



## BNY MELLON

**Raymond J. Dorado**  
Executive Vice President, Deputy General Counsel

October 11, 2011

Jennifer J. Johnson, Secretary  
Board of Governors of the Federal Reserve System  
20<sup>th</sup> Street and Constitution Avenue, NW  
Washington, DC 20551

Re: Docket No. R-1428/RIN No. 7100 - AD 79

Ladies and Gentlemen:

The Bank of New York Mellon (BNY Mellon) appreciates the opportunity to provide comments to the Board of Governors of the Federal Reserve System on its proposed rule to establish requirements for retail foreign exchange (forex) transactions offered by banking organizations regulated by the Federal Reserve.

As proposed, Regulation NN would govern the manner in which such organizations may enter into certain types of forex transactions with “retail forex customers,” who are defined to be those forex customers who do not meet the definition of “eligible contract participant” (ECP). The Commodities Exchange Act, 7 U.S.C. 1a(18), defines ECPs as entities that meet certain criteria evidencing sophistication in investing, for example requiring certain entities to have total assets exceeding \$10 million.<sup>1</sup>

For the reasons set forth below, proposed Regulation NN unnecessarily requires banking institutions to provide retail-type protections to sophisticated customers who would not benefit from them. BNY Mellon urges the Federal Reserve to recognize that requiring onerous and costly retail protections for otherwise sophisticated customers is unnecessary.

### Some Sophisticated Institutional Investors Do Not Meet the ECP Threshold Requirements.

BNY Mellon conducts thousands of forex transactions each day with other dealers, such as banks and broker-dealers, as well as with sophisticated end-users, including corporations, partnerships, funds, pensions, and other similar customers.

A significant number of these end-users, although sophisticated, may not meet the \$10 million asset threshold to be considered ECPs. For example, in their early stages, many start-up

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<sup>1</sup> Entities such as of corporations, partnerships, etc., can alternatively establish ECP status if they (a) have more than \$1 million in net worth and (b) are entering into the relevant transaction “in connection with the conduct of the entity’s business or to manage the risk associated with the asset or liability owned or incurred or reasonably likely to be owned or incurred by the entity in the conduct of the entity’s business.”

institutional funds, or “incubator” funds, will not meet the \$10 million asset threshold. Forex transactions done on behalf of such incubator funds are not retail in nature, and it would be administratively and operationally burdensome to both the fund and to the forex provider to subject them to the requirements set forth in Regulation NN.

Investment Advisors Will Be Forced to Move Business away from Institutional Banks that Do Not Have the Retail Infrastructure to Comply with Regulation NN.

Many investment advisors registered under the Investment Advisers Act of 1940 or under similar foreign regulatory requirements, manage investments simultaneously for both ECP and non-ECP institutional clients. These advisors often prefer “one-stop shopping” for forex services. If advisors with both ECP and non-ECP clients could no longer use one institutional bank for their forex transactions, the advisors would have to bifurcate their forex activity between an institutional and retail forex bank, and the advisors’ transaction costs would increase and such fees would likely be passed onto clients. Of course, such advisors might also choose to move their business from institutional banks to retail banks, resulting in a significant loss of business for institutions like BNY Mellon.

Conclusion

BNY Mellon recommends that proposed Regulation NN carve out from its definition of “retail forex customer” institutional non-ECP customers that are represented by registered investment advisors.

BNY Mellon would welcome the opportunity to discuss these distinctions and recommendations in detail at your convenience. Please feel free to call Garland Sims at 212.635.1688 or the undersigned at 212.635.1643 with any questions.

Thank you for your consideration.

Sincerely,



Cc: Jane Sherburne, BNY Mellon  
Lucinda Brickler, Federal Reserve Bank of New York  
William Carlucci, Federal Reserve Bank of New York