

FMS Wertmanagement AG&R, Prinzregentenstraße 56, 80538 München

Persönlich / Vertraulich

Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581
USA

Ansprechpartner:

Dr. Nico Zachert
Director
Compliance/Legal

Tel.: +49 (0) 89 954 7627 634

Fax: +49 (0) 89 954 7627 139

nico.zachert@fms-wm.de

FAO: David A. Stawick
Secretary, Commodity Futures Trading Commission

August 24, 2012

**Re: CFTC; Cross-Border Application of Certain Swaps Provisions
of the Commodities Exchange Act (RIN 3038-AD57)**

Dear Mr. Stawick:

We are submitting this comment letter in response to the July 12, 2012 Release issued by the Commodity Futures Trading Commission (the “CFTC”) soliciting comments on the proposed Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 Fed. Reg. 41,213 (July 12, 2012) (the “Proposed Guidance”). We appreciate the opportunity to comment on the proposed definitions set forth in the Proposed Guidance, pursuant to Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).

This comment letter is submitted on behalf of FMS Wertmanagement (“FMS-WM”), and the views expressed herein are those of FMS-WM only. For the reasons described herein, we believe that the use of Swaps, as defined under Dodd-Frank, by FMS-WM, should not be subject to the regulatory scheme instituted by Dodd-Frank. As explained below, FMS-WM is an institution organized under public law of the Federal Republic of Germany (the “Federal Republic”), the obligations of which are backed by the full faith and credit of the Federal Republic, including full loss compensation. In addition, FMS-WM is engaged solely in the management of certain legacy portfolios on behalf of the Federal Republic and uses Swaps only for the purpose of hedging such portfolio. Accordingly, we respectfully request that the CFTC clarify in the final interpretive guidance that FMS-WM be treated as a foreign government for purposes of the registration requirements and that it not be subject to the requirements otherwise applicable to major swap participants (“MSPs”), including the registration and clearing requirements.

I. Background on FMS-WM

A. FMS-WM's Origins in the Global Financial Crisis

Government Measures to Support German Financial Institutions and the Role of Liquidation Institutions. In connection with the financial crisis in October 2008, the German Federal Government, with broad support of the German Parliament, adopted a comprehensive package of measures to support German financial institutions, most notably HRE Group. This comprehensive package included the German Financial Market Stabilization Fund Act (*Finanzmarktstabilisierungsfondsgesetz*, “FMStFG”), which provided for the implementation of the German Financial Market Stabilization Fund (*Sonderfonds für Finanzmarktstabilisierung*, “SoFFin”) and established the German Federal Agency for Financial Market Stabilization (*Bundesanstalt für Finanzmarktstabilisierung*, “FMSA”).

SoFFin is a special pool of assets (*Sondervermögen*) of the Federal Republic, established by law and designated to fulfill specific tasks of the German Federal Government assigned to it under the FMStFG. SoFFin’s purpose is to stabilize the German financial sector by extending guarantees, providing equity capital, assuming risk positions and setting up liquidation institutions. To this end, SoFFin has been authorized by the German legislature to extend guarantees in a total aggregate amount of up to €400 billion and to incur debt in a total amount of up to €80 billion. Any financing required by SoFFin is obtained in the manner used by the Federal Republic to finance itself, i.e., through the issuance of debt instruments by the Federal Republic of Germany – Finance Agency (*Bundesrepublik Deutschland – Finanzagentur GmbH*). When the Federal Republic incurs debt for SoFFin it leads to an increase in the net borrowings and debt of the Federal Republic. Applications for stabilization measures extended by SoFFin could initially be made only until the end of 2010. As a consequence of developments in the euro area in late 2011, the Federal Government in December 2012 re-opened SoFFin for new applications until the end of 2012. For the year ended December 31, 2011, SoFFin recorded a loss of EUR 13.1 billion, which was mainly driven by expenses of EUR 11.4 billion recorded in connection with the accrual of provisions for loss compensation obligations of SoFFin vis-à-vis FMS-WM. As of June 30, 2012, the total outstanding stabilization measures provided by SoFFin amounted to EUR 30.8 billion, of which EUR 11.0 billion related to liquidity guarantees and EUR 19.8 billion related to equity capital.

The FMSA was established to manage SoFFin and to implement and monitor the stabilization measures extended by it. The FMSA is a federal agency under public law with legal personality (*rechtsfähige Anstalt öffentlichen Rechts*). FMSA is supervised by the German Federal Ministry of Finance (*Bundesfinanzministerium*), which ensures that FMSA acts in the public interest. In particular, the German Federal Ministry of Finance supervises FMSA’s activities, nominates the members of FMSA’s management committee (*Leitungsausschuss*) and delegates decision-making powers to the management committee. The FMStFG also grants the FMSA the power to create liquidation institutions. The purpose of these institutions is to assume distressed

and non-strategic assets from systemically important financial institutions and to eventually dispose of or liquidate the risk positions transferred to them. The FMSA has created two liquidation institutions: Erste Abwicklungsanstalt, which was established in December 2009, and FMS-WM. A chart providing an overview of the ownership and supervision of FMS-WM is attached hereto as Annex A.

FMS-WM was established on July 8, 2010. Its task is to wind up risk positions and non-strategic assets/businesses it assumed from HRE Group with an initial total (nominal) volume of approximately €175.7 billion in order to stabilize HRE Group and the German financial market, in particular the German covered bond market¹. FMS-WM is wholly owned by SoFFin, which acts on behalf of the Federal Republic and is managed by the FMSA.²

Background on Government Rescue Measures for HRE Group. As of 2007, HRE Group was one of the largest commercial property lenders and providers of public finance in Germany. Most of the commercial property loans were refinanced by the issuance of covered bonds, making HRE Group the leading German issuer of covered bonds. In the course of the liquidity crisis in September 2008, HRE Group encountered financial difficulties primarily caused by the heavy debt burden held by one of its subsidiaries, Depfa Bank plc (“Depfa”). Depfa had borrowed short-term money to fund higher interest bearing long-term positions in the area of public sector finance on a large scale. When the interbank lending market collapsed in September 2008, Depfa faced substantial refinancing problems. Within a short period of time, the entire HRE Group faced solvency issues as well. Due to HRE Group’s importance for the German financial system, the Federal Republic initiated various support measures, which led to the SoFFin becoming the sole owner of Hypo Real Estate Holding AG in October 2009. Following its acquisition of HRE Group, SoFFin began to reorganize HRE Group’s business. Risk positions and non-strategic assets/businesses in a nominal amount of €175.7 billion were transferred to FMS-WM on October 1, 2010. HRE Group’s core bank, Deutsche Pfandbriefbank AG (“PBB”), continues to operate two strategic business lines, real estate finance and public investment finance and is expected to be reprivatized in the medium term. According to existing EU requirements, the cooperation agreement with PBB must be terminated by September 30, 2013 at the latest. FMS-WM has launched a project to make alternative arrangements for its portfolio servicing.

¹ Covered bonds (*Pfandbriefe*) are recourse obligations secured or “covered” by pools of loans, e.g., mortgage loans or public sector loans.

² Given SoFFin’s liquidity support and loss compensation obligations and the Federal Republic’s liability for SoFFin’s obligations discussed in section VI below, all major rating agencies have aligned the rating of FMS with the rating of the Federal Republic. Cf. Fitch Ratings, FMS Wertmanagement Anstalt des oeffentlichen Rechts, Full Rating Report, December 19, 2011; Moody’s Investors Service, Rating Action: Moody’s assigns Aaa to FMS Wertmanagement, stable outlook, Global Credit Research, October 21, 2010; Standard & Poor’s, FMS Wertmanagement Anstalt des oeffentlichen Rechts, November 4, 2011.

FMS-WM's Task. FMS-WM's mandate is to un-wind the portfolio of risk positions and non-strategic assets/businesses that it assumed from HRE Group on October 1, 2010, in ways that maximize value. In order to achieve its object and purpose, FMS-WM may engage in all kinds of banking and financial services transactions and all other transactions that directly or indirectly serve its purposes. FMS-WM is, however, neither a financial institution nor a financial services institution within the meaning of the German Banking Act (*Kreditwesengesetz*, "KWG"), nor a financial service provider within the meaning of the German Securities Trading Act (*Wertpapierhandelsgesetz*, "WpHG"), nor an insurance company within the meaning of the German Insurance Supervision Act (*Versicherungsaufsichtsgesetz*, "VAG") nor regulated accordingly. As a consequence, FMS-WM is prohibited from engaging in transactions that would require a license under the EU Banking Directive (2006/48/EC)³ or the EU Directive on markets for financial instruments (2004/39/EC). Nonetheless, pursuant to its charter and the FMStFG, FMS-WM is subject to certain provisions of the KWG and the WpHG. In particular, FMS-WM is subject to banking supervision by the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, "BaFin") and it must comply with the organizational obligations and restrictions on certain activities imposed by the KWG applicable to banks and financial institutions. FMS-WM is, however, exempted from the regulatory capital and liquidity requirements and the banking license requirement under the KWG. FMS-WM is also deemed to be a financial institution for purposes of the German Money Laundering Act (*Geldwäschegesetz*).

The portfolio assumed by FMS-WM is managed and liquidated in accordance with a winding-up plan (*Abwicklungsplan*), which describes the winding-up measures FMS-WM intends to take. Depending on the market situation and the asset category, the winding-up plan provides for the following strategies in connection with liquidating the portfolio assumed by FMS-WM:

- Holding assets, which includes active management of loans and securities with a view to repaying outstanding amounts (e.g., where the risk/return profile is acceptable).
- Selling assets to the extent it makes economic sense (e.g., to reduce positions with a higher risk profile and when market opportunities arise).
- Restructuring, including workout, wind-up and reorganization measures, relating to both performing and non-performing financial instruments, especially in the segments Infrastructure and Real Estate, with a view to maximizing the value of the liquidation measure related to the financial instrument (including by reducing risk).

³ As interpreted by BaFin, the prohibition on FMS to engage in transactions that would require a banking license requires FMS to include a selling restriction in its debt issuance programs that permits the issuance of its debt securities only to central banks and certain institutional investors (such as banks, insurers or funds, or entities which are regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets).

The winding-up plan has been established with a view to ensuring that FMS-WM at all times has sufficient liquidity to cover its three-month liquidity requirements under stress scenario assumptions over the entire winding-up period, independently of SoFFin's duty to provide liquidity to FMS-WM and to offset losses incurred by it as described below. FMS-WM's management board and supervisory board as well as SoFFin are bound by the winding-up plan. FMS-WM monitors prevailing market conditions to determine whether the winding-up plan needs to be adapted. In its supervisory capacity, the FMSA has the right to request changes to the winding-up plan.

FMS-WM engages in funding activities, including the issuance of debt securities and/or the taking out of bank loans, in order to refinance funding instruments associated with the portfolio it has assumed as they expire. FMS-WM will be required to engage in refinancing activities on the capital markets until its portfolio has been liquidated. FMS-WM monitors its financing needs and liquidity requirements by means of a liquidity management system similar to the ones used by financial institutions. FMS-WM seeks to ensure that it has sufficient liquidity to cover its three-month liquidity requirements under stress scenario assumptions at all times.

B. As a Public Law Institution, FMS-WM is an Instrumentality of the Federal Government

Federal Republic as 100% Beneficial Owner. FMS-WM was created by an administrative act of the FMSA, which itself is a public law institution, pursuant to Section 8a of the FMStFG as a public law institution with partial legal capacity (*teilrechtsfähige Anstalt des öffentlichen Rechts*) within the FMSA. FMS-WM may act in its own name, may bring suit and may be sued in court. FMS-WM is fully owned by SoFFin, which is a special pool of assets (*Sondervermögen*) of the Federal Republic. As such, FMS-WM is effectively owned by the Federal Republic. Any transfer of ownership interests in FMS-WM would require the express written consent of the FMSA. The assets and liabilities of FMS-WM are kept separate from the assets and liabilities of other liquidation institutions established by the FMSA and from other assets and liabilities of the FMSA.

Administrative Law Institution Existing for a Limited Duration. FMS-WM is an institution created pursuant to German administrative law. According to its charter, FMS-WM was established for such period of time as will be required for it to wind up the portfolio acquired from HRE Group. Upon completion of such winding up, FMS-WM will be dissolved and any remaining assets will be distributed to SoFFin. According to Section 16(1) of FMS-WM's charter, the winding up may not be completed until either all creditors have been satisfied or SoFFin has directly assumed liability for any remaining debt outstanding.

C. FMS-WM Serves a Public Purpose

Important Role in Stabilizing the German Financial Market. FMS-WM was established to stabilize HRE Group and the German financial market. To this end, risk positions and non-strategic assets/businesses were transferred from HRE Group to FMS-WM, which involved the use of public funds. As such, the transfer constituted state aid pursuant to EU law and had to be approved by the European Commission. Under EU law, state aid may be considered compatible with the internal market if it remedies a serious disturbance in the economy of a member state and thus serves a public purpose. In approving the rescue measures extended to HRE Group, the European Commission in effect acknowledged that HRE Group was a bank of systemic relevance and that the stabilization measures extended to it served an important public purpose.⁴

Long-Term Winding-Up and Incurrence of Substantial Losses in the Public Interest. A significant portion of the portfolio assumed by FMS-WM from HRE Group consists of claims based on public sector financing and other assets that were, and continue to be, difficult to refinance in the wake of the global financial markets crisis and in light of the ongoing European sovereign debt crisis. Under its charter, FMS-WM is required to liquidate the assumed risk positions and assets/businesses in a profit-oriented manner, which FMS-WM seeks to do by managing and winding-up its portfolio in a value-preserving manner over an extended period of time. Due to the quality of FMS-WM's portfolio, FMS-WM has incurred and may continue to incur substantial losses. In accordance with Section 7 of FMS-WM's charter, SoFFin is required to compensate FMS-WM for these losses.

D. FMS-WM Uses Swaps Solely for Hedging Purposes

In connection with its winding-up of the portfolios under its management, FMS-WM utilizes Swaps solely for hedging purposes. In particular, the management of its portfolios and FMS-WM's financing of the activities, give rise to interest rate and currency risk that result in exposures that need to be hedged through the use of interest rate and currency swaps. FMS-WM manages such risk exposures by entering into interest rate and currency swaps with a variety of major financial institutions, including a limited number of U.S. entities that likely will be required to register as swap dealers ("SDs"). While FMS-WM is in the process of winding down the portfolios under its management, it is nevertheless necessary to enter into new Swap transactions

⁴ Commission Decision of 18 July 2011 on State aid C 15/09 (ex N 196/09), which Germany implemented and is planning to implement for Hypo Real Estate (notified under document C(2011) 5157) (2012/118/EU).

from time to time as risk management positions need to be adjusted, increased or decreased. FMS-WM does not anticipate dealing with U.S. counterparties that will not be registered as SDs.

E. FMS-WM is Controlled and Supervised by the FMSA

Governmental Supervision. FMS-WM operates under the supervision and control of the Federal Republic, which is exercised through the FMSA. Specifically, the FMSA is supervised by the German Federal Ministry of Finance as described in Section I.A. above, which ensures that the FMSA acts in the public interest. The FMSA, in turn, is responsible for the regulatory and legal supervision of FMS-WM. In particular, the FMSA has to approve and supervise FMS-WM's implementation of the winding-up plan as well as any deviations from, or amendments to, the winding-up plan. The FMSA may give instructions to FMS-WM's executive board and supervisory board in order to ensure that FMS-WM complies with applicable law and the requirements of its charter. Comprehensive reporting obligations by FMS-WM ensure that the FMSA has a solid basis for exercising its control and instruction rights.

The FMSA May Dismiss FMS-WM's Management. The FMSA appoints the members of FMS-WM's supervisory board. The supervisory board members, in turn, appoint the members of FMS-WM's executive board. Both the supervisory board and the FMSA may dismiss a member of the executive board for good cause. Under German corporate law, members of the executive board of a corporation may only be dismissed by the supervisory board, and not by the corporation's shareholders. In this respect, the powers of the FMSA go beyond those granted to shareholders of a German corporation and provide an effective means of governmental supervision and control over the operations of FMS-WM.

F. FMS-WM's Obligations are Backed by the Full Faith and Credit of the Federal Republic

FMS-WM's obligations are ultimately backed by the full faith and credit of the Federal Republic. Pursuant to Section 7 of FMS-WM's charter, SoFFin is obligated to provide FMS-WM liquidity support and loss compensation. The Federal Republic, in turn, is directly liable for SoFFin's obligations pursuant to Section 5 of the FMStFG.

SoFFin's Liquidity Support and Loss Compensation Obligations. SoFFin is obligated to provide FMS-WM with such amounts as are necessary for FMS-WM to fully satisfy its obligations when due and to compensate it for losses it may incur. This includes all obligations of FMS-WM under any of its Swap positions.

- Liquidity Support Obligation. FMS-WM has established a liquidity management system that seeks to ensure that FMS-WM has sufficient liquidity to cover its three-month liquidity requirements under stress scenario assumptions at all times. According to Section 7 of FMS-WM's charter, SoFFin would, however, be obligated to provide FMS-WM, upon first demand by FMS-WM's executive board and within three business days, such amounts as are necessary for FMS-WM to fully satisfy its obligations when due. FMS-WM's executive board is in turn specifically required to make such demands in a timely manner. In its supervisory capacity, the FMSA may, to the extent required, direct the executive board to take such action. To date, FMS-WM has not required liquidity support from SoFFin.
- Loss Compensation Obligation. As permitted by the FMStFG, Section 7(1) of FMS-WM's charter provides that SoFFin is required to offset any losses sustained by FMS-WM. FMS-WM has incurred and may continue to incur substantial losses. FMS-WM has incurred and may continue to incur substantial losses. Specifically, FMS-WM realized losses of €3.0 billion in 2010 and €9.9 billion in 2011. In accordance with its loss compensation obligation, SoFFin fully compensated FMS-WM for these losses.

The Federal Republic's Liability for SoFFin's obligations. Section 5 of the FMStFG provides that the Federal Republic is directly liable for the obligations of SoFFin. In fact, any debt incurred by SoFFin is accounted for as direct debt of the Federal Republic. SoFFin's obligations are thus effectively obligations of the Federal Republic.

II. Cross-Border Application of Title VII of the Dodd-Frank Act to FMS-WM

A. The Full Scope of Dodd-Frank Should Not Apply to Non-U.S. Entities Such as FMS-WM

The Proposed Guidance, among other things, makes it clear that the CFTC does not intend to extend the full scope of the Dodd-Frank regulatory scheme to non-U.S. entities or to transactions between such entities and other non-U.S. entities. Instead, the CFTC has proposed a regime of "substituted compliance" in a number of important respects. Specifically, the CFTC noted that a substituted compliance regime, allowing a registered, non-U.S. SD or MSP to conduct business by complying with its home country regulations and "without additional requirements under the CEA," would "advance the congressional directive that the [CFTC] act in order to 'promote effective and consistent global regulation of swaps [. . .].'"⁶ If the CFTC determines that a non-

⁶ See CFTC, "Cross Border Application of Certain Swaps Provisions of the Commodity Exchange Act," 77 Fed. Reg. 41,214, 41,229 (July 12, 2012).

U.S. MSP's home jurisdiction regulatory regime provides comparable protections to those mandated by the CEA and the CFTC's regulations, substituted compliance with respect to Entity-Level Requirements, and to a certain extent, Transaction-Level Requirements, will be permitted. In light of this approach reflected in the Proposed Guidance, taken together with the CFTC's statements in earlier releases, we respectfully request that the CFTC clarify that entities such as FMS-WM, that utilize Swaps for limited purposes and are backed by the full faith and credit of a foreign sovereign, will not be required to register as SDs or MSPs and will not be subject to the clearing requirement.

In particular, the CFTC has stated, in its Rules Regarding the Further Definition of "Swap Dealer," "Major Swap Participant," and other matters, that foreign governments, foreign central banks and international financial institutions should not be required to register as SDs or MSPs.⁷ Furthermore, in its rules regarding the end-user exception to clearing requirements for Swaps, the CFTC has similarly stated that these entities will not be subject to the requirement under Dodd-Frank that Swap transactions be cleared through a derivatives clearing organization.⁸ The CFTC has therefore recognized not only that non-U.S. entities in general should be eligible for relief from CFTC regulations, but that foreign sovereign entities in particular should be distinguished from other non-U.S. persons and excluded from certain of the most significant regulatory requirements. In so doing, the CFTC acknowledged that "[t]here is nothing in the text or history of the swap-related provisions of Title VII to establish that Congress intended to deviate from the traditions of the international system by including foreign governments, foreign central banks and international financial institutions within the definitions of the terms "swap dealer" or "major swap participant," thereby requiring that they affirmatively register as swap dealers or major swap participants with the CFTC and be regulated as such." We believe that the provisions in the Proposed Guidance, taken together with the CFTC's statements and reasoning in the release accompanying the final definitions of SDs and MSPs and the rules applicable to end-users, similarly warrant excluding entities such as FMS-WM from SD or MSP registration and from the clearing requirement under Dodd-Frank, and we respectfully request that the CFTC confirm this exclusion in its finalization of the Proposed Guidance.

⁷ See CFTC and the Securities and Exchange Commission, Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 77 Fed. Reg., 30,596, 30,693 (May 23, 2012), "The CFTC does not believe that foreign governments, foreign central banks and international financial institutions should be required to register as swap dealers or major swap participants."

⁸ See CFTC, "End-User Exception to the Clearing Requirement for Swaps," 77 Fed. Reg. 42,560, 42,562 (July 19, 2012), "Given these considerations of comity and in keeping with the traditions of the international system, the [CFTC] believes that foreign governments, foreign central banks, and international financial institutions should not be subject to Section 2(h)(1) of the CEA."

B. Entities Such as FMS-WM Should Not Be Required to Register as a Major Swap Participant and Should Not Be Subject to the Clearing Requirement

Based on the definition of a “major swap participant” under the CFTC’s final rules, it is possible that FMS-WM will be required to register in this capacity in the future. However, for the reasons set forth above, and in the releases regarding the definitions of SD and MSP and on end-users, such a result would be unnecessary and burdensome, both to FMS-WM and the CFTC, duplicative with non-U.S. regulation and contrary to the Proposed Guidance regarding the extraterritorial effect of the CEA and the CFTC’s rules. Backed by the full faith and credit of the Federal Republic, FMS-WM does not pose the type of risk to other counterparties and the wider financial system that the registration and clearing requirements were designed to address. FMS-WM enters into Swaps solely for hedging purposes in connection with its mandate to wind up the assets and positions of HRE group—not for speculative purposes. Furthermore, as noted above, SoFFin is obligated to provide liquidity support and loss compensation for FMS-WM. As FMS-WM is 100% owned by SoFFin, itself an instrumentality of the Federal Republic, in the event that FMS-WM suffers losses on its Swap positions, those losses would be fully covered by the Federal Republic, and FMS-WM’s counterparties would face minimal risk.

In adopting final rules for the definitions of “Swap Dealer” and “Major Swap Participant,” the CFTC declined to exclude categorically entities that maintain “legacy portfolios” of Swaps from the definition of an MSP.⁹ However, the entities referenced in the CFTC’s release as those with legacy portfolios, such as the Canadian Master Asset Vehicles, do not appear to have been backed by the full faith and credit of their respective sovereign governments. The CFTC recognized that, despite the fact legacy portfolio entities do not typically enter into new Swap transactions, they do maintain existing sizeable portfolios of Swaps and may “pose systemic risk to the U.S. financial system.”

We believe that entities such as FMS-WM, that are backed by the full faith and credit of sovereign governments, should be distinguished from such entities and should instead be given the same status as foreign governments under the CFTC’s rulemakings. We note that, in its release regarding the further definitions of SDs and MSPs, and in its release regarding the end-user exception to Swaps clearing, the CFTC expressly stated that the German governmental entity KfW Bankengruppe (“KfW”), would be considered a “foreign government” for purposes of the CFTC’s regulatory requirements and would also not be subject to SD or MSP registration. In addition, in its release regarding end-users, the CFTC further excluded these entities, including KfW, from the clearing requirement under Dodd-Frank, regardless of whether they separately qualify as end-users. With respect to KfW in particular, the CFTC noted its status as 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

⁹ See *supra* note 10 at 30,691.

federal government.”¹⁰ We submit that FMS-WM satisfies each of those criteria as well—its beneficial owner is the Federal Republic, it has a limited public mandate to restore stability in the German financial markets, and it is a non-profit backed by the full faith and credit of the Federal Republic. Unlike KfW, creditors of FMS-WM do not have a direct claim against SoFFin or the Federal Republic; however, the backing of SoFFin and the full faith and credit of the Federal Republic, we submit, should result in FMS-WM being included in the “foreign government” category as well.

As discussed above, FMS-WM’s fundamental purpose—managing the run-off portfolio of HRE Group and enhancing liquidity in the German financial system—constitutes a public mandate and is inherently focused on activities which have their primary effects outside the U.S. Given the CFTC’s willingness to consider substituted compliance with foreign regulatory regimes for entities that would otherwise be considered MSPs, and combined with the public purpose, non-U.S. nature of FMS-WM’s activities, formal regulatory oversight and explicit credit-backing of the Federal Republic, we believe that FMS-WM should be considered a “foreign government” in the context of MSP registration and the extraterritorial application of the CEA’s Swap provisions. Requiring FMS-WM to register as an MSP would be inconsistent with the Proposed Guidance and cross-border application of the Swaps-related regulation under the CEA, as the CFTC has previously made clear that entities that function as instrumentalities of foreign governments should not be required to register and be subject to the associated clearing and regulatory requirements for MSPs.

III. Request for Clarification Regarding Determination of Major Swap Participant Status for Positions with Non-U.S. Counterparties

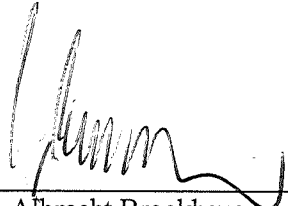
The majority of FMS-WM’s Swap positions are entered into with non-U.S. counterparties. If FMS-WM is not excluded from registration as an MSP and must determine if its Swap positions exceed the MSP thresholds, we respectfully request confirmation of our interpretation of the Proposed Guidance with regard to the exclusion of Swaps entered into with certain non-U.S. branches, and all non-U.S. subsidiaries, of U.S. entities. In particular, under the Proposed Guidance, our understanding is that any Swaps entered into by FMS-WM with a non-U.S. branch of a registered SD, or a non-U.S. subsidiary of a U.S. entity (whether or not registered and whether or not guaranteed) would be excluded from consideration in determining its status as an MSP. We interpret the proposed guidance to cover both of these points, but believe that greater clarity is needed.

¹⁰ See CFTC, “Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act”, Footnote 12, 77 Fed. Reg. 42,560, 42,561 (July 19, 2012).

Thank you for your consideration of our comments and please do not hesitate to contact the undersigned or David Gilberg at (212) 558-4680 or gilbergd@sullcrom.com if you have questions or would find further background helpful.

Sincerely,

FMS-WM



Name: Ernst-Albrecht Brockhaus
Title: Member of the Management
Board



Name: Dr. Nico Zachert
Title: Authorized Signatory –
Legal/Compliance

Annex A

FMS-WM:

The following chart provides an overview of the ownership and supervision of

