

From: Peter.Malyshev  
Sent: Friday, February 17, 2012 12:36 PM  
To: Buffa, JonMarc; Schnabel, Nancy L.  
Cc: Jones, Shonneice; jonathan.ammons@lw.com  
Subject: ECP CPO Forex fix  
Importance: High

Dear Nancy and Jon Marc,

I just left a voice message for you. We would very much appreciate if you would consider the following.

As you recall, we discussed an issue with the pass-through provisions in the ECP definitions as it applies to commodity pools dealing with forex. I am aware that there is a new version that is proposed in the rule, but, although it is better than the original proposal, myself and several of my clients have concerns that I would like to communicate to you. Specifically, the third condition set forth in the Staff's current proposal in this section may be too narrow and, as a result, may prevent certain large commodity pools from qualifying.

The original text for the ECP CPO language fix listed as a third condition that:

“(iii) the commodity pool is formed and operated by a registered CPO.”

For the reasons listed below, we believe this third condition should be amended to read as follows:

“(iii) the commodity pool is operated by a registered CPO (unless subject to an exemption or an exclusion from such registration under the CEA or under CFTC rules) or, by a foreign person performing a similar role or function principally for non-United States persons as defined under the CEA or under CFTC rules and not subject to registration as a CPO.”

## RATIONALE

**Formation** – A commodity pool that would have otherwise qualified as an ECP under 1(a)(18)(v)(I) should not be altogether barred from qualifying as an ECP solely because it was not formed by a registered CPO. If a commodity pool is operated by a registered CPO, for example, and has more than \$10,000,000 of assets and has not been formed for the purpose of avoiding regulation of its off-exchange FX activity, we do not see why the parties involved with the administrative process of its formation, in contrast to those handling its operation (which would include the coordination of any private placements), should be relevant to its qualification as an ECP. The CPO of the pool, and therefore the pool itself, will be subject to the CEA and CFTC rules, which should be sufficient.

**Registration Exemption/Exclusion** – The reference in section 1(a)(18)(iv)(II) to a “person subject to regulation under this Act,” is understood in the market to include, in addition to registered

CPOs and CTAs, persons performing similar functions who are exempt or excluded from registering under the CEA or applicable CFTC rules. This same concept should be reflected in the condition. We note in this regard that a person operating under an exemption or exclusion is nevertheless subject to regulation because it remains subject to the antifraud provisions and such requirements as notice filing, recordkeeping and reporting.

Foreign Persons – A commodity pool that is organized, has its principal place of business outside the United States, and is comprised of investors that are non-US persons, should not be penalized, by not qualifying as an ECP, simply because it is not operated by (since it is not required to be operated by) a registered CPO. Indeed, under such circumstances, there would seem to be less of a need for the pool to be operated by a registered CPO because it is a non-US pool for non-US investors. We note that, under Rule 4.7, a non-US pool is considered a non-US person if it has less than 10% participation by US persons. As a result, we believe offshore pools covered by the ECP definition could have very limited US investment. We are of the view that such pools should qualify as ECPs if they (i) have a de-minimus amount of US investors and would therefore be a “Non-US person” under the CEA or applicable CFTC regulations and (ii) have more than \$10,000,000 of assets and were not formed for the purpose of avoiding regulation of their off-exchange FX activity. Such a pool should not be disqualified from being an ECP because it’s not operated by a registered CPO, especially since pursuant to the CEA it would have no such obligation to so register.

Please call me if you have any further questions. We very appreciate your time and attention to this very important matter.

Peter Y. Malyshev

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