CLIENT UPDATE

RELIEF FOR FOREIGN-OWNED U.S. BANKS IN RESPECT OF FOREIGN AFFILIATES' SWAP ACTIVITIES

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On December 31, 2012, the Commodity Futures Trading Commission (the "CFTC") issued a no-action letter (the "December 31 No-Action Letter") providing relief to certain U.S. banks that are wholly owned by foreign swap dealers ("SDs") from the obligation to include the swap activity of their foreign affiliates in the calculation of the aggregate gross notional amount of swaps connected with their swap dealing activity for purposes of determining whether they are eligible for the de minimis exception from SD registration set forth in Regulation 1.3(ggg)(4).[1]

The December 31 No-Action Letter extends the relief provided in a prior CFTC no-action letter, issued on December 20, 2012 (the "December 20 No-Action Letter"),[2] to foreign-owned U.S. banks with different ownership structures, including state-chartered banks regulated by the Federal Reserve or the Federal Deposit Insurance Corporation. Unlike the December 31 No-Action Letter, the December 20 No-Action Letter applies only to nationally-chartered U.S. banks that, among other things, are indirectly wholly owned by a foreign SD and are directly owned by an entity that (1) is registered with and subject to oversight and supervision by the Board of Governors of the Federal Reserve System as a financial holding

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1 CFTC No-Action Letter No. 12-71 issued on December 31, 2012, http://www.cftc.gov/PressRoom/PressReleases/pr6488-12

2 See CFTC No-Action Letter No. 12-61 issued on December 20, 2012, http://www.cftc.gov/PressRoom/PressReleases/pr6476-12

company under the Bank Holding Company Act of 1956; (2) files its financial statements with the Securities and Exchange Commission; and (3) is capitalized separately from the U.S. bank's foreign affiliates. Other than the foregoing differences, the relief granted by the December 31 No-Action Letter is identical to the one granted under the December 20 No-Action Letter.

DE MINIMIS EXCEPTION AND APPLICATION TO FOREIGN AFFILIATES' SWAP ACTIVITIES

The joint final rules[3] issued by the CFTC and the Securities and Exchange Commission (the "SEC" and, together with the CFTC, the "Commissions") defining the terms "swap," "security-based swap" and "security-based swap agreement" and addressing "mixed swaps" became effective on October 12, 2012. As a result, all swaps entered into by a person on or after that date in connection with a person's swap dealing activities are relevant in determining whether the person must register as an SD.

Regulation 1.3(ggg)(4)(i) provides a de minimis exception (the "De Minimis Exception") from SD registration for any person that, starting on October 12, 2012, enters into swaps positions connected with its swap dealing activities, the aggregate notional amount of which does not exceed either of the two thresholds. The two thresholds are:

- $3 billion, subject to an initial phase-in level of $8 billion; and
- $25 million with regard to swaps in which the counterparty is a "special entity" as defined in Section 4s(h)(2)(C) of the Commodity Exchange Act (the "CEA").

In the adopting release accompanying the joint final rules issued by the Commissions defining the term "swap dealer," the CFTC made clear that the notional thresholds set forth in the De Minimis Exception encompass swap dealing positions entered into "by an affiliate controlling, controlled by or under common control with the person at issue."[4]

REQUEST FOR RELIEF

Certain foreign-owned U.S. banks (the "Petitioners") requested that they be permitted to determine whether they satisfy the De Minimis Exception without having to consider the swap activity of their foreign affiliates (including their foreign owners) that will register as

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3 *Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement;" Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 Fed. Reg. 48208 (Aug. 13, 2012).

4 *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, 30632 n. 444 (May 23, 2012).

SDs. The Petitioners represented that they would qualify for the De Minimis Exception if such relief were granted.

The Petitioners asserted that the following factors constitute appropriate boundaries that warrant such relief: (1) the strength of the Petitioners' respective holding companies and the Petitioners' stand-alone and publicly available financial profiles; (2) the Petitioners' separate legal existence and oversight by a prudential U.S. banking regulator; and (3) the Petitioners' independent and distinct swaps operations from those of their foreign affiliates.

The Petitioners are subject to comprehensive U.S. prudential banking regulation. As banks regulated by the Office of the Comptroller of the Currency (the "OCC"), the Board of Governors of the Federal Reserve System (the "Federal Reserve") or the Federal Deposit Insurance Corporation (the "FDIC"), they are subject to significant restrictions on their transactions with their foreign affiliates under Sections 23A and 23B of the Federal Reserve Act and Regulation W. They are owned by a bank holding company subject to the supervision, regulation and examination of the Federal Reserve under the Bank Holding Company Act of 1956, as amended (the "BHCA"). The Petitioners and their parent holding companies are subject to regulatory capital requirements that do not look to the resources of the Petitioners' foreign affiliates.

NO-ACTION RELIEF

The December 31 No-Action Letter provides that, based on the foregoing, the Division of Swap Dealer and Intermediary Oversight of the CFTC ("DSIO") will not recommend that the CFTC take enforcement action against any U.S. bank that is wholly owned by a foreign entity for failure to consider the swap dealing activities of its foreign affiliates, or the U.S. branches of such affiliates, with respect to swap positions executed from and after October 12, 2012, when determining whether such U.S. bank satisfies the De Minimis Exception, so long as the U.S. bank meets the following conditions:

- (a) It is a state- or nationally-chartered bank (including a state-or nationally-chartered savings bank) regulated by the OCC, the Federal Reserve or the FDIC; (b) it is wholly owned, directly or indirectly, by a foreign entity that is registered as an SD; (c) an entity that directly or indirectly wholly owns the U.S. bank is registered with and subject to oversight and supervision by the Federal Reserve as a bank holding company under the BHCA and such entity, or an entity that directly or indirectly wholly owns such entity, files its financial statements with either the SEC or the Federal Reserve; or (d) the U.S. bank is separately capitalized from its foreign affiliates.

- The U.S. bank (a) will strictly comply with all organizational formalities to maintain its existence separate from its foreign affiliates and will promptly correct any known misunderstanding, if any, regarding its separate identity; (b) has its own principal executive and administrative offices through which its business is conducted, separate from those of its affiliates; and (c) will prepare separate financial statements from those of its foreign affiliates and will not provide copies of financial statements of its foreign affiliates to its swaps customers or otherwise state or suggest that its foreign affiliates are undertaking any specific financial responsibility in connection with its swaps activities.
- No swap obligations of the U.S. bank will be guaranteed, or otherwise supported through keep-well agreements or other arrangements, by its foreign affiliates. None of the affiliates outside the U.S. will hold out their credit or assets to the marketplace as being available to satisfy the swap obligations of the U.S. bank or pledge its assets in support of those obligations.
- Overall the U.S. bank and its foreign affiliates serve different aspects of the U.S. swap market (understanding that there might be circumstances in which customers of the U.S. bank are also customers of its foreign affiliates).
- The U.S. bank (a) will not rely on its foreign affiliates for operational servicing of its swaps business, and will at all times maintain separate core operational capabilities, including, without limitation, sales, marketing and trading personnel, appropriate to the scope of its swap business; and (b) will make its own credit determinations with respect to its swaps activities, which determinations will be subject to (and may be reduced as a result of) broader enterprise risk management oversight, in addition to a foreign regulator's applicable requirements.
- The U.S. bank will at all times comply with the requirements of Section 23B(c) of the Federal Reserve Act, which provides that "[a] member bank or any subsidiary or affiliate of a member bank shall not publish any advertisement or enter into any agreement stating or suggesting that the bank shall in any way be responsible for the obligations of its affiliates." As a result, the U.S. bank will at all times hold itself out to the public and all other persons as a legal entity separate from its foreign affiliates and any other person.[5] The U.S. bank will at all times conduct its swaps business in its own name, with all swap trading documentation (e.g., ISDA Master Agreements and confirmations), and required disclosures of material risks and characteristics showing

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[5] DSIO will not consider a U.S. bank to be holding itself out as separate from its foreign affiliates if it uses a name of a foreign affiliate (or any other information that identifies a foreign affiliate) in its name or in its branding materials, although marketing and other materials may reference the U.S. bank's affiliation with its foreign affiliates.

only the U.S. bank and not any of its affiliates as the relevant counterparty to the customer.

- To the extent a U.S. bank claiming the foregoing no-action relief may be unable to observe any of the foregoing conditions in the future, the U.S. bank will notify DSIO promptly to determine whether such changed circumstances alter the relief provided and, if DSIO determines that relief is no longer appropriate, the U.S. bank would register as an SD or cease swap dealing activities within two (2) months of the date of such determination.

CLAIMING THE NO-ACTION RELIEF

In order to rely on the foregoing no-action relief, an eligible foreign-owned U.S. bank must file a claim to perfect the relief, which claim will be effective upon filing, so long as it is materially complete. The claim must:

- state the name, main business address and main business telephone number of the foreign-owned U.S. bank that is claiming the relief;
- be signed by a legal representative of the bank filing the claim;
- be filed with DSIO via email using the email address dsionoaction@cftc.gov and stating "Foreign-Owned Banks and De Minimis Exception" in the subject line of such email.

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Please do not hesitate to contact us if you have any questions.

January 31, 2013