

**MEMO# 27057**

February 27, 2013

# **ICI, ICI Global, ABA, and ABA Securities Association File Petition with CFTC Requesting Relief for Non-Deliverable Forwards**

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TO: DERIVATIVES MARKETS ADVISORY COMMITTEE No. 23-13  
ICI GLOBAL MEMBERS  
INTERNATIONAL MEMBERS No. 17-13  
INVESTMENT ADVISER MEMBERS No. 18-13 RE: ICI, ICI GLOBAL, ABA, AND ABA SECURITIES ASSOCIATION FILE PETITION WITH CFTC REQUESTING RELIEF FOR NON-DELIVERABLE FORWARDS

ICI, ICI Global, the American Bankers Association, and the American Bankers Association Securities Association have filed a petition ("Petition") with the Commodity Futures Trading Commission ("CFTC" or "Commission") requesting exemptive relief from certain aspects of the swap regulatory regime for non-deliverable forwards ("NDFs"). The petition, which is attached to this memorandum, is described briefly below.

The Petition requests that the CFTC use its authority under Section 4(c) of the Commodity Exchange Act ("CEA") to provide an exemption from certain of the rules regulating swaps under the CEA so that NDFs will be regulated in the same manner as foreign exchange ("FX") forwards and swaps.\* The Petition explains that many market participants with cross border businesses, as well as U.S. funds that are regulated under the Investment Company Act of 1940 (including mutual funds and closed-end funds) and non-U.S. regulated funds publicly offered to investors (collectively, "Regulated Funds") legitimately seek to hedge the currency risks associated with their underlying economic or investment activities by using FX forwards, when both of the relevant currencies are freely tradable, or NDFs, in restricted markets when one of the relevant currencies is incapable of delivery or impracticable to deliver. The Petition requests that NDFs receive the same regulatory treatment as FX forwards because they are economically and functionally equivalent to FX forwards.

Section 4(c) of the CEA permits the CFTC to "exempt any agreement, contract, or transaction" from the provisions of the CEA, with certain exceptions, "[i]n order to promote

responsible economic or financial innovation and fair competition.” The Petition sets out how the requested exemption would meet the statutory requirements for a Section 4(c) exemption, explaining that: (i) the exemption is in the public interest, because the market for NDFs is an important component of the FX market, a market on which U.S. companies, Regulated Funds, and other investors and market participants rely on a daily basis; (ii) applicants’ members—Regulated Funds and financial institutions—are active participants in the NDF market, and are “appropriate persons” to enter into the transactions that are the subject of the Petition, as required by Section 4(c); (iii) NDFs, like FX forwards and swaps, would remain subject to the regulatory reporting, business conduct rules, and anti-fraud and anti-manipulation rules applicable to swaps under the CEA.

The Petition asserts that granting the requested relief would be consistent with the general policy goals underlying Congress’s broad grant of exemptive relief to the Commission. It explains that many of the factors relied upon by the Department of Treasury to support its exemption of FX forwards and swaps apply equally to NDFs, demonstrating that exempting them from certain aspects of swap regulation is warranted. The Petition also states that granting the requested relief would serve the public interest explaining, among other things, that procedures already exist in the NDF markets to minimize risk and help ensure stability, and that regulating NDFs as swaps would significantly increase the costs for market participants to hedge their exposures in markets with restricted currencies, and place them at a disadvantage to those doing business or investing solely in developed markets. Finally, the Petition argues that the benefits of the requested relief for NDFs outweigh the costs, and that granting the requested relief would satisfy the Commission’s obligation to conduct an analysis of the costs and benefits of its actions under the CEA.

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[Attachment](#)