

MEMO# 28032

April 14, 2014

European Commission Issues Consultation Paper on FX Financial Instruments

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TO: DERIVATIVES MARKETS ADVISORY COMMITTEE No. 27-14
ICI GLOBAL MEMBERS No. 14-14
INTERNATIONAL COMMITTEE No. 10-14 RE: EUROPEAN COMMISSION ISSUES
CONSULTATION PAPER ON FX FINANCIAL INSTRUMENTS

On April 10, the European Commission issued a consultation paper on the definition of a spot foreign exchange ("FX") instrument under the Markets in Financial Instruments Directive ("MiFID"). [\[1\]](#) Specifically, the Commission is requesting views on the boundary between an FX spot and an FX forward. As we previously informed you, the European Securities and Markets Authority ("ESMA") requested that the Commission adopt measures to clarify whether the definition of "derivatives" for purposes of the European Market Infrastructure Regulation ("EMIR") would cover certain FX forwards and physically settled commodity forwards. [\[2\]](#)

The definition of financial instruments under MiFID is used in a wide variety of other EU laws, including EMIR. The majority of EU Member States, however, do not have a definition of a forward or delineate a boundary for FX spots in their national laws. As a result, the definition is not currently being applied uniformly across the European Union. The Commission intends to clarify the definition of a spot FX contract through implementing regulations. In the brief consultation paper, the Commission requests views on the following questions:

1. Do you agree that a clarification of the definition of an FX spot contract is necessary?
2. What are the main uses for and users of the FX spot market? How does use affect considerations of whether a contract should be considered a financial instrument?
3. What settlement period should be used to delineate between spots contracts? [\[3\]](#) Is it better to use one single cut-off period or apply different periods for different currencies? If so, what should those settlement periods be and for which currencies?

4. Do you agree that non-deliverable forwards be considered financial instruments regardless of their settlement period?
5. What have been the main developments in the FX market since the implementation of MiFID?
6. What other risks do FX instruments pose and how should this help determine the boundary of a spot contract? [\[4\]](#)
7. Do you think a transition period is necessary for the implementation of harmonized standards?
8. What is the approach to this issue in other jurisdictions outside the EU? Where there are divergent approaches, what problems do these create?
9. Are there additional implications to those set out above of the delineation of a spot FX contract for these [MiFID, EMIR, Capital Adequacy Directive, Central Securities Depositories Regulation, Market Abuse Regulation, and Benchmarks proposals] and other applicable legislation?
10. Are there any additional issues in relation to the definition of FX as financial instruments that should be considered?

Comments on the consultation paper are due to the Commission by May 9, 2014. We are not inclined to submit a letter in response to the request for comment. If members believe ICI or ICI Global should submit a comment letter, please contact me at jennifer.choi@ici.org or 202-326-5876 no later than Monday, April 21.

Jennifer S. Choi
Senior Associate Counsel Securities Regulation

endnotes

[\[1\]](#) Consultation Document, FX Financial Instruments, European Commission, April 10, 2014, available at http://ec.europa.eu/internal_market/consultations/2014/foreign-exchange/docs/consultation-document_en.pdf.

[\[2\]](#) Letter from Steven Maijoor, Chair of European Securities and Markets Authority, to Michael Barnier, Commissioner for Internal Market and Services, European Commission, dated February 14, 2014, available at http://www.esma.europa.eu/system/files/2014-184_letter_to_commissioner_barnier_-_classification_of_financial_instruments.pdf. For a summary of the ESMA letter and the Commission's response, see ICI Memoranda Nos. 27895 (Feb. 18, 2014), available at http://www.ici.org/my_ici/memorandum/memo27895 and 27980 (Mar. 25, 2014), available at http://www.ici.org/my_ici/memorandum/memo27980.

[\[3\]](#) The Commission notes that two business days delivery appears to be the most widely used delineation for a spot contract.

[\[4\]](#) The Commission notes that spot and FX derivatives transactions are subject to three main risks – counterparty credit risk, market risk, and settlement risk.

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