



## U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Clearing and Risk

Jeffrey M. Bandman  
Acting Director

CFTC Letter No. 16-05  
No-Action; Exemption  
February 1, 2016  
Division of Clearing and Risk

Mr. Thomas Book, Chief Executive Officer  
Mr. Oliver Haderup, Executive Director  
Eurex Clearing AG  
Mergenthalerallee 61  
65760 Eschborn, Germany

Re: Request of Eurex Clearing AG for No-Action Relief from the Written Acknowledgment Requirements of Commission Regulation 22.5 and for Exemptive Relief from Commission Regulation 1.49(d)(3)

Dear Mr. Book and Mr. Haderup:

This is in response to your letter dated August 4, 2015 (“Letter”), to the Division of Clearing and Risk (“Division”) of the Commodity Futures Trading Commission (the “Commission”). In the Letter, you request that the Division confirm that it will not recommend that the Commission take enforcement action against Eurex Clearing AG (“Eurex Clearing”) for failing to obtain, or provide the Commission with, an executed version of the template acknowledgment letter set forth in Appendix B to Regulation 1.20 (“Template Acknowledgment Letter”), as required by Regulation 22.5, for customer accounts maintained at the Deutsche Bundesbank (“Bundesbank”). You additionally request that the Division grant exemptive relief from Regulation 1.49(d)(3)(i), with respect to Eurex Clearing’s holding of customer funds in the Bundesbank, which is not a qualified depository for customer funds under the regulation.

### **I. No-Action Relief from the Written Acknowledgment Requirements of Commission Regulation 22.5**

Regulation 22.5 requires, among other things, that a derivatives clearing organization (“DCO”) obtain an acknowledgment letter from each depository with which the DCO deposits cleared swaps customer funds.<sup>1</sup> Specifically, Regulation 22.5(a) provides that,

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<sup>1</sup> See Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations, 78 Fed. Reg. 68,506 (Nov. 14, 2013).

before depositing cleared swaps customer funds with a depository, a DCO must obtain and retain in its files a written acknowledgment letter from the depository “in accordance with [Regulation] 1.20 . . . , with all references to ‘Futures Customer Funds’ modified to apply to Cleared Swaps Customer Collateral, and with all references to section 4d(a) or 4d(b) of the [Commodity Exchange] Act [“CEA”] and the regulations thereunder modified to apply to section 4d(f) of the [CEA] and the regulations thereunder.”

Eurex Clearing was recently granted by the Commission an order of registration as a DCO under Section 5b of the CEA. In anticipation of its registration, Eurex Clearing had requested that the Bundesbank provide an acknowledgment letter for customer funds that Eurex Clearing will deposit with the Bundesbank. As discussed below, however, the Bundesbank is a central bank and has proposed to execute with Eurex Clearing the Template Acknowledgment Letter modified in certain respects relative to the operations of a central bank (“Bundesbank Acknowledgment Letter”).

#### A. Statement of Facts

The Division understands the relevant facts to be as follows:

In addition to its registration with the Commission as a DCO, Eurex Clearing is an authorized clearing house in Germany in accordance with the European Market Infrastructure Regulation and subject to the direct supervisory oversight of the Federal Financial Supervisory Authority (BaFin).

The Bundesbank is the central bank of the Federal Republic of Germany. It is governed by an Executive Board which is appointed by the President of the Federal Republic of Germany. The President, the Vice-President, and one other member are nominated by the Federal Government; the other three members are nominated by the Bundesrat (the upper house of Parliament representing the Federal States) in agreement with the Federal Government. As the central bank of Germany, Bundesbank is part of the European System of Central Banks.<sup>2</sup>

Under its governing statute, the Bundesbank’s capital (which is owned by Germany) is set at 2.5 billion euros. Bundesbank currently has a balance sheet total of over 770,000 million euro and foreign reserve assets of over 158.7 billion euro.<sup>3</sup>

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<sup>2</sup> See Bundesbank Act, *Gesetz über die Deutsche Bundesbank*, in the wording of the announcement of 22 October 1992 (Federal Law Gazette I (*Bundesgesetzblatt I*), page 1782) available at: [http://www.bundesbank.de/Redaktion/EN/Downloads/Bundesbank/Tasks\\_and\\_organisation/bundesbank\\_act.pdf?\\_\\_blob=publicationFile](http://www.bundesbank.de/Redaktion/EN/Downloads/Bundesbank/Tasks_and_organisation/bundesbank_act.pdf?__blob=publicationFile) (the “Bundesbank Act”).

<sup>3</sup> See [http://www.bundesbank.de/Navigation/EN/Bundesbank/Tasks\\_and\\_organisation/The\\_Bundesbank\\_key\\_figures/the\\_bundesbank\\_key\\_figures.html](http://www.bundesbank.de/Navigation/EN/Bundesbank/Tasks_and_organisation/The_Bundesbank_key_figures/the_bundesbank_key_figures.html).

By statute, the Bundesbank's objectives include maintaining price stability, holding and managing the foreign reserves of Germany, and operating domestic and cross-border payment systems. It also is authorized by statute to contribute to the stability of payment and clearing systems. In addition, it is authorized to participate in the Bank for International Settlements and may participate, as authorized, in other organizations which serve the purposes of supranational monetary policy or international payment and lending operations.<sup>4</sup>

Eurex Clearing seeks to maintain accounts at the Bundesbank in which Eurex Clearing would hold cleared swaps customer funds. As noted above, Eurex Clearing must obtain an acknowledgment letter from the Bundesbank for each such account. The Bundesbank has indicated to Eurex Clearing that it must execute the Bundesbank Acknowledgment Letter for these accounts.

B. Discussion of Request for No-Action Relief and Applicable Legal Requirements

The Bundesbank is the central bank of Germany, a money center country, which the Commission has recognized as a permissible location for a depository holding customer funds.<sup>5</sup> As a central bank, the Bundesbank's provision of account services to Eurex Clearing is distinguishable from the provision of account services by a commercial bank. In adopting the Template Acknowledgment Letter requirements, the Commission explicitly recognized the "unique role" of the Federal Reserve Bank in excluding Federal Reserve Banks, when providing account services, from the requirement that depositories accepting customer funds from DCOs execute a Template Acknowledgment Letter.<sup>6</sup> In this regard, under Regulation 1.20(g)(4)(ii), a Federal Reserve Bank acting as a depository for customer funds need only provide "a written acknowledgment that (A) The Federal Reserve Bank was informed that the customer funds deposited therein are those of customers . . . and are being held in accordance with the provisions of section 4d of the [CEA] and Commission regulations thereunder; and (B) The Federal Reserve Bank agrees to reply promptly and directly to any request from [Commission staff] for confirmation of account balances or provision of any other information regarding or related to an account."<sup>7</sup>

Due to certain favorable policy considerations, both Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") and the CPSS-IOSCO

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<sup>4</sup> Bundesbank Act.

<sup>5</sup> Regulation 1.49(c)(1)(ii) provides that customer funds may be held in a depository located in a money center country, which is defined to include Germany. *See* Regulation 1.49(a)(1) (defining "money center country").

<sup>6</sup> *See* 78 Fed. Reg. at 68,535.

<sup>7</sup> 17 C.F.R. § 1.20(g)(4)(ii).

Principles for Financial Market Infrastructures (“PFMIs”) support central banks acting as depositories for customer funds.<sup>8</sup> In addition, the Bundesbank, in its capacity as a central bank for a money center country, does not present the same types of risks as traditional commercial banks, as it serves in the public interest and operates with the goal of maintaining stability in the financial markets. Further, deposits at a central bank have the lowest credit risk and are the source of liquidity with regard to their currency of issue.<sup>9</sup> Therefore, Eurex Clearing would face much lower credit and liquidity risk with a deposit at the Bundesbank than it would with a deposit at a commercial bank. Thus, granting the relief requested is appropriate to permit Eurex Clearing to maintain customer accounts at the Bundesbank.

In addition, the Commission had contemplated the possibility that foreign depositories might require modifications to the Template Acknowledgment Letter in certain situations, in which case “the Commission would consider alternative approaches, including no-action relief, on a case-by-case basis.”<sup>10</sup> In this regard, the Division previously has granted no-action relief to DCOs in connection with the holding of customer funds at the Bank of England.<sup>11</sup> In light of the above, the Division believes it is appropriate to permit the use of the Bundesbank Acknowledgment Letter, set forth in an attachment to this letter.

### C. Terms and Conditions set forth in the Bundesbank Acknowledgment Letter

The Bundesbank Acknowledgment Letter incorporates provisions of the Template Acknowledgment Letter and the written acknowledgment requirements applicable to Federal Reserve Banks set forth in Regulation 1.20(g)(4)(ii), and includes certain provisions that are specific to the customer accounts maintained at the Bundesbank. The terms of the Bundesbank Acknowledgment Letter also are in accordance with those of the letters executed by the Bank of England pursuant to previously granted no-action relief by the Division.<sup>12</sup> Specifically, paragraph 1 of the Bundesbank Acknowledgment Letter identifies the subject matter of the letter and makes no substantive change to the first paragraph of the Template Acknowledgment Letter.

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<sup>8</sup> The PFMIs are a set of international risk management standards for financial market infrastructures, including DCOs, which have been adopted and implemented by many jurisdictions.

<sup>9</sup> See PFMIs, ¶ 3.9.3 (noting that “[c]entral banks have the lowest credit risk and are the source of liquidity with regard to their currency of issue”); see also PFMIs, Key Consideration 8 (specifying that a financial market infrastructure “with access to central bank accounts, payment services, or securities services should use these services, where practical, to enhance its management of liquidity risk,” which is consistent with the standards set forth in section 806(a) of the Dodd-Frank Act, authorizing accounts at a Federal Reserve Bank for designated financial market utilities). See 12 U.S.C. § 5465(a).

<sup>10</sup> 78 Fed. Reg. at 68,536.

<sup>11</sup> See CFTC Letters No. 14-123 (Oct. 8, 2014), and 14-124 (Oct. 8, 2014) (granting relief to ICE Clear Europe Limited and LCH.Clearnet Limited, respectively, permitting the use of a modified acknowledgment letter for customer accounts maintained at the Bank of England).

<sup>12</sup> *Id.*

Paragraphs 2 and 3 of the Bundesbank Acknowledgment Letter together fulfill the requirements of Commission Regulation 1.20(g)(4)(ii)(A), which is applicable to acknowledgment letters obtained from a Federal Reserve Bank. Specifically, the paragraphs state that Eurex Clearing has informed the Bundesbank that it has opened the account for the purpose of depositing customer funds, as required by Commission regulations, and that the Bundesbank has confirmed that the deposited funds will be treated in accordance with Commission regulations.

Paragraph 4 of the Bundesbank Acknowledgment Letter refers to a provision in the terms and conditions governing Eurex Clearing's account(s) at the Bundesbank ("Account Agreement") in which the Bundesbank waived its right of set off against the account. This provision addresses the concerns addressed by paragraph 3 of the Template Acknowledgment Letter.

Consistent with paragraph 4 of the Template Acknowledgment Letter and Regulation 1.20(g)(4)(ii)(B), paragraph 5 of the Bundesbank Acknowledgment Letter provides that the Bundesbank will, "as soon as reasonably practicable," reply to any request for confirmation of account balances or provision of any other information regarding or related to the account from the Division or the Division of Swap Dealer and Intermediary Oversight. This provision deviates from the language of Regulation 1.20(g)(4)(ii)(B) in one respect, *i.e.*, the Bundesbank is to provide a response "as soon as reasonably practicable" rather than "promptly." This change is intended to take into account such circumstances as differences between time zones and German bank holidays which could impact the timing of the Bundesbank's response.

Paragraph 6 of the Bundesbank Acknowledgment Letter is derived from paragraph 6 of the Template Acknowledgment Letter, in that Eurex Clearing will not hold the Bundesbank responsible for acting pursuant to Commission inquiries in paragraph 5. Finally, paragraph 7 of the Bundesbank Acknowledgment Letter clarifies that except for the Bundesbank's commitment to respond to Commission inquiries in paragraph 5, the Bundesbank Acknowledgment Letter is not intended to amend the Account Agreement. This provision also acknowledges that the Bundesbank is not making any representations as to Eurex Clearing's representations in the Bundesbank Acknowledgment Letter, *e.g.*, the funds in the account are customer funds and Eurex Clearing is treating them in accordance with Section 4d of the CEA.

#### D. Grant of No-Action Relief

Based on the facts presented and the representations Eurex Clearing has made, the Division will not recommend that the Commission take enforcement action against Eurex Clearing for executing, and submitting to the Commission, the Bundesbank Acknowledgment Letter, in place of the Template Acknowledgment Letter.

The position taken herein concerns enforcement action only and does not represent a legal conclusion with respect to the applicability of any provision of the CEA or the Commission's regulations. As with all no-action relief, the Division retains the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of the no-action relief provided herein, in its discretion.

## **II. Exemptive Relief from the Requirements of Commission Regulation 1.49(d)(3)**

As previously noted, Eurex Clearing has requested that the Division grant exemptive relief to permit Eurex Clearing to hold customer funds at the Bundesbank. Regulation 1.49(d)(3) provides that, in order to hold customer funds with a depository located outside of the United States, the depository must be: (i) a bank or trust company that has in excess of \$1 billion of regulatory capital, (ii) a registered futures commission merchant, or (iii) a DCO.<sup>13</sup> The Division finds that Regulation 1.49(d)(3)(i) unintentionally precludes the Bundesbank from acting as a depository for customer funds, notwithstanding that it is a central bank for a money center country, because the Bundesbank cannot satisfy the regulatory capital requirement. Nonetheless, based on the following analysis, the Division is granting an exemption to Eurex Clearing from the requirements of Regulation 1.49(d)(3).<sup>14</sup>

In adopting Regulation 1.49, the Commission sought to address the various types of risks that arise in the context of holding customer funds with a depository. In requiring that a non-U.S. bank or trust company have at least \$1 billion in regulatory capital, the Commission sought to ensure that customer funds would not be deposited with a small commercial bank or trust company, which, because of its size, would be unlikely to have the financial or operational resources to adequately administer customer accounts. The \$1 billion regulatory capital requirement, therefore, serves as a proxy for a bank or trust company's suitability as a depository for customer funds, both in terms of financial strength and operational sophistication. While the Bundesbank has adequate financial and operational resources to properly handle customer funds, it does not technically satisfy the \$1 billion *regulatory* capital requirement. Regulatory capital consists of the capital required pursuant to a depository's regulatory regime, and is typically composed of Tier 1 capital (*i.e.*, common stock). Unlike commercial banks, central banks, like the Bundesbank, are not held to regulatory capital requirements. Therefore, because the Bundesbank does not, by definition, satisfy the requirements of Regulation 1.49(d)(3)(i), the Division finds that an exemption is appropriate to address the preclusive effect of the regulation's plain meaning.

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<sup>13</sup> 17 C.F.R. § 1.49(d)(3).

<sup>14</sup> The Division has provided a similar exemption to the Bank of England. *See* CFTC Letters No. 14-123 (Oct. 8, 2014), and 14-124 (Oct. 8, 2014) (granting relief to ICE Clear Europe Limited and LCH.Clearnet Limited, respectively, permitting the Bank of England to act as a depository of customer funds).

The Division notes that Section 4d of the CEA, which establishes segregation requirements for futures and cleared swaps customer funds, similarly refers to “a bank or trust company” or “any depository institution,” without distinguishing between a commercial or central bank, a large or small depository, or a depository located in the United States or in a foreign country.<sup>15</sup> In addition, Regulation 1.49(c)(1)(ii) permits customer funds to be held in a depository located in Germany.<sup>16</sup> Section 4d of the CEA and Regulation 1.49(c)(1)(ii) can be read to permit the Bundesbank to act as a depository for customer funds; however, Regulation 1.49(d)(3)(i), in its reference to *regulatory* capital, precludes the Bundesbank in this regard.

As discussed in greater detail above, there are distinct financial safeguards afforded by holding customer funds at the Bundesbank, as a central bank for a money center country, that merit an exemption in this regard.<sup>17</sup> Based on the foregoing, pursuant to delegated authority from the Commission, the Division hereby grants an exemption to Eurex Clearing from the requirements of Regulation 1.49(d)(3) to permit Eurex Clearing to hold customer funds at the Bundesbank. The Division believes that granting the relief would not be contrary to the public interest or to the purposes of Regulation 1.49(d)(3).

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<sup>15</sup> 7 U.S.C. § 6d. Additionally, Title VIII of the Dodd-Frank Act, in permitting systemically important DCOs to deposit customer funds at Federal Reserve Banks, thereby subjects the Federal Reserve Banks to compliance with the segregation requirements of Section 4d of the CEA. *See* Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>16</sup> *See* note 5 above.

<sup>17</sup> *See* discussion above in Part I.B. (emphasizing the favorable policy considerations of holding customer funds at a central bank, as supported by Title VIII of the Dodd-Frank Act and the PFMI). Regulation 1.49(d)(3) has not been updated to align with Title VIII of the Dodd-Frank Act nor with the standards set forth in the PFMI.

Mr. Thomas Book  
Mr. Oliver Haderup  
February 1, 2016  
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### **III. Conclusion**

This letter is based upon the representations of Eurex Clearing and applicable laws and regulations in their current form; any new, different, or changed material facts or circumstances might render this letter void. Moreover, this letter represents the position of the Division only and does not necessarily represent the views of the Commission or those of any other division or office of the Commission. Should you have any questions, please do not hesitate to contact Michael Margolis, Special Counsel, at (312) 596-0576.

Sincerely,

Jeffrey M. Bandman  
Acting Director

Attachment

**Attachment A—Form of Acknowledgement Letter from Deutsche Bundesbank.**

*[Please note that “Eurex wegen US-Swap-Kunden” in English reads as “Eurex U.S. Swap Customers.”]*

**Eurex / Deutsche Bundesbank**

**Acknowledgment Letter regarding Account for Swap Settlement of Eurex Clearing**

1. We refer to the Segregated Account which Eurex Clearing AG ("we" or "our") have opened with Deutsche Bundesbank ("you" or "your") entitled: "*Eurex wegen US-Swap-Kunden*" (the "Account").
2. We have informed you that we have opened the above-referenced Account for the purpose of depositing money (collectively the "Funds") of customers who trade commodities, options, swaps, and other products, as required by Commodity Futures Trading Commission ("CFTC") Regulations, including Regulation 22.5, as amended.
3. You have confirmed that the Funds held by you, hereafter deposited in the Account or accruing to the credit of the Account, will be separately accounted for and segregated on your books from our own funds and from any other funds or accounts held by us (which we have informed you is required pursuant to the provisions of the Commodity Exchange Act, as amended (the "Act"), and Part 22 of the CFTC's regulations, as amended). We have informed you that we will otherwise treat the Funds in accordance with the provisions of Section 4d of the Act and CFTC regulations thereunder.
4. You have also agreed to waive, in respect of the Account, your rights of set off by a legally binding provision which has the effect of providing that, notwithstanding any provision of the terms and conditions governing the Account (the "Terms and Conditions"), you waive, in respect of the Account, your rights of set off arising under the Terms and Conditions.
5. You agree to reply as soon as reasonably practicable and directly to any request for confirmation of account balances or provision of any other Information regarding or related to the Account from the director of the Division of Clearing and Risk of the CFTC or the director of the Division of Swap Dealer and Intermediary Oversight of the CFTC, or any successor divisions, or such directors' designees, and this letter constitutes the authorization and direction of the undersigned on our behalf to release the requested information without further notice to or consent from us. The requests have to be addressed to your contact information provided below.
6. We have informed you that we will not hold you responsible for acting pursuant to any information request from the director of the Division of Clearing and Risk of the CFTC or the director of the Division of Swap Dealer and Intermediary Oversight of the CFTC, or any successor divisions, or such directors' designees.

7. Except with respect to paragraphs 4 and 5 above, this letter is not intended to amend the Terms and Conditions for the Account. For the avoidance of doubt, you provide no opinion on or agreement with information we have provided to you in this letter, including with respect to matters of U.S. law.

ACKNOWLEDGED

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Eurex Clearing AG  
Eschborn, DD.MM.YYYY

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Deutsche Bundesbank  
Frankfurt, DD.MM.YYYY

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Contact Information

Eurex Clearing AG  
Nnnn

Deutsche Bundesbank  
*Z 11 oder T2Servicedesk*