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

Re: Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest[1]

Dear Mr. Stawick:

This letter is submitted on behalf of FX Alliance Inc. ("FXall"). FXall appreciates the opportunity to provide comments to the Commodity Futures Trading Commission (the "CFTC") with respect to the Proposed Rules and, in particular, the provisions of the Proposed Rules pertaining to the ownership requirements applicable to swap execution facilities ("SEFs").

The Proposed Rules provide, among other things, that an individual member or participant in the SEF, or an individual "enumerated entity" (as that term is defined in the Proposed Rules – generally banks, dealers and major swap participants) may not own more that 20% of the SEF; the Proposed Rules do not impose a limit on aggregate ownership of the SEF among enumerated entities.

Recently, the Department of Justice (the "DoJ") submitted a comment[2] recommending, among other measures, that aggregate ownership of a SEF be limited to 40% among enumerated entities. FXall would like to respond specifically to the aggregate ownership limit suggested by the DoJ.

The DoJ argues that such a restriction is "appropriate to limit the possibility of anticompetitive conduct" (DoJ Comments, p.2). As an active participant in the derivatives business, FXall respectfully disagrees with the DoJ's conclusion. Rather, it is FXall's view that the proposed restrictions may, in fact, have a detrimental effect on competition by diminishing key

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[1] 75 Fed. Reg. 63732 (Oct. 18, 2010) (the "Proposed Rules").
[2] Comments of the United States Department of Justice, IN THE MATTER OF: RIN 3038-AD01, December 28, 2010, http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26809&SearchText= (the DoJ Comments").

stakeholders' willingness to invest and participate in the development of innovative platforms and trading services with the potential to increase efficiency and transparency in derivatives markets. The CFTC should avoid enacting broad prohibitions when the competitive effects are unproven and uncertain, particularly when there are viable means available to the CFTC for addressing any anticompetitive behavior when and if necessary.

The DoJ's proposal amounts to an attempt to regulate competition by imposing a burdensome set of "*per se*" restrictions on the ownership and governance of key derivative facilities. Such an approach violates a first principle of antitrust law – *i.e.*, that *per se* restrictions should be imposed on market behavior only where a robust set of empirical evidence demonstrates that the practice will plainly lead to anticompetitive consequences, and there is little or no potential for redeeming pro-competitive effects.[3] In this case, the DoJ has provided neither.

The DoJ Comments provide a catalogue of possible anticompetitive effects that it claims may result from certain ownership and governance structures. The comments do not, however, cite any empirical evidence that such effects are a necessary or even likely result of the ownership and governance structures it seeks to prohibit. Instead, the DoJ refers only to a "potential for abuse" (DoJ Comments, p.5). Imposing such highly restrictive "*per se*" restrictions on such a vague basis, without the benefit of significant empirical study, risks an unnecessary distortion of competition with potentially unforeseen consequences. At the very least, such broad restrictions should not be imposed without careful consideration of alternative, less intrusive ways of addressing any potential competition concerns.

In this instance, there are effective and less restrictive alternatives available to address the behavioral competition concerns that the DoJ raises. As industry participants, we share the DoJ's interest in ensuring a healthy competitive environment and believe that the industry as a whole benefits if there are checks on the kind of exclusionary behavior the DoJ describes. But unlike the DoJ, we believe that the appropriate tools for addressing the potential anticompetitive behavior already exist. In its comments, the DoJ cites no reason why regulatory structures in place and those already contemplated by the Dodd-Frank Act are not adequate to deal with any potential anticompetitive behaviors that may arise. In particular, the core principles and the open access provisions mandated by the Dodd-Frank Act provide appropriate and focused measures to combat the specific concerns identified by the DoJ. Taken as a whole, the authorities given to the CFTC by the Dodd-Frank Act provide a wide spectrum of measures designed to manage a wide variety of potential conflicts, including the prevention of anticompetitive behavior. If, for example, the membership criteria for a SEF were to unjustifiably shut out certain dealers, the CFTC has the tools to address the exclusionary behavior in a manner that is narrowly tailored to address the exclusion itself. Arbitrary restrictions on governance and ownership are overly broad, and not the most effective way to prevent such behavior.

In fact, there is reason to believe that, if imposed, an aggregate ownership cap may have the opposite of the intended competitive effect. Specifically, such restrictions may decrease the

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[3] The Supreme Court, for instance, has observed that *per se* rules are only appropriate for practices that are "plainly anticompetitive," *Broadcast Music v. CBS* , 441 U.S. 1, 8, and "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations." *United States v. Topco Assocs.,* 405 U.S. 596, 607-08 (1972).

incentive of those with the largest stake in this industry to invest in and promote competition and innovation. The development of a new financial platform entails significant expense and risk, and is as likely to fail as it is to succeed, even when backed by leading industry participants. As the DoJ itself has noted in other contexts, a centralized financial services facility, whether it is a clearinghouse, an exchange or a trading platform, must attract volume and liquidity to be viable.[4] A key way in which new platforms have managed this risk is by securing the commitment of those entities most capable of driving volume to the new facility. In support of an aggregate ownership cap on SEFs, the DoJ argues that such caps "might lead to the creation of multiple DCMs/SEFs, each sponsored by a dealer or two" (DoJ Comments, pp. 2, 6). In our experience as a successful innovator in this area, we believe that the DoJ's assumption is not correct, and that aggregate ownership caps may, in fact, increase the risks of starting up a new platform and discourage the entities best able to provide support from investing or participating in such facilities, particularly where the service is truly novel and the risks are highest. As the CFTC pointed out in the Proposed Rules, "the enumerated entities would be the most likely source of funding for a new . . . SEF."[5] FXall believes that permitting uncapped aggregate ownership by enumerated entities promotes competition. The CFTC appears to agree; it states in the Proposed Rules that "the benefits of sustained competition between new . . . SEFs outweigh the incremental benefit of better governance through limitations on the aggregate influence of the enumerated entities."[6]

The DoJ's own example of an innovative financial platform is a case in point. The DoJ notes that "in the Treasury futures market, the entry of the BrokerTec Futures Exchange in 2000 led to a significant shift to electronic trading of Treasury futures contracts, an important innovation" (DoJ Comments, p. 7). The DoJ proposals, however, would prohibit SEFs from adopting the ownership structure on which BrokerTec relied. At the time of its innovation, BrokerTec was majority-owned by banks and dealers. If this structure were prohibited and investments by these entities were capped, it is impossible to say whether BrokerTec would have ever had sufficient support or the necessary momentum to influence the shift to electronic trading.

Our own platform, FXall, is another example of innovation driven by multiple enumerated entities. Since launching in 2001, FXall has provided an electronic trading system for foreign exchange spot and FX derivatives. With its success, FXall's electronic platform has improved efficiency and transparency and has reduced risk in an important market. The investment of our liquidity partners was an essential part of our ability to introduce electronic trading of FX instruments. Without the assurance of participation from a significant number of these investors, it is difficult for us to predict whether we would have succeeded in introducing innovation to the structure of FX trading and, indeed, whether FXall would have been formed at all.

In conclusion, the ownership limitations as applied to SEFs and contained in the Proposed Rules reflect an appropriate and balanced approach to preventing anticompetitive behavior, on the one hand, while promoting competition, on the other hand. Any such limitation must be viewed in the context of other regulatory provisions applicable to SEFs; taken together those

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[4] Comments of the United States Department of Justice in Response to the Department of Treasury's Request for Comments on the Regulatory Structure Associated with Financial Institutions 10-11(Jan. 31, 2008).
[5] 75 Fed. Reg. 63745.
[6] Id.

provisions form an integrated, interdependent and comprehensive regulatory regime. FXall supports the ownership limitations as applied to SEFs that are contained in the Proposed Rules.

Thank you for the opportunity to comment on the Proposed Rules.

Respectfully submitted,

James F.X. Sullivan
General Counsel

Cc: Chairman Gary Gensler
Commissioner Bart Chilton
Commissioner Michael Dunn
Commissioner Scott O'Malia
Commissioner Jill E. Sommers