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VIA ONLINE SUBMISSION http://www.regulations.gov

Christopher Kirkpatrick
Secretary of the Commission
Attn: Comments/RIN 3038-AC97
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Date: January 28, 2016

Re: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants

Ladies and Gentlemen:

We are submitting this comment letter in response to the January 6, 2016 interim final rule on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants (the "Interim Final Rule") as promulgated by the Commodity Futures Trading Commission ("CFTC").[1] We appreciate the opportunity to comment on the Interim Final Rule, issued 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 KfW, and the views expressed herein are those of KfW only. For the reasons described herein, we respectfully request that the CFTC clarify that entities not subject to mandatory clearing requirements under Dodd-Frank on any basis (and not just those entities that expressly qualify for a specific exception or exemption from such requirements) are not subject to the margin rules of the CFTC. We believe that this clarification is necessary in order to ensure that the Interim Final Rule is consistent with the clear and express intention of Congress in adopting the Terrorism Risk Insurance Program Reauthorization Act of 2015 ("TRIPRA"), and of the Commission in issuing the Interim Final Rule. KfW, as the Commission itself has determined, and as set forth more fully below, is not subject to the mandatory clearing requirement pursuant to the Commission's release adopting the "end-user" exception to its clearing rules in 2012 (the "End-User Release").[2]

In the alternative, we respectfully request that the Commission clarify and confirm that, even if KfW is not eligible for the exception from the margin rules under the Interim Final Rule, KfW should

1 *See* 81 Fed. Reg. 636 (January 6, 2016).

2 *See* 77 Fed. Reg. at 42559.

nevertheless not be subject to such margin rules because it should be treated as a "sovereign entity" or "multilateral development bank" under the margin rules, based on the fact that KfW is a public law institution with a public mandate and operates under an express statutory guarantee of the German Federal Republic.

I. Background on KfW

Information regarding KfW and its legal status, purpose, governance and swap-related activities, is set forth in our prior comment letter submitted to the Commission on November 25, 2014, regarding the Commission's October 3, 2014 Notice of Proposed Rulemaking on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants.[3] For convenience, we are attaching a copy of that letter and refer the Commission to the information on KfW set forth therein.

II. Clarification Regarding Exception from the Margin Requirements for Entities Such as KfW

KfW is Not Subject to Mandatory Clearing Requirements

Title III of TRIPRA provides that the margin rules of both the CFTC and the Prudential Regulators should not apply to uncleared swaps in which a counterparty qualifies for an exemption or exception from clearing under the Dodd-Frank Act. More specifically, as described in the CFTC's margin release:

> "... section 302 of Title III amends sections 731 and 764 of the Dodd-Frank Act to provide that the Commission's rules on margin requirements under those sections shall not apply to a swap in which a counterparty: (1) qualifies for an exception under section 2(h)(7)(A) of the Commodity Exchange Act;[4] (2) qualifies for an exemption issued under section 4(c)(1) of the Commodity Exchange Act for

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[3] *See* "Background on KfW," starting at page 2 of such letter. To update the financial information provided on page 4 of such letter, we note that (i) in 2014, the Euro and the U.S. dollar accounted for 45% and 38% of KfW's new capital-market funding, respectively; (ii) as of December 31, 2014, the amount of outstanding bonds and notes issued by KfW totaled EUR 370.0 billion; (iii) since 1987, KfW has offered registered debt securities in global debt offerings in an aggregate amount equivalent to more than EUR 400 billion; (iv) as of December 31, 2014, more than 55% of KfW's funded debt outstanding consisted of debt securities sold in global debt offerings and (v) as of December 31, 2014, KfW's total notional amount of derivatives outstanding amounted to EUR 685.7 billion equivalent (on a consolidated basis).

[4] *I.e.*, the "end-user" exception.

KFW

> cooperative entities as defined in such exemption;[5] or (3) satisfies the criteria in section 2(h)(7)(D)[6] of the Commodity Exchange Act."[7]

In accordance with the CFTC's own determinations, KfW is not subject to the clearing requirement under Section 2(h)(7) of the Commodity Exchange Act ("CEA"), and therefore, in our view, is within the scope of this provision of TRIPRA. As a result, KfW should not be subject to the CFTC's margin rules. In particular, in the End-User Release, the CFTC stated that:

> "The Commission recognizes that there are important public policy implications related to the application of the end-user exception, and the clearing requirement generally, to foreign governments, foreign central banks, and international financial institutions. . . .
>
> Canons of statutory construction 'assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.' In addition, international financial institutions operate with the benefit of certain privileges and immunities under U.S. law indicating that such entities may be viewed similarly under certain circumstances. There is nothing in the text or history of the swap-related provisions of Title VII of the Dodd-Frank Act 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. **Given these considerations of comity and in keeping with the traditions of the international system, the Commission believes that foreign governments, foreign central banks, and international financial institutions should not be subject to Section 2(h)(1) of the CEA.** Accordingly, it is not necessary to determine whether these entities are 'financial entities' under Section 2(h)(7) of the CEA."[8]
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> The Commission also stated that:

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5 *I.e.*, the clearing exemption for certain cooperatives comprised of non-financial entity members.

6 *I.e.*, the "inter-affiliate" exemption.

7 81 Fed. Reg. at 637.

8 77 Fed. Reg. at 42561 (emphasis added; internal footnotes omitted).

> "For this purpose, the Commission considers 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."[9]

Request for Clarification Regarding the Application of the CFTC's Margin Rules to Entities Not Subject to Mandatory Clearing Requirements

We believe that an entity such as KfW that is not subject to the clearing requirement under Section 2(h)(7) of the CEA is clearly within the scope of the provisions of TRIPRA and therefore is also not subject to the margin rules. By enacting TRIPRA, Congress expressed the unequivocal intention to exclude from the margin requirements any entity that is not subject to the CFTC's mandatory clearing requirement, regardless of the basis on which such entity is not subject to that requirement.[10] The Interim Final Rule, therefore, reflects the same objective. Accordingly, we have interpreted the Interim Final Rule that the Commission has issued pursuant to TRIPRA as excluding from the margin requirements the same foreign governments, foreign central banks, and international financial institutions that the Commission has stated should not be subject to its clearing requirements, which, as noted, includes KfW. Although KfW is not expressly included within an exemption or exclusion from the clearing requirement under the CEA or CFTC rules, the Commission concluded that it should not be subject to the clearing requirement, regardless of whether it would be considered a financial entity. We believe that the Commission's conclusion should be construed and applied as the equivalent of an exemption or exclusion, for purposes of TRIPRA, and that KfW therefore is exempted or excluded, based on the Commission's intention to exclude foreign governments from the clearing requirement, together with the broad intention of TRIPRA to exclude from the margin requirements any entity that is not subject to the clearing requirement.

KfW as a "Sovereign Entity" under the Margin Rules

Alternatively, if KfW is not deemed to be excluded from the margin requirements under the Interim Final Rule, we believe it should be treated as a "sovereign entity" for purposes of the margin rules. We note that the CFTC stated in its release that "[t]he existence of a government

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9 *Id.* (emphasis added).

10 *See, e.g.,* statements by Representative Lucas (OK), Congressional Record 160:150 (December 10, 2014), p. H8987: "[TRIPRA] ensures that those businesses which have been exempted from clearing requirements of their trades are also exempted from margining their trades, just as Congress always intended."

guarantee does not in and of itself exclude the entity from the definition of financial end user."[11] As noted above, however, and as the Commission has noted in two prior releases, KfW is not relying on a government guarantee alone as the basis for its inclusion in the exemption from the clearing requirement and therefore would not be relying solely on the government guarantee for purposes of its inclusion in the definition of "sovereign entity" under the margin rules.

To the contrary, KfW 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."[12] KfW is not, therefore, simply an entity with a government guarantee but is itself a "public sector entity" with a statutory mandate and a guarantee that is included in German statutory law. Under such circumstances, we believe that KfW can and should be distinguished from entities that operate under a government guarantee alone, and should be regarded as a "sovereign entity" for purposes of the margin rules. Indeed, we respectfully submit that it would be inconsistent with the Commission's prior actions not to treat KfW as a "sovereign entity" for purposes of the margin rules.

KfW as "Multilateral Development Bank" under the Margin Rules

As a separate alternative approach, we believe that KfW should be treated as a "multilateral development bank" for purposes of the Commission's margin rules. In this regard, the definition of the term "multilateral development bank" includes "Any other entity that provides financing for national or regional development in which the U.S. government is a shareholder or contributing member or which the Commission determines poses comparable credit risk."

KfW is clearly encompassed within this provision because it "provides financing for national or regional development" and, as a result of its explicit statutory guarantee by the German Federal government, "poses comparable credit risk" to that of the enumerated multilateral development banks, and identical credit risk to that of the German Federal government. Although this category appears to focus primarily on multilateral entities, the Commission expressly contemplated that entities with a national focus could qualify, depending on the extent to which the credit risk that they pose is comparable to that of sovereign risk.[13]

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11 81 Fed. Reg. at 644.

12 77 Fed. Reg. at 42561.

13 *See* 81 Fed. Reg. 642, at fn. 53.

Accordingly, we respectfully request, as an alternative to concluding that KfW is not subject to the margin rules on the same basis that KfW is not subject to the clearing requirement, that the Commission confirm that KfW will be treated as a multilateral development bank for purposes of the margin rules.

* * *

We believe it is clear that Congress, in enacting TRIPRA, and the Commission, in issuing the Interim Final Rule, intended to exclude from the margin requirements any entity, such as KfW, that is not subject to the clearing requirement. Alternatively, we also believe, for the reasons set forth above, that KfW should be treated as a "sovereign entity," or as a "multilateral development bank," for purposes of the margin rules. Although we are confident that these conclusions and characterizations are correct and consistent with Congressional and Commission action, we would very much appreciate the Commission's clarification and confirmation on these issues, for the avoidance of doubt and for the benefit of third parties with which KfW may enter into swaps.

Thank you for your consideration of our comments and please do not hesitate to contact David J. Gilberg of Sullivan & Cromwell LLP at 212-558-4680 or gilbergd@sullcrom.com 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 owner and in its capacity as KfW's legal supervisory authority.

Sincerely,

KfW

/s/ Andreas Müller

Name: Andreas Müller
Title: Senior Vice President

/s/ Dr. Frank Czichowksi

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

(Attachment: November 25, 2014 Letter to CFTC)

KfW

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Secretary of the Commission
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››› Re: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants

Date: 25/11/2014

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Ladies and Gentlemen:

We are submitting this comment letter in response to the October 3, 2014 Notice of Proposed Rulemaking on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants (the "Proposed Rule") as promulgated by the Commodity Futures Trading Commission ("CFTC").[1] We appreciate the opportunity to comment on the Proposed Rule, issued 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 KfW, and the views expressed herein are those of KfW only. For the reasons described herein, we believe that the use of swaps ("Swaps"), as defined under Dodd-Frank, by KfW, which, as explained below, is a foreign government-linked entity owned by the Federal Republic of Germany (the "Federal Republic") and the German states and the obligations of which are backed by the full faith and credit of the Federal Republic due to a statutory guarantee, do not pose the same types of systemic risk concerns which can be associated with uncleared Swaps transactions. Accordingly, we respectfully request that the CFTC make clear in the final rule that KfW and entities like it, which are backed by the full faith and credit and the irrevocable guarantee of a sovereign government, are either (i) within the definition of a "sovereign entity" and therefore not subject to the margin rules otherwise applicable to Swaps not cleared by a registered derivatives clearing organization ("DCO"); or (ii) otherwise excluded from the definition of "financial end user" and not required to post or collect initial or variation margin under the margin rules.[2] In

1 *See* 79 Fed. Reg. 59898 (October 3, 2014).

2 We note that the margin regulation proposals issued by the CFTC and the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Farm Credit Administration and the Federal Housing Finance Agency (collectively, the "Prudential Regulators") are substantially the same in this respect. Margin and Capital Requirements for Covered Swap Entities, 79

addition, we respectfully request that the CFTC clarify in the final rule the scope of their extraterritorial jurisdiction with respect to the applicability of the margin rules in cross-border contexts, as discussed below.

I. Background on KfW

Legal Status, Ownership and Statutory Guarantee

KfW is a German public law institution (*Anstalt des öffentlichen Rechts*) organized under the Law Concerning KfW (*Gesetz über die Kreditanstalt für Wiederaufbau*, or "KfW Law"). The Federal Republic holds 80% of KfW's subscribed capital and the German federal states hold the remaining 20%.

The KfW Law expressly provides that the Federal Republic guarantees all existing and future obligations of KfW in respect of moneys borrowed, bonds and notes issued and derivative transactions entered into by KfW (KfW Law, Article 1a). Under this statutory guarantee (the "Guarantee of the Federal Republic"), if KfW fails to make any payment of principal or interest or any other amount required to be paid with respect to any of KfW's obligations mentioned in the preceding sentence, the Federal Republic will be liable at all times for that payment as and when it becomes due and payable. The Federal Republic's obligation under the Guarantee of the Federal Republic ranks equally, without any preference, with all of its other present and future unsecured and unsubordinated indebtedness. Creditors who have a claim against KfW resulting from one of the obligations mentioned in the first sentence of this paragraph may enforce this obligation directly against the Federal Republic without first having to take legal action against KfW. Against this background, these obligations of KfW, both financially and in terms of legal recourse, are viewed as sovereign credits and KfW's obligations, like those of the Federal Republic, are rated triple A by Moody's, Standard & Poors and Fitch.

Furthermore, as a public law institution, KfW benefits from the German administrative law principle of *Anstaltslast*, according to which the Federal Republic, as the constituting body of KfW, has an obligation to safeguard KfW's economic basis. Under *Anstaltslast*, the Federal Republic must keep KfW in a position to pursue its operations and enable it, in the event of financial difficulties, through the allocation of funds or in some other appropriate manner, to meet its obligations when due. Although *Anstaltslast* is not a formal guarantee of KfW's obligations by the Federal Republic, the effect of this legal principle is that KfW's obligations are fully backed by the credit of the Federal Republic on this basis as well, in addition to the Guarantee of the Federal Republic referred to above.

Purpose

KfW was established in 1948 by the Administration of the Combined Economic Area, the immediate predecessor of the Federal Republic. Originally, KfW's purpose was to distribute and lend funds of the European Recovery Program (the "ERP"), which is also known as the

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Fed. Reg. 57348 (September 24, 2014). As such, KfW will submit its comments in response to both proposals for consideration.

Marshall Plan. Even today, several of KfW's programs to promote the German and European economies are supported using funds for subsidizing interest rates from the so-called "ERP Special Fund." Over the past decades, KfW has expanded and internationalized its operations. Today, KfW serves domestic and international public policy objectives of the German Federal government, primarily by engaging in various promotional lending activities.[3]

KfW does not seek to maximize profits and is prohibited from distributing profits, which are instead allocated to statutory and special reserves. KfW is generally also prohibited from taking deposits, conducting current account business or dealing in securities for the account of others.

Governance and Supervision

KfW is governed by an Executive Board (*Vorstand*) and a Board of Supervisory Directors (*Verwaltungsrat*). The Executive Board is responsible for the day-to-day conduct of KfW's business and the administration of its assets. The Board of Supervisory Directors, which, among others, consists of seven Federal ministers, supervises the overall conduct of KfW's business and the administration of its assets.

Under the KfW Law, the Federal Ministry of Finance, in consultation with the Federal Ministry for Economic Affairs and Technology, supervises KfW and has the power to adopt all measures necessary to safeguard the compliance of KfW's business operations with applicable laws, KfW's by-laws and other regulations (*Rechtsaufsicht*, legal supervision).

In addition to the annual audit of its financial statements, KfW, as a government-owned entity, is subject to an audit that meets the requirements of the German Budgeting and Accounting Act (*Haushaltsgrundsätzegesetz*). One of the specific aspects to be covered by this audit and the related reporting is the proper conduct of KfW's business by its management.

KfW is not recognized or treated as a bank in accordance with Section 2(1), No. 2, of the German Banking Act (*Gesetz über das Kreditwesen*, or "KWG") and is exempted from European Union bank regulatory requirements in accordance with Article 2 Paragraph 5(6) of the Capital Requirements Directive (CRD IV).[4] However, amendments to the KfW

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3 KfW's lending activities include: domestic financing, primarily made through commercial banks, including loans to small and medium-sized enterprises, housing-related loans, grants and financings to individuals for educational purposes, financing for infrastructure projects and global funding instruments for promotional institutes of the German federal states (*Landesförderinstitute)*; export and project finance through its wholly-owned subsidiary KfW IPEX-Bank GmbH ("KfW IPEX-Bank"); and development finance for developing and transition countries, including private-sector investments in developing countries through its wholly-owned subsidiary DEG—Deutsche Investitions- und Entwicklungsgesellschaft mbH ("DEG").

4 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

Law enacted in July 2013 and implemented by a regulation published in October 2013 (the "KfW Regulation") subject KfW by analogy to such provisions of European and German bank regulatory law as are expressly listed in the regulation, in particular provisions of the KWG and the Capital Requirements Regulation (CRR).[5] The KfW Regulation also provides for supervision of KfW's compliance with the applicable provisions of bank regulatory law by the German Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*) in cooperation with the German Central Bank (*Deutsche Bundesbank*). With respect to its compliance with all other applicable law, KfW remains under the legal supervision (*Rechtsaufsicht*) of the Federal Ministry of Finance, as described above.

Funding Activities and Derivatives Transactions

KfW finances the majority of its lending activities from funds raised by it in the international financial markets. KfW issues debt instruments in various currencies, primarily the Euro and the U.S. dollar (which accounted for 48% and 39% of KfW's new capital-market funding in 2013, respectively). As of December 31, 2013, the amount of outstanding bonds and notes issued by KfW totaled EUR 360.2 billion. On the basis of a no-action letter issued by the U.S. Securities and Exchange Commission ("SEC") on September 21, 1987, KfW has registered debt securities with the SEC under Schedule B of the Securities Act of 1933, which is applicable to foreign governments or political subdivisions thereof. Since 1987, KfW has offered registered debt securities in global debt offerings in an aggregate amount equivalent to more than EUR 350 billion. As of December 31, 2013 more than 60% of KfW's funded debt outstanding consisted of debt securities sold in these global debt offerings.

KfW enters into derivatives transactions in order to manage the risks incurred by it and its wholly-owned subsidiaries KfW IPEX-Bank and DEG in connection with its financing and funding activities. Such risks are almost entirely associated with changes in interest rates and foreign exchange rates. As U.S. dollar bonds make up a significant portion of KfW's funding activities, KfW generally has large over-the-counter ("OTC") positions in derivatives hedging changes in the Euro/U.S. dollar exchange rate. A number of KfW's counterparties are entities that are registered swap dealers subject to oversight and regulation by the CFTC ("Swap Entities").

As of December 31, 2013, the total notional amount of derivatives outstanding amounted to EUR 674 billion equivalent (on a consolidated basis). KfW enters into all of the foregoing types of transactions solely for purposes of hedging risks incurred by it and its wholly-owned subsidiaries KfW IPEX-Bank and DEG, and KfW does not and, in accordance with Article 2 paragraph 3 of the KfW Law, may not, engage in proprietary or speculative trading. Further, KfW does not accommodate demand for swaps from other parties nor does it enter into swaps in response to interest expressed by other parties in the manner a dealer customarily would, except that, in the context of centralizing and aggregating market-facing hedging activities within the group at the

[5] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

parent level, KfW accommodates demand for swaps by its wholly-owned subsidiaries KfW IPEX-Bank and DEG for their hedging activities. KfW therefore considers itself as an end user customer of derivatives.

II. Exception from the Proposed Margin Requirements for Entities Such as KfW

Treatment of "Sovereign Entities" in the Proposed Rule

The Dodd-Frank amendments to the Commodity Exchange Act ("CEA") required that the margin regulations adopted by the CFTC address the risk caused by uncleared Swaps be "appropriate" for the actual risk posed. Notably, the CFTC has recognized in the Proposed Rule that "sovereign entities" are appropriately categorized as excluded from the definition of financial end users and excluded from the margin requirements otherwise applicable to transactions between Swap Entities and other Swap Entities or financial end users, indicating that their exclusion is appropriate given the lower level of risk posed in transactions by sovereign entities. In addition certain other parties are also excluded from the definition of "financial end user" and, accordingly, from the margin requirements of the rules. These excluded parties include: multilateral development banks; the Bank for International Settlements; captive finance companies that qualify for the exemption from clearing under section 2(h)(7)(C)(iii) of the CEA and implementing regulations; or persons that qualify for the affiliate exemption from clearing pursuant to section 2(h)(7)(D) of the CEA.

A "sovereign entity" is defined in the Proposed Rule as "a central government (including the U.S. government) or an agency, department, ministry, or central bank of a central government." As noted in the Proposed Rule, this exclusion for sovereigns is consistent with the 2013 international framework for margin requirements finalized in September 2013 by the Basel Committee on Banking Supervision ("BCBS") and the Board of the International Organization of Securities Commissions ("IOSCO"), (the "International Framework"),[6] and with the margin rule proposal of the Prudential Regulators. Notably, the Prudential Regulators' proposed rule states that the exclusion of these types of entities "is consistent with the statute, which requires the margin requirements to be risk-based, and is appropriate in light of the lower risks that these types of counterparties generally pose to the safety and soundness of covered swap entities and U.S. financial stability."

As noted above, in carrying out its public mandate to serve domestic and international public policy objectives of the German Federal government through lending and similar activities, KfW engages in Swaps transactions solely for risk mitigation and hedging purposes. Absent clarification from the CFTC in the final rule related to the margin regulations that entities such as KfW are "sovereign entities," or are otherwise not "financial end users," KfW could be required to post and collect margin in connection with its uncleared Swaps transactions if its counterparties are registered Swap Entities under the supervision of the CFTC, due to the lack of clarity in the Proposed Rule as to whether such

[6] BCBS and IOSCO, Margin Requirements for Non-Centrally Cleared Derivatives (Sept. 2013), available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD423.pdf.

counterparties must treat KfW as being subject to the margin requirements. Specifically, according to the Proposed Rule, the term "financial end user" includes an entity that would be a financial end-user "if it were organized under the laws of the United States . . . ." Given the unique status of KfW under German law, it may be difficult for Swap Entities to conclude that KfW is not a financial end user using this comparative framework, without clarification from the CFTC in the final rule. The resulting uncertainty in this regard would most likely result in Swap Entities treating KfW as financial end user. We do not believe that such treatment is warranted or appropriate in light of the purposes of the Proposed Rule, or the CFTC's prior actions, described below, and we do not believe that it will operate to reduce systemic risk or to protect market participants. To the contrary, it will serve only to increase the cost, and reduce the efficiency, of necessary hedging transactions entered into by KfW. Due to the Federal Republic's statutory guarantee, KfW's obligations under Swaps transactions are supported by the full faith and credit of the Federal Republic. The Federal Republic itself, as a sovereign entity, is excluded from the financial end user definition under the Proposed Rule. Consequently, KfW should be explicitly excluded from the financial end user definition, too.

Treatment of KfW by the CFTC in Related Contexts

We note that, in regulatory contexts related to the margin requirements of the Proposed Rule, the CFTC has recognized that "foreign governments" should not be required to register as swap dealers or major swap participants and should be exempt from the swap clearing requirements set forth in Section 2(h)(1)(A) of the CEA. In the CFTC's release accompanying its final rules regarding the further definition of "Swap Dealer," "Major Swap Participant," and other matters, the CFTC stated that foreign governments, foreign central banks and international financial institutions should not be required to register as a Swap Dealer ("SD") or Major Swap Participant ("MSP") and it clarified that it considers KfW a foreign government for this purpose.[7] Furthermore, in its release accompanying its final rules regarding the end user exception to clearing requirements for Swaps, the CFTC similarly stated that foreign governments, foreign central banks and international financial institutions will not be subject to the requirement under Dodd-Frank that Swaps transactions be cleared through a DCO and it also clarified that it considers KfW a foreign government for this purpose.[8]

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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, 30,692-93 (May 23, 2012). The CFTC stated that it "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." *See id.* at 30,693. In addition, in a footnote just prior to that statement, the Release stated that "[f]or this purpose, we consider 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." *See id.* at fn. 1178.

8 *See* CFTC, End-User Exception to the Clearing Requirement for Swaps, 77 Fed. Reg. 42,560 (July 19, 2012). The CFTC stated that "foreign

The CFTC has therefore recognized 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 and that KfW should be treated as a sovereign for these purposes. In so doing, the CFTC stated 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 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." Similarly, 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 subjecting foreign governments, foreign central banks and international financial institutions to the clearing requirement set forth in Section 2(h)(1) of the CEA."

We believe that the same reasoning and conclusion applies to the treatment of KfW and entities like it as "sovereign entities" with respect to the Proposed Rule. Alternatively, we respectfully request that the CFTC (and will request that the Prudential Regulators) provide appropriate other relief to the same effect, such as by providing interpretive guidance that KfW is excluded from the definition of "financial end user" and thus not subject to the margin rules.

Treatment of "Sovereign Entities" Under the BCBS/IOSCO International Framework and EMIR

As noted in the Proposed Rule, the exclusion proposed for "sovereign entities" is consistent with the BCBS/IOSCO International Framework. The International Framework notes that "the BCBS and IOSCO believe that the margin requirements need not apply to non-centrally cleared derivatives to which non-financial entities that are not systemically important are a party, given that (i) such transactions are viewed as posing little or no systemic risk and (ii) such transactions are exempted from central clearing mandates under most national regimes. Similarly, the BCBS and IOSCO advocate that margin requirements are not applied in such a way that would require sovereigns, central banks, multilateral development banks . . . or the Bank for International Settlements to either collect or post margin. Both of these views are reflected in the exclusion of such transactions from the scope of margin requirements."

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governments, foreign central banks, and international financial institutions should not be subject to the [clearing] requirements of Section 2(h)(1) of the CEA." *See id.* at 42,562. It further stated, as it did in its release with respect to the swap dealer and MSP definition rules, that "for this purpose, the Commission considers 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." *See id.* fn 12 at 42,561.

Further, in the Proposed Rule, the CFTC indicates a desire to harmonize or be consistent with many aspects of the International Framework, and an interpretation that KfW is considered a "sovereign entity" would be consistent with that framework. With regard to evaluating public sector entities ("PSEs") (such as KfW), BCBS and IOSCO noted that "[s]ubject to national discretion, PSEs may be treated as sovereigns for the purpose of determining the applicability of margin requirements" and "[i]n considering whether a PSE should be treated as a sovereign for the purpose of determining the applicability of margin requirements, national supervisors should consider the counterparty credit risk of the PSE, as reflected by, for example, whether the PSE has revenue-raising powers and the extent of guarantees provided by the central government."

We note further that Article 1 Paragraph 4 and 5 of the so-called European Market Infrastructure Regulation ("EMIR")[9] provides for both an exemption from the clearing obligation for standardized derivatives in accordance with Article 4 of EMIR and from certain risk mitigation techniques (including but not limited to "exchanging collateral," i.e. posting and collecting margin) in accordance with Article 11 of EMIR for sovereigns, central banks, multilateral development banks and government-guaranteed public sector entities. KfW is a public sector entity within the meaning of Article 1 Paragraph 5b) of EMIR, and is thus not subject to the clearing obligation nor the margin requirements under EMIR. Pursuant to the directive of the International Framework and in alignment with the understandings of EMIR, we believe that KfW should be considered a "sovereign entity" and should be exempted from the margin requirements under the Proposed Rule on this basis as well.

Proposed Interpretation of KfW as a "Sovereign Entity" or Other Exclusion from the Definition of Financial End User

There is no evidence suggesting that Congress intended government-owned entities like KfW to be subject to Title VII of Dodd-Frank, and, as noted above, Dodd-Frank requires that the CFTC's margin rules be "appropriate" for the actual risk posed. KfW's derivatives transactions did not contribute to the recent financial crisis that resulted in the adoption of Dodd-Frank, and those transactions do not pose risks for which these regulations would be either "appropriate" or necessary to mitigate. Subjecting KfW and its derivative transactions to the margin requirements of Dodd-Frank could have serious adverse effects on its ability to cost-efficiently hedge the risks to which it is exposed, thereby increasing costs to its borrowers, to which the federal government has directed KfW to provide financing services in order to fulfill KfW's public mandate. Moreover, imposing the margin requirements of Dodd-Frank on KfW and its derivative transactions is unnecessary for the protection of counterparties and the financial system. Finally, an exclusion for KfW from the requirement to post initial and variation margin would be in line with the treatment of "sovereign entities" under the Proposed Rule, as well as in line with the treatment of KfW in related contexts by the CFTC and with the guidelines put forth in the BCBS/IOSCO International Framework and EMIR provisions.

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9 Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:201:0001:0059:EN:PDF

While we support the CFTC's measures to enhance the safety and soundness of, and reduce systemic risk to, the overall financial system, the proposed establishment of margin requirements for uncleared Swaps was prompted by the failure of profit-maximizing commercial institutions. As a not-for-profit public entity backed by the full faith and credit of the Federal Republic, KfW does not pose the type of risk to counterparties, both U.S. and non-U.S., and the wider financial system that the proposed margin requirements seek to rectify.

Accordingly, for the reasons set forth above, we believe KfW should not be subject to the CFTC's proposed margin regulations, and should be properly considered as a "sovereign entity" for purposes of the margin rules. We respectfully request that the CFTC clarify that the definition of "sovereign entity" includes entities established or chartered by a central government to serve public purposes specified by statute and whose debt and swap obligations are explicitly guaranteed by the full faith and credit of such central government, or confirm that KfW should be considered a "sovereign entity," which would be consistent with the CFTC's determination with respect to KfW in footnotes 1178 and 12 at 77 Fed. Reg. 30,692 and 42,561, respectively. In the alternative, even if the CFTC determine that KfW does not fall within the definition of a "sovereign entity," we request that the CFTC clarify in the final rule that KfW is explicitly excluded from the definition of "financial end user" and not required to post or collect initial or variation margin under the margin rules. Without such further clarity, KfW's counterparties, due to the difficulty in determining whether KfW is an entity that would be a financial end-user "if it were organized under the laws of the United States . . .", may find it necessary to treat KfW as a financial end user, which would impose an undue and inappropriate burden on KfW in fulfilling its public mandate to serve domestic and international public policy objectives of the German Federal government through lending and similar activities, thereby adversely affecting its borrowers as well.

Request for Clarification of the Jurisdictional Scope of the CFTC's Margin Rules

In addition to clarifying the status of KfW as a sovereign entity, or as an entity otherwise excluded from the definition of a financial end user, we also respectfully request that the CFTC clarify the scope of the extraterritorial jurisdiction of the CFTC's margin rules, as the Proposed Rule does not provide guidance on the applicability of the rules in certain cross-border contexts. We are aware of the CFTC's cross-border guidance and of the subsequent statements in which the CFTC has expressed the view that transactions that are entered into between two non-U.S. persons, but arranged, negotiated or executed through the use of personnel located in the U.S., should be subject to the CFTC's transaction-level rules.[10] We also understand that these issues are

[10] *See* Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 Fed. Reg. 41214 (proposed July 12, 2012); Further Proposed Guidance Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 909 (Jan. 7, 2013); Final Exemptive Order Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 858 (Jan. 7, 2013); Exemptive Order Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 43785 (July 22, 2013); Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45292 (July 26, 2013); Division of Swap Dealer

under further consideration by the CFTC. To the extent that KfW were subject to the margin rules, we believe that its transactions with non-U.S. swap dealers, that are entered into by KfW outside the United States, should not be subject to the CFTC's margin rules. We believe that the CFTC's cross-border guidance approach[11] with respect to transactions between non-U.S. swap dealers and non-U.S. persons is appropriately designed to avoid dysfunctional duplicative, and potentially conflicting, requirements on market participants in cross-border transactions and should thus remain unchanged and not be extended to transactions, where the swap dealer counterparty utilizes personnel in the U.S. to arrange, negotiate or execute the transactions. We believe that such transactions, because they are entered into between two non-U.S. parties and booked outside the United States, should not be subject to the Proposed Rule.

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Thank you for your consideration of our comments and please do not hesitate to contact David J. Gilberg of Sullivan & Cromwell LLP at 212-558-4680 or gilbergd@sullcrom.com 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 owner and in its capacity as KfW's legal supervisory authority.

Sincerely,

KfW

/s/ DR. FRANK CZICHOWSKI

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

/s/ DR. HARALD LOB

Name: Dr. Harald Lob
Title: Vice President

and Intermediary Oversight CFTC Staff Advisory No. 13-69, "Applicability of Transaction-Level Requirements to Activity in the United States" (Nov. 14, 2013); Division of Clearing and Risk and Division of Market Oversight CFTC Letter No. 13-71, "No-Action Relief: Certain Transaction-Level Requirements for Non-U.S. Swap Dealers" (Nov. 26, 2013); Division of Clearing and Risk and Division of Market Oversight CFTC Letter No. 14-140, "Extension of No-Action Relief: Transaction-Level Requirements for Non-U.S. Swap Dealers" (Nov. 14, 2014).

11 *See* Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45292 (July 26, 2013).