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CEA §§ 4r and 4s
CFTC Regulations § 3.10 and
Parts 23, 43, 45, 46 and 50

December 5, 2012

Mr. Richard Shilts
Director
Division of Market Oversight
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: Request for No-Action Relief

Dear Mr. Shilts:

Davis Polk & Wardwell LLP, on behalf of certain of our clients named on the signature page of this letter (the "Dealers"), requests that the Commodity Futures Trading Commission (the "CFTC") grant the relief requested herein with respect to the classification of "compo" equity total return swaps, as described below, as "mixed swaps" under certain rules promulgated by the CFTC and the Securities and Exchange Commission (the "SEC" and together with the CFTC, the "Commissions") under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). Representatives of the Dealers have been in discussions with the Staffs (the "Staffs") of the Commissions regarding this issue to provide greater clarity with respect to the regulation of compo equity total return swaps. However, the Dealers understand that those discussions may not be completed prior to impending deadlines for registration of entities and compliance with rules under the Dodd-Frank Act, and also understand the heavy burden of requests for no-action, interpretive and other relief that the Staffs and the Commissions are currently facing. Therefore, while those discussions remain ongoing, we are requesting time-limited no-action relief from the Staff of the CFTC to address serious compliance challenges raised by the joint CFTC and SEC interpretations accompanying their joint final rules to further define the terms "swap," "security-based swap," and "security-based swap agreement" and regarding "mixed swaps" (such interpretations, the

"Product Definitions Interpretations").[1] Specifically, we are requesting no-action relief for any person who treats "compo" equity total return swaps (as described below) entered into prior to July 1, 2013, as security-based swaps and not as mixed swaps.

Market participants have understood since the enactment of the Dodd-Frank Act that they would need to make significant changes to the manner in which they do business in order to bring themselves into compliance with the new regulatory framework. In recognition of this fact, market participants, including the Dealers, have taken substantial steps to achieve compliance, in some cases even prior to the promulgation of proposed or final rules by the Commissions. These efforts have been expensive and time-consuming, as many of the rules under the Dodd-Frank Act require swap dealers and major swap participants to build significant new technological infrastructure and to design and implement new policies and procedures specifically tailored to the rules under the Dodd-Frank Act. As the Staffs are aware from the number of requests for no-action or interpretive relief they have received in relation to impending compliance deadlines, meeting the requirements of the new regulatory framework by the applicable deadlines has been difficult even in cases where swap market participants had significant advance notice of the regulations to which they would be subject under the new regime.

In the case of equity total return swaps on single securities or narrow-based indices , the market fully expected that these equity transactions would be security-based swaps subject to the jurisdiction of the SEC, and buy-side and sell-side market participants (including those whose businesses involve primarily or exclusively transactions focused on single names or narrow-based securities indices) have been sequencing their implementation efforts in accordance with this expectation. As part of these businesses, such market participants often wish to transact in total return swaps that allow one party to gain equity exposure to a stock or a narrow-based index of stocks that trade outside the United States, but wish for payments under such total return swaps to be made in U.S. dollars ("foreign equity total return swaps"). These market participants traditionally have viewed the business of transacting in foreign equity total return swaps principally as an equity business, and not a foreign exchange business, regardless of the method by which the foreign currency is translated into U.S. dollars for purposes of making payments under such swaps. As a result, market participants believed that foreign equity total return swaps on single securities or narrow-based indices would be security-based swaps subject solely to the jurisdiction of the SEC.

Contrary to market expectations, the Product Definitions Interpretations classify a common category of foreign equity total return swaps, "compo" equity total return swaps, as mixed swaps.[2] Importantly, there was no discussion of either "compo" or "quanto" equity total

[1] 77 Fed. Reg. 48208 (Aug. 13, 2012).

[2] The Product Definitions Interpretations draw a distinction between "quanto" swaps, in which currency translation whenever required for a valuation or payment is effected using a fixed exchange rate specified at inception of the swap, and "compo" swaps, in which currency translation is effected using the prevailing "spot" exchange rate at the time of such valuation or payment. The Product Definitions Interpretations conclude that (….continued)

return swaps in the interpretations accompanying the proposed rules further defining "swap", "security-based swap," and "security-based swap agreement" published by the Commissions on May 23, 2011 (the "Proposed Product Definitions Interpretations").[3] The discussion of compo and quanto swaps was added to the final Product Definitions Interpretations in response to a comment requesting clarification that quanto swaps are not "mixed swaps",[4] leaving market participants with no opportunity to comment on this interpretation.

The classification of compo equity total return swaps as "mixed" swaps is very significant to market participants. "Compo" swaps, as described in the Product Definitions Interpretations, represent a very substantial portion of the overall equity total return swaps market. The Dealers estimate that "compo" swaps on non-U.S. dollar denominated stocks represent 15-20% of the total market for equity total return swaps transacted with U.S. persons. By contrast, "quanto" swaps represent significantly less than 1% of that total market.

The classification of compo equity total return swaps as mixed swaps will have very significant short-term consequences for both sell-side and buy-side market participants. First, it may require entities (particularly end users) to register as commodity pool operators, commodity trading advisors or potentially as major swap participants (in addition to registering as major security-based swap participants). Such status carries significant obligations and compliance efforts. In addition, such classification may require entities that are planning to register solely as security-based swap dealers also to register as swap dealers. For entities that engage primarily or exclusively in an equities business focused on single-names or narrow-based securities indices, this registration requirement was wholly unexpected and, given the significant requirements for a complete registration application, would be extremely burdensome, if feasible at all. In short, without additional time to prepare for such registration and such treatment, these entities will be precluded from conducting their businesses as planned, resulting in a significant disruption of the market for foreign equity total return swaps.[5]

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"quanto" equity total return swaps are security-based swaps (only), while "compo" equity total return swaps are mixed swaps. 77 Fed. Reg. 48208 at 48265.

[3] The Proposed Product Definitions Interpretations stated that "[f]inancing terms [in a security-based swap] may also involve . . . calculating the financing rate in a currency other than that of the underlying reference security or security index", and included at footnote 650 an example of an equity total return swap in which payments would be made in a different currency from the currency in which the underlying security traded, concluding that this was a security-based swap and not a mixed swap. 76 Fed. Reg. 29818 at 29842 & n.176.

[4] Letter from Kenneth E. Bentsen, Jr., Executive Vice President, Public Policy and Advocacy, Securities Industry and Financial Markets Association to Mr. David A. Stawick, Secretary, CFTC and Ms. Elizabeth M. Murphy, Secretary, SEC (Jul. 22, 2011). The comment did not request interpretation regarding compo swaps, which market participants had presumed were not "mixed swaps".

[5] It should be noted that the entities and businesses referred to in this paragraph as having not expected to need to register as swap dealers or major swap participants did fully expect to register as security-based swap dealers or major security-based swap participants, as applicable, and to comply with the SEC's rules and requirements applicable to security-based swap dealers and major security-based swap participants, as applicable, on (….continued)

Second, such a classification may require such entities, or equity-specific businesses within entities, to comply with CFTC external business conduct, recordkeeping and reporting and other rules applicable to swap dealers and major swap participants transacting in swaps and mixed swaps. While such entities and businesses have been diligently preparing to comply with SEC rules applicable to security-based swap dealers and major security-based swap participants transacting in security-based swaps, on the SEC's timetable for application of those rules, they were not expecting to be required to comply with CFTC rules on the CFTC's earlier timetable for application of those rules. Building the necessary infrastructure within those entities and businesses on the timetable required for compliance with the CFTC's rules would be extremely difficult. Because the conclusion reached in the Product Definitions Release that compo swaps should be considered mixed swaps was so unexpected, market participants had not begun the long and difficult process of building the necessary infrastructure and designing the necessary policies and procedures to ensure that their foreign equity total return swap businesses would be in compliance with the CFTC's rules prior to the relevant compliance deadlines. As a result, dealers in compo swaps (even if timely registration as swap dealers were feasible) and, perhaps more importantly, end users will not be prepared to comply with the CFTC's external business conduct rules by January 1, 2013, which will cause significant further disruption in the market for foreign equity total return swaps.

Accordingly, we strongly urge the Staff of the CFTC to adopt the relief described below.

Relief Request: We request that the Division of Market Oversight of the CFTC confirm that they will not recommend that the CFTC commence enforcement action against any person in connection with any failure of such person to comply with any provision of the Dodd-Frank Act or the rules promulgated thereunder to the extent such failure arises solely because such person treats the "compo" swaps (as such term is used in the Product Definitions Interpretations) entered into by such person prior to July 1, 2013, solely as security-based swaps and not as mixed swaps.

* * *

(continued….)

the SEC's timetable for effectiveness of those rules and requirements, and have been planning and building toward that compliance.

Based on the foregoing, we respectfully request that the Staff of the CFTC grant the relief described in this letter.

Please do not hesitate to contact the undersigned for further information the CFTC or its staff may require in connection with this request.

Very truly yours,

James T. Rothwell
Partner
Davis Polk & Wardwell LLP

Daniel N. Budofsky
Partner
Davis Polk & Wardwell LLP

On behalf of:

Barclays Bank PLC
Citibank NA
Credit Suisse
Deutsche Bank AG
Goldman, Sachs & Co.
JPMorgan Chase Bank, N.A.
Morgan Stanley
UBS AG

cc: Mr. Robert Cook, Director, Division of Trading and Markets, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549

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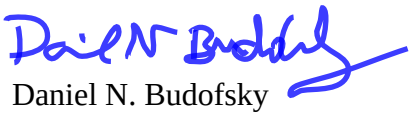
Certification Pursuant to CFTC Regulation 140.99(c)(3)

As required by CFTC Regulation 140.99(c)(3), I hereby (i) certify that the material facts set forth in the attached letter dated December 5, 2012 are true and complete to the best of my knowledge; and (ii) undertake to advise the CFTC, prior to the issuance of a response thereto, if any material representation contained therein ceases to be true and complete.

Sincerely,



Daniel N. Budofsky
Partner
Davis Polk & Wardwell LLP