AKIN GUMP
STRAUSS HAUER & FELD LLP
Attorneys at Law

BURKE A. MCDAVID
214.969.4295/1.214.969.4343
bmcdavid@akingump.com

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VIA WEBSITE UPLOAD TO HTTP://COMMENTS.CFTC.GOV

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

Re: The Dodd-Frank Wall Street Reform and Consumer Protection Act/Proposed Regulations – Definition of "Eligible Contract Participant"

Dear Mr. Stawick:

We are writing to the Commodity Futures Trading Commission (the "CFTC") on behalf of many of our clients that manage pooled investment vehicles (the "Clients") in anticipation of changes of the definition of "eligible contract participant" ("ECP") in Section 1a(12)(A)(iv)(II) of the Commodity Exchange Act (the "CEA") pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), which will become effective on July 21, 2011 (the "Effective Date"). After the passage of the CFTC Reauthorization Act of 2008 and the CFTC's adoption of its related regulations (the "Retail Forex Regulations"), it is unlawful for any person to enter into contracts for sale of a foreign currency for future delivery, an option to such a contract or similar forwards that do not result in actual delivery within two days if the person entering into such contract is not an ECP (collectively, "Retail Forex") unless such contracts are on or through a designated contract market or with, among other counterparties, a retail foreign exchange dealer. Assuming that the U.S. Department of the Treasury does not determine that currency contracts are not swaps, ECPs may continue to enter into forex contracts on a cleared basis after the effectiveness of the Dodd-Frank Act through swaps execution facilities and, if not cleared, on a bilateral basis. In addition, without qualification as an ECP or an exemption, a person engaged in Retail Forex transactions in its capacity as an advisor to a pooled investment vehicle will be required to register as a commodity trading advisor ("CTA") and/or a commodity pool operator ("CPO") and will be subject to the Retail Forex Regulations.

The CFTC has, together with the Securities and Exchange Commission (the "SEC"), issued Proposed Rules regarding Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant" (Release No. 34-63452) (the "Proposed Rules") and requested comments. Because of the numerous negative consequences set forth below, we express our

views that the CFTC should not expand the look-through for the definition of ECP in Section 741 of the Dodd-Frank Act so that persons who are entering into forex transactions to hedge their exposure to foreign currencies are not subject to the Retail Forex Regulations and are able to access the swaps market.

Prior to the Dodd-Frank Act, the ECP definition in Section 1a(12)(A)(iv) of the CEA provided that a commodity pool was an ECP if the pool and its operator met certain requirements (i.e., the commodity pool has $5 million in total assets and is operated by a commodity pool operator regulated under the CEA or subject to foreign regulation), regardless of whether each pool participant was itself an ECP. The Dodd-Frank Act has amended this Section 1a(12)(A)(iv) so that any commodity pool engaged in forex transactions no longer qualifies as an ECP if any participant in the pool is not independently an ECP. However, in some cases, commodity pools unable to satisfy the conditions of Section 1a(12)(A)(iv) of the ECP definition may instead rely on Section 1a(12)(A)(v) to qualify as ECPs. Section 1a(12)(A)(v) defines ECPs to include, among other things, corporations, partnerships, proprietorships, organizations, trusts and other entities if the entities have $1 million in net worth and such entities are "entering 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."

In the Proposed Rules, the CFTC states that it plans to adopt regulations that prohibit pools with one or more non-ECP participants to achieve ECP status by relying on Section 1a(12)(A)(v). In other words, the CFTC proposes to preclude a pool that invests in forex from being an ECP pursuant to Section 1a(12)(A)(v) of the ECP definition if there is a non-ECP participant at any investment level (e.g., a participant in the pool itself (a direct participant) or an investor or participant in a fund or pool that invests in the pool in question (an indirect participant)).

The Clients are primarily managers of hedge funds or private equity funds investing in securities[1] that (i) utilize forex transactions solely for the purpose of hedging currencies risks of their investment portfolios and/or (ii) enter into forex transactions as a result of accepting subscriptions in currencies other than U.S. dollars. Certain of our other Clients are managers of non-U.S. entities and are non-U.S. CTAs and CPOs that would benefit from clarification of the extra-territorial reach of the CEA provisions added by the Dodd-Frank Act.

In the first case, the funds managed by the Clients invest in securities and other investments denominated in non-U.S. currencies. Multi-currency investments are increasingly common in hedge funds and private equity funds sectors, as attractive investment

[1] These Clients are typically not currently registered as CPOs or CTAs

opportunities emerge in overseas markets. Such investments offer investors opportunities to benefit from global growth and protection from over-exposure to systematic risks within the U.S. market. However, while overseas investments may produce positive returns without a means to hedge exposure to the currency, the funds that the Clients manage would also implicitly be investing in the currency in which such investments are denominated. Significant fluctuations in currency exchange rates may reduce or eliminate such returns and, in some cases, result in negative returns. Many sophisticated investors are demanding currency hedging as an additional safeguard in their investment portfolios.

By deeming the Clients' forex transactions to be Retail Forex transactions, they will be required to enter into their Retail Forex transactions through a designated contract market, register as CTAs and/or CPOs (even if the U.S. Department of the Treasury determines that transactions in foreign currency are not swaps) and comply with the Retail Forex Regulations. As a result, the funds managed by the Clients and similarly situated hedge funds and private equity funds will be forced to incur higher expenses, which will be passed onto their respective investors. Alternatively, the funds that the Clients manage and similarly situated hedge funds and private equity funds may terminate their foreign currency hedging activities altogether, which would increase the currency risk exposure of their investors, resulting in increased systematic risk in the market place and higher volatility in the investment industry. In either case, prohibiting such pools with one or more non-ECP participants from being able to rely on Section 1a(12)(A)(v) to achieve ECP status as stated in the Proposed Rules will have substantive effects on the hedging efforts of market participants.

In the second case, the Clients' funds are exposed to forex transactions as a result of accepting subscriptions or valuing their portfolios in currencies other than U.S. dollars. Certain investors in the Clients' funds subscribe for interests in, or make capital commitments to, those funds using non-U.S. currencies. To reduce the risks that the Client's funds and their investors will be adversely affected by currency exchange rate fluctuations, the Clients hedge currency risks created by such subscriptions or commitments by entering into forex transactions. Such transactions provide flexibility and predictability for the Clients and the investors in the funds they manage. By requiring the Clients to enter into Retail Forex transactions through a designated contract market or register as CTAs and/or CPOs, the Clients will incur significant compliance and transaction costs. Similar to the consequences of imposing such costs to currency hedging transactions, the Clients will either stop accepting subscriptions in non-U.S. currencies or pass such additional costs to investors. Consequently, the investors will be exposed to currency exchange risks or choose to hedge such risks directly.

We believe that expanding the look-through found in 1a(12)(A)(iv) to 1a(12)(A)(v) is contrary to congressional intent. As opposed to 1a(12)(A)(iv), 1a(12)(A)(v) includes as one means of satisfying its criteria that the entity be entering into a contract for hedging purposes.

Requiring a look-through for persons who are hedging their exposure to foreign currencies through their operations as set forth below would exacerbate the risks the Dodd-Frank Act attempted to reduce. Given the ease with which the U.S. Congress could have provided for the look-through for 1a(12)(A)(v), we believe that the U.S. Congress did not include 1a(12)(A)(v) in the look-through because of its effect on bona fide hedgers.

In connection with the Proposed Rules, the CFTC did not articulate any legal or factual basis for prohibiting a pool investing in forex from being an ECP pursuant to Section 1a(12)(A)(v) of the ECP definition if there is a non-ECP participant at any investment level. We believe that Section 1a(12)(A)(v) provides an independent basis for qualification as an ECP, which should not be affected by changes in Section 1a(12)(A)(iv).

Accordingly, in drafting the Proposed Rules, the CFTC should maintain the current availability of ECP status under Section 1(a)(12)(A)(v) of the CEA for hedge funds, private equity and other investment pools that (i) utilize forex transactions solely for the purpose of hedging currencies risks of their investment portfolios or (ii) are exposed to forex transactions as a result of accepting subscriptions or valuing their portfolios in currencies other than U.S. dollars. Even if such pools have direct or indirect investors which do not themselves qualify as ECPs, such pools should be eligible to qualify for the ECP status under Section 1a(12)(A)(v) by meeting the requirements under such section. Limiting the look-through to 1a(12)(A)(iv) would permit the Clients and investors in the funds that the Clients manage to control their currency risks in a cost-efficient way and maintain the flexibility in subscription management. The market, as a whole, would continue to benefit from decreased systematic risks and volatility.

We would welcome the opportunity to meet with the appropriate members of the CFTC staff working on drafting the Proposed Rules to explain in greater detail with respect to the application of the Retail Forex Regulations and the requirements of the Dodd-Frank Act to the Clients entering into forex transactions for hedging purposes. Also, as stated above, we would welcome clarification of the extraterritorial reach of these proposed provisions.

The views expressed in this letter are those of Akin Gump Strauss Hauer & Feld LLP and not of any particular client of Akin Gump Strauss Hauer & Feld LLP.

Sincerely,

Burke A. McDavid

cc. Jason M. Daniel