U.S. COMMODITY FUTURES TRADING COMMISSION
Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581
www.cftc.gov

Market Participants
Division

Thomas J. Smith
Acting Director

Re: Exception to Statutory Disqualification Condition of CFTC Staff Letter No. 12-70 Regarding Affiliate Support Activities of UBS Europe SE[1]

Ladies and Gentlemen:

This letter is in response to your request to the Market Participants Division ("**MPD**") of the U.S. Commodity Futures Trading Commission ("**Commission**" or "**CFTC**") on behalf of UBS Europe SE ("**UBS ESE**") for a no-action letter such that, if UBS ESE engages in any Affiliate Support Activities (as defined below) on behalf of its affiliate UBS AG, MPD will not recommend an enforcement action against UBS ESE or any of its employees for failure to register as an introducing broker ("**IB**") or a commodity trading advisor ("**CTA**") as required under Sections 4d(g) or 4m of the Commodity Exchange Act ("**CEA**"),[2] respectively, based solely on the fact that UBS ESE is subject to statutory disqualification under CEA Section 8a[3] due to certain regulatory actions described below, provided that UBS ESE otherwise complies with the conditions set forth in CFTC Staff Letter No. 12-70.[4, 5]

I. Statutory and Regulatory Background

Section 4d(g) of the CEA provides that it is unlawful for any person to be an IB unless such person has registered with the Commission as an IB and such registration has not expired or been

[1] This letter contains one or more collections of information under Office of Management and Budget ("**OMB**") number 3038-0049. No person is required to respond to a request for information unless a valid OMB number is displayed.

[2] 7 U.S.C. §§ 6d(g) and 6m.

[3] 7 U.S.C. § 12a.

[4] CFTC Staff Letter No. 12-70 (Dec. 31, 2012), available at http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/12-70.pdf.

[5] This is the first such request for UBS ESE.

suspended or revoked. Section 1a(31) of the CEA,[6] as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("**Dodd-Frank Act**"),[7] and Commission Regulation 1.3[8] define the term, "introducing broker," subject to certain exceptions, to include, *inter alia*, any person who is engaged in soliciting or accepting orders for the purchase or sale of any swap, provided that such person does not accept any money, securities, or property to margin, guarantee, or secure any trades or contracts that result or may result therefrom.

Section 4m of the CEA provides that, subject to certain exceptions, it shall be unlawful for any CTA, unless registered under the CEA, to make use of the mails or any means or instrumentality of interstate commerce in connection with its business as such. Section 1a(12) of the CEA,[9] as amended by the Dodd-Frank Act, and Commission Regulation 1.3 define the term, "commodity trading advisor," subject to certain exceptions, to include, *inter alia*, any person who, for compensation or profit, engages in the business of advising others as to the value of or advisability of trading in any swap. Commission Regulation 4.6,[10] among other things, excludes from the definition of CTA a registered swap dealer ("**SD**") and its employees and principals where the commodity interest and swap advisory activities of the SD are solely incidental to the conduct of its business as an SD. Commission Regulation 4.14[11] exempts from CTA registration a registered IB whose trading advice is performed solely in connection with its business as an IB.

Following implementation of the foregoing amendments to the IB and CTA definitions, the CFTC's Division of Swap Dealer and Intermediary Oversight ("**DSIO**")—MPD's predecessor—received various registration no-action requests from affiliates of SDs who are not registered with the Commission in any capacity ("**Agent Affiliates**").

The requests stated, in pertinent part, that SDs may deal in swaps through multiple affiliates, such that employees of an Agent Affiliate may engage in certain activities in support of an affiliated SD (an "**Affiliate SD Counterparty**") in connection with a swap transaction to be entered by an Affiliate SD Counterparty. These activities may include soliciting, negotiating, structuring, recommending, and/or accepting as agent, swap transactions on behalf of the Affiliate SD Counterparty. Agent Affiliates may receive compensation from an Affiliate SD Counterparty for services performed by their employees by way of cost and/or revenue allocation arrangements. Because the Agent Affiliates act only on behalf of Affiliate SD Counterparties that are already regulated by the Commission and not unaffiliated third-parties, the Agent Affiliates argued that IB and CTA registration was unnecessarily burdensome and requested a no-action position relating to the IB and CTA registration requirements.

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[6] 7 U.S.C. § 1a(31).

[7] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed through the website of the Commission, www.cftc.gov.

[8] 17 C.F.R. § 1.3.

[9] 7 U.S.C. § 1a(12).

[10] 17 C.F.R. § 4.6(a)(3).

[11] 17 C.F.R. § 4.14.

In response to these requests, DSIO issued CFTC Staff Letter No. 12-70, stating that it would not recommend that the Commission commence an enforcement action against an Agent Affiliate or any employee thereof for failure to register as an IB or a CTA if such Agent Affiliate engages in soliciting, negotiating, structuring, recommending, and/or accepting as agent, swap transactions on behalf of an Affiliate SD Counterparty (the "**Affiliate Support Activities**"), subject to the following conditions:

- The Agent Affiliate is registered or licensed with, or subject to regulation by, a financial service, prudential, or banking regulator (including a self-regulatory organization) in specified jurisdictions (the "**Regulated Entity Condition**");

- The Agent Affiliate and the Affiliate SD Counterparty are "majority-owned affiliates" as described in paragraph (6)(i) of the definition of "swap dealer" in Commission Regulation 1.3;

- The Agent Affiliate, the employee, and any person in the supervisory chain of command of the employee, are not subject to statutory disqualification under Sections 8a(2) or 8(a)(3) of the CEA (the "**Statutory Disqualification Condition**");

- The Agent Affiliate and the employee provide commodity interest trading advice in a manner solely incidental to the conduct of the business of the Agent Affiliate for which it is subject to regulation under the Regulated Entity Condition and are not engaged in any activity other than the Affiliate Support Activities that would require registration as an IB, CTA or associated person ("**AP**")[12] thereof;

- The Agent Affiliate and the Affiliate SD Counterparty execute in writing an undertaking by which they each agree to be jointly and severally liable for any violation of the CEA or Commission Regulations by any employee of the Agent Affiliate engaged in any Affiliate Support Activity on behalf of the Affiliate SD Counterparty, and the Agent Affiliate consents to the jurisdiction of the Commission to investigate and take enforcement action against the Agent Affiliate or any employee thereof engaged in any Affiliate Support Activity on behalf of the Affiliate SD Counterparty for any violation of the CEA or Commission Regulations by such employee (the "**Joint Liability Undertaking**"); and

- The Affiliated SD Counterparty maintains the Joint Liability Undertaking at its main business office and in accordance with Commission Regulation 1.31.[13]

[12] An "associated person" includes generally any natural person who is associated in certain capacities with an IB or CTA and is engaged in the solicitation or acceptance of customer accounts or the solicitation of a client's or prospective client's discretionary account, respectively, and any person supervising any person so engaged. *See* 17 C.F.R § 1.3.

[13] 17 C.F.R. § 1.31.

II. UBS ESE's Request and Representations

UBS ESE wishes to rely on CFTC Letter No. 12-70 to engage in Affiliate Support Activities on behalf of UBS AG, but it believes that it may be subject to a statutory disqualification under Section 8a(2) and/or (3) of the CEA as a result of the Foreign Actions (defined below). Therefore, UBS ESE is requesting that MPD provide a no-action letter stating that, if UBS ESE engages in any Affiliate Support Activities on behalf of UBS AG in accordance with all the conditions set forth in CFTC Staff Letter No. 12-70 other than in relation to the Foreign Actions, MPD will not recommend an enforcement action against UBS ESE or any of its employees for failure to register as an IB or CTA as required under Sections 4d(g) or 4m of the CEA.

In connection with its request UBS ESE makes the following representations:

UBS ESE is a wholly owned indirect subsidiary of UBS Group AG.[14] It is a credit institution headquartered in Germany, subject to the supervision of the European Central Bank, with conduct, consumer protection, and anti-money laundering-related supervision by the German Federal Financial Supervisory Authority (the "**BaFin**") and supervisory support by the German Bundesbank. It maintains branch offices in various jurisdictions in Europe, including, as relevant to this request, Spain ("**UBS Spain**") and France ("**UBS France**"), and is subject to conduct supervision by authorities in all such jurisdictions. It is not registered, or required to be registered, with the Commission in any capacity; however, it is an exempt foreign firm under Commission Regulation 30.10.[15]

UBS AG is a wholly owned subsidiary of UBS Group AG and a global financial institution organized under the laws of Switzerland and licensed by the Swiss Financial Market Supervisory Authority. UBS AG is registered with the Commission as a SD and is also an exempt foreign firm under Commission Regulation 30.10. It has been registered or provisionally registered as an SD since December 31, 2012.

UBS ESE confirms that, other than with respect to its Affiliate Support Activities that do not require IB or CTA registration pursuant to Commission Regulations 3.10(c)(3) or (4),[16] respectively, all of the swaps for which it engages in Affiliate Support Activities on behalf of UBS AG will be executed in the name of, and booked at, UBS AG. UBS ESE will not accept any money, securities, or other property from swap counterparties or UBS AG in connection with such swap transactions to margin, guarantee, or secure the obligations of any such counterparty or UBS AG under any of the related swap transactions. Although all of UBS ESE's employees who would engage in Affiliate Support Activities on behalf of UBS AG will be located in the European Union, some counterparties to the swaps entered into by UBS AG and intermediated by UBS ESE may not be foreign located persons (as defined in Commission Regulation 3.10(c)(1)(ii)[17]).

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[14] UBS Group AG is a banking and financial services company formed under the laws of Switzerland.

[15] 17 C.F.R. § 30.10.

[16] 17 C.F.R. § 3.10(c)(3) and (4).

[17] 17 C.F.R. § 3.10(c)(1)(ii).

III. Regulatory Actions in Spain and France

As described by UBS ESE in its request, UBS ESE has been subject to certain regulatory proceedings in Spain and France; one occurring in a now-discontinued business line in Spain in 2017, one in France in 2019, and another in France in 2025 based on activities taking place many years before the regulatory judgment. None of the regulatory proceedings in Spain or France resulted in UBS ESE's loss of its regulatory license or registration and UBS ESE continues to operate in Spain and France. As a result of these regulatory actions related to UBS Spain and UBS France (collectively, the "**Foreign Actions**"), UBS ESE believes it may no longer be able to engage in Affiliate Support Activities on behalf of UBS AG in reliance on CFTC Letter No. 12-70 due to a potential failure to meet the Statutory Disqualification Condition.

IV. Mitigating Circumstances Raised by UBS ESE

UBS ESE believes that there are several mitigating circumstances with respect to the Foreign Actions that support MPD granting the requested no-action position.[18] First, UBS ESE notes that none of the Foreign Actions involved swaps activities of UBS ESE on behalf of UBS AG or otherwise. Second, the violation identified in the 2017 action in Spain relates solely to deficiencies in UBS ESE's then-existing policies, procedures, systems, and controls, not fraud, manipulation, or other intentional misconduct. Third, the two UBS France matters stem primarily from the misconduct of UBS France employees who are no longer employed with UBS France (or any other UBS affiliate) and relate to facts and circumstances that occurred more than 15 years ago, the nature of which was intensively contested over the course of years of advocacy and litigation. Fourth, UBS ESE had undertaken several remedial actions prior to the adverse findings in Spain, such that the Spanish regulator did not require further remediation.

V. Staff Position

Notwithstanding the Foreign Actions, MPD believes that a no-action position is warranted in light of the reasons articulated by UBS ESE above. Accordingly, MPD will not recommend that the Commission commence an enforcement action against UBS ESE or any employee of UBS ESE for failure to register as an IB or CTA as a result of engaging in Affiliate Support Activities (as defined in CFTC Staff Letter No. 12-70) on behalf of UBS AG if UBS ESE or an employee of UBS ESE complies with the following conditions:[19]

(1) UBS ESE is registered or licensed with, or subject to regulation by, the European Central Bank, the BaFin and the German Bundesbank;

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[18] UBS ESE notes that DSIO granted a no-action position to a petitioner under facts and circumstances that, they submit, were comparable to those presented here in issuing CFTC Staff Letter No. 19-21 (June 7, 2019), available at https://www.cftc.gov/csl/19-21/download.

[19] Conditions (1) through (5) mirror the ones in Part III of CFTC Staff Letter No. 12-70.

(2) Each of UBS ESE and UBS AG is a "majority-owned affiliate" of UBS Group AG as described in paragraph (6)(i) of the definition of "swap dealer" in Commission Regulation 1.3;

(3) Neither UBS ESE nor its employees engaged in Affiliate Support Activities on behalf of UBS AG are subject to a statutory disqualification under Section 8a(2) or (3) of the CEA, and no person in the supervisory chain of command of those relevant employees is subject to such a statutory disqualification, other than solely as a result of the Foreign Actions;

(4) Neither UBS ESE nor its employees are otherwise engaged in activity that would require registration as IBs, CTAs, or APs thereof;

(5) UBS ESE and UBS AG execute in writing an undertaking by which they each agree to be jointly and severally liable for any violation of the CEA or Commission Regulations by any employee of UBS ESE engaged in any Affiliate Support Activity on behalf of UBS AG; UBS ESE consents to the jurisdiction of the Commission to investigate and take enforcement action against UBS ESE or any employee of UBS ESE engaged in any Affiliate Support Activity on behalf of UBS AG for any violation of the CEA or Commission Regulations by such employee; and UBS AG maintains such undertakings at its main business offices and in accordance with Commission Regulation 1.31;

(6) UBS ESE develops, implements, and follows policies and procedures reasonably designed to monitor for and detect circumstances or events, including foreign regulatory actions, that might constitute a statutory disqualification of UBS ESE under Section 8a(2) or (3) of the CEA;

(7) Such circumstances or events are promptly escalated to appropriate personnel for a determination of whether such circumstance or event constitute a statutory disqualification under Section 8a(2) or (3) of the CEA; and

(8) If it is determined that UBS ESE may be subject to a statutory disqualification under Section 8a(2) or (3) of the CEA, other than solely as a result of the Foreign Actions, UBS ESE will promptly notify MPD staff and cease to rely on this letter.

Failure to comply with any of the conditions of this letter will automatically terminate the no-action position granted herein. MPD further wants to emphasize that this no-action position with respect to the Statutory Disqualification Condition only applies to UBS ESE and its employees in connection with the specific facts and circumstances outlined in this letter. MPD is not, with this letter, granting any other person a no-action position relating to the statutory or regulatory provisions governing persons who are subject to statutory disqualification.

This letter, and the position taken herein, represent the views of MPD only, and do not necessarily represent the position or view of the Commission or of any other office or division of the Commission This letter and the no-action position taken herein are not binding on the

Commission.[20] Further, this letter, and the position taken herein, are based upon the facts and circumstances presented to MPD staff. Any different, changed or omitted material facts or circumstances might render the position taken in this letter void. Finally, as with all staff letters, MPD retains the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of the position taken herein, in its discretion.

Should you have any questions, please contact Frank Fisanich, Deputy Director, at (202) 418-5949 or ffisanich@cftc.gov, or Jacob Chachkin, Associate Director, at (202) 418-5496 or jchachkin@cftc.gov.

Sincerely,

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Thomas J. Smith
Acting Director
Market Participants Division

cc: Kathleen Clapper, Compliance
National Futures Association, Chicago

Michael Otten, OTC Derivatives
National Futures Association, New York

[20] *See* Commission Regulation 140.99(a)(2), 17 C.F.R. § 140.99(a)(2) ("A no-action letter binds only the issuing Division . . . and not the Commission or other Commission staff.").