

**CFTC Letter No. 98-01****January 7, 1998****Division of Trading & Markets****Re: Eligible Swaps Participants Pursuant to Part 35**

Dear :

This is in response to your letter dated October 16, 1997, to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"). By your correspondence, you inquire on behalf of "X" about any constraints that exist for United States persons that qualify as "Eligible Swaps Participants" ("ESPs") who enter into swap agreements in the OTC swaps markets with non-U.S. financial institutions.

Part 35 of the Commission's regulations provides an exemption for swap agreements which meet the requirements set forth therein from all provisions of the Commodity Exchange Act ("Act")<sup>1</sup> and regulations issued thereunder<sup>2</sup>, with the exception of Sections 2(a)(1)(B), 4b, 4o, 6(c), 9(a)(2) and Rule 32.9. Specifically, Part 35 requires that: (1) all participants to the swap agreement must qualify as ESPs as defined in Rule 35.1(b)(2); (2) the swap agreement must not be part of a fungible class of agreements that are standardized as to their material economic terms; (3) the creditworthiness of any party having an actual or potential obligation under the swap agreement would be considered to be a material factor in entering into or determining the terms of the swap agreement, including price terms, etc.; and (4) the swap agreement is not entered into and traded on or through a multilateral transaction execution facility.

In response to your question concerning transactions between U.S. ESPs and non-U.S. financial institutions, as long as both parties qualify as ESPs and all of the other above mentioned conditions have been met, the swap agreement would qualify for treatment under Part 35. However, if the non-U.S. financial institution is not an ESP as defined in Part 35.1(b)(2) and/or any of the above mentioned conditions have not been met, then the U.S. ESP could not claim the exemptive relief provided by Part 35.

Should you have any questions concerning this correspondence, please do not hesitate to contact me or Charles O'Brien, an attorney on my staff, at (202) 418-5450.

Sincerely,

I. Michael Greenberger

Director

<sup>1</sup> 7 U.S.C. § 1 *et seq.* (1994).

<sup>2</sup> Commission rules referred to herein are found at 17 C.F.R. Ch. I (1997).