KfW

KfW Bankengruppe, Postfach 111141, 60046 Frankfurt am Main

Via Agency Web Site

Securities and Exchange Commission
Elizabeth M. Murphy, Secretary
100 F Street, NE
Washington, D.C. 20549-1090
Attention: Elizabeth M. Murphy
Secretary, Securities and Exchange Commission

»» Re: Releases No. 34-63556 and 34-69491; File No. S7–43–10

Date: 18/07/2013

Jochen Leubner
Our ref.: Lbn/bkm
Phone: +49 69 7431-2569
Fax: +49 69 7431-[redacted]

Dear Ms. Murphy:

We are submitting this comment letter in response to the re-opening by the Securities and Exchange Commission ("SEC") of the comment period on its proposed rule (the "Proposed Rule") governing the end-user exception (the "End-User Exception") to the mandatory clearing requirement applicable to security-based swaps pursuant to Section 3C(a)(1) of the Securities Exchange Act of 1934 (the "Exchange Act"). We appreciate this opportunity to comment on the scope of the mandatory clearing requirement.

This comment letter is submitted on behalf of KfW, and the views expressed herein are those of KfW only. For a background discussion of the legal status, ownership, governance and activities of KfW, we would respectfully direct the SEC to the comment letters previously filed by KfW in response to the SEC's proposed rules on "Capital, Margin and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker Dealers" (Dec. 20, 2012, SEC File No. S7-08-12, available here: www.sec.gov/comments/s7-08-12/s70812-5.pdf) and "Further Definition of 'Swap', 'Security-Based Swap' and 'Security-Based Swap Agreement'; Mixed Swaps; Security-Based Swap Agreement Recordkeeping" (Aug. 12, 2011, SEC File No. S7-16-11, available here: www.sec.gov/comments/s7-16-11/s71611-51.pdf).

Applicability of the mandatory clearing requirement to foreign governments

Section 3C(a)(1) of the Exchange Act and Section 2(h)(1)(A) of the Commodity Exchange Act (the "CEA") were added by Title VII of the

Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Together, they impose mandatory clearing requirements on persons engaging in security-based swaps and swaps. We believe that the scope of those mandatory clearing requirements, insofar as foreign governments are concerned, should be the same.

In its July 2012 release entitled "End-User Exception to the Clearing Requirement for Swaps; Final Rule" (the "CFTC End User Release"),[1] the CFTC concluded that foreign governments, foreign central banks and international financial institutions should not be subject to the clearing requirement set forth in Section 2(h)(l) of the CEA. The CFTC also recognized that "the term 'foreign government' includes KfW, which is a non-profit, public sector entity responsible to and owned by the federal and state authorities in Germany, mandated to serve a public purpose, and backed by an explicit, full statutory guarantee provided by the German federal government."[2]

The CFTC's position was based on a number of considerations, including the following:

1. The CFTC noted that "[c]anons of statutory construction 'assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws'" and concluded that "[t]here is nothing in the text or history of the swap-related provisions of Title VII of [Dodd-Frank] to establish that Congress intended to deviate from these traditions of the international system by subjecting foreign governments, foreign central banks, or international financial institutions to the clearing requirement set forth in Section 2(h)(1) of the CEA."[3]

2. The CFTC acknowledged that considerations of comity and the need to protect the U.S. government from foreign regulation indicate that foreign governments should not be subjected to the clearing requirement. If foreign governments were subject to the mandatory clearing requirement, the CFTC would have greater regulatory oversight of swap transactions entered into by such foreign governments. As a consequence, non-U.S. regulators might reciprocally decide to subject the U.S. government and U.S. governmental entities such as the Federal Reserve Banks to foreign regulations, including foreign clearing requirements.

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1 See Final Rule: End User Exception to the Clearing Requirement for Swaps, 77 Fed. Reg. 42560 (July 19, 2012).

2 Id. fn. 12 at 42561.

3 Id. at 42562 (footnote omitted).

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3. If a foreign government enters into a non-cleared swap with a counterparty that is subject to CFTC regulations with respect to that swap, such counterparty must still comply with CFTC regulations applicable to non-cleared swaps, such as recordkeeping and reporting requirements.

4. For the reasons noted above – specifically the fact that KfW is owned by German federal and state governments, is mandated to serve a public purpose and is backed by an explicit, full statutory guarantee of the German federal government – the CFTC expressly concluded that KfW should be treated as a foreign government for this purpose.

We believe the considerations articulated by the CFTC are equally applicable to consideration of the scope of the mandatory clearing requirement under the Exchange Act. Although the SEC and the CFTC regulate different products, participants, and markets, and enjoy different statutory authority in many respects, nothing in Dodd-Frank or its legislative history suggests that – insofar as the mandatory clearing requirements would apply to foreign governments – Congress intended to apply a different statutory standard. Moreover, the SEC has recognized that it is "guided by the objective of establishing consistent and comparable requirements to U.S. market participants."[4] The SEC's express recognition of an exclusion from the mandatory clearing requirement in favor of foreign governments would serve to align the SEC's regulatory approach in this respect with that of the CFTC, and is more likely to result in a parallel treatment of the U.S. government by foreign regulators.

In light of the foregoing, we respectfully request that the SEC take this opportunity to expressly clarify that foreign governments are not subject to the mandatory clearing requirement under the Exchange Act, and that in this context, KfW should be treated as a foreign government.[5]

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[4] Proposed Rule: Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, 78 Fed. Reg. 30968, at 31102 (May 23, 2013).

[5] We note that such treatment of KfW as a foreign government by the SEC would be consistent with the relief granted to KfW pursuant to the SEC's no-action letter of August 20, 1987, which enabled KfW to utilize Schedule B in connection with its registration of securities under the Securities Act of 1933. See SEC No-Action Letter, Kreditanstalt für Wiederaufbau, Fed. Sec. L. Rep. P 78,469 (Sept. 21, 1987).

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Thank you for your consideration of our comments. Please do not hesitate to contact either Dennis C. Sullivan ([redacted]; [redacted]) or David J. Gilberg ([redacted]; [redacted]) if you have questions or would find further background helpful. We have sent a copy of this letter to the Federal Ministry of Finance of Germany in its capacity as KfW's supervisory authority.

Sincerely,

KfW

Name: Dr. Lutz-Christian Funke
Title: Senior Vice President

Name: Dr. Frank Czichowski
Title: Senior Vice President and Treasurer