From: Ford, Mildred Y. <mford@CFTC.gov>
Sent: Wednesday, March 10, 2010 9:58 AM
To: secretary <secretary@CFTC.gov>
Subject: FW: Comments on Proposed Regulation of Retail Foreign Exchange Transactions and Intermediaries, RIN 3038-AC 61
Attach: Letter.pdf

From: Ng, Sharon [mailto:sharon.ng@sidley.com]
Sent: Tuesday, March 09, 2010 4:51 PM
To: Stawick, David
Cc: Gensler, Gary; Dunn, Michael; Sommers, Jill; Chilton, Bart; O'Malia, Scott; Radhakrishnan, Ananda; Penner, William; Smith, Thomas J.
Subject: Comments on Proposed Regulation of Retail Foreign Exchange Transactions and Intermediaries, RIN 3038-AC 61

Please find the attached letter with enclosure from William Nissen. Thanks.

Sharon Ng
Legal Secretary for
William Nissen, Hugh Abrams & Tom Hankinson
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603
phone: (312) 853-7590
fax: (312) 853-7036

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SIDLEY AUSTIN LLP
ONE SOUTH DEARBORN STREET
CHICAGO, IL 60603
(312) 853 7000
(312) 853 7036 FAX

wnissen@sidley.com
(312) 853 7742

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FOUNDED 1866

March 9, 2010

By Facsimile (202-418-5521),
Email and Federal Express

Mr. David A. Stawick
Office of the Secretariat
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: Comments on Proposed Regulation of Retail Foreign Exchange Transactions and Intermediaries, RIN 3038-AC 61

Dear Mr. Stawick:

This letter is written on behalf of Global Futures & Forex, Ltd., doing business as Global Forex Trading ("GFT"). GFT is registered with the Commodity Futures Trading Commission ("Commission") as a futures commission merchant ("FCM"), and is a Forex Dealer Member ("FDM") of National Futures Association ("NFA"). GFT is also a member of the Foreign Exchange Dealers Coalition ("FXDC"), an organization which is composed of the leading FDMs and which advocates for responsible regulation of the retail foreign exchange ("forex") industry before the Commission and the Congress. GFT appreciates the opportunity to comment on the Commission's proposed rules for regulating retail forex transactions and intermediaries.

Summary of Comments

Overall, with one significant exception, GFT believes that the Commission's proposed rules provide a constructive approach toward implementing the provisions of the 2008 Farm Bill and establishing a comprehensive regulatory program for retail forex in the United States. The significant exception is proposed Regulation 5.9, which would require forex dealers to collect margin of no less than 10% of the notional value of each forex contract from each retail customer. As a member of FXDC, GFT has opposed the adoption of this proposed rule, and on January 25, 2010, GFT participated in a meeting of FXDC representatives with the Commission's Chairman and members of the Commission's staff to voice that opposition. Proposed Regulation 5.9 should not be adopted because it is unnecessary to protect customers, and it would effectively put the U.S. retail forex industry out of business, as forex dealers in the U.S. would be unable to compete against foreign dealers which typically permit trading on 1% margin.

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With the exception of proposed Regulation 5.9, the Commission's overall approach in the proposed rules is constructive. Nevertheless, GFT believes some changes should be made before the final rules are issued. These changes fall into two broad categories. First, some of the proposed rules unjustifiably place retail forex dealers at a competitive disadvantage in relation to FCMs and exchanges offering exchange-traded currency futures. The proposed rules should not be adopted to the extent they impose these unwarranted anticompetitive burdens, and instead should be made consistent with the regulations applicable to exchange-traded futures. Second, some of the proposed rules appear to be based on a misunderstanding of the differences in how orders for forex transactions are placed and executed, as these proposals incorrectly assume that orders for forex transactions are placed and executed in a manner similar to the placement and execution of orders with FCMs for futures transactions. The proposals should be changed to conform to the way forex contracts are actually traded.

GFT believes that the retail forex industry has made significant contributions to our economy while producing additional trading opportunities for retail customers. Retail forex dealers such as GFT are aggregators of smaller orders which in turn are combined into institutional-size transactions which retail forex dealers enter into with banks and other institutional dealers. The large trades resulting from this aggregation promote price discovery and help narrow spreads in the larger institutional currency markets. In addition, retail customers, who previously had limited access to these forex markets, can now participate in them through the retail dealers. The forex dealers, moreover, have customers throughout the world and by serving these customers, they generate economic activity and jobs in the U.S. that would otherwise take place in other countries.

The goal of the regulatory reforms reflected in the 2008 Farm Bill was to provide for the continued economic viability of the retail forex industry while creating additional regulatory protections for customers that did not previously exist. If adopted, the Commission's proposed regulations generally promote this goal, but specific changes should be made, as outlined below, to better achieve Congress's objectives.

Discussion of Comments

1. Proposed Regulation 5.9 Should Not Be Adopted.

Enclosed is a statement issued by the FXDC in opposition to proposed Regulation 5.9, which would require margin of at least 10% for each forex transaction. GFT hereby incorporates this statement by reference in this letter. For the reasons stated by FXDC, proposed Regulation 5.9 should not be issued as a final rule.

2. Proposed Rules Which Place an Unwarranted Competitive Disadvantage On Retail Forex Dealers Should Not Be Adopted.

Section 15(b) of the Commodity Exchange Act ("CEA") requires the Commission to take the antitrust laws into consideration and to endeavor to take the least anticompetitive means of

achieving the objectives of the CEA. GFT and other members of FXDC are competitors of the exchanges offering currency futures and of FCMs brokering such futures. These exchanges and FCMs would have an unwarranted and unfair competitive advantage if only retail forex dealers, and not FCMs brokering retail currency futures trades, were made subject to some of the proposed rules. In order to comply with the statutory requirement, and to prevent such an unwarranted anticompetitive impact on the forex dealers, the Commission should change these rules, so that retail forex dealers and FCMs acting as brokers for exchange-traded futures are treated similarly.

a. Proposed Regulations 5.5(e) And 5.18(i) Should Be Revised.

Proposed Regulation 5.5(e) would require retail forex dealers to provide each customer opening an account with a written disclosure stating the following for the most recent four quarters: (i) the total number of retail forex accounts maintained by the dealer, (ii) the percentage of such accounts that were profitable, and (iii) the percentage of such accounts that were not profitable. Similarly, proposed Regulation 5.18(i) would require forex dealers to keep the records of unprofitable accounts that would be needed to make this disclosure.

These proposed rules should not be adopted in their current forms. They are anticompetitive, because they unfairly impose on retail forex dealers a requirement that is not imposed on FCMs with respect to similar retail futures accounts.

GFT does not believe there is a rational basis to assume that the percentage of unprofitable retail forex accounts is greater than the percentage of unprofitable retail futures retail accounts, and there is therefore no valid reason to impose these requirements on forex accounts when they are not required for retail futures accounts. Moreover, if a study were made, it is possible that the retail futures accounts would show a greater percentage of unprofitable accounts because of the transaction costs associated with the requirement that an FCM act as intermediary between the customers and the market-makers on the exchanges. Because retail forex customers deal directly with the market-maker, *i.e.*, the dealer, they do not have these transaction costs.

If the Commission believes that the percentage of profitable retail forex accounts is less than the percentage of profitable retail futures accounts, the Commission should undertake a study to determine whether this is true. Without such a study or other evidence of a disparity, there is no rational basis to impose an anticompetitive and potentially misleading burden on retail forex dealers, as opposed to FCMs brokering exchange-traded futures for retail customers.

b. Proposed Regulation 5.18(h) Should Be Deleted.

This proposal would require every forex introducing broker ("IB") to be guaranteed by the forex dealer to which it introduces accounts. If adopted, this proposed rule would be inconsistent with the regulatory treatment of IBs introducing futures accounts, which

are allowed to be independent if they maintain their own capital, and the proposal is therefore anticompetitive.

IBs who are willing to post their own capital and maintain their own compliance functions should be permitted to operate independently when they introduce forex accounts, just as they do when they introduce futures accounts. There is no rational reason to distinguish between futures and forex IBs in relation to guarantees, and such a requirement would impose an unwarranted anticompetitive burden on forex dealers to which accounts are introduced by IBs. Therefore, the Commission should permit IBs introducing forex accounts to be independent as long as they comply with the same regulatory requirements as futures IBs.

c. Proposed Regulation 5.2(c) Should Not Be Adopted.

Proposed Regulation 5.2(c) would prevent a forex dealer from accepting trades for a customer account where the forex dealer or its affiliate exercises discretion over the transactions in the account. This proposed rule would also impose an unfair competitive disadvantage on forex dealers in relation to exchanges offering currency futures and FCMs brokering these futures.

GFT understands the rationale for this proposed restriction to be that the dealer or affiliate would have a conflict of interest in exercising discretion, because it would be able to deal with itself by ordering discretionary trades where it takes the other side. In exchange-traded futures, however, there is a similar conflict of interest, because a broker who is compensated by commissions can increase the broker's own income by making additional discretionary trades and thereby earning additional commissions. The Commission also permits a commodity trading advisor ("CTA") to exercise discretion despite a similar conflict of interest, because CTAs are allowed to receive commission income. See CFTC Regulation 1.3(mm).

The Commission and the courts have had no difficulty dealing with the conflicts of interest inherent in the grant of discretion to a broker or CTA who is compensated with commissions. First, conflicts of interest such as these must be disclosed to the customer so that the customer can make an informed decision whether to grant the discretion. In addition, churning of an account by a broker or CTA with discretion is a violation of the CEA, which can create liability for brokers and CTAs who abuse their discretion by placing their own interests in generating commission income above their customers' interests in achieving profitable trading results.

Forex dealers with discretion should be subject to rules similar to those governing FCMs and CTAs who take discretion and receive commission income. NFA currently has in effect a rule preventing forex dealers, and their associated persons from taking discretion. GFT disagrees that NFA's rule is appropriate, but even NFA's rule does not go so far as to prevent a dealer from accepting a trade where an affiliate has discretion. Particularly now that CTA registration and associated regulatory requirements will be imposed on separate entities that manage forex accounts, there is no valid reason to prevent forex dealers from

accepting discretionary orders from affiliates. The Commission has had a longstanding policy of permitting brokers and CTAs to take discretion and receive commission income from the resulting trades, and there is no rational reason to prohibit forex dealers and their affiliates from taking discretion where the forex dealer is the counterparty to the trade.

3. Proposed Regulation 5.18 Should Be Amended to Accurately Reflect How Forex Trading is Conducted.

Proposed Regulation 5.18, which would establish trading and operational standards for retail forex trading, has valid customer protection objectives. In some of its specific provisions, however, it does not accurately address the ways in which retail forex orders are entered and executed. Instead it assumes a futures brokerage model which does not apply. Adoption of these proposed rules would therefore cause confusion and fail to achieve the valid regulatory objectives that are intended. GFT believes that with some changes to reflect actual forex practices, these regulations can achieve their intended objectives.

a. Proposed Regulation 5.18(b)(1) Should Be Revised.

This proposed rule would require that an executable order received from a retail forex customer be entered before entry of any proprietary order or order of a related person. This proposed rule has a valid objective of preventing preferential treatment of proprietary and related orders, but it is based on the faulty assumption that a forex dealer, like a broker, first receives an order and then enters it for execution with a third party market-maker. In fact, forex orders are entered directly by the customers with the forex dealers, who are the market-makers, through an electronic order-entry system where the orders are immediately executed if the price is available. There is no opportunity for a forex dealer, as there is with a futures broker, to withhold some orders from the market while executing others. Moreover, every executable order filled by a forex dealer involves a proprietary trade, because the forex dealer takes the opposite side of every customer order.

GFT recommends that this proposed rule be revised to provide that each retail forex dealer's electronic trade matching system shall operate in a non-discriminatory manner such that executable orders are filled in the order received, and such that the system is not capable of delaying an executable order of a customer to fill a later-received order of a related person. Such a requirement would prevent the abuse which the Commission rightly seeks to prevent, while conforming to the way in which the retail forex market operates.

b. Proposed Regulation 5.18(f)(4) Should Be Eliminated.

This proposal would prevent a forex dealer from establishing a new position for a customer, except one that offsets an existing position for that customer, if the dealer holds outstanding orders of other retail customers for the same currency pair at a comparable price. It is not clear what this proposed rule actually seeks to accomplish, but in any event, it is not operationally or economically feasible.

If the purpose of this proposed rule is to require that one customer order be offset against another customer order, rather than against the forex dealer, this is not operationally feasible, and it is based on the faulty assumption that a forex dealer operates like an exchange. Unlike electronic matching systems of exchanges, the electronic trading platforms operated by forex dealers are not set up to match one customer order against another, but rather are designed for the dealer to immediately and automatically take the other side of all executable orders as soon as they are received.

This proposed rule is also not economically feasible because dealers, like other market-makers, are compensated by revenues derived from selling at a higher offer price and buying at a lower bid price. Dealers do not customarily charge transaction fees or commissions like exchanges and brokers. Therefore if the dealers were required to offset one customer order against another before being allowed to take the other side of a customer order, they would be providing their services and taking the risks of the business without compensation.

Other rules proposed by the Commission, as well as NFA requirements, will adequately ensure that customers will receive fair prices. Indeed, the growth and success of the retail forex industry demonstrates that competition among dealers has resulted in fair prices, or else customers would not be trading with the dealers in the increasing volume that has occurred since retail forex trading first became available to the general public. Therefore, there is no valid customer protection objective that requires this proposed rule, and because it is operationally and economically not feasible in any event, it should not be adopted.

c. Proposed Regulations 5.18(d)(3) and 5.18(e)(2) Should Be Revised.

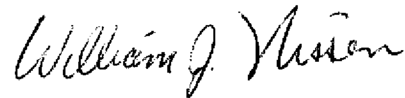
Proposed Regulations 5.18(d)(3) and 5.18(e)(2) would require each forex dealer, when carrying an account for a related person of another forex dealer, to regularly transmit copies of all account statements and all order detail for the account to the other dealer. This proposal has a valid objective of preventing an employee of one forex dealer from using an account at another forex dealer contrary to the interests of the individual's employer. The requirement to transmit all statements and order detail, however, is overly burdensome. It is also inconsistent with the way forex statements are provided to customers, and with the level of order detail customarily provided to customers.

The objectives of this proposal could be achieved by making these provisions consistent with proposed Regulation 5.13, which recognizes that forex statements can be made available for customers to access electronically, rather than requiring transmission of statements, and proposed Regulation 5.18(b)(4), which requires order detail information to be provided to customers only on request. Proposed Regulations 5.18(d)(3) and 5.18(e)(2) should therefore be changed so that the forex dealer employing the trader is given access to the same online account records as the trader. That way, the employer would be able to see the account activity of its employee, and if it needed additional order detail, it could obtain it on request, just as the customer may obtain it on request.

Conclusion

For the foregoing reasons, the Commission's proposed rules should be changed as outlined above. These changes would provide for strong regulation while permitting the retail forex business to continue to provide trading opportunities for customers, price discovery for the foreign currency markets, and activity for our economy. GFT looks forward to continuing to work with the Commission to achieve these goals.

Very truly yours,



William J. Nissen

Enclosure

cc: Chairman Gary Gensler *(by email)*
Commissioner Michael Dunn *(by email)*
Commissioner Jill E. Sommers *(by email)*
Commissioner Bart Chilton *(by email)*
Commissioner Scott D. O'Malia *(by email)*
Ananda Radhakrishnan *(by email)*
William Penner *(by email)*
Thomas Smith *(by email)*

Over the past decade the domestic retail foreign exchange industry has enjoyed a tremendous growth spurt and its prospects going forward are more promising than perhaps in any other sector of financial services. However, the CFTC's recent rule proposal, which would limit customer trading leverage to 10 to 1, would be a crippling blow to the industry and drive it offshore into the hands of foreign competitors. Even worse, it would encourage fraud both at home and abroad as customers seeking to trade retail forex would have no other legitimate domestic alternative.

- Today the U.S. retail forex industry can boast hundreds of thousands of live accounts. Should the 10 to 1 leverage rule be adopted 90% of those accounts can be expected to go offshore. And the first place they'll go is to the United Kingdom where customers can trade with leverage as high as 200 to 1.

- The U.S. retail forex industry (forex dealers and introducing brokers) employs thousands of people. The vast majority of these jobs are high paying, white collar jobs that require advanced education and range from software developers to accountants to foreign exchange dealers. The industry is just as much a high tech industry as it is a financial services industry.

- The domestic industry's revenue is well over $1 billion. This revenue is money generated from a product that is in many ways an export. Furthermore, as capital markets open in the BRIC countries the number of new accounts that will flow out of places like China and India will lead to huge job and revenue gains in the United States. Trillions of dollars of trade volume are at stake. This is money that could (and should) be booked in the United States as taxable revenue. But if this rule passes the United States could well be costing itself billions of dollars in taxes down the road.

- The problem of Forex fraud will get worse absent legitimate dealers offering retail forex. Retail forex fraud is not something that is caused by the actions of retail forex dealers; rather it is caused by unlicensed con-men who masquerade as forex experts promising silly and unjustifiable returns before disappearing with customer funds. That is why the FXDC fully supports the CFTC's rule requiring all introducing brokers be licensed. That rule will solve forex fraud, not 10 to 1 leverage.

- The 10 to 1 leverage rule will be highly unpopular with traders. The fact is 100 to leverage is very popular with the retail forex trading public. They simply will not accept 10 to 1 leverage.

- Unregulated dealers from around the world will also be the beneficiaries of the 10 to 1 leverage rule. These unregulated forex dealers don't have to worry about capital requirements, risk management models, marketing ethics, dealing practices or even returning a customer's funds. These dealers will be out of the reach of the CFTC and they will thrive.

The case against the 10 to 1 leverage rule is clear. The rule will be a boon to foreign forex dealers (both regulated and unregulated) who will grow entirely at the expense of retail forex dealers in the United States. Thousands of high paying jobs will be lost and the potential for tens of thousands of more jobs will forever vanish as well. Consumers will be hurt and more vulnerable to fraud. And the United States will toss away one of the most promising export industries that it has, all in the midst of 10% unemployment. There is no good reason that this should be so.