



February 22, 2011

Mr. David A. Stawick  
Secretariat  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, N.W.  
Washington, D.C. 20581

Re: Definitions: RIN 3038-AD06

Dear Mr. Stawick:

National Futures Association appreciates the opportunity to comment on the Commodity Futures Trading Commission's and Securities and Exchange Commission's joint proposed rule relating to the further definitions of "swap dealer" ("SD"), "security-based swap dealer", "major swap participant" ("MSP"), "major security based swap participant", and "eligible contract participant" ("ECP"). NFA's comments on these further definitions focus upon several issues in the Commissions' release, including the Commission's limited designation proposal, and the definition of MSP and ECP.

### **Limited Designations**

Proposed Rules 1.3 (ppp)(3) and (qqq)(2) provide that SDs and MSPs ("Swap Entities"), respectively, may apply to limit their designations as Swap Entities to specified categories of swaps or specified activities in connection with swaps. The proposed rules further provide that a Swap Entity may apply for the limited designation at the same time as or subsequent to its initial registration application. However, the rules do not specify whether the limited designation request will be part of or independent from the registration application or whether the limited designation application should be filed with NFA or the Commission. NFA recommends that the simplest and most efficient process for requesting a limited designation is to incorporate the request into the Form 7-R. A Swap Entity could request a limited designation as part of its initial Form 7-R or in an update thereto.



Mr. David A. Stawick

February 22, 2011

### **Definition of MSP**

Additionally, proposed Rule 1.3(qqq) defines MSP, among other things, as a person that is not an SD. By implication, this proposed rule prohibits a person from becoming registered as both an SD and MSP. Theoretically, however, one entity could be an SD with respect to one type of swap and an MSP with respect to a different swap category. For example, a registered SD could request that its designation be limited to one swap category (e.g. "credit swaps") but meet the definition of MSP with respect to another category (e.g. "other commodity swap.") Therefore, in light of this potentiality, NFA requests that the Commission clarify whether and in what cases a person may be registered as both an SD and MSP.

### **Definition of ECP—Retail Forex**

Prior to the Dodd-Frank Act ("DFA"), Section 1a(12)(A)(iv) of the Commodity Exchange Act ("CEA")<sup>1</sup> provided that a commodity pool was an ECP if the pool and its operator met certain conditions, including that the pool had total assets exceeding \$5,000,000 and is formed and operated by a person subject to regulation under the CEA. Section 741(b)(10) of the DFA amended this definition to provide that a commodity pool engaging in retail forex of the type described in CEA Sections 2(c)(2)(B) or 2(c)(2)(C) no longer qualifies as an ECP if any participant in the pool is not otherwise an ECP.

The Commissions believe that in some cases commodity pools that are unable to satisfy the new definition of an ECP pursuant to Section 1a(12)(A)(iv) may alternatively rely upon CEA Section 1a(12)(A)(v)(III)<sup>2</sup> to qualify as an ECP for purposes of retail forex trading. Section 1a(12)(A)(v)(III) applies to business entities irrespective of their form of organization (i.e. corporations, partnerships, proprietorships, organizations, trusts, and other entities) and contains only a \$1 million net worth test where the entity "enters into an agreement, contract, or transaction in connection with the conduct of the entity's business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the entity in the conduct of the entity's business." The Commissions state that Congressional intent would be frustrated if commodity pools engaging in retail forex could achieve ECP status by relying upon Section 1a(12)(A)(v) rather than 1a(12)(A)(iv). To close this

<sup>1</sup> Post Dodd-Frank Act, Section 1a(12)(A)(iv) is now Section 1a(18)(A)(iv).

<sup>2</sup> Post Dodd-Frank Act, Section 1a(12)(A)(v)(III) is now Section 1a(18)(A)(v)(III).



Mr. David A. Stawick

February 22, 2011

potential loophole, the Commissions propose to adopt CFTC Regulation 1.3(m)(6) to further define the term ECP to preclude a retail forex pool with one or more non-ECP participants from qualifying as an ECP by relying upon Section 1a(12)(A)(v)(III) if the commodity pool can not otherwise satisfy the regulatory and monetary conditions as set forth in amended Section 1a(12)(A)(iv).

NFA strongly supports the Commissions' efforts to close this potential loophole. In fact, just recently NFA's Executive Committee took separate emergency actions against two firms<sup>3</sup> that received legal counsel and attempted to claim that their retail forex commodity pools were ECPs thereby falling outside NFA's retail forex requirements. In one case, the firm's pool fell short of Section 1a(12)(A)(iv)'s \$5 million total asset requirement, and in the other case the firm never properly formed a commodity pool. Nonetheless these two cases illustrate that firms will attempt to obtain ECP status to shield themselves from the jurisdiction of regulators to the detriment of customers. We therefore share the Commissions' concerns that commodity pools that are unable to satisfy the new definition of an ECP pursuant to Section 1a(12)(A)(iv) may alternatively rely upon CEA Section 1a(12)(A)(v)(III) to qualify as an ECP for purposes of retail forex trading. Congressional intent in amending Section 1a(12)(A)(iv) is obviously frustrated if fraudsters can avail themselves of this alternative and the Commissions' proposed amendments to the ECP definition are appropriate to protect retail forex pool participants and customers.

If you have any questions concerning this letter, please do not hesitate to contact the undersigned at (312) 781-1413 or [tsexton@nfa.futures.org](mailto:tsexton@nfa.futures.org), Carol Wooding at (312) 781-1409 or [cwooding@nfa.futures.org](mailto:cwooding@nfa.futures.org) or Michael Crowley at (312) 781-1388 or [mcrowley@nfa.futures.org](mailto:mcrowley@nfa.futures.org).

Very truly yours,

A handwritten signature in blue ink, appearing to read "Thomas W. Sexton, III", is written over a blue circular stamp or seal.

Thomas W. Sexton, III  
Senior Vice President and General Counsel

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<sup>3</sup> See In the matter of International Commodity Advisors et. al., NFA Case No. 10-MRA-007 (November 2010) and In the matter of Profitstars Intl Corp., NFA Case No. 10-MRA-008 (December 2010).