

June 18, 2012

Michael A. Macchiaroli  
Associate Director  
Division of Trading and Markets  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-7070

Re: Customer Protection and Insolvency Treatment of OTC Securities Derivatives

Dear Mr. Macchiaroli:

We appreciate the opportunity to meet with you and your colleagues on May 29, 2012. By way of follow-up to our meeting, the outline below summarizes the proposal we discussed for the application, following implementation of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“**Dodd-Frank**”), of customer protection and insolvency rules to eligible contract participant (“**ECP**”) counterparties for (a) non-cleared security-based swaps (“**SBS**”) and (b) “eligible OTC derivative instruments” (as defined in Rule 3b-13 under the Securities Exchange Act of 1934 (the “**Exchange Act**”)) that are not classified as swaps or SBS under Dodd-Frank (“**Eligible OTC Securities Derivatives**”) (such as OTC options on securities and qualifying securities forwards) entered into by (i) an OTC derivatives dealer registered as an SBS dealer or (ii) a full-purpose broker-dealer (“**BD**”) registered as, or acting as agent for, an SBS dealer.<sup>1</sup>

OTC Derivatives Dealer/SBS Dealer

- If the counterparty elects to grant the dealer full right to rehypothecate or otherwise use its initial margin without any protection under Rule 15c3-3 under the Exchange Act:
  - Rule 15c3-3 would not apply because (1) the Rule currently provides an exception from its “customer” definition for counterparties to OTC derivatives dealers that have delivered specified disclosures and (2) SBS dealers are not BDs subject to Rule 15c3-3.<sup>2</sup>
  - The counterparty is likely to be a general creditor in the dealer’s insolvency because (1) the dealer’s insolvency is subject to the Bankruptcy Code (instead of the Securities

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<sup>1</sup> Since, in each case, the customer protection/segregation and insolvency regimes would be the same for non-cleared SBS and Eligible OTC Securities Derivatives, portfolio margining and commingling of collateral as between the two types of instruments would be permitted. This proposal is not intended to address portfolio margining of swaps with SBS or other Eligible OTC Securities Derivatives.

<sup>2</sup> Because only registered BDs are subject to Rule 15c3-3, and there is an exception from the Exchange Act’s “dealer” definition for dealing in SBS with ECPs, an SBS dealer that limits its SBS counterparties to ECPs and does not engage in brokerage activities is not subject to Rule 15c3-3.

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Investor Protection Act (“SIPA”)<sup>3</sup> and (2) Section 3E(g) of the Exchange Act (as added by Dodd-Frank) provides that non-cleared SBS and OTC options counterparties are not “customers” under the Code except to the extent of “any margin delivered to or by the customer with respect to which there is a customer protection requirement under section 15(c)(3) or a segregation requirement.”<sup>4</sup>

- If the counterparty elects to have its initial margin held by the dealer subject to compliance with Rule 15c3-3:
  - Rule 15c3-3 would need to be amended to clarify that a counterparty to an OTC derivatives dealer may elect protection under Rule 15c3-3.
  - Under Section 3E(g), the counterparty would have “customer” status in the dealer’s insolvency under the Code to the extent of its initial margin subject to Rule 15c3-3.
- If the counterparty elects third-party segregation of its initial margin under Section 3E(f):
  - Rule 15c3-3 would not apply because (1) the Rule currently provides an exception from its “customer” definition for counterparties to OTC derivatives dealers that have delivered specified disclosures and (2) SBS dealers are not BDs subject to Rule 15c3-3.
  - The counterparty would not have “customer” status in the dealer’s insolvency under the Code, but rather would have full rights to its custodied initial margin as “specifically identifiable property.”<sup>5</sup>
    - Under this approach, the Commission would confirm that the “segregation requirement” in Section 3E(g) means a statutory or regulatory requirement similar to the statutory segregation requirements contained in Section 4d of the Commodity Exchange Act or the customer protection requirements contained in Rule 15c3-3 that mandates the segregation of, or reserves for, collateral held by the dealer, rather than the requirement in Section 3E(f) that an SBS dealer merely offer segregation at a third-party custodian to its uncleared SBS counterparties.
    - In this regard, we note that:

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<sup>3</sup> Because only registered BDs are required to join the Securities Investor Protection Corporation (“SIPC”), and there is an exception from the Exchange Act’s “dealer” definition for dealing in SBS with ECPs, an SBS dealer that limits its SBS counterparties to ECPs and does not engage in brokerage activities is not subject to SIPA. In addition, even though an OTC derivatives dealer is technically a registered BD, Rule 36a1-2 exempts OTC derivatives dealers from SIPA.

<sup>4</sup> As a result, the counterparty would not be a “customer,” its initial margin would not be considered “customer property” and it would not have any “customer” claims.

<sup>5</sup> Such rights would, of course, remain subject to the rights of the insolvency trustee acting on behalf of the dealer’s estate.

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- Counterparties electing segregation at a third-party custodian will not expect, nor indeed want, to receive “customer” status in the dealer’s insolvency.
- “Customer” status is important as a policy matter only in cases where a claimant’s collateral is commingled and a *pro rata* or other distribution regime is therefore necessary to assure equitable treatment across customers.
- Where counterparties have individually elected segregation at a third-party custodian, they each expect to have their own rights to the collateral located in the specific custodial account as specifically identifiable property. Indeed, such counterparties typically elect segregation precisely to avoid bearing the risks that arise when customers share *pro rata* in losses accruing to them as a class.

Full-Purpose BD/SBS Dealer

- If the counterparty elects to grant the dealer full right to rehypothecate or otherwise use its initial margin without any protection under Rule 15c3-3:
  - Rule 15c3-3 would need to be amended to permit eligible counterparties to opt out of “customer” status with respect to claims for initial margin provided for non-cleared SBS and Eligible OTC Securities Derivatives.
  - To conform the affected provisions of SIPA to the legal changes effected by Title VII of Dodd-Frank, either the Commission or SIPC would exercise its further definitional authority under the Exchange Act or SIPA, respectively, to define technical terms used within SIPA (“other instrument commonly known as a security,” “securities account,” “purchase” and “sale”) consistently with the modifications to the Code made by Section 3E(g) of the Exchange Act.
    - Such definitional rules would clarify that, where the counterparty has elected to grant the dealer full right to rehypothecate or otherwise use its initial margin without any protection under Rule 15c3-3, the counterparty would not have “customer” status in the dealer’s insolvency under SIPA.
- If the counterparty elects to have its initial margin held by the dealer subject to compliance with Rule 15c3-3:
  - No changes to Rule 15c3-3 would be necessary.
  - The definitional rules described above would clarify that the counterparty would have “customer” status in the dealer’s insolvency under SIPA.

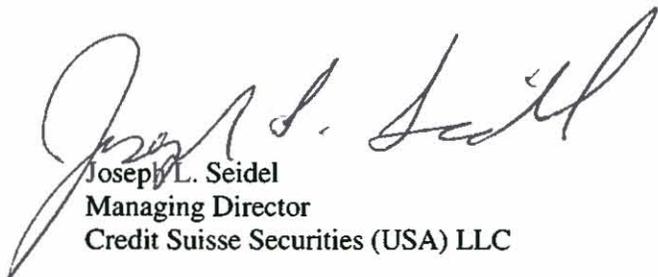
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- If the counterparty elects third-party segregation of its initial margin under Section 3E(f):
  - Rule 15c3-3 would need to be amended to permit eligible counterparties to opt out of “customer” status.
  - The definitional rules described above would clarify that the counterparty would not have “customer” status in the dealer’s insolvency under SIPA, but would have full rights to its custodied initial margin as “specifically identifiable property.”

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If you have any questions regarding the foregoing, please do not hesitate to contact the undersigned (202 626 3302) or Edward J. Rosen (212 225 2820) or Colin D. Lloyd (212 225 2809) of Cleary Gottlieb Steen & Hamilton LLP, outside counsel to Credit Suisse in this matter.

Respectfully submitted,

  
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Managing Director  
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cc: Robert W. Cook, Director  
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