

**TREASURY PROPOSES TO EXCLUDE FX SWAPS AND FX FORWARDS
FROM MOST CFTC OVERSIGHT**

The Secretary of the Treasury has proposed to exempt foreign exchange swaps (FX Swaps) and foreign exchange forwards (FX Forwards) from the definition of “swap” in the Commodity Exchange Act (CEA).¹ FX Swaps and FX Forwards would still be subject to the swap reporting rules promulgated by the Commodity Futures Trading Commission. Comments on the Proposal are due 30 days after publication in the Federal Register.

Not All Foreign Exchange Swap Transactions Would Be Exempt

The Treasury’s proposed determination would apply only to FX Swaps and FX Forwards and would not apply to other foreign currency transactions that do not fall within the narrow definitions of these terms. For example, currency options, non-deliverable forwards and currency swaps would not be excluded from the definition of swap.

An FX Swap is:

A transaction that solely involves (A) an exchange of two different currencies on a specific date at a fixed rate that is agreed upon on the inception of the contract covering the exchange; and (B) a reverse exchange of the two currencies at a later date and at a fixed rate that is agreed upon on the inception of the contract covering the exchange.

An FX Forward is:

A transaction that solely involves the exchange of two different currencies on a specific future date at a fixed rate agreed upon on the inception of the contract covering the exchange.

Treasury notes in the Proposal that FX Swaps and FX Forwards should be excluded from the definition of “swap” because they are different from other swaps. For example, unlike other swaps, FX Swaps and FX Forwards have fixed payment obligations, involve the physical exchange of the full principal amount of the contract in two different currencies and are predominantly short-term instruments with lower credit risk. A foreign currency transaction that does not involve full physical exchange of the two reference currencies (*e.g.*, a contract that allows for net settlement according to profit or loss) would not be an FX Swap or FX Forward. Such transactions would be swaps and would be subject to full regulation by the CFTC.

¹ *Determination of Foreign Exchange Swaps and Foreign Exchange Forwards under the Commodity Exchange Act*, April 29, 2011 (the “Proposal”). Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act authorizes the Secretary to exclude FX Swaps and FX Forwards from the definition of “swap.” On October 28, 2010, the Department of the Treasury requested comments on whether FX Swaps and FX Forwards should be regulated as swaps under Dodd-Frank, but did not make a determination on the status of FX Swaps and FX Forwards at that time.

Some Commodity Exchange Act Requirements Would Still Apply

Under the Proposal, most requirements otherwise applicable to swaps would not apply to FX Swaps and FX Forwards. For example, such swaps would not have to be cleared or traded on a regulated venue. In addition, counterparties to FX Swaps and FX Forwards would not be subject to registration as swap dealers or major swap participants with respect to such transactions. FX Swaps and FX Forwards would, however, still be subject to the swap reporting rules and the anti-evasion provisions of the CEA. In addition, FX Swap and FX Forward counterparties that are otherwise swap dealers or major swap participants would be required to conform to the business conduct standards applicable to such entities. FX Swaps and FX Forwards traded on regulated venues would be subject to all applicable CEA requirements. Further, the Proposal would not affect the jurisdiction of the CFTC over retail foreign exchange transactions.

The Proposal does not explain how FX Swaps and FX Forwards, which are swaps unless excluded by the Treasury, differ from contracts of sale of a commodity (foreign currency) for future delivery, which are excluded from the definition of swap in the CEA. Contracts of sale of a foreign currency for future delivery are not regulated as swaps and may come within other exemptions from regulation under the CEA.

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If you have any questions regarding this new proposal, please contact Rita M. Molesworth (212-728-8727, rmolesworth@willkie.com), Irene Moyseyenko (212-728-8118, imoyseyenko@willkie.com), or the Willkie attorney with whom you regularly work.

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