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Via Electronic Submission: http://comments.cftc.gov
http://www.sec.gov/rules/proposed.shtml

Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant" and "Eligible Contract Participant" *75 F.R. 80174* (December 21, 2010) (the "Proposal")

Dear Mr. Stawick and Ms. Murphy:

Willkie Farr & Gallagher LLP respectfully submits comments on the aspect of the Proposal that further interprets the definition of "eligible contract participant" ("ECP") promulgated as part of the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[1] Our comments are limited to the proposed definition of ECP as it applies to commodity pools. We have numerous clients that have a particular interest in this issue. Willkie advises commodity pools, including many pools that are also hedge funds, and their sponsors, advisors and service providers. Such service providers include banks that act as counterparties to commodity pools with respect to such pools' over-the-counter ("OTC") foreign currency ("FX") transactions. References herein to "hedge funds" mean hedge funds that are commodity pools.

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010) (the "Dodd-Frank Act"). The Proposal contains rules proposed jointly by the Commodity Futures Trading Commission and the Securities and Exchange Commission.

If Rules 1.3(m)(5)[2] and 1.3(m)(6)[3] are adopted as proposed, a substantial number of traditional commodity pools, including most hedge funds, would fail to qualify as ECPs for purposes of OTC FX transactions, including forward foreign currency trading. Publicly offered commodity pools owned by retail investors most certainly would not qualify as ECPs under the rule as proposed. Such a result would be disruptive to the trading strategies employed by many commodity trading advisors on behalf of public and private commodity pools, including hedge funds.

Currently, Commodity Exchange Act ("CEA") Section 1a(12)(A)(iv)[4] provides that a commodity pool with $5 million in assets that was formed and is operated by a person subject to CFTC or similar foreign regulation is an ECP for purposes of all transactions. The Dodd-Frank Act amended the definition of ECP to provide that a commodity pool will not qualify as an ECP *with respect to OTC FX transactions* unless all of the pool's participants are themselves ECPs. The Proposal would apply the ECP requirement to both direct *and indirect* investors by mandating an indefinite look-through to determine ECP status. The Proposal also would prohibit a commodity pool from qualifying as an ECP under CEA Section 1a(12)(A)(v)[5] of the ECP definition, which generally acts as a catch-all ECP category that includes any entity with at least $10 million in total assets.

Although the text of the proposed rule does not define "indirect," discussion in the Proposal specifies that the look-through requirement of the proposed rule is intended to capture participants "*at any investment level* (*e.g.*, a participant in the pool itself (a direct participant), a participant in a fund or pool that invests in the pool in question (an indirect participant), a participant in a fund or pool that invests in that investor fund or pool (also an indirect participant), *etc.*)"[6] (emphasis added).

The look-through requirement added by the Dodd-Frank Act will likely cause many hedge funds to lose their ECP status with respect to their OTC FX transactions. If extended indefinitely (as proposed), the look-through would result in most hedge funds being non-ECPs for OTC FX purposes, as presumably most hedge funds would have at least one direct or indirect non-ECP participant. For example, post-Dodd-Frank, an individual generally will have to have more than $10 million in *investible* assets to qualify as an ECP.

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[2] Proposed Rule 1.3(m)(5) states: "A commodity pool with one or more *direct or indirect* participants that is not an eligible contract participant is not an eligible contract participant for purposes of Sections 2(c)(2)(B)(vi) and 2(c)(2)(C)(vii) of the Commodity Exchange Act." (emphasis added).

[3] Proposed Rule 1.3(m)(6) states: "A commodity pool that does not have total assets exceeding $5,000,000 or that is not operated by a person described in clause (A)(iv)(II) of Section 1a(18) of the Commodity Exchange Act is not an eligible contract participant pursuant to clause (A)(v) of such Section."

[4] Redesignated as Section 1a(18)(A)(iv) by the Dodd-Frank Act.

[5] Redesignated as Section 1a(18)(A)(v) by the Dodd-Frank Act.

[6] Proposal at 80185.

A further complication arises from the fact that a non-ECP may not engage in OTC FX transactions (whether for speculation or to hedge currency exposure) unless its counterparty is one of several enumerated types of entities specified in the CEA. Such types of entities include, among others, U.S. financial institutions, broker-dealers, futures commission merchants, financial holding companies and retail foreign exchange dealers. CEA Section 2(c)(2)(E) as amended by the Dodd-Frank Act provides, however, that these entities may enter into OTC FX transactions with non-ECPs only pursuant to, and in accordance with, regulations promulgated by such entities' respective federal regulators. Such regulators are not required to promulgate such regulations. Thus, even if such enumerated counterparties are willing to engage in OTC FX transactions with non-ECPs, they may do so only if permitted by their respective federal regulators.

We note that for as long as there have been registered CPOs, pool strategies have included spot and forward foreign exchange trading. OTC FX contracts are used as a hedge for currency exposures as well as for speculation. In fact, many of the best-known and oldest pools have used FX as a main focus. Similarly, many well-known commodity trading advisors ("CTAs") have offered FX-focused trading strategies over the years. This is at least in part because the market for FX provides ample liquidity. Moreover, not all currencies have corresponding exchange-traded futures contracts. If Rule 1.3(m) is adopted as proposed, trading strategies for commodity pools would have to be adjusted, which could be disruptive to their operations. Such a result could also be disruptive to the CTAs that trade on behalf of commodity pools. CTAs would have to decide whether to adjust their trading strategies to accommodate commodity pool clients that are not ECPs for purposes of FX transactions or terminate those relationships.[7] Moreover, documentation governing FX transactions would have to be revised or replaced. Limiting the ability of commodity pools to hedge their FX exposure would be contrary to the purposes of the Dodd-Frank Act and arguably harmful to investors, including retail investors in public pools.

The distinguishing features of the FX market were recognized in the Treasury Amendment to the CEA in 1974 and again in 2000 when deregulation of various areas occurred. These features should continue to be recognized in our current re-regulatory environment. It may be time to regulate certain previously unregulated transactions and traders, so that more CPOs are registered and more trades are on exchanges. On the other hand, we should accept the well established principle that many commodity pools are operated and advised by registered professionals. Moreover, trading in FX provides hedging and speculative opportunities in very liquid FX markets. The individual investor's qualification or lack of qualification to be a trader should be irrelevant. Consequently, proposed Rule 1.3(m) should be revised prior to being implemented in final form.

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[7] CTAs generally prefer to employ the same methods and instruments (*e.g.*, exchange vs. OTC for a particular currency) on behalf of all clients within a given strategy. This preference is in part due to a desire to have consistent returns among client accounts traded pursuant to the same trading program.

If professionally managed commodity pools are not within the intended scope of the proposed rules, we recommend that the final rules make that fact clear. One approach may be to provide that commodity pools with assets in excess of a certain level would qualify as ECPs, notwithstanding the look-through requirement applicable in certain circumstances. A second approach may be to combine a (perhaps lower) level of pool assets with a requirement that the commodity pool was not formed for the purpose of evading the regulatory requirements applicable to FX transactions involving "retail" investors. Other approaches might include providing that a pool would be an ECP if it were operated by a CPO or advised by a CTA subject to regulation by the CFTC or a comparable foreign regulator or if the pool were a non-U.S. person under the CEA.

I would be happy to discuss our recommendations with the Commissioners or their respective staffs at any time.

Respectfully submitted,

Rita M. Molesworth

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cc: The Hon. Gary Gensler, CFTC Chairman
The Hon. Michael Dunn, CFTC Commissioner
The Hon. Bart Chilton, CFTC Commissioner
The Hon. Jill E. Sommers, CFTC Commissioner
The Hon. Scott D. O'Malia, CFTC Commissioner

The Hon. Mary Schapiro, SEC Chairman
The Hon. Kathleen L. Casey, SEC Commissioner
The Hon. Elisse B. Walter, SEC Commissioner
The Hon. Luis A. Aguilar, SEC Commissioner
The Hon. Troy A. Paredes, SEC Commissioner