Secretary of the Treasury Seeks Input on Whether Foreign Exchange Swaps and Foreign Exchange Forwards Should Be Regulated as Swaps Under Dodd-Frank

October 29, 2010

Section 1a(47)(E) of the Commodity Exchange Act (CEA), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), empowers the Secretary of the Treasury (Treasury Secretary) to categorically exempt foreign exchange swaps and forwards from being regulated as "swaps" under the CEA, as amended by Dodd-Frank. On October 28, 2010, the Department of the Treasury (Treasury Department) published a Notice and Request for Comments (Notice) in the Federal Register seeking public input on whether foreign exchange swaps and/or forwards should be exempt from Dodd-Frank's regulatory framework for swaps. The Notice puts forth a series of questions and also asks members of the public to comment on factors the Treasury Secretary should take into account in determining whether an exemption is necessary for foreign exchange swaps and forwards. Comments must be submitted electronically on or before **November 29, 2010.**

The CEA defines a foreign exchange swap as either: (A) a transaction that involves an exchange of two different currencies on a specific date at a fixed rate; or (B) the reverse exchange of the two currencies in (A) on a later date at a fixed rate. A foreign exchange forward is a transaction that solely involves the exchange of two different currencies on a specific future date at a fixed rate. Both foreign exchange swaps and forwards fall under the definition of a "swap" under Dodd-Frank.[1] Accordingly, foreign exchange swaps and forwards will be subject to Dodd-Frank's regulatory regime once Dodd-Frank's reforms go into effect in July 2011.

If foreign exchange swaps and/or forwards are exempted they would not be subjected to Dodd-Frank's clearing and margin requirements, among other things. Even if the Treasury Department determines that foreign exchange swaps and forwards should not be regulated, however, these transactions will be subject to new reporting requirements, and any swap dealers or major swap participants engaging in these transactions must conform to new business conduct standards.

Section 1(a)(47)(E) of the CEA grants the Treasury Secretary discretion to exempt foreign exchange swaps and/or forwards from swap regulations under Dodd-Frank. In deciding whether to issue such an exemption, the Treasury Secretary is charged with considering several factors, including: (1) whether the required trading and clearing of foreign exchange swaps and forwards would create systemic risk, lower transparency or threaten the financial stability of the United States; (2) whether foreign exchange swaps and forwards are already subject to a regulatory scheme that is materially comparable to that established by the CEA for other classes of swaps; (3) the extent to which bank regulators of participants in the foreign exchange market provide adequate supervision, including capital and margin requirements; (4) the extent of adequate payment and settlement systems; and (5) the use of a potential exemption of foreign exchange swaps and/or forwards to evade otherwise applicable regulatory requirements.

[1] The Commodity Futures Trading Commission is currently in the process of clarifying the meaning of the term "swap" as contained in Dodd-Frank. For more information see Sutherland's Legal Alert dated Sept. 14, 2010, "SEC and CFTC Request Comments on Significant Defined Terms in Title VII of Dodd-Frank."

Although not required under Dodd-Frank, the Treasury Department invites members of the public to comment on the above factors as well as any relevant information pertaining to the regulation of foreign exchange swaps and forwards. In addition, the Treasury Department's Notice sets forth a list of 10 questions for members of the public to address in their comments. The 10 questions pertain to various topics, including the distinctions between foreign exchange swaps and forwards and other types of swaps, the primary risks associated with foreign exchange swaps and forwards, whether there are ways of mitigating these risks without subjecting foreign exchange swaps and forwards to Dodd-Frank's swap regulations, and the effect that Dodd-Frank's swap regulations would have on foreign exchange swaps and forwards. Members of the public are also invited to suggest additional factors for the Treasury Secretary to consider in determining whether an exemption for foreign exchange swaps and forwards is necessary.

Comments in response to the Treasury Department's Notice must be submitted electronically via the Federal Rulemaking Portal, www.regulations.gov. Please contact one of the Sutherland attorneys listed below if you would like more information or if you would like advice on and/or assistance in preparing comments in response to the Notice.

We will continue to monitor the implementation of Dodd-Frank and will keep you updated on key events.

■ ■ ■

If you have any questions about this development, please feel free to contact the attorneys listed below or the Sutherland attorney with whom you regularly work.

James M. Cain	202.383.0180	james.cain@sutherland.com
Paul B. Turner	713.470.6105	paul.turner@sutherland.com
Warren N. Davis	202.383.0133	warren.davis@sutherland.com
Catherine M. Krupka	202.383.0248	catherine.krupka@sutherland.com
William H. Hope II	404.853.8103	william.hope@sutherland.com
Mark D. Sherrill	202.383.0360	mark.sherrill@sutherland.com
Ann M. Battle	202.383.0842	ann.battle@sutherland.com
Michael W. Brooks	202.383.0863	michael.brooks@sutherland.com
Doyle Campbell	212.389.5073	doyle.campbell@sutherland.com
Meltem F. Kodaman	202.383.0674	meltem.kodaman@sutherland.com
Raymond A. Ramirez	202.383.0868	ray.ramirez@sutherland.com