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September 28, 2012

The Honorable Gary Gensler  
Chairman  
Commodity Futures Trading Commission  
1155 21st Street, N.W.  
Washington, D.C. 20581

Re: FX Forwards and FX Swaps Determination

Dear Chairman Gensler:

The undersigned trade associations<sup>1</sup> are submitting this letter to request the Commodity Futures Trading Commission (the “CFTC”) to take urgent action if the

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<sup>1</sup> The Asset Management Group (“AMG”) of the Securities Industry and Financial Markets Association’s members represent U.S. asset management firms whose combined assets under management exceed \$20 trillion. The clients of AMG member firms include, among others, registered investment companies, endowments, state and local government pension funds, private sector Employee Retirement Income Security Act of 1974 pension funds and private funds such as hedge funds and private equity funds.

The Investment Company Institute (“ICI”) is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (“ETFs”), and unit investment trusts (“UITs”). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$13.3 trillion and serve over 90 million shareholders.

The Managed Funds Association (“MFA”) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry’s contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, the Americas, and Australia.

The Investment Adviser Association (“IAA”) is a not-for-profit association that represents the interests of SEC-registered investment adviser firms. Founded in 1937, the IAA’s membership consists of more than 530 firms that collectively manage in excess of \$10 trillion for a wide variety of individual and institutional investors, including pension plans, trusts, investment companies, private funds, endowments, (...continued)

Secretary of the Department of Treasury (the “Treasury”) does not make a final or interim determination on its proposal to exempt foreign exchange forwards and foreign exchange swaps (collectively, the “FX Products”) from the definition of “swap” under the Commodity Exchange Act (“CEA”) prior to October 12, 2012. We direct your attention to the attached letter to the Secretary of the Treasury which sets out in more detail our serious concerns about the consequences on the impending registration and compliance deadlines for commodity trading advisors (“CTAs”), commodity pool operators (“CPOs”) and major swap participants (“MSPs”), as each such term is defined under the CEA, if the Treasury fails to make a final or interim determination with respect to FX Products prior to that date.

Our members represent asset management firms that advise registered investment companies, private funds and accounts, endowments, state and local government pension funds and private sector pension funds and accounts subject to the Employee Retirement Income Security Act of 1974 and other institutional clients. In their role as asset managers, our member firms, on behalf of their clients, may engage in transactions that will be classified as “foreign exchange forwards” or “foreign exchange swaps”<sup>2</sup> under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”).

Under the Dodd-Frank Act and the final product definition rules (the “Swap Definition”)<sup>3</sup> adopted by the CFTC and the Securities and Exchange Commission, FX Products are included in the definition of swap unless and until the Treasury determines that they should be excluded. The Swap Definition, which becomes effective on October 12, 2012, triggers the effectiveness of other new rules recently promulgated pursuant to the Dodd-Frank Act and other regulatory changes recently adopted by the CFTC that require CTA and CPO registration with the CFTC. While we remain hopeful that the Treasury will act to finalize its determination prior to October 12, 2012, and thus bring certainty to market participants, we respectfully request that, if the Treasury does not make a determination at some point prior to this date, the CFTC take action to avoid the substantial burden on market participants (and the CFTC) that will otherwise occur.

We do not believe that there would be any public policy purpose for entities to be required to register as a CTA, CPO or MSP after October 12, 2012 solely because such registration is triggered by the inclusion of the FX Products in their swap positions due to Treasury not having made a final determination. Registration under these circumstances would be unnecessary, illogical and unduly burdensome if the Treasury ultimately

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foundations, and corporations. For more information, please visit our website:  
[www.investmentadviser.org](http://www.investmentadviser.org).

<sup>2</sup> An asset manager may engage in transactions involving FX Products on behalf of their clients for a variety of reasons, including to offset portfolio risk from exposure to currency risk from a foreign investment.

<sup>3</sup> 77 Fed. Reg. 48207 (Aug. 13, 2012).

exempts FX Products from the swap definition at some point after October 12, 2012. Similarly, market participants that are preparing in earnest for compliance with these new rules, while also preparing for all of the other Dodd-Frank Act-related requirements, should not be required to incur significant costs to implement systems for monitoring their FX Product positions as swaps in the interim period between October 12, 2012 and the date when the Treasury makes its final determination.

Market participants generally had expected that the Treasury would have made a final determination with respect to FX Products shortly after the adoption of the final Swap Definition on July 10, 2012. It would be contrary to those market expectations, and disruptive to planning for all of the CFTC's new regulatory requirements, for FX Products to be treated as swaps beginning on October 12, 2012 due to lack of final action from the Treasury prior to that date. We recognize that the CFTC has a full and busy agenda, but we would appreciate the CFTC coordinating with the Treasury on this matter as soon as possible in an effort to reach a timely resolution.<sup>4</sup>

Should the Treasury not issue a determination by October 5, 2012, we respectfully request that the Commission promptly issue an order or other determination, effective October 12, 2012, providing that it will not treat FX Products as "swaps" under Section 1a(47) of the CEA until the effective date of the Treasury's final determination with regard to these FX Products.<sup>5</sup> Of course, during any such period, transactions in the FX Products should still be subject to the CFTC's new reporting rules, business conduct standards and anti-evasion authority, to the same extent as if the Treasury had determined to exempt the FX Products from the definition of swap.

This proposed relief would defer any CTA, CPO and MSP registration or compliance obligations on market participants arising from their use of FX Products, while preserving the Treasury's ability to make whatever final determination it should elect. Meanwhile, the CFTC's authority with respect to other instruments that are characterized as swaps under the CEA will also be maintained. However, the additional regulatory burdens on both market participants and the CFTC resulting from the lack of a final determination on FX Products would be relieved until such time as the Treasury acts.

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<sup>4</sup> See also letter from The Honorable Barney Frank, Ranking Member, House Committee on Financial Services, to the CFTC and Treasury regarding the exemption of FX Products from the Swap Definition (September 21, 2012).

<sup>5</sup> If it should become apparent to the CFTC that the Treasury will not make a final determination excluding FX Products from the definition of swap, then we respectfully request that the CFTC allow for a significant transition period before FX Products are treated as swaps in order to allow market participants sufficient time to come into compliance with such treatment for all purposes.

The undersigned trade groups appreciate the CFTC's consideration of this request, and stand ready to provide any additional information or assistance that the CFTC might find useful.

Should you have any questions, please do not hesitate to contact Tim Cameron of SIFMA AMG at 212-313-1389, Karrie McMillan of the Investment Company Institute at 202-326-5815 or Sarah Bessin of the Investment Company Institute at 202-326-5835, Stuart J. Kaswell or Jennifer Han of MFA at 202-730-2600, or Karen L. Barr of IAA at 202-293-4222.

Sincerely,

/s/ Timothy W. Cameron  
Timothy W. Cameron, Esq.  
Managing Director, Asset Management Group  
Securities Industry and Financial Markets Association

/s/ Karrie McMillan  
Karrie McMillan, Esq.  
General Counsel  
Investment Company Institute

/s/ Stuart J. Kaswell  
Stuart J. Kaswell  
Executive Vice President and Managing Director, General Counsel  
Managed Funds Association

/s/ Karen L. Barr  
Karen L. Barr, Esq.  
General Counsel  
Investment Adviser Association

cc: Hon. Jill E. Sommers, Commissioner, Commodity Futures Trading Commission  
Hon. Bart Chilton, Commissioner, Commodity Futures Trading Commission  
Hon. Scott O'Malia, Commissioner, Commodity Futures Trading Commission  
Hon. Mark Wetjen, Commissioner, Commodity Futures Trading Commission

Attachment