

**Via Agency Web Site**

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

**»» Re: Releases No. 34-69490; File Nos. S7-02-13; S7-34-10; S7-40-11**

Date: 19/08/2013

Dear Ms. Murphy:

We are submitting this comment letter in response to the May 23, 2013 release on Cross-Border Security-Based Swap Activities, 78 Fed. Reg. 30968 (May 23, 2013) (the "Proposing Release") issued by the Securities and Exchange Commission (the "SEC"). We appreciate the opportunity to comment on the registration and other regulatory requirements for security-based swap dealers ("SBSDs") and major security-based swap participants ("MSBSPs") in the cross-border context, and particularly the request set forth on page 31035 of the Proposing Release for comments with respect to the treatment of foreign public sector financial institutions ("FPSFIs").

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This comment letter is submitted on behalf of KfW, and the views expressed herein are those of KfW only. For the reasons described below, we believe that any use of security-based swaps by KfW should not require KfW to register as an SBSB or an MSBSP under the Securities Exchange Act of 1934 (the "Exchange Act"). Accordingly, we respectfully request that the SEC clarify in the final cross-border rules and interpretive guidance that foreign governments are not subject to the SBSB and MSBSP registration requirements under the Exchange Act, or to the other regulatory requirements that would be applicable to SBSBs and MSBSPs, and that KfW constitutes a foreign government for such purposes.

KfW is a foreign governmental entity that is owned by the Federal Republic of Germany (the "Federal Republic") and the German states. KfW was organized for the purpose of serving, and continues to serve, domestic and international public policy objectives of the government of the Federal Republic, primarily by engaging in various promotional lending activities. The obligations of KfW, including but not limited to obligations under any security-based swaps that it enters into, are backed by the full faith and credit of the Federal Republic pursuant to an explicit statutory guarantee. For a more detailed background discussion of the legal status, ownership, governance and activities of

KfW, we respectfully direct the SEC to the comment letters previously filed by KfW in response to the SEC's proposed rules on "Capital, Margin and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker Dealers" (Dec. 20, 2012, SEC File No. S7-08-12, available at [www.sec.gov/comments/s7-08-12/s70812-5.pdf](http://www.sec.gov/comments/s7-08-12/s70812-5.pdf)) and "Further Definition of 'Swap', 'Security-Based Swap' and 'Security-Based Swap Agreement'; Mixed Swaps; Security-Based Swap Agreement Recordkeeping" (Aug. 12, 2011, SEC File No. S7-16-11, available at [www.sec.gov/comments/s7-16-11/s71611-51.pdf](http://www.sec.gov/comments/s7-16-11/s71611-51.pdf)).

*Foreign Governments, including KfW, Should Not be Required to Register as SBSDs or MSBSPs and Should Not Be Subject to SBSD/MSBSP Requirements*

In the final release defining the terms swap dealer, SBSD, major swap participant and MSBSP, jointly issued by the SEC and the Commodity Futures Trading Commission (the "CFTC") on May 23, 2012 (the "Intermediary Definitions Adopting Release"), the SEC did not address the extent to which the SBSD and MSBSP definitions or registration requirements would apply to foreign governments or FPSFIs. Instead, the SEC noted in the Intermediary Definitions Adopting Release that it intended to separately address that issue in connection with other issues raised in the cross-border context.<sup>1</sup>

In the Proposing Release, the SEC acknowledged that it had "received little information regarding the types, levels and natures of security-based swap activity that FPSFIs regularly engage in" and that it had "comparatively little basis to understand [the roles of FPSFIs] in the security-based swap markets."<sup>2</sup> The SEC therefore requested comment to help determine "the basis on which it may be appropriate to exclude FPSFIs" from the application of the MSBSP definition to non-U.S. persons. The SEC also invited comments addressing FPSFI concerns on an individual basis.<sup>3</sup>

As discussed further in Sections A, B and C below, we believe that the objectives of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") and the SEC, as expressed in the Proposing Release, as well as canons of statutory construction, considerations of comity and consistency in regulatory treatment, all indicate that foreign governments should not be subject to the SBSD or MSBSP registration requirements, or to the other regulations otherwise applicable to SBSDs and MSBSPs. Moreover, we believe that the

<sup>1</sup> See Final Rule: Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant", 77 Fed. Reg. 30596, 30692, fn. 1181 (May 23, 2012).

<sup>2</sup> Proposing Release at 31034-31035.

<sup>3</sup> *Id.* at 31035.

structure, purpose and foreign governmental character of KfW make it appropriate to treat KfW as a foreign government for this purpose.

**A. An Exception from the SBSB/MSBSP Requirements for Foreign Governments, including KfW, would Advance International Comity and Maintain a Consistent Interpretation of Dodd-Frank**

In the Intermediary Definitions Adopting Release, the CFTC considered the applicability to foreign governments of the swap dealer and major swap participant registration requirements mandated by Dodd-Frank. The CFTC concluded that foreign governments should not be subject to those registration requirements. As noted by the CFTC, “[c]anons of statutory construction ‘assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws’” and “[t]here is nothing in the text or history of the swap-related provisions of Title VII of [Dodd-Frank] to establish that Congress intended to deviate from these traditions of the international system by including foreign governments, foreign central banks, or international financial institutions within the definitions of the terms ‘swap dealer’ or ‘major swap participant’...”<sup>4</sup>

In its July 2012 release entitled “End-User Exception to the Clearing Requirement for Swaps; Final Rule” (the “CFTC End User Release”),<sup>5</sup> the CFTC similarly concluded that foreign governments, foreign central banks and international financial institutions should not be subject to the clearing requirement set forth in Section 2(h)(1) of the Commodity Exchange Act. Besides noting the absence of legislative history favoring the inclusion of foreign governments, the CFTC acknowledged that considerations of comity and the need to protect the U.S. government from comparable foreign regulation advised against subjecting foreign governments to the clearing requirement. If foreign governments were subject to the mandatory clearing requirement, the CFTC would have greater regulatory oversight of swap transactions entered into by such foreign governments. As a consequence, non-U.S. regulators might reciprocally decide to subject the U.S. government and U.S. governmental entities such as the Federal Reserve Banks to foreign regulations, including foreign clearing requirements.

We believe that the considerations articulated by the CFTC are equally applicable to the SEC’s consideration of the scope of the registration and other requirements for SBSBs and MSBSPs. Although the SEC and the CFTC regulate different products, participants and markets, and are subject to different statutory authority in many respects, nothing in Dodd-Frank or its legislative history suggests that – insofar as the SBSB and MSBSP registration would apply to foreign

<sup>4</sup> Intermediary Definitions Adopting Release at 30693 (footnote omitted).

<sup>5</sup> See Final Rule: End User Exception to the Clearing Requirement for Swaps, 77 Fed. Reg. 42560 (July 19, 2012).

governments or FPSFIs – Congress intended to apply a different statutory standard. Moreover, the SEC has recognized that it is “guided by the objective of establishing consistent and comparable requirements to U.S. market participants.”<sup>6</sup> The SEC’s express recognition of an exclusion from the registration and other SBSD/MSBSP requirements in favor of foreign governments (including KfW) would serve to maintain an appropriate alignment between the SEC’s regulatory approach in this respect with that of the CFTC, and is more likely to result in a parallel treatment of the U.S. government and U.S. public sector financial institutions by foreign regulators.

**B. Treating KfW as a Foreign Government would be Consistent with Prior SEC and CFTC Practice**

We note that in both the Intermediary Definitions Adopting Release and the CFTC End User Release, the CFTC expressly stated that KfW would be considered a “foreign government” for purposes of the CFTC’s regulatory requirements and would also not be subject to clearing requirements or to registration as a swap dealer or major swap participant. 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 federal government.”<sup>7</sup> We submit that the CFTC applied appropriate criteria to its analysis of KfW, and that the SEC should also consider KfW as a “foreign government”, exempt from the registration and other requirements applicable to SBSDs and MSBSPs. We further note that treatment of KfW as a foreign government would also be consistent with the no-action relief granted to KfW by the SEC on September 21, 1987, which enabled KfW to utilize Schedule B in connection with its registration of securities under the Securities Act of 1933.<sup>8</sup>

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<sup>6</sup> Proposing Release at 31102.

<sup>7</sup> CFTC End User Release at 42561, fn. 12; Intermediary Definitions Adopting Release at 30692, fn. 1178.

<sup>8</sup> See KfW, (SEC No-Action Letter) September 21, 1987.

### C. As a Foreign Government or an FPSFI, KfW Does Not Pose the Risks Posed by SBSDs and MSBSPs

The SEC has previously noted that the SBSd regime seeks to promote market stability and transparency by identifying persons whose interactions with counterparties or role in the security-based swap markets warrant such regulation,<sup>9</sup> while the MSBSP regime regulates persons that could pose a high degree of risk to the U.S. financial system.<sup>10</sup> KfW is not a major player in the security-based swap markets. The year-end outstanding notional amount of KfW's security-based swap transactions between 2004 and 2012 never exceeded €2.18 billion.<sup>11</sup>

While KfW currently has no security-based swaps outstanding, at some point in the future, KfW may enter into equity-related security-based swaps for purposes of hedging equity risk related to the issuance of notes for which pay-out may be linked to the performance of a single stock or a narrow basket or index of stocks. KfW may also enter into credit default swaps that are encompassed within the definition of security-based swaps, for the purpose of hedging its exposure to the credit risk of issuers of debt instruments held by KfW. In any of these instances, KfW will enter into the foregoing types of transactions for the purposes of hedging risks incurred by it and its wholly-owned subsidiaries, KfW IPEX-Bank GmbH ("KfW IPEX-Bank")<sup>12</sup> and DEG-Deutsche Investitions-und Entwicklungsgesellschaft mbH ("DEG"),<sup>13</sup> in connection with their financing and funding activities.<sup>14</sup> In order to hedge the risk arising from these activities, KfW may enter into hedging transactions with KfW IPEX-Bank or DEG. In the context of centralizing and aggregating market-facing hedging activities within the group at the parent level, KfW may hedge such positions with corresponding offsetting transactions in the market to the extent necessary.<sup>15</sup>

<sup>9</sup> Intermediary Definitions Adopting Release at 30617.

<sup>10</sup> Intermediary Definitions Adopting Release at 30661.

<sup>11</sup> For a detailed overview of KfW's security-based swap transactions please see Annex A to this comment letter (*Data Relating to KfW's Security-Based Swap Transactions*).

<sup>12</sup> The primary business of KfW IPEX-Bank is export and project finance.

<sup>13</sup> The primary business of DEG is providing development finance for developing and transition countries, including private sector investments in developing countries.

<sup>14</sup> Between 2008 and 2010, in order to protect IKB Deutsche Industriebank AG ("IKB") from risks arising out of IKB's exposure to the U.S. subprime mortgage market, KfW acted as protection seller under security-based swaps in a very limited number of transactions (of an aggregate notional amount of €343 million). These transactions were conducted in very close consultation with the Federal Republic or were mandated by the Federal Republic.

<sup>15</sup> In 2008, KfW acted as protection seller in two transactions (of aggregate notional amounts of €30 million and €10 million) as an intermediary for KfW IPEX-Bank. Such transactions are currently not conducted and are regarded at best as a niche product for KfW IPEX-Bank.

KfW does not and will not, and by its constitutive statute is not permitted to, engage in proprietary or speculative trading. Other than accommodating demand for security-based swaps by KfW IPEX-Bank and DEG for their hedging activities, KfW does not accommodate demand for security-based swaps from other parties nor enter into security-based swaps in response to interest expressed by other parties in the manner an SBSD would customarily do. KfW therefore considers itself an end-user of derivatives.

Based on the nature of KfW's security-based swap activities, as well as its explicit statutory guarantee from the Federal Republic, it is clear that KfW does not pose the type of risk to other counterparties and the wider financial system that the registration and other SBSD/MSBSP requirements were designed to address. Further, as discussed in our prior comment letters to the SEC, KfW's fundamental purpose — advancing the domestic and international public policy objectives of the Federal Republic through promotional lending activities — constitutes a public mandate and is inherently focused on activities which have their primary effects outside the U.S. Given the non-U.S. nature of and the public purpose underlying KfW's activities, and the formal regulatory oversight and statutory guarantee provided by the Federal Republic, we believe that KfW should not be required to comply with the SBSD/MSBSP registration and other requirements.

In light of the foregoing, we respectfully request that the SEC take this opportunity to expressly clarify that foreign governments, including KfW, are not required to register as SBSDs/MSBSPs and are not subject to the other SBSD/MSBSP requirements.

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Thank you for your consideration of our comments. Please do not hesitate to contact either Dennis C. Sullivan (202-956-7500; [sullivan@nullcrom.com](mailto:sullivan@nullcrom.com)) or David J. Gilberg (212-558-4000; [gilbergd@nullcrom.com](mailto:gilbergd@nullcrom.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 supervisory authority.

Sincerely,

KfW



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



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

ANNEX A

DATA RELATING TO KfW's SECURITY-BASED SWAP TRANSACTIONS

<u>CREDIT PROTECTION PURCHASED; OUTSTANDING NOTIONAL AMOUNT:</u>									
	U.S. SBSDs		FOREIGN BRANCHES OF U.S. SBSDs		FOREIGN AFFILIATES OF U.S. SBSDs		NON-U.S. COUNTERPARTIES		TOTAL
AT YEAR-END OF	€ MN EQUIVALENT	AS % OF TOTAL	€ MN EQUIVALENT	AS % OF TOTAL	€ MN EQUIVALENT	AS % OF TOTAL	€ MN EQUIVALENT	AS % OF TOTAL	€ MN EQUIVALENT
2004	20	50.0%	0	0.0%	0	0.0%	20	50.0%	40
2005	280	32.9%	130	15.3%	60	7.1%	380	44.7%	850
2006	330	17.5%	270	14.3%	380	20.2%	905	48.0%	1885
2007	360	16.7%	300	13.9%	480	22.2%	1020	47.2%	2160
2008	350	16.1%	300	13.8%	470	21.6%	1060	48.6%	2180
2009	300	16.9%	300	16.9%	180	10.2%	990	55.9%	1770
2010	0	0.0%	120	41.4%	100	34.5%	70	24.1%	290
2011	0	0.0%	0	0.0%	100	66.7%	50	33.3%	150
2012	0	N/A	0	N/A	0	N/A	0	N/A	0

KfW

**CREDIT PROTECTION PURCHASED; NEW TRADES:**

AT YEAR-END OF	U.S. SBSDs		FOREIGN BRANCHES OF U.S. SBSDs		FOREIGN AFFILIATES OF U.S. SBSDs		NON-U.S. COUNTERPARTIES		TOTAL
	# OF TRADES	AS % OF TOTAL	# OF TRADES	AS % OF TOTAL	# OF TRADES	AS % OF TOTAL	# OF TRADES	AS % OF TOTAL	# OF TRADES
2004	2	50.0%	0	0.0%	0	0.0%	2	50.0%	4
2005	11	42.3%	4	15.4%	2	7.7%	9	34.6%	26
2006	1	3.7%	4	14.8%	10	37.0%	12	44.4%	27
2007	1	14.3%	1	14.3%	1	14.3%	4	57.1%	7
2008	0	0.0%	0	0.0%	0	0.0%	2	100.0%	2
2009	0	N/A	0	N/A	0	N/A	0	N/A	0
2010	0	N/A	0	N/A	0	N/A	0	N/A	0
2011	4	100.0%	0	0.0%	0	0.0%	0	0.0%	4
2012	0	N/A	0	N/A	0	N/A	0	N/A	0
TOTAL	19		9		13		29		70

**CREDIT PROTECTION SOLD; OUTSTANDING NOTIONAL AMOUNT:**

AT YEAR- END OF	U.S. SBSDs		FOREIGN BRANCHES OF U.S. SBSDs		FOREIGN AFFILIATES OF U.S. SBSDs		NON-U.S. COUNTERPARTIES		TOTAL
	€ MN EQUIVALENT	AS % OF TOTAL	€ MN EQUIVALENT	AS % OF TOTAL	€ MN EQUIVALENT	AS % OF TOTAL	€ MN EQUIVALENT	AS % OF TOTAL	€ MN EQUIVALENT
2004	0	N/A	0	N/A	0	N/A	0	N/A	0
2005	0	N/A	0	N/A	0	N/A	0	N/A	0
2006	0	N/A	0	N/A	0	N/A	0	N/A	0
2007	0	N/A	0	N/A	0	N/A	0	N/A	0
2008	30	7.8%	10	2.6%	0	0.0%	343	89.6%	383
2009	30	7.9%	10	2.6%	0	0.0%	342	89.5%	382
2010	0	N/A	0	N/A	0	N/A	0	N/A	0
2011	0	N/A	0	N/A	0	N/A	0	N/A	0
2012	0	N/A	0	N/A	0	N/A	0	N/A	0