INSTITUTE OF INTERNATIONAL BANKERS

299 Park Avenue, 17th Floor
New York, N.Y. 10171
Direct: (646) 213-1147
Facsimile: (212) 421-1119
Main: (212) 421-1611
www.iib.org

Sarah A. Miller
Chief Executive Officer
E-mail: smiller@iib.org

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The Honorable Debbie Stabenow
Chairwoman
Committee on Agriculture, Nutrition and Forestry
United States Senate
Washington DC, 20010

The Honorable Thad Cochran
Ranking Member
Committee on Agriculture, Nutrition and Forestry
United States Senate
Washington DC, 20010

Dear Chairwoman Stabenow and Ranking Member Cochran:

The Institute of International Bankers (IIB) appreciates the opportunity to provide recommendations as the Committee begins to consider the reauthorization of the Commodity Futures Trading Commission (CFTC). As discussed below, our recommendations focus on certain aspects of swaps regulation under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (DFA). The IIB represents internationally headquartered financial institutions from over 35 countries around the world, and its members are extensively involved in activities regulated by the CFTC, including in particular swaps activities that are subject to the requirements of Title VII. Indeed, IIB members constitute approximately half of the firms that are currently registered as swap dealers under Title VII.

We respectfully urge the Committee to take into consideration the recommendations outlined below in order to (i) provide certainty with respect to the application of the requirements of Title VII to cross-border swaps activities and enable effective and efficient coordination and harmonization of U.S. rules with those of other countries in furtherance of the principles adopted by the G-20; and (ii) ensure national treatment for the U.S. operations of foreign banks vis-à-vis U.S.-headquartered banks in connection with their swaps activities in the United States.

Cross-Border Swaps Activities – Certainty in the Coordination of U.S. and International Rules

1) A substantial majority of swaps transactions are effected between counterparties in different countries. Insuring proper alignment of U.S. rules with those of other countries therefore is crucial to maintaining the vitality of the U.S. swaps market.

   Substituted compliance is an important component of harmonizing U.S. swaps rules with the rules of other jurisdictions. Reflecting the strong U.S. commitment to the principles agreed to by the G-20 leaders in 2009, DFA Sec. 752 directs the CFTC to consult and coordinate with its regulatory counterparts outside the United States in order to promote effective and consistent global regulation of swaps. The cross-border dimensions of swaps regulation are also addressed in DFA Sec. 722(d), which establishes a general prohibition against the application of Title VII's requirements to swaps activities outside the United States, except with respect to activities that have a "direct and significant connection with activities in, or effect on, commerce of the United States" or as may be necessary to avoid evasion of Title VII.

   Unfortunately, efforts to this point to achieve an appropriate cross-border harmonization of Title VII's requirements with those of other countries have born little fruit. As a result, there remains considerable uncertainty regarding the cross-border application of Title VII's requirements, which in turn has given rise to significant concerns regarding the prospect of fragmenting and disrupting the international swaps market.

   Mutual recognition of each other's rules through substituted compliance is an important means to accommodate the rules of different countries in a manner that fosters coordination and avoids unnecessary duplication or conflict. Consistent with international comity principles, permitting a financial institution to comply with equivalent rules of another jurisdiction in connection with its cross-border swaps activities best achieves the purposes underlying DFA Sections 752 and 722(d).

   At this stage of Title VII's implementation, there exists a very real potential for conflict between U.S. rules and those of other countries. Absent a satisfactory resolution of these conflicts, many global swap dealers will face the untenable position of violating one country's rules or laws in order to comply with another's. **We believe it is essential to make it explicitly clear that reliance on broadly equivalent rules of other countries is an integral part of the cross-border swaps regulatory regime intended under Title VII.**

Ensuring National Treatment

2) DFA Sec. 716, also known as the "swap push-out rule", contains an acknowledged oversight that results in unequal treatment for uninsured U.S. branches and agencies of

foreign banks compared to that of U.S. banks. Sec. 716 sets forth a general prohibition against "Federal assistance" (including access to the discount window) for swap entities, but includes certain grandfather and transitional provisions that permit the phased-in implementation of the prohibition with respect to insured depository institutions as well as safe harbor provisions that allow insured depository institutions to continue to engage in swap activities related to their bona fide hedging and traditional bank activities. The uninsured branches and agencies of foreign banks are not afforded the benefit of these provisions. Senators Dodd and Lincoln recognized that this exclusion was unintentional and acknowledged that there was a need "to ensure that uninsured U.S. branches and agencies of foreign banks are treated the same as insured depository institution."[1]

Uninsured U.S. branches and agencies are licensed by a federal or state banking authority and subject to the same type of safety and soundness examination and oversight as U.S. banks. Based on the policy of national treatment, uninsured branches and agencies are afforded equivalent treatment to U.S. banks, including access to the Federal Reserve's discount window. Access to the discount window is an important tool for maintaining a sound and orderly financial system, and the branches and agencies of U.S. banks are provided access to similar facilities in other countries.

Based on the disparate treatment to which they are subject under Sec. 716, the uninsured U.S. branches and agencies of foreign banks are facing the prospect of having to "push out" all their existing swap positions and ongoing swap activities to a registered swap affiliate by the July 16, 2013 effective date –an impossible compliance task and one that places these uninsured branches and agencies at a substantial competitive disadvantage vis-à-vis insured depository institutions that benefit from the grandfather, transitional and safe harbor provisions. **The resulting disparity is wholly at odds with the longstanding U.S. policy of national treatment, and therefore we would urge the Committee to address this important issue.**

3) The definition of a "Swap Dealer" under Sec. 1(a)(49) of the CEA (as modified by the DFA) provides an exclusion for insured depository institutions, specifying that in "no event shall an insured depository institution be considered to be a swap dealer to the extent it offers to enter into a swap with a customer in connection with originating a loan with that customer." Similar to the unintended omission of uninsured U.S. branches and agencies of foreign banks in DFA Sec. 716, this exclusion is provided only for insured depository institutions and results in unequal treatment for those uninsured branches and

[1] 156 Cong. Rec. S5903-S5904 (daily ed. July 15, 2010) (colloquy between Senator Dodd, Chairman of the Senate Banking Committee, and Senator Lincoln, Chairman of the Senate Agriculture Committee and sponsor of Sec. 716).

agencies that generally enter into swaps transactions only in connection with their lending activities. [2]

This exclusion permits small U.S. banks the ability to enter into interest rate swaps in connection with their lending activities without having to register as swap dealers, thereby providing them a competitive advantage over the similarly-situated uninsured U.S. branches and agencies of foreign banks, which are denied this parity of treatment. **We would urge the Committee to address this important national treatment issue.**

We thank you for your attention to our recommendations and are happy to provide additional information at your request.

Sincerely,

Sarah A. Miller
Chief Executive Officer

[2] For those insured depository institutions that generally enter into swaps transactions with customers only in connection with their lending activities, the exclusion ensures that such ordinary course banking activities will not result in their having to register as a swap dealer. At the same time, swap transactions conducted by an insured depository institution outside the context of its ordinary banking activities may result in it having to register as a swap dealer.