April 18, 2012
Via Electronic Mail

Mr. Thomas J. Curry
Comptroller
Office of the Comptroller of the Currency
Department of the Treasury
250 E Street, SW
Washington, D.C. 20219

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

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

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

Re: Retail Foreign Exchange Transactions; Determination Requested on Foreign Exchange Transactions with Retail Customers Related to Foreign Securities Settlement

Dear Ladies and Gentlemen:

On behalf of our member institutions, the American Bankers Association[i] ("ABA") and the GFMA Global FX Division[ii] respectfully request that the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), the Board of Governors of the Federal Reserve System ("FRB"), the Commodity Futures Trading Commission ("CFTC") and the Securities and Exchange Commission ("SEC") (collectively the "Agencies") provide clarification or, in the alternative, relief regarding certain foreign exchange ("FX") transactions with counterparties that are not within the definition of "eligible contract participants," or "ECPs," under the Commodity Exchange Act. Specifically, we ask that the Agencies confirm that FX transactions that are solely incidental to, and are initiated for the sole purpose of permitting a client to complete a transaction in, a foreign security are not subject to the Agencies' retail FX rules promulgated pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Act"). We do not believe that such transactions were intended to be covered by the Act or the Agencies' rules. However, we are concerned that the broad definition of "retail FX transactions" under those rules could be construed to encompass such transactions.

Definition of FX Transaction Subject to the Rule

Section 742 of the Act prohibits financial institutions that are regulated by a Federal regulatory agency from entering or offering to enter into certain FX transactions with retail customers[iii] except pursuant to a rule by that Federal regulatory agency. The OCC, FDIC and CFTC have issued a final rulemaking under this statutory provision, the FRB has issued a proposed rule and the SEC has issued an interim final temporary rule.[iv]

Under at least four of these final or proposed rules, the definition of "retail FX transactions" subject to the rule explicitly excludes contracts of sale that result in actual delivery within two days ("T+2") and create an enforceable obligation to deliver between a seller and buyer ("spot transactions"). The final rules and proposed rule also exclude from the definition "an agreement, contract, or transaction that the [Agency] determines is not functionally or economically similar to: (A) A contract of sale of a commodity for future delivery or an option on such a contract…"[v] In other words, retail FX spot transactions that are not delivered within two days of the contract may be subject to the rule unless the Agencies clarify that at least certain such transactions were not intended to be included, or make a determination to exclude them.

Clarification or Relief for Incidental Spot Transactions Requested

Many of our members act as custodian for the securities of, in the case of broker-dealers, their customers and, in the case of banks, for their customers and those of their affiliated broker-dealers. Due to the increased access and investor interest in foreign markets, growing numbers of these customers are invested in foreign securities. To facilitate the purchase or sale of these foreign securities, as well as to convert dividend payments and other payments received through corporate actions of the foreign issuer into US dollars, bank custodians and broker-dealers, as part of their duties, often enter into a FX transaction that is incidental to and for the sole purpose of effecting the foreign securities transaction.

For example, when a customer wishes to purchase a Euro-denominated security, the broker-dealer or bank custodian will enter into a corresponding FX transaction to have Euros on hand to effect the securities transaction. These FX transactions are an integral part of the settlement process. Typically, the settlement cycle for most non-US denominated securities is trade date plus three days ("T+3").[vi] Accordingly, the bank custodian or broker-dealer would enter into a FX transaction on a T+3 basis, as well. In some securities markets, for example in South Africa, the settlement cycle can take up to seven days.

Because only T+2 spot transactions are explicitly exempt from the retail FX transaction rules, this may cause some broker-dealers or bank custodians that may not have retail FX approvals under the relevant final rules to restrict these FX transactions to T+2 spot transactions, even when the securities settlement takes longer. As a result, the customer will be exposed to FX risk, while the bank may be exposed to certain operational risks.

The relevant provisions of Section 742 of the Act, and the Agencies' rules, were intended to impose certain regulatory requirements on speculative currency trading conducted by retail investors in an attempt to profit from fluctuations in exchange rates. The objective of these provisions was to provide protections to speculative traders, many of whom may be smaller and less sophisticated market participants. The statute and rules clearly were not intended to cover spot transactions in actual currencies effected in connection with securities transactions that might not, because of the settlement cycle of the relevant securities, result in an exchange of currencies within two days. Such transactions do not involve speculation in the underlying currencies and, to the contrary, will result in an exchange of currencies to be used to settle the relevant securities transactions. By definition, the transactions are not entered into – and cannot be entered into – for speculative purposes in order to profit from changes in currency exchange rates. Moreover, while certain of the investors entering into these transactions might not be ECPs, they generally are not "retail" investors in the ordinary sense of the term and typically constitute sophisticated international investors in the global securities markets, rather than smaller currency speculators.

As highlighted in two comment letters to the SEC,[vii] subjecting spot transactions that are incidental to related securities transactions to the retail FX rules, would expose bank custodians, broker-dealers and their customers to needless operational, price, credit and other risks. We understand that the Agencies' rules do not prohibit currency transactions with retail customers, and that the banks that are subject to the Agencies' rules on retail FX transactions may still execute such transactions, provided that they comply with the requirements of those rules. However, the rules simply cannot be applied to the types of incidental transactions at issue here, and will not provide any meaningful protection to investors. For example, the risk disclosure requirements assume that the customers are entering into leveraged, speculative currency transactions and make no sense in the context of transactions that are incidental to purchases and sales of securities. Moreover, it is not possible, or at least not helpful, for a bank to disclose the profitability of its customers' currency accounts, because the transactions described above are not entered into for profit and, indeed, "profitability" is not even a relevant concept. Such disclosure will therefore be confusing and seriously misleading. Further, many banks manage certain of their customers' portfolios on a discretionary basis and must enter into the incidental currency transactions as portfolio managers. Because discretionary transactions with a retail FX counterparty are prohibited under the rules, this activity will not be permitted if the rules are applicable, thereby disadvantaging those customers that rely on their banks to execute the transactions on their behalf. Compliance with the rules in this context, therefore, is simply not feasible.

Conclusion

For the stated reasons, we strongly believe the Agencies should clarify that FX spot transactions that are incidental to related securities transactions are not covered by the rules so that banks can continue to provide efficient and seamless settlement services.

Specifically, we urge you to clarify, or to determine, that the following transactions are excluded from the definition of "retail FX transaction":

1. the purchase, sale or exchange of a foreign currency by a bank on behalf of a retail customer for the sole purpose of effecting a purchase or sale of a foreign security or in order to clear or settle such purchase or sale, when the settlement period for such FX transaction is within the settlement cycle for such foreign security; and

2. physically-settled exchanges of foreign currency to facilitate distribution to customers of monies or securities received through corporate actions (e.g., coupons, dividends, class action settlements and rights offerings) made with respect to foreign securities held for a customer to the currency in which the account is denominated.

In addition to the foregoing, we further urge the CFTC and SEC to adopt a similar approach with respect to the Act as it relates to the definition of FX forwards for purposes of swaps regulation. As previously noted in a comment letter to the CFTC, the financial markets would benefit greatly from clarification that FX spot transactions – not only those with a settlement period of T+2, but also those with a settlement period beyond T+2 as described in (1) and (2) above – are excluded from the definition of FX for purposes of Title VII of the Act.[viii]

ABA and Global FX Division appreciate this opportunity to request clarification or a determination that certain incidental retail FX transactions are not subject to the Agencies' rules. If you have any questions about the letter, please write Phoebe Papageorgiou (phoebep@aba.com; 202-663-5053) or Mandy Lam (mlam@gfma.org; 212-313-1229).

Sincerely,

Phoebe A. Papageorgiou
Senior Counsel
American Bankers Association

James Kemp
Managing Director
Global Foreign Exchange Division

cc: Tena Alexander
Stephanie Boccio
Roman Goldstein
(Office of Comptroller of the Currency)

Thomas Hearn
(Federal Deposit Insurance Corporation)

Scott Holz
(Board of Governors of the Federal System)

David Aron
Daniel Berkovitz
Julian Hammar
(Commodity Futures Trading Commission)

David Blass
Robert Cook
Joe Furey
Bonnie Gauch
John Ramsay
(Securities and Exchange Commission)

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[i] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its two million employees.

[ii] The Global Financial Markets Association ("GFMA") joins together some of the world's largest financial trade associations to develop strategies for global policy issues in the financial markets, and promote coordinated advocacy efforts. The member trade associations count the world's largest financial markets participants as their members. GFMA currently has three members: the Association for Financial Markets in Europe ("AFME"), the Asia Securities Industry & Financial Markets Association ("ASIFMA"), and, in North America, the Securities Industry and Financial Markets Association ("SIFMA"). The GFXD of GFMA was formed in co-operation with AFME, ASFIMA and SIFMA. Its members comprise 22 global FX market participants, collectively representing more than 90% of the FX market. *See* Euromoney FX Survey 2011: Overall Market Share.

[iii] Retail customers are defined as persons that are not ECPs as defined under the Commodity Exchange Act (e.g., financial institutions, insurance companies, commodity pools, individuals with more than $10 million in assets). Please note that this does not reflect the changes to the definition of an ECP under the Act, which will narrow the definition and therefore expand the definition of "retail."

[iv] *See* 76 Fed. Reg 41,375 (adopting OCC Rules Part 48, effective July 15, 2011), 76 Fed. Reg 40,779 (adopting FDIC Rules Part 349, effective July 15, 2011; 78 Fed. Reg. 55,409 (adopting CFTC Rules Part 5, effective Oct. 18, 2010; 76 Fed. Reg 46,652 (proposing FRB Regulation NN, Aug 3, 2012); and 76 Fed. Reg 41,676 (adopting SEC interim final temporary Rule 15b12–1T, effective July 15, 2011).

[v] 12 CFR 349.2; 12 CFR 48.2; proposed 12 CFR 240.2; 17 CFR 240.15b12-1T. See also section 2(c)(2)(C) of the Commodity Exchange Act.

[vi] *See* www.sec.gov/investor/pubs/tplus3.htm.

[vii] Letter from Pershing to the SEC (June 17, 2011) at http://www.sec.gov/comments/other/other-initiatives/otherinitiatives-56.pdf; and joint letter from SIFMA and ISDA to the SEC (October 17, 2011) at http://www.sec.gov/comments/s7-30-11/s73011-12.pdf.

[viii] *See* letter from Global FX Division to the CFTC (February 7, 2011) at http://comments.cftc.gov/PublicComments/CommentList.aspx?id=920.