

**From:** David Kozak <David\_Kozak@jwhmail.com>  
**Sent:** Friday, March 19, 2010 3:31 PM  
**To:** secretary <secretary@CFTC.gov>  
**Subject:** Regulation of Retail Forex  
**Attach:** Comment ltr CFTC FOREX proposal March 2010(2).pdf

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Office of the Secretary - please find attached the comment letter of John W. Henry & Company, Inc. on the above-referenced rule proposals.

David Kozak  
General Counsel

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301 Yamato Road  
Suite 2200  
Boca Raton  
Florida 33431-4931

561.241.0018  
Fax: 561.994.6887

E-mail: investor@jwh.com  
Web site: www.jwh.com

March 19, 2010

David Stawick, Secretary  
Commodity Futures Trading Commission  
1155 21<sup>st</sup> Street, N. W.  
Washington, D.C. 20581

Re: Regulation of Retail Forex

Dear Mr. Stawick:

These comments are addressed to the proposed rules regarding “Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries,” published in the Federal Register by the Commission on January 20, 2010 (the “Proposal”). John W. Henry & Company, Inc. (“JWH”) is registered as a commodity trading advisor (“CTA”) and commodity pool operator (“CPO”) under the Commodity Exchange Act, as amended, (the “Act”) and has conducted its CTA business since 1982. It therefore has a direct interest in the regulation of CTAs and CPOs.

JWH understands that the purpose of the Proposal is to “adopt a comprehensive regulatory scheme...to implement the CFTC Reauthorization Act of 2008...with respect to off-exchange transactions in foreign currency with members of the retail public...” as noted on page 3282 of the Proposal. However, we have concerns about the scope and application of the Proposal to CTAs and CPOs now registered as such and already subject to existing Commission and National Futures Association (“NFA”) rules. The Proposal does not acknowledge the application of the rules in the Proposal to current registrants in order to alert such firms of these proposed obligations, and does not recognize the potential for overlapping regulation in certain areas.

The Commission states that the statutory definitions of entities such as CTAs and CPOs do not anticipate persons engaged in off-exchange activities (footnote 45), and that “the statutory and regulatory definitions of the identifying terms do not necessarily comprehend involvement in retail forex trading” (page 3288). The Commission determined, however, that those categories of registrants would be employed in the proposed rules.

Proposed rules 5.1(d) and (e) create definitions of CTAs and CPOs for the proposed Part 5 rules. These forex CTA and CPO definitions are so broadly drawn that they include firms already registered as CTAs or CPOs, and which may have only a small portion of their business devoted to the forex transactions that are the concern of the proposed regulations. For example, a currently registered CPO may be operating a pool that is not an eligible contract participant (“ECP”) due to the fact that it just began to raise assets and has not yet reached a level of assets to attain ECP status, or a long-established pool that has had its assets reduced over time due to redemptions or trading losses and so no longer qualifies as an ECP. A currently registered CTA may have a small number of managed accounts that are not owned by eligible contract

participants but which trade forex as part of diversified trading programs. As a consequence, such firms would be subject to the Part 5 forex requirements for such pools or accounts, even though they do not apply to the great majority of their pool or account business. New and different obligations would thus be created from those that apply to the balance of their business. For example, proposed rule 5.19 would require notification to the Commission of material proceedings with respect to retail forex transactions.

We note that the Commission has taken into account a comparable situation -- futures commission merchants ("FCMs") that are primarily or substantially engaged in business that falls within the Commodity Exchange Act's definition of an FCM. The commission provided that such FCMs would be permitted to engage in retail forex transactions without also registering as retail foreign exchange dealers. Accordingly, a new definition of "primarily or substantially" is included in Section 5.1(g) of the Proposal, which is based in part on the source of revenues derived from the FCM's business, as defined in Section 1a (20) of the Act. In order to provide for parity in regulatory treatment, we propose that a similar "primarily or substantially" exemption be created for CTAs and CPOs that are not engaged generally in the retail forex business, based on a 50% test regarding assets under management devoted to trading forex. The test for exemption for CPOs would be based on having less than 50% of the assets in its pools devoted to forex trading; the test for exemption for CTAs would be based on having less than 50% of the assets in the accounts that it manages devoted to forex trading. That would focus the Part 5 rules on firms that are conducting essentially a forex trading business, but would exclude CPOs that only trade forex as a relatively small part of their pool business and CTAs that trade forex as one component of their trading programs. The exemption could be conditioned on a requirement that CPOs or CTAs seeking the exemption not market or hold out their services as designed to provide forex exposure to their clients.

Although the Proposal is intended to coordinate with existing NFA rules regarding retail forex (page 3282), that intention has not been carried through completely. For example, the "General Disclosure Required - Risk Disclosure Statements" in proposed rules 4.24 and 4.34 contain disclosure statements about the risks of trading forex. Those disclosure statements do not correspond to those currently required by NFA, in NFA's publication "Disclosure Documents: Guide for CPOs and CTAs - March 2010," available on the NFA website. The statements vary in several respects, as, for example, in stating whether the funds of a pool or account trading forex "may" (NFA) or "will" (Commission) receive the same protections as funds used to trade on exchanges. We urge the Commission and NFA to develop uniform language for risk disclosures regarding forex transactions.

Sincerely yours,  
*DMKozak*  
David M. Kozak  
General Counsel