

**The Foreign Exchange Committee  
The Financial Markets Lawyers Group**

**33 Liberty St., 7th Floor  
New York, NY 10045**

Commodity Exchange Act § 4s  
Commission Regulation 23.431(a)(3)

April 11, 2013

Gary Barnett  
Director, Division of Swap Dealer and Intermediary Oversight  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, NW  
Washington, DC 20581

Re: The Foreign Exchange Committee and Financial Markets Lawyers Group – Request for No-action Relief Regarding Obligation to Provide Pre-Trade Mid-Market Quote

Dear Mr. Barnett:

The Foreign Exchange Committee (the “**FXC**”) is an industry group that has been providing guidance and leadership to the global foreign exchange market since 1978. The Committee includes representatives of major financial and non-financial institutions engaged in foreign currency trading in the United States.<sup>1</sup> The Financial Markets Lawyers Group (“**FMLG**”) is composed of lawyers who support foreign exchange and other financial markets trading in leading worldwide financial institutions.<sup>2</sup> Both the FXC and the FMLG are sponsored by the Federal Reserve Bank of New York.<sup>3</sup>

**I. Introduction**

Beginning May 1, 2013, registered swap dealers and major swap participants, including FXC and FMLG member financial institutions, will be required to comply with the core provisions of the external business conduct standards (the “**Business Conduct Standards**”)<sup>4</sup> with respect to foreign exchange or currency transactions they enter into or offer to enter into (“**FX Transactions**”). FX Transactions include

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<sup>1</sup> The FXC includes members from the sell-side and buy-side. The FXC firms signing on to this letter are: Citigroup; Fischer Francis Trees & Watts; Deutsche Bank; State Street Bank and Trust Company; Barclays; The Royal Bank of Scotland plc, Credit Agricole CIB; Mellon Capital; Goldman Sachs & Co.; Wells Fargo; Bank of America Merrill Lynch; Banco Itau BBA; Standard Chartered; CLS Bank International; TD Securities; Microsoft Corporation; Mizuho Corporate Bank; EBS; UBS; JP Morgan Chase; HSBC; FX Concepts; BlackRock; FXall; and QFR Capital Management.

<sup>2</sup> The FMLG includes members from the following institutions signing on to this letter: Bank of America, NA; Barclays; BNP Paribas; Citigroup Global Markets Inc.; CLS Bank International; Credit Suisse; Deutsche Bank; Goldman Sachs & Co.; HSBC Securities (USA) Inc. (affiliate member); JP Morgan Chase & Co.; Morgan Stanley; Royal Bank of Canada; Standard Chartered Bank; State Street Bank and Trust Company; The Bank of New York Mellon; UBS AG; U.S. Bank National Association; and Wells Fargo.

<sup>3</sup> Although the FXC and the FMLG are sponsored by the Federal Reserve Bank of New York, this request letter is not endorsed by the Federal Reserve Bank of New York or the Federal Reserve System.

<sup>4</sup> 17 C.F.R. §§ 23.400—23.451. See Business Conduct and Documentation Requirements for Swap Dealers and Major Swap Participants; Extension of Compliance Date, 78 Fed. Reg. 17 (Jan. 2, 2013); Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 Fed. Reg. 9734 (Feb. 17, 2012) (the “**Business Conduct Release**”).

transactions that reference currencies and are defined as swaps in Section 1a(47) of the Commodity Exchange Act (the “**Act**”) and in Commodity Futures Trading Commission (“**Commission**”) Regulation 1.3(xxx), as well as physically-settled foreign exchange forwards and physically-settled foreign exchange swaps, which have been exempted from the definition of “swap” by the Department of the Treasury.<sup>5</sup> The Business Conduct Standards require swap dealers and major swap participants, among other things, to provide each counterparty or potential counterparty with whom the swap dealer or major swap participant intends to enter into an FX Transaction in the over-the-counter market: “[a]t a reasonably sufficient time prior to entering into [the FX Transaction]... the price of the [FX Transaction]... and the mid-market mark of the [FX Transaction]...” (the “**Pre-Trade Mid-Market Mark**” and such requirement, the “**Pre-Trade Mid-Market Mark Requirement**”).<sup>6</sup>

On December 6, 2012, the Commission’s Division of Swap Dealer and Intermediary Oversight (“**DSIO**”) issued a no-action letter<sup>7</sup> in response to a request from the FXC and FMLG. In that letter, the Division granted no-action relief from the Pre-Trade Mid-Market Mark Requirement with respect to “Covered Forex Transactions” subject to the conditions that: (1) real-time tradeable bid and offer prices for the Covered Forex Transaction are available electronically, in the marketplace, to the counterparty; and (2) the counterparty to the Covered Forex Transaction agrees in advance, in writing, that the swap dealer or major swap participant need not disclose a pre-trade mid-market mark. The DSIO stated that it was making its no-action relief available to Covered Forex Transactions “based on, among other things, FXC’s and FMLG’s representations that Covered Forex Transactions benefit from a combination of high liquidity, narrow bid and offer spreads, and the existence of a significant amount of publicly available information with respect thereto.”<sup>8</sup>

## **II. Request for No-action Letter**

The FXC and FMLG hereby request that the DSIO amend the conditions to the no-action relief granted in CFTC Letter No. 12-42, through a further no-action letter or a restatement of CFTC Letter No. 12-42, to provide that, in lieu of obtaining a written agreement from its counterparty, the swap dealer or major swap participant may provide notice to the counterparty, through any means that would satisfy CFTC Regulation 23.402(e), that in reliance on DSIO no-action relief it will not furnish the Pre-Trade Mid-Market Mark with respect to Covered Forex Transactions, unless requested on a per-transaction basis by a counterparty transacting by voice at the time it requests or receives a price quotation.<sup>9</sup>

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<sup>5</sup> See Determination of Foreign Exchange Swaps and Foreign Exchange Forwards under the Commodity Exchange Act, 77 Fed. Reg. 69694 (Nov. 20, 2012).

<sup>6</sup> 17 C.F.R. §23.431(a)(3). The Pre-Trade Mid-Market Mark Requirement is not specifically required by the Act but was adopted by the Commission pursuant to Section 4s(h)(3)(B)(ii) of the Act. That provision requires a swap dealer and major swap participant to disclose “any material incentives or conflicts of interest that the swap dealer or major swap participant may have in connection with the swap.” See Business Conduct Release at 9765.

<sup>7</sup> CFTC Letter No. 12-42 (Dec. 6, 2012).

<sup>8</sup> *Id.* at 4.

<sup>9</sup> This ability to request the Pre-Trade Mid-Market Mark would not apply to trading via electronic platforms.

### III. Discussion

#### **A. The market characteristics that make the Pre-Trade Mid-Market Mark unnecessary for Covered Forex Transactions apply uniformly to all of a swap dealer's or major swap participant's counterparties.**

As the DSIO stated in CFTC Letter No. 12-42, its determination to grant no-action relief was based on characteristics of the market for Covered Forex Transactions, namely the "combination of high liquidity, narrow bid and offer spreads, and the existence of a significant amount of publicly available information", characteristics that were substantiated in detail in FXC's and FMLG's submission to DSIO. These market attributes are independent of the traits of any particular counterparty to a Covered Forex Transaction. The market for Covered Forex Transactions offers multiple, competing sources of information and liquidity and a diversity of trading environments. As a result, all eligible contract participant counterparties have ready access to real-time market information, obviating the purpose of Pre-Trade Mid-Market Mark Requirement.

#### **B. Because written consent from all counterparties is a practical impossibility, the fixed costs of providing the Pre-Trade Mid-Market Mark will be borne by the market no matter how small the number of non-consenting counterparties.**

DSIO is aware of the logistical and behavioral challenges dealers now face in obtaining various consents and agreements requested of counterparties in order to achieve Title VII compliance. DSIO is also cognizant that new price streams and operational capabilities must be created by FX dealers and trading platforms were they to be obliged to generate and furnish Pre-Trade Mid-Market Marks.<sup>10</sup>

FX dealers of course are seeking counterparty written agreement to non-disclosure of Pre-Trade Mid-Market Marks. In fact, this request has been included in an Addendum to the ISDA August 2012 DF Protocol.<sup>11</sup> It is certainly true, however, that some counterparties inevitably will not provide the requested written agreement. Even if this number is small and even if these counterparties withhold consent for non-substantive reasons, FX dealers and platforms will be required to do the same infrastructure build as if all counterparties withheld consent, as well as building additional capabilities to distinguish consenting from non-consenting counterparties. In other words, the consent requirement, as a practical matter, renders the existing no-action relief of little practical value.

### IV. Conclusion

The pre-trade mid-market mark is not specifically required by statute. Its purpose in the case of Covered Forex Transactions is fulfilled by the ready availability of market data. We believe, therefore that the DSIO should be comfortable removing the written agreement requirement from CFTC Letter No. 12-42.

Please do not hesitate to contact the FXC's and the FMLG's legal counsel, Joshua Cohn of Mayer Brown LLP, at 212-506-2539 or [jcohn@mayerbrown.com](mailto:jcohn@mayerbrown.com), should you have any questions regarding our request.

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<sup>10</sup> These price streams and capabilities vary by currency and platform.

<sup>11</sup> The Commission of course is aware that seeking consent by protocol or other means does not assure a response.

Gary Barnett  
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Sincerely,

**The Foreign Exchange Committee**

**By:** \_\_\_\_\_  
**Jeff Feig, Committee Chair**

**By:** \_\_\_\_\_  
**Adnan Akant, Buy Side Chair**

**The Financial Markets Lawyers Group**

**By:** \_\_\_\_\_  
**Jeff Lillien**

cc: Hon. Gary Gensler, Chairman  
Hon. Jill E. Sommers, Commissioner  
Hon. Bart Chilton, Commissioner  
Hon. Scott D. O'Malia, Commissioner  
Hon. Mark P. Wetjen, Commissioner  
Commodity Futures Trading Commission  
1155 21st Street NW  
Washington, DC 20581

**UNDERTAKING AND CERTIFICATION**

I, the undersigned, a representative member of the FMLG who has been duly appointed to sign this Undertaking and Certification on behalf of the FMLG, hereby undertake that I will notify U.S. Commodity Futures Trading Commission staff promptly if any of the representations made in connection with or related to the FXC's and FMLG's Request for No-action Relief dated April 11, 2013 cease to be true or correct, or become incomplete or misleading.

I hereby certify that the material facts set forth in the attached letter dated April 11, 2013 are true and complete to the best of my knowledge.

Signed: \_\_\_\_\_

Name: \_\_\_\_\_

Date: \_\_\_\_\_