

U.S. Treasury Secretary Proposes to Exempt FX Swaps and FX Forwards from Dodd-Frank's "Swap" Definition

April 29, 2011

Earlier today the U.S. Treasury Secretary published a [Notice of Proposed Determination](#) (the "Notice") to exempt foreign exchange ("FX") swaps and FX forwards from the definition of a "swap" contained in the Commodity Exchange Act ("CEA"), as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

Under the Dodd-Frank Act, an FX swap is either: (A) a transaction that involves an exchange of two different currencies on a specific date at a rate fixed upon the inception of the contract or (B) the reverse exchange of the two currencies in (A) on the later date at a rate fixed upon the inception of the contract. The Dodd-Frank Act defines an FX forward as a transaction that solely involves the exchange of two different currencies on a specific date at a rate fixed upon the inception of the contract. Both FX swaps and FX forwards were included in the CFTC's proposed definition of a "swap" that was published earlier this week.¹

Section 1a(47)(E) of the CEA, as amended by the Dodd-Frank Act, grants the Treasury Secretary authority to categorically exempt FX swaps and FX forwards from the "swap" definition.² Today's Notice indicates that the Treasury Secretary's decision to exempt FX swaps and FX forwards was based on the conclusion that FX swaps and FX forwards present less risk to the financial system than other types of swaps because they are already subject to regulatory oversight reflecting the Dodd-Frank Act's objectives for reform. The Treasury Secretary also noted that FX swaps and FX forwards are markedly different from other types of swaps in that they are physically settled and of a short duration.

Although the effect of the Treasury Secretary's decision will be to exempt FX swaps and FX forwards from some of the Dodd-Frank Act's requirements, namely mandatory clearing and exchange trading requirements, FX swaps and FX forwards will still be subject to the Dodd-Frank Act's business conduct standards and recordkeeping and reporting obligations.

FX options, currency swaps and non-deliverable forwards (*i.e.*, transactions that cannot be settled in a currency that is the subject of the forward) are not affected by the Treasury Secretary's decision. These products will still fall within the definition of a "swap" and will be subject to all of the Dodd-Frank Act's requirements for swaps.

Market participants are invited to comment on the Treasury Secretary's proposed exemption for FX swaps and FX forwards. The deadline for submission of comments will be thirty (30) days after publication of the Notice in the Federal Register.

¹ The proposed rule, which was jointly issued with the Securities and Exchange Commission (SEC), has yet to be published in the Federal Register. A pre-publication copy of the Notice of Proposed Rulemaking is available [here](#). For more information, see Sutherland's [Legal Alert](#).

² For more information, see Sutherland's [Legal Alert](#).



If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

James M. Cain	202.383.0180	james.cain@sutherland.com
Paul B. Turner	713.470.6105	paul.turner@sutherland.com
Catherine M. Krupka	202.383.0248	catherine.krupka@sutherland.com
Warren N. Davis	202.383.0133	warren.davis@sutherland.com
William H. Hope II	404.853.8103	william.hope@sutherland.com
Mark D. Sherrill	202.383.0360	mark.sherrill@sutherland.com
Ann M. Battle	202.383.0842	ann.battle@sutherland.com
Michael W. Brooks	202.383.0863	michael.brooks@sutherland.com
Doyle Campbell	212.389.5073	doyle.campbell@sutherland.com
Meltem F. Kodaman	202.383.0674	meltem.kodaman@sutherland.com
Raymond A. Ramirez	202.383.0868	ray.ramirez@sutherland.com