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

Office of the Comptroller of the Currency
Attn: Docket ID OCC-2011-0008
Legislative and Regulatory Activities Division
400 7th Street SW, Suite 3E-218
Mail Stop 9W-11
Washington, DC 20219

Robert de V. Frierson, Secretary
Board of Governors of the Federal Reserve System
Attn: Docket No. R-1415 & RIN 7100 AD74
20th Street and Constitution Avenue, NW
Washington, DC 20551

Robert E. Feldman, Executive Secretary
Attn: Comments RIN 3064 AE-21
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Alfred M. Pollard, General Counsel
Attn: Comments/RIN 2590-AA45
Federal Housing Finance Agency
Constitution Center (OGC Eighth Floor)
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Date: January 28, 2016

Re: Margin and Capital Requirements for Covered Swap Entities

Ladies and Gentlemen:

We are submitting this comment letter in response to the November 30, 2015 interim final rule on Margin and Capital Requirements for Covered Swap Entities (the "Interim Final Rule") as promulgated by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve, the Federal Deposit Insurance Corporation, the Farm Credit Administration and the Federal Housing Finance Agency (the "Prudential Regulators").[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").

[1] *See* 80 Fed. Reg. 229 (November 30, 2015).

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 Prudential Regulators 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 Prudential Regulators. 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 Prudential Regulators in issuing the Interim Final Rule. KfW, as the Commodity Futures Trading Commission ("CFTC") has determined, and as set forth more fully below, is not subject to the mandatory clearing requirement pursuant to the CFTC'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 Prudential Regulators clarify and confirm that, even if KfW is not eligible for the exception from the margin rules under the Interim Final Rule, KfW should nevertheless not be subject to such margin rules because it should be treated as a "sovereign entity" or "multilateral development bank" under the Prudential Regulators' Final Rule on Margin and Capital Requirements for Covered Swap Entities (the "Final Rule"),[3] 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 Prudential Regulators on November 17, 2014, regarding the Prudential Regulators' September 24, 2014 Notice of Proposed Rulemaking on Margin and Capital Requirements for Covered Swap Entities.[4]

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

3 *See* 80 Fed. Reg. 229 (November 30, 2015).

4 *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).

For convenience, we are attaching a copy of that letter and refer the Prudential Regulators 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 Interim Final Rule:

> "... section 302 of TRIPRA amends sections 731 and 764 so that initial and variation margin requirements will not apply to a swap or security-based swap in which a counterparty (to a covered swap entity) is: (1) A non-financial entity (including small financial institution and a captive finance company) that qualifies for the clearing exception under section 2(h)(7)(A) of the Commodity Exchange Act ...;[5] (2) A cooperative entity that qualifies for an exemption from the clearing requirements issued under section 4(c)(1) of the Commodity Exchange Act;[6] or (3) A treasury affiliate acting as agent that satisfies the criteria for an exception from clearing in section 2(h)(7)(D)[7] of the Commodity Exchange Act..."[8]

As noted in the Prudential Regulators' release, "the CFTC ... is vested with primary responsibility for the oversight of the swaps market under Title VII of the Dodd-Frank Act," and "the CFTC has authority to exempt swaps from [Dodd-Frank's clearing requirements]."[9] In accordance with the CFTC's 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 Prudential Regulators' margin rules. In particular, in the End-User Release, the CFTC stated that:

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5 *I.e.*, the "end-user" exception.

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

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

8 80 Fed. Reg. at 74919.

9 80 Fed. Reg. at 74918, citing 7 U.S.C. 6(c)(1), which statute provides that the CFTC has authority to exempt from clearing requirements not only swaps, but also any person or class of persons entering into such contracts.

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"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 <u>not be subject</u> 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."[10]

The CFTC also stated 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."[11]

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

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10 77 Fed. Reg. at 42561 (emphasis added; internal footnotes omitted).

11 *Id.* (emphasis added).

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 Dodd-Frank's mandatory clearing requirement, regardless of the basis on which such entity is not subject to that requirement.[12] The Interim Final Rule, therefore, reflects the same objective. Accordingly, we have interpreted the Interim Final Rule that the Prudential Regulators have issued pursuant to TRIPRA as excluding from the margin requirements the same foreign governments, foreign central banks, and international financial institutions that the CFTC 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 CFTC 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 CFTC'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 CFTC'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 Final Rule

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 Final Rule. We note that the Prudential Regulators stated in their release that "[t]he existence of a government guarantee does not in and of itself exclude the entity from the definition of financial end user."[13] As noted above, however, and as the CFTC 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."[14] KfW is

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12 *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."

13 80 Fed. Reg. at 74856.

14 77 Fed. Reg. at 42561.

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 Final Rule.

KfW as "Multilateral Development Bank" under the Final Rule

As a separate alternative approach, we believe that KfW should be treated as a "multilateral development bank" for purposes of the Final Rule. 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 [Agency] 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 Prudential Regulators 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.[15] 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 Prudential Regulators confirm that KfW will be treated as a multilateral development bank for purposes of the Final Rule.

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[15] *See* 80 Fed. Reg. at 74856, fn. 102.

We believe it is clear that Congress, in enacting TRIPRA, and the Prudential Regulators, 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 Final Rule. Although we are confident that these conclusions and characterizations are correct and consistent with Congressional and Prudential Regulator action, we would very much appreciate the Prudential Regulators' 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 Czichowksi
Title: Senior Vice President and Treasurer

(Attachment: November 17, 2014 Letter to Prudential Regulators)

KFW

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››› **Re: Margin and Capital Requirements for Covered Swap Entities**

Date: 17/11/2014

Dr. Svenja Brinkmann
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Ladies and Gentlemen:

We are submitting this comment letter in response to the September 24, 2014 Notice of Proposed Rulemaking on Margin and Capital Requirements for Covered Swap Entities (the "Proposed Rule") as promulgated by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve, the Federal Deposit Insurance Corporation, the Farm Credit Administration and the Federal Housing Finance Agency (the "Prudential Regulators").[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 and security-based swaps ("Swaps"), as defined under Dodd-Frank, by KfW, which, as explained below, is a foreign government-linked entity owned by the Federal

1 *See* 79 Fed. Reg. 57348 (September 24, 2014).

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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 Prudential Regulators 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 addition, we respectfully request that the Prudential Regulators 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.

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[2] We note that the margin regulation proposals issued by the Prudential Regulators and the Commodity Futures Trading Commission ("CFTC") are substantially the same in this respect. Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 79 Fed. Reg. 59898 (Oct. 3, 2014). As such, KfW will submit its comments in response to both proposals for consideration.

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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 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

[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 Entwicklungs-gesellschaft mbH ("DEG").

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 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 400 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.

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[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.

[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.

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. Many of KfW's counterparties are entities that are registered swap dealers, major swap participants, security-based swap dealers, and major security-based swap participants subject to oversight and regulation by the Prudential Regulators ("Swap Entities"). While KfW occasionally entered into single-name credit default swaps in the past in order to hedge credit risk incurred in connection with its financing activities, there are no such transactions outstanding as of the date hereof. However, at some point in the future, KfW may enter into single-name or index-linked credit default swaps for hedging credit risk again, or enter into equity-related security based swaps for purposes of hedging equity risk related to the issuance of notes of which the pay-out may be linked to the performance of a single stock or a narrow basket or index of stocks. 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 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 regulations adopted by the Prudential Regulators to address the risk caused by uncleared Swaps be "appropriate" for the actual risk posed, and the Prudential Regulators have 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. In the Proposed Rule, the Prudential Regulators state that "risk-based distinctions can be made" between types of counterparties, and they therefore specifically have excluded certain parties from the definition of "financial end user" and, accordingly, from the margin requirements of the rules. These

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excluded parties include: sovereign entities; 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 or section 3C(g)(4) of the Securities Exchange Act and implementing regulations.

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" and indicates in footnote 79 of the Proposed Rule that the European Central Bank would be included in the definition. The 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 Prudential Regulators 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 a Prudential Regulator, due to the lack of clarity in the Proposed Rule as to whether such 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 Prudential Regulators 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 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 Commodity Futures Trading Commission

("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.[6] 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.[7]

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

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[6] *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 36,093. 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.

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

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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 (and the CFTC's proposed rules, and we thus intend to respectfully request that the CFTC provide similar guidance on and relief with respect to the treatment of KfW as a "sovereign entity" in the release to its final margin rules). Alternatively, we respectfully request that the Prudential Regulators (and will request that the CFTC) 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 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").[8] 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."

Further, in the Proposed Rule, the Prudential Regulators indicate 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

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

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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 Prudential Regulators 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.

While we support the Prudential Regulators' 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 and Security-Based Swaps was prompted by the

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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

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 Prudential Regulators' proposed margin regulations, and should be properly considered as a "sovereign entity" for purposes of the margin rules. We respectfully request that the Prudential Regulators 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 Prudential Regulators' determination with respect to the European Central Bank in footnote 79 of the Proposed Rule. In the alternative, even if the Prudential Regulators determine that KfW does not fall within the definition of a "sovereign entity," we request that the Prudential Regulators 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 to determine whether KfW was 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 Prudential Regulators' 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 Prudential Regulators clarify the scope of the extraterritorial jurisdiction of the Prudential Regulators' margin rules, as the Proposed Rule does not provide guidance on the applicability of the rules in certain cross-border contexts. For example, even if KfW and its counterparties are not subject to the Proposed Rule, as detailed above, it is not clear whether the margin rules would apply if KfW engages in Swaps transactions booked by a non-U.S. registered Swap Entity, but arranged, negotiated, or executed by persons operating from a U.S. branch of such Swap Entity. We believe that such transactions, because they are entered into between two non-U.S. parties and booked outside the United States, should be considered foreign non-cleared swap that is not subject to the Proposed Rule. However we believe that further guidance and clarification is needed in this regard.

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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/ ANDREAS MÜLLER

Name: Andreas Müller
Title: Senior Vice President

/s/ DR. FRANK CZICHOWSKI

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