 2012.

and, as required by the CFTC's rules, have to wait until a full year has passed while under the threshold before deregistering. These entities, which would become MSPs based on FX Products later excluded from the calculation, would unnecessarily face the enormous registration and regulatory costs associated with being an MSP and compliance with that regime while not posing the risks that Congress intended to be captured through MSP regulation.

In addition, far fewer entities would qualify for the safe harbors from daily monitoring that the CFTC and SEC included in the MSP calculation. The CFTC and SEC included these safe harbors in order to "promote certainty and regulatory efficiency by helping market participants appropriately focus their compliance efforts and avoid undue compliance costs in circumstances when they would be highly unlikely to be major participants."⁸ We believe that these benefits would be lost if FX Products were included in the MSP calculations and the FX Products were then subsequently excluded from the definition of swap.

Consequences of the Status Quo

The uncertainty concerning when or if Treasury Secretary will address the treatment of FX Products is already causing market participants to expend resources to change their systems to include FX Products in their calculations for purposes of making the necessary registration determinations. Furthermore, if investment advisers and pool operators must register as CTAs or CPOs, as described above, as a result of their clients' positions in FX products and if the Treasury Secretary issues a final determination to exempt FX Products after October 12, 2012, these market participants will have unnecessarily incurred significant costs and expended substantial resources to prepare for rules that ultimately do not affect them. Some entities that register with the CFTC may then incur additional cost and time to unwind these registrations when they are permitted to do so upon FX Products becoming excluded from the definition of swap. In other cases, market participants may choose to leave the market for FX Products (or at least reduce trading or investment volumes to below the relevant thresholds) until the Treasury's final determination is made, depriving them of useful tools to hedge currency risk and impairing liquidity in these markets.

Request for Immediate Action

For the reasons cited above, we urge the Treasury Secretary to act as expeditiously as possible to make its final determination with respect to FX Products. The Treasury's proposal to exclude FX Products from the definition of swap was issued on April 29, 2011 and public comments provided strong support and data to support the proposal. Market participants generally had expected that the Treasury Secretary would

⁸ Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 77 Fed. Reg. 30596, 30695 (May 23, 2012).

have made a final determination with respect to FX Products shortly after the adoption of the final Swap Definition on July 10, 2012. We recognize that the Treasury, like the CFTC, has a full and busy agenda, but we would appreciate the Treasury coordinating with the CFTC on this time-sensitive matter.⁹ Accordingly, we respectfully request that the Treasury Secretary promptly act to make a final determination with regard to FX Products prior to October 12, 2012.

If, for any reason, the Treasury Secretary will be unable to issue a final determination by October 12, 2012, we request that he issue an interim final determination by that date to address the immediate needs of market participants to prepare for the new swaps regime.¹⁰

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⁹ *See also* letter from The Honorable Barney Frank, Ranking Member, House Committee on Financial Services, to the CFTC and Treasury regarding the exemption of FX Products from the Swap Definition (September 21, 2012).

¹⁰ If the Treasury elects to make such an interim final determination, but then ultimately makes a final determination that the FX Products should be treated as swaps, we respectfully request that the Treasury allow for a significant transition period before the inclusion of FX Products as swaps would become effective in order to allow market participants sufficient time to prepare for such treatment.

The undersigned trade groups appreciate the Treasury's consideration of this request, and stand ready to provide any additional information or assistance that the Treasury might find useful.

Should you have any questions, please do not hesitate to call Tim Cameron of SIFMA AMG at 212-313-1389, Karrie McMillan of the Investment Company Institute at 202-326-5815 or Sarah Bessin of the Investment Company Institute at 202-326-5835, Stuart J. Kaswell or Jennifer Han of MFA at 202-730-2600, or Karen L. Barr of IAA at 202-293-4222.

Sincerely,

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cc: Hon. Gary Gensler, Chairman, Commodity Futures Trading Commission
Hon. Jill E. Sommers, Commissioner, Commodity Futures Trading Commission
Hon. Bart Chilton, Commissioner, Commodity Futures Trading Commission
Hon. Scott O'Malia, Commissioner, Commodity Futures Trading Commission
Hon. Mark Wetjen, Commissioner, Commodity Futures Trading Commission