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Via Agency Web Site

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FAO: Ms. Elizabeth Murphy
Secretary, Securities and Exchange Commission

August 20, 2013

**Re: Cross-Border Security-Based Swap Activities
(Releases No. 34-69490
File Nos. S7-02-13; S7-34-10; S7-40-11)**

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 regulatory requirements for security-based swap dealers ("SBSDs") and major security-based swap participants ("MSBSPs") in the cross-border context, especially 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").

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 below, we believe that the use of security-based swaps by FMS-WM, should not require FMS-WM to register as an SBSD or an MSBSP under the Securities Act of 1934 (the "Exchange Act"). As explained more fully below, FMS-WM is an institution organized under public law of the Federal Republic of Germany (the "Federal Republic"), the obligations of which are effectively 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 enters into security-based swaps only for the purpose of restructuring existing security-based swaps as part of its winding-up strategy.

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 SBSD and MSBSP registration requirements under the Exchange Act, or to the other regulatory requirements that would be applicable to SBSDs and MSBSPs, and that FMS-WM constitutes a foreign government for such purposes. We note that treatment of FMS-WM as a foreign government would be consistent with the no-action relief granted to FMS-WM by the SEC pursuant to FMS-WM's request of October 5, 2012, which enabled FMS-WM to utilize Schedule B in connection with its registration of securities under the

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Securities Act of 1933.¹ We also note that FMS-WM is treated as a foreign government by the Commodity Futures Trading Commission (“CFTC”), and is excluded from the swap dealer and major swap participant registration requirements under the Commodity Exchange Act (“CEA”).

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 from the German legislature, adopted a comprehensive package of measures to support German financial institutions, most notably Hypo Real Estate Group (“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 2011 re-opened SoFFin for new applications until the end of the year 2012. For the year ended December 31, 2012, SoFFin recorded a profit of €580 million, largely due to the €1.39 billion reversal of loss provisions for FMS-WM, which was only partially offset by write-downs of SoFFin’s stakes in other institutions totaling €0.74 billion and interest expenses of €0.27 billion. As of December 31, 2012, the total outstanding stabilization measures provided by SoFFin amounted to €22.5 billion, of which €3.7 billion related to liquidity guarantees and €18.8 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

¹ See FMS Wertmanagement, Request for No-Action Relief dated October 5, 2012.

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.

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 market.² FMS-WM is wholly owned by SoFFin, which acts on behalf of the Federal Republic, and is managed by the FMSA.³

A chart providing an overview of the ownership and supervision of FMS-WM is attached hereto as Annex A.

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 (the holding company of HRE Group) 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 European Union ("EU")

² Covered bonds (*Pfandbriefe*) are recourse obligations secured or "covered" by pools of loans, e.g., mortgage loans or public sector loans.

³ Given SoFFin's liquidity support and loss compensation obligations and the Federal Republic's liability for SoFFin's obligations discussed in Section I.F below, all major rating agencies have aligned the rating of FMS-WM with the rating of the Federal Republic. Cf. *Fitch Ratings, FITCH AFFIRMS FMS WERTMANAGEMENT AT 'AAA'; OUTLOOK STABLE, September 13, 2012; 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, October 4, 2012.*

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.

FMS-WM's Task. FMS-WM's mandate is to unwind the portfolios 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)⁴ 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 portfolios assumed by FMS-WM are 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 portfolios 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 as 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 Infrastructure and Real Estate segments, with a view to

⁴ As interpreted by BaFin, the prohibition on FMS-WM to engage in transactions that would require a banking license requires FMS-WM 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).

maximizing the value of the liquidation measure related to the financial instrument (including by reducing risk).

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 portfolios it has assumed as they expire. 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 portfolios 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.⁵

Long-Term Winding-Up and Incurrence of Substantial Losses in the Public Interest. A significant portion of the portfolios 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 portfolios in a value-preserving manner over an extended period of time. Due to the quality of FMS-WM's portfolios, 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 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

⁵ 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).

shareholders of a German corporation and provide an effective means of governmental supervision and control over the operations of FMS-WM.

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

FMS-WM's obligations, including its obligations under security-based swaps, are effectively 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. However, SoFFin's role under the FMS-WM charter and the assumption of liability by the Federal Republic for SoFFin's obligations do not constitute formal guarantees, and creditors of FMS-WM have no direct recourse against SoFFin or the Federal Republic.

Furthermore, against the background of planned regulatory changes in Europe, in particular in connection with the implementation of the Third Accord of the Basel Committee on Banking Supervision ("Basel III") in the European Union (CRD IV/CRR), on July 5, 2013, the German legislature passed a bill amending the FMStFG. Once it is signed by the Federal President and published in the Federal Gazette (*Bundesgesetzblatt*), the bill will establish, in addition to SoFFin's loss compensation obligation, a guarantee by SoFFin in respect of all loans, debt securities, fixed forward transactions, options and other credits extended to FMS-WM which FMS-WM has borrowed, issued, entered into, incurred or which have been transferred to FMS-WM during the time period for which SoFFin is the sole obligor of the loss compensation obligation (*alleiniger Verlustausgleichspflichtiger*). For the time period for which SoFFin is the sole obligor of the loss compensation obligation (*alleiniger Verlustausgleichspflichtiger*), the bill would also establish a guarantee by SoFFin in respect of credits extended to third parties inasmuch as such credits are expressly guaranteed by FMS-WM. The guarantee is expected to come into effect on January 1, 2014.

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 security-based 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. 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.

F. FMS-WM enters into Security-Based Swaps solely in order to restructure existing Security-Based Swaps as part of its winding-up strategy

FMS-WM's portfolio of security-based swaps consists mostly of certain credit default swaps and total return swaps which were transferred from HRE Group to FMS-WM together with other risk positions and non-strategic assets/businesses on October 1, 2010 as a stabilization measure for the German financial markets. Some of the security-based swaps in FMS-WM's portfolio are hedges while others constitute non-hedging long or short positions taken over from HRE Group. FMS-WM's task is to wind-up such positions in ways that maximize value.

FMS-WM does not enter into any new security-based swaps except with the purpose of restructuring existing security-based swaps within the limits of its winding-up strategy. FMS-WM's counterparties generally consist of major financial institutions, including some institutions that may be registered as swap dealers under the CEA or SBSDs under the Exchange Act. Similarly, FMS-WM does not actively trade in new credit default swaps, although in individual cases FMS-WM may engage in restructurings involving credit default swaps. FMS-WM's portfolio of security-based swaps – both with regard to the number of swaps and the nominal amounts of such swaps – form only a small portion of FMS-WM's derivatives portfolio, which consists mostly of interest rate swaps entered into for hedging purposes.

II. Foreign Governments, including FPSFIs such as FMS-WM, 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 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 entities owned by or related to foreign governments. 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.⁶

⁶ 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).

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.”⁷ 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.⁸

As discussed further in Sections II.A and II.B 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 regulations otherwise applicable to SBSDs and MSBSPs, and that FMS-WM should be considered a foreign government for this purpose. Moreover, we believe that the structure, purpose and foreign governmental character of FMS-WM make it appropriate to treat FMS-WM as a foreign government for this purpose.

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

In the Intermediary Definitions Adopting Release, the CFTC considered the applicability of the swap dealer and major swap participant registration requirements mandated by Dodd-Frank to foreign governments. 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 concluded that “[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’ ...”⁹

In its July 2012 release entitled “End-User Exception to the Clearing Requirement for Swaps; Final Rule” (the “CFTC End User Release”),¹⁰ 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)(l) of the CEA. Besides noting the absence of legislative history favoring the inclusion of foreign governments, the CFTC acknowledged that considerations of comity and the

⁷ Proposing Release at 31034-31035.

⁸ Id. at 31035.

⁹ Intermediary Definitions Adopting Release at 30693 (footnote omitted).

¹⁰ See Final Rule: End User Exception to the Clearing Requirement for Swaps, 77 Fed. Reg. 42560 (July 19, 2012).

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 SBSDs 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 SBSD and MSBSP registration would apply to foreign 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.”¹¹ The SEC's express recognition of an exclusion from the registration and other SBSD/MSBSP requirements in favor of foreign governments (including FMS-WM) 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. As a Foreign Government or an FPSFI, FMS-WM Does Not Pose the Risks Posed by SBSDs and MSPBSPs

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,¹² while the MSBSP regime regulates persons that could pose a high degree of risk to the U.S. financial system.¹³ FMS-WM's security-based swap activities, as well its public purpose and significant support from the Federal Republic, indicate that FMS-WM should not be regulated as an SBSD or an MSBSP.

FMS-WM enters into security-based swaps solely in order to restructure swaps assumed from the HRE Group in connection with its mandate to wind up the assets and positions of HRE Group. In particular, FMS-WM does not enter into any security-based swaps for any speculative purposes. Further, as noted above, SoFFin is obligated to provide liquidity support and loss compensation for FMS-WM. As FMS-WM is 100% owned by¹⁴ SoFFin, itself an instrumentality of the Federal Republic, in the event

¹¹ Proposing Release at 31102.

¹² Intermediary Definitions Adopting Release at 30617.

¹³ Intermediary Definitions Adopting Release at 30661.

¹⁴ In addition, as described above, in connection with the implementation of Basel III in the EU, the German legislature passed a bill amending the FMStFG which, in addition to SoFFin's loss compensation obligation, will provide for a guarantee by SoFFin in respect of *inter alia*, all loans, debt securities, fixed forward transactions, options and other credits extended to FMS-WM, which FMS-WM has borrowed, issued, entered into, incurred or

that FMS-WM suffers losses on its security-based swap positions, those losses would be fully covered by the Federal Republic, and FMS-WM's counterparties would face minimal risk. Thus, FMS-WM does not pose the type of risk to other counterparties and the wider financial system that registration and other SBSB/MSBSP requirements were designed to address. Moreover, as described in Section 1.E above, a bill passed by the German legislature on July 5, 2013 in connection with the implementation of Basel III in the EU, will establish, in addition to SoFFin's loss compensation obligation, a guarantee by SoFFin in respect of all loans, debt securities, fixed forward transactions, options and other credits extended to FMS-WM which FMS-WM has borrowed, issued, entered into, incurred or which have been transferred to FMS-WM during the time period for which SoFFin is the sole obligor of the loss compensation obligation (*alleiniger Verlustausgleichspflichtiger*). For this period, the bill will also establish a guarantee by SoFFin in respect of credits extended to third parties inasmuch as they are expressly guaranteed by FMS-WM.

As discussed above, FMS-WM's fundamental purpose—managing the run-off portfolios of HRE Group and enhancing the stability of, and 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 non-U.S. nature of and the public purpose underlying FMS-WM's activities, the formal regulatory oversight and effective credit-backing of the Federal Republic, we believe that FMS-WM should not be required to comply with the SBSB/MSBSP registration and other requirements.

FMS-WM is treated as a foreign government by the CFTC and is excluded from the swap dealer and major swap participant registration requirements under the Commodity Exchange Act ("CEA"). In both the Intermediary Definitions Adopting Release and the End User Release, 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 clearing requirements or to registration as a swap dealer or major swap participant. The CFTC subsequently recognized FMS-WM's "foreign government" status for the same purposes.¹⁵ We believe the same foreign-government exception should apply for FMS-WM with regard to security-based swaps.

In light of the foregoing, we respectfully request that the SEC take this opportunity to expressly clarify that foreign governments, including FMS-WM, are not required to register as SBSBs/MSBSPs and are not subject to SBSB/MSBSP requirements.¹⁶

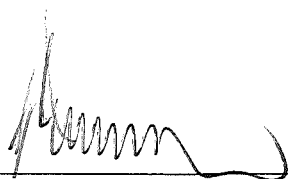
which have been transferred to FMS-WM during the time period for which SoFFin is the sole obligor of the loss compensation obligation (*alleiniger Verlustausgleichspflichtiger*). This guarantee is currently expected to come into effect on January 1, 2014. The relevant bill has not yet been signed by the German President or published in the Federal Gazette.

¹⁵ Representatives of FMS-WM have discussed with the CFTC and members of its senior staff the treatment of FMS-WM's status as a "foreign government" and have confirmed that the CFTC would treat FMS-WM as a "foreign government" for the purposes of the swap dealer and major swap participant registration requirements under the CEA.

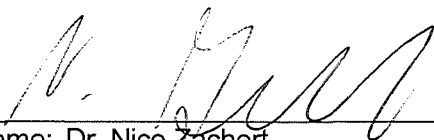
Thank you for your consideration of our comments and please do not hesitate to contact the undersigned or Dennis Sullivan (at 202-956-7500 or sullivan@sullcrom.com) or David Gilberg (at 212-558-4680) or gilbergd@sullcrom.com) if you have questions or would find further background helpful.

Sincerely,

FMS-WM



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



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

Annex A

The following chart provides an overview of the ownership and supervision of FMS-WM:

