

Swaps Developments: Treasury Considers Exempting FX from Swaps; CFTC To Consider Treating Foreign Bankers as “Swaps Dealers”

November 4, 2010

Treatment of Foreign-Exchange Swaps

As amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Commodity Exchange Act (CEA) permits the Secretary of the Treasury Department to issue a written determination exempting foreign exchange swaps, foreign exchange forwards, or both, from the definition of a "swap" under the CEA, thereby removing such transactions from the aegis of the CFTC. The Department of the Treasury has recently issued a notice for comment on whether such an exemption for foreign exchange swaps, foreign exchange forwards, or both, is warranted.

To determine whether to issue an exemption, the Treasury Secretary can consider: (1) whether the required trading and clearing of foreign exchange swaps and forwards would create systemic risk, lower transparency or threaten the financial stability of the United States; (2) whether foreign exchange swaps and forwards are already subject to a regulatory scheme that is materially comparable to that established by the CEA for other classes of swaps; (3) the extent to which bank regulators of participants in the foreign exchange market provide adequate supervision, including capital and margin requirements; (4) the extent of adequate payment and settlement systems; and (5) the use of a potential exemption of foreign exchange swaps and/or forwards to evade otherwise applicable regulatory requirements.

The Secretary will be accepting public comment until November 29, 2010.

Application of Dodd-Frank Swap Rules to Foreign Banks

In a speech delivered on October 21, 2010, CFTC Chairman Gensler stated that foreign banks doing business in the U.S. and offering swaps to U.S. counterparties may be treated as swaps dealers and subject to CFTC regulation because, under Dodd-Frank, the CFTC has jurisdiction if an entity's swap activities have "a direct and significant connection with the activities in, or effect on, commerce in the United States."

The CFTC plans to finish its proposed rule-writing agenda by mid-December, allowing time to receive and review public comment before publishing final rules by the July 2011 deadline under Dodd-Frank.