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CLIENT MEMORANDUM

Prudential Obtains No-Action Relief From CFTC in Connection With Swap Definition Under the Commodity Exchange Act

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The Division of Swap Dealer and Intermediary Oversight of the Commodity Futures Trading Commission recently issued a letter providing no-action relief to certain subsidiaries of Prudential Financial, Inc.[1] in connection with the longevity reinsurance contracts that they write.

Prudential's subsidiaries, which are regulated by the insurance laws of the states in which they are domiciled, in certain circumstances write reinsurance contracts that ultimately cover the longevity risk of defined benefit plans. The longevity risk is a traditional type of insurance risk and specifically covers the risk that beneficiaries of such pension plans live longer than actuarially expected and are thus entitled to retirement benefits for a longer period of time. Pension plans purchase coverage for this risk so that they may continue to provide the benefits to which their beneficiaries are entitled.

In the case of foreign pension plans seeking to obtain longevity risk coverage, the coverage is sometimes provided in steps called an interposed longevity reinsurance transaction. One of the steps in the chain of such transaction may involve a transfer of risk that is documented in the form of a derivative (as opposed to in the form of insurance, which would traditionally be the case in the United States) that may be a swap as defined under the Commodity Exchange Act.

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[1] CFTC Letter No. 14-67 (April 8, 2014).

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The reinsurance contract written by a Prudential insurance company is provided as the final step of such interposed longevity reinsurance transaction. Language in the final rules further defining “swap” for purposes of the Commodity Exchange Act had created some ambiguity as to the status of Prudential’s reinsurance contracts when a step in an interposed longevity reinsurance transaction involved a derivative.

With our assistance, Prudential sought and received no-action relief. The no-action relief provided that, subject to certain conditions specified in the letter, the reinsurance contracts that were provided at the final step of an interposed longevity reinsurance transaction involving a derivative should not be characterized as a swap, as insurance of a swap, or as a guarantee of a swap, and that neither Prudential nor its subsidiaries (as a result of providing such reinsurance contracts) would be a provider of, a party to, guarantor of, or insurer of, a swap.

If you have any questions concerning the foregoing or would like additional information, please contact Jack I. Habert at 212-728-8952 (jhabert@willkie.com), Rita M. Molesworth at 212-728-8491 (rmolesworth@willkie.com), Vladimir Nicenko at 212-728-8273 (vnicenko@willkie.com) or Donald B. Henderson at 212-728-8262 (dhenderson@willkie.com).

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