

April 10, 2025

CFTC Staff Issues Interpretation Regarding Certain Foreign Exchange Products

Guidance Clarifies Regulatory Characterization of Window FX Forwards and Package Foreign Exchange Transactions

SUMMARY

On April 9, 2025, the Market Participants Division (“MPD”) and the Division of Market Oversight (“DMO,” and, together with MPD, the “Divisions”) of the Commodity Futures Trading Commission (“CFTC”) jointly issued CFTC Letter No. 25-10 (the “Staff Interpretation”) to clarify the Divisions’ views on the regulatory treatment of certain foreign exchange products.¹ Specifically, the Staff Interpretation clarifies that (1) “Window FX Forward” transactions (described below) should be considered “foreign exchange forwards” exempt from the “swap” definition in the Commodity Exchange Act (the “CEA”) and (2) “package Spot FX Transactions” (described below) are not “swaps” or “foreign exchange swaps.”

STAFF INTERPRETATION

A. Window FX Forwards

The Staff Interpretation clarifies that “Window FX Forwards” should be considered “foreign exchange forwards”² that are exempt from the “swap” definition in the CEA and many of the associated CFTC regulations pursuant to a 2012 Treasury Department determination.³ The Staff Interpretation describes a Window FX Forward as a transaction in which counterparties enter into “an agreement to make a physical exchange of two currencies at an agreed price on one or more dates during an agreed period of time.” A Window FX Forward may include circumstances where delivery may take place on one or more dates within a series of dates, sometimes identified as individual specific dates and sometimes specified as any date in a specified “window” of dates.⁴ The final physical delivery of currency in a Window FX Forward must occur by the last specified date or the last day of the specified window period.⁵ All other terms of the exchange, including price, are established at the time the contract is entered into by the parties, though the Divisions

New York Washington, D.C. Los Angeles Palo Alto London Paris Frankfurt Brussels
Tokyo Hong Kong Beijing Melbourne Sydney

SULLIVAN & CROMWELL LLP

note that the agreed price may vary depending on the date(s) on which delivery takes place, given that electing one date or the other may affect the tenor of the transaction.⁶

The Divisions determined that a Window FX Forward fits within the “foreign exchange forward” definition because it solely involves (i) the exchange of two different currencies (ii) on a “specific” future date (*i.e.*, the exchange will take place on one or more dates clearly identified at the inception of the contract) (iii) at a fixed rate agreed upon on the inception of the contract covering the exchange. In this regard, the Divisions noted that a Window FX Forward differs from a non-Window foreign exchange forward only in that the former allows a counterparty to elect the one or more specific dates on which settlement will occur, rather than identifying one specific date on which settlement will occur.

As a result, Window FX Forwards are not subject to many CEA regulatory requirements, including real-time public reporting, uncleared margin, or swap dealer registration. However, as foreign exchange forward transactions, Window FX Forwards remain subject to the CFTC’s regulatory trade-reporting requirements, anti-evasion authority and business-conduct standards.⁷

The Divisions offered the Staff Interpretation in light of uncertainty resulting from some market participants treating Window FX Forwards as foreign exchange forwards and others treating such transactions as swaps.⁸ In this regard, the Divisions noted that Window FX Forwards are commonly used by commercial end-users and that treating Window FX Forwards as swaps “would disproportionately and negatively affect” smaller commercial entities that are non-eligible contract participants. That said, the Staff Interpretation notes that Window FX Forwards are also entered into in the inter-dealer market and with financial end-users and that “the status of the counterparties does not bear on the analysis of the Window FX Forward transactions.”

B. Package Spot FX Transactions

The Staff Interpretation provides that “package Spot FX transactions” should be treated as individual foreign exchange spot transactions, rather than, as some firms had been doing, as swaps or foreign exchange swaps. The Staff Interpretation states that it is “relatively common” for two parties to enter into a “package” of foreign exchange spot transactions to extend the settlement date for a certain foreign exchange position or for funding purposes. Such “package Spot FX Transactions” are structured such that (i) in the first transaction, the parties agree to physically exchange two currencies on the same day or next business day and (ii) in the second transaction, the parties agree to physically exchange the same two currencies, but in the opposite direction, on the next business day or the business day after next. (*i.e.*, a “today/next” or “tom/next” transaction, respectively). In a package Spot FX Transaction:

- the two (or more) transactions are entered into by the parties as a package, meaning that execution of each component transaction is contingent on execution of the other component, and the component transactions are priced or quoted together as one economic transaction with simultaneous or near-simultaneous execution of both components;

SULLIVAN & CROMWELL LLP

- each spot transaction is evidenced by a separate confirmation (often two SWIFT messages) that contain no linkage between the two; and
- if one party failed to perform on the first transaction, the other party would still be obligated to perform on the second transaction (*i.e.*, each transaction is a separate legally enforceable obligation that is not contingent on performance of the other transaction).

According to the Divisions, the separate confirmation of the two component transactions and separate legal obligations evidenced by each distinguish a package Spot FX transaction from a foreign exchange swap.⁹ Likewise, the Divisions credited market participants' arguments that package Spot FX Transactions should be characterized similarly to how the CFTC has considered other package transactions (*i.e.*, determining regulatory treatment based on the rules that would apply to each individual transaction within the package). In this regard, the Divisions view a package Spot FX Transaction as two bona fide deliverable foreign exchange spot transactions whose regulatory status derives from the status of its components. On that basis, the Staff Interpretation clarifies that a package Spot FX transaction should not be considered a foreign exchange swap or any other type of swap, provided that such transaction is executed, confirmed, and settled as individual bona fide spot transactions (*i.e.*, transactions that settle via an actual delivery of the relevant currencies within two business days of the transaction date or within the customary timeline for the relevant spot currency market).¹⁰ As a result, such transactions are not subject to any of the CFTC's swap regulations.

* * *

ENDNOTES

- 1 CFTC Letter No. 25-10, Staff Interpretation Regarding Certain Foreign Exchange Products (Apr. 9, 2025), <https://www.cftc.gov/csl/25-10/download>. Sullivan & Cromwell participated in the requests that led to the Staff Interpretation.
- 2 7 U.S.C. 1a(24).
- 3 7 U.S.C. 1a(47); 17 CFR 1.3. Foreign exchange forwards were exempted from the swap definition pursuant to the Secretary of the Treasury's November 16, 2012 determination. Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act, 77 Fed. Reg. 69694, 69695-69699 (Nov. 20, 2012) (the "Treasury Determination").
- 4 In other words, the aggregate amount of currency agreed to be exchanged at inception of the contract may have its delivery broken down into a series of deliveries.
- 5 Because settlement must occur by the last specified date or the last date of the window, the Divisions noted that a Window FX Forward is not an option (which would also make it a "swap" under the CEA definition).
- 6 The Staff Interpretation further provides that, given that foreign exchange forward transactions are typically priced taking into account both the foreign exchange rate itself (for example, derived from the spot foreign exchange rate) as well as the embedded interest rate that applies depending on the tenor of the forward, in a Window FX Forward the exchange rate may be adjusted to account for different settlement dates (e.g., through adjustment to the amount of "forward points" added to the foreign exchange rate) in order to take into account any change in the embedded interest rate associated with such tenor, without changing the foreign exchange rate of the currency pair. Under these facts and circumstances, the Staff Interpretation notes that price (*i.e.*, the foreign exchange rate) remains as established at the time the contract is entered into by the parties, and the basis for how the interest rate will be adjusted to account for the settlement date is agreed to at the time the contract is entered into by the parties as well.
- 7 Treasury Determination, *supra* note 3.
- 8 Though the CFTC had never formally addressed the regulatory characterization of Window FX Forwards or package Spot FX transactions, CFTC Staff had indicated informally that such transactions might constitute swaps.
- 9 The CEA refers to foreign exchange swap in the singular (*i.e.*, "a transaction"). 7 U.S.C. 1a(25).
- 10 In prior guidance, the CFTC and the Securities and Exchange Commission (the "SEC" and, together with the "CFTC," the "Commissions") provided that a "bona fide foreign exchange spot transaction," *i.e.*, a foreign exchange transaction that is settled on the customary timeline of the relevant spot market, is not within the swap definition. Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48208, 48256-58 (Aug. 13, 2012). In this regard, the Commissions concluded that a foreign exchange transaction will be considered a bona fide spot transaction if it settles via an actual delivery of the relevant currencies within two business days (*i.e.*, T+2). *Id.* at 458257.

SULLIVAN & CROMWELL LLP

ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 900 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers or to any Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future publications by sending an e-mail to SCPublications@sullcrom.com.