

REGULATION OF FORWARD FOREIGN EXCHANGE TRANSACTIONS IN THE UNITED STATES

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I. Summary Position.

OTC FX forwards, including non-deliverable forwards, are not generally regulated unless they are offered to or entered into with retail counterparties by unregulated entities.

II. General Background.

- (a) FX forwards do not generally implicate the US securities laws.
- (b) FX forwards are generally eligible for an exclusion from regulation under the US commodities laws which regulate commodity futures and options.
- (c) FX forwards eligible for exclusion from regulation under the US commodities laws, are generally not subject to prohibition or invalidation under US state gaming and bucket shop laws.

III. Exclusions Under US Commodities Laws.

- (a) Forward Contract Exclusion. While the Commodity Exchange Act of 1922 ("CEA") does not specifically define the term "futures contract", Section 1(a)(19) excludes any sale of a cash commodity for "deferred shipment or delivery". This exclusion is generally available for FX forwards that, among other things, create binding obligations to deliver the relevant currencies.
- (b) The Commodity Futures Modernization Act of 2000 ("CFMA"), enacted several overlapping exclusions for nonagricultural commodities transactions from regulation under the CEA. FX forwards, including non-deliverable forwards, structured in compliance with one of these exclusions are generally so exempt. Two of the principal exclusions for FX forwards are summarized below. FX forwards which comply with these exclusions are not subject to prohibition or invalidation under US state gaming and bucket shop laws.
 - (i) Section 2(d)(i) of the CEA excludes transactions involving an "excluded commodity" that is entered into only between persons that are "eligible contract participants" and which are not executed

or traded on a “trading facility”. Excluded commodities include financial commodities such as currencies. Eligible contract participants include several defined classes of US or foreign regulated financial institutions (e.g., banks, insurance companies, funds, broker-dealers, and futures commission merchants), corporations, partnerships, trusts with total assets exceeding \$10 million or a net worth exceeding \$1 million and which enter into the transaction in connection with the conduct of its business, individuals with total assets exceeding \$10 million or total assets exceeding \$5 million and which enter into the transaction to hedge the risk of an asset or liability, and governmental entities. Trading facilities generally includes multilateral trading systems.

- (ii) Section 2(c) of the CEA (the so –called Treasury Amendment), excludes a list of transaction types including those in foreign currency unless they are traded or executed on an “organized exchange” or are offered to or entered into with a person that is not an eligible contract participant (i.e., a retail client). Off-exchange retail transactions are still covered by the Treasury Amendment exclusion from CEA regulation if they are offered by or entered into with one of several categories of directly or indirectly regulated or supervised entities (e.g., banks, broker-dealers, futures commission merchants and insurance companies). Organised exchanges generally includes exchanges which permit participation by retail investors, allow brokered transactions or have a self-regulatory organisation type disciplinary infrastructure.

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