Instituto de Crédito Oficial

Asesoría Jurídica

January 28, 2016

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

Alfred M. Pollard, General Counsel
Attn: Comments/RIN 2590-AA45
Federal Housing Finance Agency
Constitution Center (OGC Eighth Floor)
400 7th Street SW
Washington, DC 20024

Robert deV. 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

Barry F. Mardock, Deputy Director
Office of Regulatory Policy
Farm Credit Administration
1501 Farm Credit Drive
McLean, VA 22102-5090

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

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

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

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Final 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 Instituto de Crédito Oficial ("ICO"), and the views expressed herein are those of ICO only. We believe it is clear that entities not subject to mandatory clearing requirements under Dodd-Frank, regardless of the basis for that determination, are also not subject to the margin rules of the Prudential Regulators. In particular, this conclusion should apply regardless of whether an entity is eligible for an express exemption or exclusion. We respectfully request that the Prudential Regulators clarify this issue 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. ICO is within the category of entities that the Commodity Futures Trading Commission ("CFTC") has determined,[2] as set forth more fully below, are 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").[3]

Alternatively, we would appreciate the clarification and confirmation of the Prudential Regulators that ICO is not subject to the margin rules 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").[4] We believe that ICO is within these categories because it is a public-sector entity, designated by the Spanish State as a State Financial Agency, according to article 1 of Royal Decree 706/1999, of 30 April, adapting Instituto de Crédito Oficial to Act 6/1997, of 14 of April, on Organization and Operation of the State General Administration, and approving its Bylaws (as amended), with a mandate to serve a public purpose, which uses swaps primarily for hedging and risk mitigation purposes and carries the full support for any losses and liabilities by the explicit, irrevocable, unconditional and direct guarantee of the Spanish State.

I. Background on ICO

We have previously provided detailed information regarding our nature

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2 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]." 80 Fed. Reg. 74919.

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

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

and purpose, in the context of our prior comment letter submitted to the Prudential Regulators on November 21, 2014, regarding the Prudential Regulators' September 24, 2014 Notice of Proposed Rulemaking on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants. We refer the Prudential Regulators to the attached copy of that letter for such information.

II. Clarification Regarding Exception from the Margin Requirements

As set forth in the release accompanying the Interim Final Rule, Title III of TRIPRA exempts from the margin rules of both the CFTC and the Prudential Regulators swaps in which either counterparty qualifies for an exemption or exception from clearing under Dodd-Frank. 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]

The exemption from the margin rules under TRIPRA and the Interim Final Rule, therefore, is based entirely on an entity not being subject to the CFTC's mandatory clearing requirement. Indeed, the Prudential Regulators expressly noted that "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-

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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.

Frank's clearing requirements]."[9] In accordance with the CFTC's determinations, ICO 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. Accordingly, ICO should not be subject to the Prudential Regulators' margin rules. In particular, in the End-User Release, the CFTC stated that:

> "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]
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> The CFTC also stated that:
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> "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

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9 80 Fed. Reg. at 74919, 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.

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

explicit, full statutory guarantee provided by the German federal government."[11]

ICO satisfies these same criteria on which the CFTC excluded KfW from the clearing requirement. In particular, in stating that KfW is considered a "foreign government," the CFTC took into account the non-profit, public sector status of KfW, as well as its mandate to serve a public purpose and the full, explicit and statutory guarantee provided to it by the German federal government. On this basis, ICO also is not subject to the clearing requirement under Section 2(h)(7) of the CEA. Although this relief from the clearing requirement granted by the CFTC to entities such as KfW and ICO was not expressly framed as an exemption or exception, it is clear that it serves the same purpose and has the same effect, and should therefore be treated as an exemption or exception. Moreover, it is apparent that Congress, in enacting TRIPRA, intended to create a broad exclusion from the margin requirements for any entity that is not subject to the Dodd-Frank 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, the Interim Final Rule should be construed to exclude 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 ICO. The CFTC's prior actions and statements, and the purpose and broad intent of TRIPRA and the nature make it clear that any entity that is not subject to the clearing requirement is also not subject to the margin requirements.

Treatment of ICO as a "Sovereign Entity" or "Multilateral Development Bank"

If for any reason the Prudential Regulators are unable or unwilling to provide the clarification requested above, we believe that entities such as ICO should nevertheless be treated as "sovereign entities" for purposes of the Interim Final Rule. In the release accompanying the margin rules, the Prudential Regulators noted 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] The emphasis in this statement, however, was clearly the phrase "in and of itself," which was obviously intended to state that a government

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11 *Id.* (emphasis added).

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.

guarantee, standing alone and without other features of sovereignty, is insufficient to include an entity within the definition of a "sovereign entity." We agree with this position, as a government should not be permitted to guarantee corporate entities and thereby remove them from the margin rules. However, that is not the case here. For the reasons set forth above, ICO 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.

ICO is a public sector entity, with a mandate to serve a public purpose, which uses swaps primarily for hedging and risk mitigation purposes and carries the full support for any losses by the explicit guarantee of the Spanish government. ICO is not, therefore, simply an entity with a government guarantee but is itself a "public sector entity" with a public mandate and a guarantee that is approved by Spanish law. Under such circumstances, we believe that ICO 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 Interim Final Rule.

Finally, if it is concluded that ICO is not exempt from the margin rules under the Interim Final Rule, and should not be treated as a "sovereign entity," it should in any event be regarded 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."[14]

ICO "provides financing for national or regional development" within the meaning of the definition of multilateral development bank, and, as a result of its explicit statutory guarantee by the Spanish government, "poses comparable credit risk" to that of the entities on the list of multilateral development banks. ICO also poses credit risk that is identical to that of the Spanish government. The Prudential Regulators expressly contemplated that entities with a national focus could qualify as multilateral development banks, 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 ICO is not subject to the margin rules on the same basis that ICO is not subject to the clearing requirement, that the Prudential Regulators confirm that ICO will be treated as a multilateral development bank for purposes of the Final Rule.

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[14] 80 Fed. Reg. at 74902.

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

The objective of TRIPRA and the Interim Final Rule is to ensure that an entity, such as ICO, that is not subject to the clearing requirement is also not subject to margin requirements. The clarification we are requesting, therefore, is fully consistent with the legislation and the Interim Final Rule and appropriate and warranted under the circumstances. Moreover, regardless of the effect of TRIPRA and the Interim Final Rule, we respectfully submit that ICO should be treated as a "sovereign entity," or as a "multilateral development bank," for purposes of the Final Rule. 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 ICO 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.

Sincerely,

ICO

Name: **LAURA DE RIVERA GARCÍA DE LEÁNIZ**
Title: DEPUTY DIRECTOR LEGAL DEPARTMENT

(Attachment: November 21, 2014 Letter to Prudential Regulators)

Instituto de Crédito Oficial

LEGAL DEPARTMENT

November 21, 2014

Via Agency Web Site

Office of the Comptroller of the Currency
Attn: Docket ID OCC-2011-0008
Legislative and Regulatory Activities Division
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Barry F. Mardock, Deputy Director
Office of Regulatory Policy
Farm Credit Administration
1501 Farm Credit DriveMcLean, VA 22102-5090

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

Re: Office of the Comptroller of the Currency, Treasury (RIN 1557-AD43); Board of Governors of the Federal Reserve System (RIN 7100-AD74); Federal Deposit Insurance Corporation (RIN 3064-AE21); Farm Credit Administration (RIN 3052-AC69); and the Federal Housing Finance Agency (RIN 2590-AA45): Margin and Capital Requirements for Covered Swap Entities

Dear Prudential Regulators:

This comment letter is submitted on behalf of Instituto de Crédito Oficial ("ICO") in response to the September 24, 2014 Notice of Proposed Rulemaking on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 79 Fed. Reg. 57348 (September 24, 2014) (the "Proposed Rule"), issued by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Farm Credit Administration and the Federal Housing Finance Agency (the "Prudential Regulators") and promulgated pursuant to Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). We appreciate the opportunity to comment, and commend the Prudential Regulators for their thorough and thoughtful development of the Proposed Rule.

I. Summary

As detailed further below, ICO is organized under public law of the Kingdom of Spain ("Spain") and the debts and obligations incurred by ICO are backed by the "explicit, irrevocable, unconditional and direct" guarantee of Spain. Further, ICO is a public sector entity engaged in various financing and lending activities, and currently uses Swaps, as such term is defined in Dodd-Frank, primarily (although not exclusively) for the purpose of hedging its investments, loans and borrowings.[1] ICO executes such Swaps either with non-U.S. counterparties or with U.S. 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"). It is our view, for the reasons described below, that the execution of Swaps by ICO does not pose the same types of systemic risk concerns which can be associated with uncleared Swap transactions. Accordingly, we respectfully request that the Prudential Regulators clarify in the final rule that a sovereign public-sector entity, such as ICO, that is backed by the explicit and irrevocable guarantee of a sovereign government, is either (i) considered to be within the definition of a "sovereign entity" and not subject to the margin rules otherwise applicable to Swaps not cleared by a registered derivatives clearing organization; or (ii) otherwise excluded from the definition of "financial end user" and not required to post or collect margin.[2]

II. ICO's Status as a Public Sector Entity Serving a Public Purpose

Pursuant to the applicable legislation and ICO's bylaws, ICO is generally subject to provisions of Spanish law relating to credit institutions. The strategic management of ICO, as well as the assessment and control of the results of its activities, are overseen by the Secretariat of State for Economy, and it is subject to the control of the Spanish Office of the Comptroller ("Intervención General") of the State Administration and of the Court of Exchequer ("Tribunal de Cuentas"). ICO is further overseen by Spain's Ministry of Economy and Competitiveness. In addition to its legal status as a credit institution, ICO also functions as a "state financial agency" with its own legal status, assets, treasury and independent management.[3] Moreover, as a credit institution, ICO is also supervised by the Bank of Spain. ICO raises funds through capital markets, and the debts and other liabilities it incurs are backed by the guarantee of the Spanish government. In addition, ICO's bylaws

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[1] A small percentage of ICO's swap transactions might not qualify as hedging transactions. However, currently the overwhelming majority of its transactions are for hedging purposes and its obligations under all transactions are in any event fully guaranteed by the Spanish government.

[2] We note that as the margin regulation proposals are the same with regard to this issue in both the Prudential Regulators' Proposed Rule and the Commodity Futures Trading Commission ("CFTC") rule proposal (Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 79 Fed. Reg. 59898 (Oct. 3, 2014)), ICO intends to submit this comment in response to both proposals for consideration.

[3] *See* Article 1 of ICO's bylaws, approved by Royal Decree 706/1999, of 30 april, adapting Instituto de Crédito Oficial to Act 6/1997, of 14 April, on Organisation and Operation of the State General Administration, and approving its Bylaws.

state that debts incurred by ICO when raising funds, performed outside the national territory and for non-residents, will be subject to the same fiscal regime as sovereign Spanish debt. [4]

The public mandate of ICO is to support and promote economic activities that contribute to growth and improvement as well as the distribution of national wealth. In its role as a credit institution, ICO acts both as a direct lender for large public and private investment projects by Spanish companies acting within Spain or in other countries, as well as a financing entity for small and medium sized companies and self-employed workers, through loans granted by private lenders (consisting of Spanish banks), in particular, financing activities that, due to their focus on social, cultural, environmental or innovative aspects of Spanish society, warrant support. In its role as a state financial agency, ICO provides financing in certain stress scenarios, such as following a natural disaster or economic crisis, at the direction of the Spanish government.[5]

III. Use of Swaps by ICO

In connection with the activities described above, ICO currently utilizes swaps primarily for hedging purposes. Specifically, ICO manages interest rate and currency risk exposures created through its financing and lending activities by entering into interest rate and currency swaps with a variety of major financial institutions, including U.S. entities that are registered or will be required to register as Swap Entities and which are subject to the regulations and oversight of the Prudential Regulators. ICO does not currently engage in dealing with U.S. counterparties that are not registered Swap Entities subject to supervision by U.S. government entities (i.e. the Prudential Regulators, the Commodity Futures Trading Commission or the Securities and Exchange Commission).

IV. Exemption from Margin Requirements for Entities Such as ICO

The Dodd-Frank Act 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

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[4] According to the article 24.2 of ICO's bylaws, debts and obligations that may be incurred by ICO when raising funds will benefit, as it concerns third parties, from the guarantee of the Spanish government. Such guarantee is explicit, irrevocable, unconditional and direct. *See also* article 24.6 of ICO's bylaws.

[5] According to its bylaws, a function of ICO is to ameliorate the negative economic effects of situations of severe economic crisis, natural catastrophes or other similar events and to take action pursuant to instructions from the Council of Ministers or the Government's Delegate Commission for Economic Affairs. Further, ICO is tasked to act as the instrument for the implementation of certain economic policy measures, following the fundamental guidelines establishked by the Council of Ministers, the Government's Delegate Commission for Economic Affairs or the Ministry of Economy and Competitiveness, and subject to the rules and decisions approved thereto by ICO's General Board. However, according to article 2 of ICO's bylaws, it shall act with full respect towards the principles of financial equilibrium and adaptation of means to purposes.

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 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 Commodity Exchange Act ("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." 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 in the Proposed Rule, this exclusion for sovereigns 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").[6]

As noted above, in carrying out its mandates to sustain and promote economic activities that contribute to growth and to distribute national wealth, ICO currently engages in interest rate and currency swap transactions primarily for risk mitigation and hedging purposes. Absent clarification from the Prudential Regulators' in the final rule related to the margin regulations as to the status of entities such as ICO as either a "sovereign entity" or as otherwise not a "financial end user," ICO 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.

We do not believe that this result is appropriate or necessary. First, as noted above, ICO currently enters swaps for hedging purposes, rather than speculative purposes. In addition, the obligations of ICO are backed by the full guarantee of the Spanish government, such that any amounts that are owed and unpaid by ICO on its Swap positions would be covered entirely by the Spanish government. This "explicit, irrevocable, unconditional and direct" guarantee of Spain means that Swaps entered into by ICO do not pose the same

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

systemic risk concerns as other entities subject to margin requirements. Furthermore, if ICO were to become subject to the margin requirements described herein, it would introduce significant burdensome costs and operational inefficiencies and would likely deter ICO from entering into transactions with U.S. counterparties, while not decreasing systemic risk or protecting market participants. For these reasons, ICO should not be subject to the margin requirements. In addition, the final margin rules should make clear that ICO's swap counterparties are not subject to the margin requirements in connection with Swaps entered into with ICO. Indeed, a contrary outcome would bring about the cost and administrative burden that the Proposed Rule seeks to avoid, with no enhancement of systemic risk protections.

We note that, in the Proposed Rule, the Prudential Regulators indicate a desire to harmonize or be consistent with many aspects of the international framework for margin requirements finalized by BCBS and IOSCO, and an interpretation that ICO is considered a "sovereign entity" would be consistent with that framework. With regard to evaluating public sector entities ("PSEs") (such as ICO), 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 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." Pursuant to this directive, ICO should be considered a sovereign entity and should be exempted from the margin requirements.

We also note that, in related regulatory contexts, the 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. The CFTC further determined that, for this purpose, the term "foreign government" includes KfW, a German entity that is substantially similar to ICO.[7] The CFTC in these contexts took into account the non-profit, public sector status of KfW, as well as its mandate to serve a public purpose and the full, explicit and statutory guarantee provided to it by the German federal government, in stating that KfW was considered a "foreign government." Moreover, the exemption from the swap clearing requirement is only available to entities that are not "financial entities;" in other words, it applies only to non-financial entity end-users. By including entities such as KfW and ICO within the exemption from the clearing requirement, therefore, the CFTC has in effect determined to treat such entities as non-financial entity end-users. The characteristics of KfW relied upon by the CFTC are substantially identical to those of ICO. Even if it is determined that ICO is not within the definition of "sovereign entity" under the Proposed Rule, we believe that ICO, and other entities that are substantially identical to KfW in the respects noted above, should similarly be considered non-financial end-users for purposes of the Proposed Rule.

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[7] 77 Fed. Reg. 30596, 30692 n.1178 (May 23, 2012); 77 Fed. Reg. 42560, 42561 n.12 (July 19, 2012).

Further, other U.S. and non-U.S. governmental entities have recognized ICO's status as a sovereign entity. In particular, as an integral part or controlled entity of the government of Spain, ICO is exempt from (i) U.S. federal income tax withholding to the extent allowed under Section 892 of the Internal Revenue Code of 1986, as amended (the "Code) and (ii) the requirements of Sections 1471-1474 of the Code ("FATCA"), as modified by the Agreement Between the United States of America and the Kingdom of Spain to Improve International Tax Compliance and To Implement FATCA (the "IGA"). The IGA explicitly exempts ICO due to its status as a "governmental entity."[8] The European Union has also exempted ICO from the Capital Requirements Directive and from the Bail In Directive, an exemption also granted to KfW and other similar entities, and therefore (among other consequences) ICO is not subject to the recovery proceedings, resolution proceedings or any other proceedings whose effects are similar to bankruptcy stated for credit institutions which are not sovereign entities.[9] We believe these actions support the treatment of ICO as a sovereign entity for purposes of the Proposed Rule.

Taking into consideration ICO's status as a public-sector entity, its mandate to serve a public purpose, its use of Swaps primarily for hedging and risk mitigation purposes and the full support for any losses by the explicit guarantee of the Spanish government, we believe ICO and similar entities are properly encompassed within the definition of "sovereign entities." However, this is not made express in the release and we therefore believe that a further interpretation or clarification of this issue would be helpful, and perhaps necessary. Accordingly, we respectfully request that the Prudential Regulators confirm this understanding in the final rule. In the alternative, even if the Prudential Regulators determine that such clarification is not warranted, we request that the Prudential Regulators clarify in the final rule that ICO, and entities like ICO, are explicitly excluded from the definition of "financial end user." Both of these interpretations would align with the prior understandings of the CFTC in similar contexts as well as the BCBS and IOSCO international framework and the views in other contexts of U.S. and foreign regulatory bodies, and would provide clarity that the Prudential Regulators do not believe it is an "appropriate" result to require that entities such as ICO post or collect margin on their Swap transactions, given the minimal level of systemic risk posed by ICO's involvement in such transactions. Such an exemption from margin requirements on uncleared Swaps would not be inconsistent with the principles established in Dodd-Frank guiding the Prudential Regulators' rulemaking and would allow ICO to carry out its public purpose mandate to sustain and promote economic activities that contribute to growth as and distribute national wealth without facing unnecessary costs and inefficiencies.

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8 *See* IGA, *available at:* http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Spain-5-14-2013.pdf

9 *See* the article 2, Subsection 1(2) of the Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 (the "Bail In Directive") in connection with the Article 2, Subsection 5 of the Directive 2013/36/EU of the European Parliament and of the Counsel of 26 June 2013 (the "Capital Requirements Directive"), *available at:* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:176:0338:0436:EN:PDF.

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

Sincerely,

Instituto de Crédito Oficial

Name: IDOYA ARTEAGABEITIA
Title: HEAD LEGAL DEPARTMENT