

The Financial Markets Lawyers Group
33 Liberty St., 7th Floor
New York, NY 10045

Commodity Exchange Act Sections 1a(18)(A)(iv) and 4s(h)(3)(A)
Commission Regulations 1.3(m), 23.402 and 23.430

November 28, 2012

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: Financial Markets Lawyers Group – Request for Extension of the Implementation of the Look-Through Rule and Related Verification and Recordkeeping Requirements

Dear Mr. Barnett:

The Financial Markets Lawyers Group (“**FMLG**”)* requests the Division of Swap Dealer and Intermediary Oversight (“**DSIO**”) of the Commodity Futures Trading Commission (the “**Commission**”) to grant interpretative relief, on or prior to December 31, 2012, (i) extending for 90 days implementation of the “**Look-Through Requirement**”¹ contained in the definition of eligible contract participant (“**ECP**”)², (ii) suspending for 90 days the obligations of swap dealers under the external business conduct standards (the “**Business Conduct Standards**”)³ to verify that commodity pool counterparties are qualified as ECPs with respect to Foreign Exchange Transactions; and (iii) extending for 90 days the implementation of related recordkeeping obligations for swap dealers. This relief would allow swap dealers to continue to engage in Foreign Exchange Transactions with commodity pools for 90 days after the CPO Compliance Date based on the definition of ECP in effect prior to effectiveness of the Dodd-Frank Act and, thereby, properly conduct their ECP verification process or transition commodity pools that do not meet the definition of an ECP under the Look-Through Requirement to a foreign exchange platform for non-ECPs, where possible.

“**Foreign Exchange Transactions**” refer to all transactions in foreign exchange that fall within the definition of “swap”⁴ or are subject to the Treasury Exemption, other than transactions executed on a designated contract market and cleared at a derivatives clearing organization.⁵ “**CPO Compliance Date**” means December 31, 2012 or such later date as the Commission provides for commodity pools that previously relied on Commission Regulation 4.13(a)(4) to comply with the commodity pool operator (“**CPO**”) registration requirements.⁶

* FMLG is composed of lawyers who support foreign exchange and other financial markets trading in leading worldwide financial institutions. The FMLG includes members from the following institutions signing onto this Letter: Bank of America, N.A.; BNP Paribas; Citigroup Global Markets Inc.; Deutsche Bank; Goldman, Sachs & Co.; HSBC Securities (USA) Inc.; JP Morgan Chase & Co.; Morgan Stanley; Royal Bank of Canada; State Street Bank and Trust Company; The Bank of New York Mellon; UBS AG; U.S. Bank National Association; and Wells Fargo. The FMLG is sponsored by the Federal Reserve Bank of New York and advises on legal issues relevant to the global foreign exchange and foreign exchange swaps markets. Although FMLG is sponsored by the Federal Reserve Bank of New York, this request for interpretative letter is not endorsed by the Federal Reserve Bank of New York or the Federal Reserve System.

I. Introduction

The Dodd-Frank Act makes it unlawful for any person, other than an ECP, to enter into a Foreign Exchange Transaction that is a swap.⁷ Foreign Exchange Transactions exempted from the definition of swap by the Treasury Exemption must also be entered into only with persons who are ECPs.⁸ The definition of ECP that was established by the Dodd-Frank Act to apply with respect to Foreign Exchange Transactions includes the Look-Through Requirement, which restricts those commodity pools that qualify as ECPs to commodity pools in which each participant is itself an ECP.⁹ The Commission's regulations further provide that a commodity pool may not avoid application of the Look-Through Requirement by qualifying as an ECP under the alternative ECP definitions contained in Section 1a(18)(A)(v) of the Act.¹⁰

The Commission adopted a safe harbor from the Look-Through Requirement (the "**Look-Through Safe Harbor**") in Commission Regulation 1.3(m)(8). The Look-Through Safe Harbor allows commodity pools that, among other things, are formed and operated by a registered CPO or by a person exempted from CPO registration by Commission Regulation 4.13(a)(3)(the "**(a)(3) Exemption**") to qualify as ECPs.¹¹ Commodity pools are in the process of taking steps to register their operator or to restructure their operations to comply with the (a)(3) Exemption in order to be in compliance by the CPO Compliance Date. Many of these commodity pools do not yet know whether they will qualify for the Look-Through Safe Harbor and, if so, the basis under which they will qualify.

As a result of the Look-Through Requirement, and absent the ability to rely on the Look-Through Safe Harbor, a commodity pool that has a participant who is not an ECP would, as of the CPO Compliance Date, be subject to the separate regulatory regime applicable to "retail foreign exchange." As of this date, the commodity pool would no longer be eligible to accept offers of or to enter into Foreign Exchange Transactions on the institutional platform on which the entity currently trades foreign exchange and swaps and where, if it is an ECP for other purposes, it will continue to trade swaps. FMLG believes that the process of migrating these counterparties from the institutional platform to a retail foreign exchange platform will be a time-consuming process, particularly because of the substantially different regulation governing retail foreign exchange. Swap dealers have generally not been able to plan ahead for a possible migration to the retail foreign exchange platform or to confirm reliance by a commodity pool on the Look-Through Safe Harbor because commodity pools are still in the process of restructuring and applying for the necessary registrations or exemptions to qualify for the Look-Through Safe Harbor and are expected to obtain the registrations and exemptions only a day or two before the Business Conduct Standards become effective.

Under the Business Conduct Standards, swap dealers are required to verify the ECP status of their counterparties prior to offering or entering into Foreign Exchange Transactions with those counterparties. One method by which swap dealers can comply with the Business Conduct Standards is through receipt of written representations. Given the length of time that it is taking the operators of many commodity pools to either register as CPOs or qualify for exemption under the (a)(3) Exemption, we are concerned that the commodity pools will be unable to provide written representations until after the Business Conduct Standards go into effect. Receipt of representations at or about the time a commodity pool seeks to enter into a Foreign Exchange Transaction will not provide a swap dealer sufficient time to input the representations into their systems and catalogue them for recordkeeping purposes in order to be ready to trade (assuming that the representations verify ECP status) or to transition the commodity pool to a retail platform (assuming that the pool is unable to verify ECP status).

Under the Business Conduct Standards, swap dealers may also verify a counterparty's status as an ECP through diligence sufficient to establish a "reasonable basis" for believing that the commodity pools are ECPs.¹² The Business Conduct Standards do not define the "reasonable basis" standard and, thus,

there is uncertainty regarding what checks are required. Regardless of the amount of diligence that may be required, FMLG members believe that it will be difficult to conduct any meaningful diligence on a counterparty's ECP status prior to the CPO Compliance Date because the commodity pools themselves are still determining how to comply with the CPO registration requirements. Further, because the CPO Compliance Date coincides with the effective date of the Look-Through Requirement, swap dealers will have less than a day to verify the ECP status of commodity pools whose operators delay CPO registration until or satisfy the (a)(3) Exemption requirements on the CPO Compliance Date. Swap dealers are also required to retain records of all of the information they use to verify status and to store the information in an organized, easily searchable manner. That process involves a significant amount of lead time.

Absent relief from the Commission, FMLG Members are concerned that they will be unable to enter into foreign currency transactions with commodity pools as of and immediately after the CPO Compliance Date. FMLG Members will not be able to enter into Foreign Exchange Transactions with many commodity pools that qualify as ECPs because they will not have obtained sufficient documentation. Similarly, they will not be able to enter into foreign currency trades with many commodity pools that are non-ECPs because they will not have sufficient time to transition these commodity pools to a retail foreign exchange platform by or soon after the CPO Compliance Date.

II. Request for Interpretative Letter

The FMLG requests that DSIO issue an interpretative letter with respect to swap dealers' Foreign Exchange Transactions with commodity pools: (i) extending implementation of the Look-Through Requirement until 90 days after the CPO Compliance Date; (ii) suspending for 90 days after the CPO Compliance Date the obligations of swap dealers under the Business Conduct Standards to verify the ECP status of commodity pools; and (iii) extending implementation of the related recordkeeping requirements for the same 90-day period.

This relief would provide swap dealers with time reasonably required to collect written representations from commodity pools and their agents (or conduct sufficient due diligence) regarding the commodity pools' ECP status after the CPO Compliance Date and to begin the lengthy process of transitioning commodity pools that no longer qualify as ECPs as a result of the Look-Through Requirement to a retail foreign exchange platform.

III. Discussion Regarding the Need for Temporary, Transitional Relief

Absent the relief requested herein, swap dealers would be unable to transact in foreign exchange, on either an institutional or a retail foreign exchange platform (because of the time necessary to transition a counterparty to such a platform), with many of the subject commodity pools beginning after the CPO Compliance Date. This could adversely impact market liquidity since commodity pools represent a significant source of liquidity in the foreign exchange market.¹³

The relief is limited in nature and tailored to a specific need. The FMLG previously discussed this relief at a meeting with the Commissioners and the Staff on July 31, 2012. The relief is also consistent with the principles underlying the Business Conduct Standards that are expressly designed to provide flexibility to swap dealers in satisfying the requirements under the applicable rules.¹⁴

IV. Conclusion

For the reasons stated above, the FMLG respectfully requests DSIO to issue an Interpretative Letter granting the relief requested above.

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The Staff has not previously issued an exemptive, no-action or interpretative letter regarding the effective date of the Look-Through Requirement or application of the Business Conduct Standards addressed in this letter.

If DSIO denies this request for an interpretative letter, the FMLG requests that DSIO consider granting alternative relief. In addition, if the Staff issues an interpretative letter to another party that grants even broader relief than the relief requested in this letter, including a longer extension of the implementation of the requirements discussed in this letter, the FMLG requests that its members also be authorized to rely on such broader relief.

Please do not hesitate to contact the FMLG's representative member, Maria Douvas, of Morgan Stanley & Co. LLC, at 212-762-4888 or maria.douvas@morganstanley.com should you have any questions regarding our request.

Sincerely,

THE FINANCIAL MARKETS LAWYERS GROUP

By:  _____
Maria Douvas

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 the U.S. Commodity Futures Trading Commission staff promptly if any of the representations made in connection with or related to FMLG's Request for Interpretative Letter, dated November 28, 2012, cease to be true or correct, or become incomplete or misleading.

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

Signed: Maria Douvas
Name: Maria Douvas
Date: November 28, 2012

ENDNOTES

¹ The “Look-Through Requirement” refers to the proviso in Section 1a(18)(A)(iv) of the Commodity Exchange Act (the “Act”) stating that a commodity pool will not be an ECP, for purposes of Sections 2(c)(2)(B)(vi) and 2(c)(2)(C)(vii) of the Act, if any participant in the commodity pool is not an ECP. The Look-Through Requirement was added by Section 741 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“**Dodd-Frank Act**”) and is scheduled to become effective, as further implemented by Commission Regulation 1.3(m), on December 31, 2012 with respect commodity pools formed prior to the adoption of the requirement. *See also* 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, 30700 (May 23, 2012).

² *See* definition in Section 1(a)(18) of the Act and Commission Regulation 1.3(m).

³ 17 C.F.R. §§ 23.400—23.451. *See also* Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 Fed. Reg. 9734 (Feb. 17, 2012) (“**Business Conduct Release**”).

⁴ *See* Section 1a(47) of the Act.

⁵ The Treasury Exemption refers to action taken by the U.S. Department of the Treasury, on November 16, 2012, pursuant to authority granted in Section 1a(47)(E) of the Act, to exempt physically-settled currency forwards and physically-settled currency swaps from the definition of “swap” (the “**Treasury Exemption**”). *See* Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act, 77 Fed. Reg. 69694, 69705 (Nov. 20, 2012). Foreign Exchange Transactions do not include transactions in foreign currency effected with persons that are not ECPs, spot transactions or foreign exchange transactions conducted on a designated contract market or on a swaps execution facility, in the latter case, to the extent that the swap dealer does not know the identity of the counterparty. These excluded transactions are not subject to the requirements of the Business Conduct Standards.

⁶ The Commission rescinded the exemption from CPO registration under Commission Regulation 4.13(a)(4) for funds offered exclusively to qualified eligible persons. *See* Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations, 77 Fed. Reg. 11252, 11265 (Feb. 24, 2012). For any CPO that previously relied on Commission Regulation 4.13(a)(4), the exemption expires on December 31, 2012.

⁷ *See* the Dodd Frank Act, Section 723(e), which applies this prohibition to all swap transactions *other than* those effected on a designated contract market. For purposes of this letter, the term “Foreign Exchange Transaction”, to which the relief requested will apply, expressly excludes transactions effected on a designated contract market.

⁸ *See* Section 1a(47)(F)(ii) of the Act.

⁹ Section 1a(18)(A)(iv) of the Act (“provided, however, that for purposes of section 2(c)(2)(B)(vi) and section 2(c)(2)(C)(vii), the term ‘eligible contract participant’ shall not include a commodity pool in which any participant is not otherwise an eligible contract participant.”). Section 2(c)(2)(B)(vi) and Section 2(c)(2)(C)(vii) of the Act relate to transactions in foreign exchange with persons that are not ECPs. As a result, the Look-Through Requirement effectively treats as a non-ECP any commodity pool whose participants are not all ECPs when transacting in foreign exchange.

¹⁰ *See* Commission Regulation 1.3(m)(5).

¹¹ *See* Commission Regulation 1.3(m)(8). The provision also requires that the commodity pool have (i) has total assets exceeding \$10,000,000 and (ii) not be formed for the purpose of evading regulation under Section 2(c)(2)(B) or Section 2(c)(2)(C) of the Act or related Commission rules, regulations or orders.

¹² *See* Business Conduct Release at 9757.

¹³ A recent study by the Bank for International Settlements found that non-bank financial institutions represent approximately 47% of the total trading conducted in the foreign exchange market, largely accounted for by commodity pools. *See* Bank for International Settlements, Triennial Central Bank Survey, Report on Global Foreign Exchange Market Activity in 2010 (Dec. 2010), available at <http://www.bis.org/publ/rpfx10t.pdf>. The non-bank financial institutions category includes non-reporting banks, hedge funds, pension funds, mutual funds, insurance companies and central banks.

¹⁴ *See* Business Conduct Release at 9757 (“The rule is principles based and allows the parties flexibility in developing efficient means to address the requirements of the rule. By providing non-exclusive guidance as to the types of representations that will meet the ‘reasonable basis’ standard, the Commission believes that the parties will be able to comply with the rule without incurring undue cost.”)