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August 13, 2012

Mr. David A. Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581.

Re: Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act

Dear Mr. Stawick:

We, on behalf of Bank of America Corporation, Citigroup Inc., and JPMorgan Chase & Co., are responding to the Commodity Futures Trading Commission's (the "Commission") proposed interpretive guidance and policy statement (the "Proposed Guidance")[1] on the cross-border application of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").

In a letter dated February 22, 2011, we previously submitted detailed comments to the Commission on the definitions of "swap dealer," "security-based swap dealer," "major swap participant" and "major security-based swap participant"[2] and the registration requirements imposed by Dodd-Frank on such entities.[3] These comments focused on the application of the definitions and the registration requirements on the non-

1 *See* Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 Fed. Reg. 41214, July 12, 2012.

2 Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 75 Fed. Reg. 80174 (Dec. 21, 2010).

3 Registration of Swap Dealers and Major Swap Participants, 75 Fed. Reg. 71379 (Nov. 23, 2010).

U.S. operations of U.S.-based entities. However, the final rules did not acknowledge or address any of the substantive arguments raised in our comment letter.

The Commission has instructed interested parties to submit comment letters to the Commission directly in response to specific rules, guidance or orders promulgated by the Commission, and that issues raised in prior comment letters will not be considered unless a specific proposed rule, guidance or order is referenced. Therefore, we are resubmitting our original comment letter, but now in response to the Proposed Guidance. The comment letter has been conformed to specifically address the Proposed Guidance and is attached to this cover letter as Appendix A. Our modified comment letter addresses several compelling issues that we believe are highly relevant to the cross-border application of Dodd-Frank and should be considered in the context of the Proposed Guidance.

We appreciate the opportunity to comment on the Proposed Guidance and we urge the Commission to carefully consider the issues we have raised in our modified comment letter.

Sincerely,

Sullivan & Cromwell LLP

cc: Honorable Gary Gensler, Chairman
Honorable Bart Chilton, Commissioner
Honorable Scott O'Malia, Commissioner
Honorable Jill E. Sommers, Commissioner
Honorable Mark Wetjen, Commissioner
Commodity Futures Trading Commission

Sarah Lee, Associate General Counsel
Bank of America Corporation

Carl V. Howard, Deputy General Counsel
Citigroup Inc.

Don Thompson, Managing Director
JPMorgan Chase & Co.

APPENDIX A

SULLIVAN & CROMWELL LLP

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August 13, 2012

VIA ONLINE SUBMISSION: http://comments.cftc.gov

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Re: Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act

Dear Mr. Stawick:

We, on behalf of Bank of America Corporation, Citigroup Inc., and JPMorgan Chase & Co., are responding to the Commodity Futures Trading Commission's (the "CFTC") proposed interpretive guidance and policy statement (the "Proposed Guidance"),[1] which was issued with the notice of proposed exemptive order and request for comment,[2] on the cross-border application of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or "Title VII").[3] We appreciate the opportunity to comment on the Proposed Guidance, as it provides a framework for the extraterritorial application of the comprehensive regulatory requirements that will be imposed on entities under Dodd-Frank, as a result of the rulemakings promulgated by the CFTC.[4] As the CFTC finalizes the Proposed Guidance,

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1 *See* Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 Fed. Reg. 41214, July 12, 2012.

2 *See* Exemptive Order Regarding Compliance With Certain Swap Regulations, 77 Fed. Reg. 41110, July 12, 2012.

3 *See* Public Law 111-203, 111th Cong., 2d sess. (July 21, 2010).

4 Dodd-Frank imposes a number of requirements on parties to swap transactions, including, without limitation: registration as swap dealer, mandatory clearing and

we are pleased to share our comments with the CFTC, many of which we raised in our comment letter to the CFTC, the Securities and Exchange Commission (the "SEC") and the Board of Governors of the Federal Reserve System, regarding the extraterritorial application of Dodd-Frank.[5]

Bank of America Corporation, Citigroup Inc. and JPMorgan Chase & Co. (collectively, the "Companies") all engage in swap activities in the United States and anticipate that certain of their U.S. subsidiaries will register as swaps entities[6] on the basis of those activities. The Companies also engage in similar swap activities overseas through subsidiaries and branches of their U.S. banks as well as subsidiaries of the holding company ("Non-U.S. Operations"). To the extent that the activities of the Companies' Non-U.S. Operations take place with non-U.S. persons outside of the United States, we believe that those entities should not be subject to the regulatory requirements of Dodd-Frank.

We fully support the CFTC's efforts to increase transparency in the swap markets, reduce systemic risk in the financial markets and promote market integrity and believe that these goals can be achieved in a manner that is consistent with the stated intent in Title VII that its provisions not be applied extraterritorially except in certain limited circumstances. Accordingly, in its final form, the Proposed Guidance should clarify that the Non-U.S. Operations of U.S. banking organizations, to the extent the Non-U.S. Operations engage in swaps activities outside the United States with non-U.S. persons, should not be covered by Dodd-Frank. Specifically, we submit that final guidance that reflect the following approach would be consistent with the language and the purposes of the statute:

- Non-U.S. Operations should not be considered U.S. entities, or be required to register as swaps entities, solely on the basis that they are affiliated with, or, in the case of non-U.S. branches of U.S. banks, a part of, a U.S. bank.
- Non-U.S. Operations that engage in swaps activities should fall within the definition of swaps entity only if they engage in swap activities with U.S. persons, other than in any *de minimis* amount authorized by the final rules and in transactions with their U.S. affiliates for purposes of risk management.

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execution for standardized swaps; capital requirements; margin requirements for uncleared swap transactions; and recordkeeping and reporting requirements, including real-time reporting for uncleared swaps (the "Dodd-Frank regulatory requirements").

[5] Comment Letter, from Kenneth Raisler, Sullivan & Cromwell LLP, dated February 22, 2011.

[6] We will refer to swap dealers and major swap participants as "swaps entities" throughout this letter.

- Engaging in transactions with non-U.S. counterparties whether or not the non-U.S. counterparties have a U.S. affiliate or are the non-U.S. branch of a U.S. banking organization (whether or not such banking organization is a registered swap dealer) should not cause the Non-U.S. Operations to be swaps entities provided that the transactions are not conducted out of the Non-U.S. Operations to evade the requirements of Title VII.

- The presence of a guarantee by one of the Companies or its U.S. subsidiaries of a swap transaction engaged in by a Non-U.S. Operation with a non-U.S. counterparty should not cause the Non-U.S. Operation to be considered a U.S. person.

This approach is supported by:

- The explicit limits on the extraterritorial application of Title VII in Dodd-Frank;
- The general presumption against extraterritorial application of Federal statutes;
- The CFTC's precedent regarding their respective jurisdictional limits; and
- Principles of international comity.

Following this approach would help U.S. banking organizations maintain their competitive position in overseas markets, which would be consistent with longstanding U.S. policy reflected in the Federal Reserve Act. It would also support the ability of U.S. banking organizations to provide services to their clients on a global basis.

However, we note that the Proposed Guidance states, "The Commission understands that branches and agencies are not separate legal entities; rather, a branch or agency is a corporate extension of its principal entity.[50] Given that a foreign branch or agency has no legal existence separate from a U.S. principal entity that is the legal counterparty to swaps, the Commission would apply the Dodd- Frank Act registration requirements to a U.S. person and its foreign branches and agencies on an entity-wide basis."[7] As discussed below, we believe the CFTC should reconsider such an approach, and should instead treat foreign branches of U.S. banks as separate entities, in determining whether they would meet the definition of swaps entities and to what extent they would be subject to the Dodd-Frank regulatory requirements.

[7] 77 Fed. Reg. 41221

I. Background

The Companies are financial holding companies as defined in the Bank Holding Company Act of 1956, as amended ("*BHC Act*").[8] They are incorporated and headquartered in the United States and provide banking, investing, asset management and financial and risk management products and services throughout U.S. and international markets. The Companies conduct swap activities, in addition to other financial services, overseas through their subsidiaries in addition to such activities in the United States.

The Companies have long-established Non-U.S. Operations that allow the Companies to participate in swap activities, among other financial activities, in foreign jurisdictions. In many cases, the Companies have had their Non-U.S. Operations for many decades. These Non-U.S. Operations already are regulated by their local foreign country regulators and generally will be subject to local regulation regarding swap activities. In fact, in some jurisdictions, such as China, Taiwan and India, only local banks and local branches of foreign banks may engage in swap activities. We also note that in the European Union, an E.U.-organized entity is given "preference" or "passport" authority to engage in swap transactions with customers (both companies and individuals) domiciled throughout the European Union, but such authority is not granted to entities outside the European Union. Non-E.U.-organized entities are required to obtain licenses in every individual jurisdiction, which is onerous and costly. Thus, to undertake E.U.-organized business transactions in the European Union in an efficient manner, the Companies must have E.U.-organized entities conducting the business.

The Companies conduct swaps activities through their Non-U.S. Operations, which include subsidiaries of the bank holding company, Edge corporation subsidiaries of their U.S. banks ("*Edges*") and non-U.S. branches of the bank. The non-U.S. subsidiaries of U.S. bank holding companies are subject to applicable law and regulation in the countries in which they are organized and, as subsidiaries of a bank holding company, are supervised by the Federal Reserve Board. Edges are corporations organized under the Edge Act (now Section 25A of the Federal Reserve Act) with the approval of Federal Reserve Board and are subject to supervision and regulation by the Federal Reserve Board.[9] Edges may be organized and established by member banks,[10] which are expressly permitted to hold their shares.[11] Edges were created to permit U.S. banking organizations to engage in international or foreign banking and other financial

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8 *See* 12 U.S.C. § 1841, *et seq.* A financial holding company is banking holding company that has elected to be treated as a financial holding company for purposes of the BHC Act. 12 U.S.C. § 1841(p).

9 *See* 12 U.S.C. §§ 611; 614; *see also* 12 C.F.R. § 211.5.

10 Member banks are national banks or state banks that are members of the Federal Reserve System. *See* 12 U.S.C. § 221.

11 See 12 U.S.C. §§ 601, 24(7).

operations to promote the foreign trade of the United States and thus are authorized to exercise "sufficiently broad powers to enable them to compete effectively with similar foreign-owned institutions in the United States and abroad."[12] Edges may establish branches and subsidiaries in foreign countries in order to conduct their activities. Non-U.S. subsidiaries of Edges are subject to applicable law and regulation in the countries in which they are organized, in addition to being supervised by the Federal Reserve Board.

U.S. banks may establish branches in foreign jurisdictions with the prior approval of the Federal Reserve Board.[13] Similar to many other activities conducted through a foreign branch, the swap activities of foreign branches are focused overseas and generally conducted with non-U.S. persons. Like Edges, foreign branches permit U.S. banking organizations to compete with their foreign counterparts because such branches may exercise powers "as may be usual in connection with the transaction of the business of banking in the places where such foreign branch shall transact business."[14] As discussed further in Section III.E below, Edges and non-U.S. branches of U.S. banks have been authorized to engage in a wider range of activities than the U.S. parent bank to help promote the ability of U.S. banking organizations to compete in international markets. As discussed below, we believe that the CFTC should amend its treatments of non-U.S. branches of U.S. banks under the Proposed Guidance, to better reflect this reality.

II. Statutory Framework for Extraterritorial Application

The Proposed Guidance notes that "[t]he statutory definitions of swap dealer and MSP do not contain any geographic limitations and do not distinguish between U.S. and non-U.S. swap dealers or non-U.S. MSPs.[41] Similarly, the Final Entities Rulemaking does not contain any such limitations or distinctions."[15] While the CFTC is correct that the statutory definitions of swap dealer and MSP do not contain geographic limitations, the statutory text of Dodd-Frank reflects Congressional intent that Title VII generally should not apply to overseas swap activities and it is clear that there are limits to its extraterritorial reach. We believe that the Congressional intent to limit the application of Dodd-Frank must be reflected in the CFTC's final guidance on the cross-border application of Dodd-Frank.

Section 722(d)(i) of Dodd-Frank provides that "the provisions of [the CEA] relating to swaps that were enacted by [Title VII] (including any rule prescribed or regulation promulgated under [Title VII]), shall not apply to activities outside the United States unless those activities have a direct and significant connection with activities in, or

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12 12 U.S.C. § 611a.

13 *See* 12 U.S.C. § 601.

14 12 U.S.C. § 604a.

15 77 Fed. Reg. 41219

effect on, commerce of the United States; or contravene such rules or regulations as the [CFTC] may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of [the CEA] that was enacted by [Title VII]."

As noted, Section 722 of Dodd-Frank established narrow standards for the extraterritorial application of Title VII. Under the CEA, in order for Title VII to apply to swap activities outside the United States, the activities must have a "direct and significant" connection with activities taking place in the United States, a "direct and significant" effect on the commerce of the United States or the activities must contravene anti-evasion rules. Both the CFTC and the SEC are directed in Section 712(d)(2) of Dodd-Frank to make their rules and regulations prescribed under Title VII comparable to the maximum extent possible, taking into consideration differences in instruments and in the applicable statutory requirements.

Section 722 of Dodd-Frank evidences Congress' recognition that it and the CFTC's jurisdiction do not extend to the regulation of non-U.S. persons and non-U.S. markets. Title VII reflects a Congressional intent to strike a careful balance with respect to extraterritoriality by permitting the CFTC to reach entities or activities outside the United States only in order to prevent evasion of Title VII or in limited circumstances where there is a direct and significant connection with or effect on U.S. commerce.

We believe it would be inconsistent with this intent to apply the requirements of Title VII wholesale to the Companies' Non-U.S. Operations where those activities are with non-U.S. persons simply because the Companies have a U.S. parent that provides a guarantee to the Non-U.S. Operations or conduct business with non-U.S. affiliates of a U.S. firm, as would be required under the Proposed Guidance. Such an outcome would impose duplicative regulation and unnecessary cost on Non-U.S. Operations that already are subject to local foreign rules and regulations. Furthermore, this outcome would only damage the Companies' positions in the overseas markets in which they compete by causing the swap business they presently conduct to migrate to non-U.S. firms.

III. Discussion

A. An Affiliation with a U.S. Banking Organization Alone Does Not Meet the Standards for Extraterritorial Application.

We do not believe that the Companies' Non-U.S. Operations have a "direct and significant connection with activities, or effect on, U.S. commerce" based solely on the existence of an affiliation with a U.S. banking organization. The transactions that the Non-U.S. Operations will enter into will be with non-U.S. persons, with a non-U.S. business purpose, and thus, are likely to have a non-U.S. orientation. The connection with U.S. activities is therefore indirect, and the transactions would not have a significant effect on U.S. commerce because both counterparties are non-U.S. persons and the transactions are related to the activities of those non-U.S. persons. Furthermore, as discussed in Section III.C below, it would be inconsistent with the CFTC jurisdictional precedent to require the Companies' Non-U.S. Operations to register as swaps entities solely because the U.S. parent bank must do so or the Non-U.S. Operations

are guaranteed by the U.S. parent bank. Each entity's activities should be evaluated independently for determining whether the entity's swap transactions should be subject to Dodd-Frank. This same approach has been used with a non-U.S. branch of a U.S. bank even though the branch is part of the bank.[16]

1. The Counterparties to the Swap Transactions in which the Non-U.S. Operations Engage Do Not Create a Jurisdictional Tie that Meets the Standards for Extraterritorial Application.

As a general matter, we acknowledge that if Non-U.S. Operations enter into swaps with U.S. persons, they would be subject to the regulatory requirements of Dodd-Frank, regardless of whether they meet the definition of swaps entity. However, Non-U.S. Operations typically do not enter into transactions with U.S. persons as the activities of the Non-U.S. operations have a non-U.S. focus. All of the Companies have U.S. entities that will be registered as swaps entities and that are the vehicles of choice when facing U.S. customers on swap transactions.

In the case of Edges, their U.S. activities are explicitly limited by statute. An Edge is prohibited by the Edge Act from "carry[ing] on any part of its business in the United States except such as, in the judgment of the [Federal Reserve Board], shall be incidental to its international or foreign business."[17] The Federal Reserve Board has narrowly construed the ability of Edges to conduct activities in the United States. The Federal Reserve Board looks to "whether the activity has a direct or clearly identifiable connection to international transactions"[18] and has found that a sufficient international connection exists "where the activity relates to transactions performed or to property located abroad."[19]

In general, Non-U.S. Operations would enter into swaps with non-U.S. persons that are headquartered outside of the United States and with non-U.S. persons that are subsidiaries, branches of, or otherwise affiliated with a U.S. person. We believe that in both cases, the counterparty should be considered a non-U.S. person for purposes of the Dodd-Frank regulatory requirements, provided that the transactions are not being conducted by the non-U.S. persons as an evasion.

In the first case, where the Non-U.S. Operations' counterparty to a transaction is a non-U.S. person that is based outside of the United States, the transaction

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16 *See* Request for IB Registration No-Action Position, CFTC Staff Ltr. No. 00-44 (CCH) 28,095 (Mar. 31, 2000).

17 12 U.S.C. § 616.

18 Order Issued under Section 25 of the Federal Reserve Act - Citibank International, 71 Fed. Res. Bull 265, 266 (1985).

19 *See id*. (citing to, as an example, 12 C.F.R. §§ 211.4(e)(4)(iv) and (xiv)).

would be unlikely to have a direct or significant connection with U.S. activities or effect on U.S. commerce. The only tie to the United States is the affiliation of the Non-U.S. Operations with the U.S. banking organization. As discussed above, we do not believe that tie alone is sufficient to meet the standard for extraterritorial application.

Where the Non-U.S. Operations' counterparty to a transaction is a non-U.S. affiliate of a U.S. person, the connection to the United States is, at most, an indirect one, as both parties are located, and operate, overseas. The transactions between the two entities are themselves occurring outside the United States and are, therefore, removed from the U.S. stream of commerce. As a result, there is no "direct" effect on U.S. commerce and it is highly unlikely that the transactions would have any significant effect on U.S. commerce. The statutory standard is that the activities actually have a direct and significant connection with or effect on U.S. commerce. Subjecting Non-U.S. Operations to the requirements of Dodd-Frank, including through a substituted compliance regime, solely because they may enter into transactions with counterparties that have a legal affiliation with a U.S. person would result in an overly broad application of Dodd-Frank, given the limited jurisdictional nexus with the U.S. and, we submit, would be inconsistent with the careful balance Congress sought to achieve in Title VII with respect to its extraterritorial effect.

2. The Risk of Evasion of Title VII Does Not Support Overly Broad Definitions of the Swaps Entities.

The fact that one or both non-U.S. counterparties to a swap transaction may be affiliated with U.S. companies does not by itself indicate an intent to evade Title VII and its implementing regulations. The Companies have established their Non-U.S. Operations for legitimate business reasons, including because in some jurisdictions only local banks and local branches of foreign banks may engage in swap activities. In addition, as noted above, in the European Union, only entities organized in a jurisdiction belonging to the European Union have "preference" or "passport" authority to engage in swap transactions with customers domiciled throughout the European Union. In addition, the Non-U.S. operations would still be subject to local foreign regulation. Duplicative regulation would only impose unnecessary burdens on Non-U.S. Operations.

We understand the concerns that the CFTC may have that persons would seek to book transactions through non-U.S. branches or subsidiaries in order to evade the requirements of the CEA. The CFTC should not, however, seek to address the potential for evasion through an overbroad application of Dodd-Frank. To do so would cause needless harm to the competitiveness of U.S. institutions in foreign markets whose activities do not have a direct and significant connection with or effect on U.S. activities or commerce and impose unnecessary regulatory burdens on such entities. Furthermore, as discussed in Section III.E below, the statutory restrictions on the U.S. activities of an Edge, through which the Companies conduct a significant amount of their overseas swap activities, provide a natural bulwark against evasion and evidence a valid reason for conducting the swap transactions with Non-U.S. persons through non-U.S. Operations.

Congress, in the language of Section 722 of Dodd-Frank, specifically set forth the CFTC's authority to prevent such evasion through the promulgation of a set of rules and regulations independent from the CFTC's rules imposing regulatory requirements on swap transactions. With this authority, the CFTC is able to implement its authority to prevent the evasion of Title VII in a manner that addresses the specific circumstances in which persons seek to evade applicable U.S. regulations through overseas swap activities.

Our position is reinforced by the *Morrison* decision, where the Supreme Court stated that the "prevent evasion" language in Section 30(b) of the Exchange Act, which mirrors the language in Section 722 of Dodd-Frank, was not sufficient to make that statute apply extraterritorially: "[t]he provision seems to us directed at actions abroad that might conceal a domestic violation, or might cause what would otherwise be a domestic violation to escape on a technicality."[20] Accordingly, the CFTC's authority to prevent evasion permits the CFTC to extend their traditional jurisdictional reach only in limited circumstances.

B. Judicial Precedent and Principles of Statutory Interpretation Do Not Support Extraterritorial Application of Title VII.

The jurisdictional limits of Title VII that are expressly stated in Section 722 of Dodd-Frank must be interpreted in light of judicial precedent and the "long-standing principle of American law that legislation of Congress, 'unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"[21]

The Supreme Court has stated that the judicial presumption against the extraterritorial application of Federal statutes "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters. Thus, 'unless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic conditions.' . . . When a statute gives no clear indication of an extraterritorial application, it has none."[22]

The jurisdictional limit in Section 722 of Dodd-Frank reflects this presumption and does not express a contrary intent to apply Title VII extraterritorially except for their specifically articulated exceptions. Furthermore, these exceptions must be read narrowly in light of the *Morrison* decision.

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[20] *Morrison v. Nat'l Australia Bank*, 130 S. Ct. 2869, 2882-83 (2010).

[21] *Id.* at 2877-78 (quoting *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

[22] *Id.*

C. The CFTC's Precedent Supports the Conclusion that the Swap Activities of the Companies' Non-U.S. Operations Generally Should Be Beyond the Jurisdictional Reach of the CFTC.

The application of Dodd-Frank to non-U.S. persons should be consistent with the CFTC's long-established tradition of not asserting jurisdiction over transactions, or entities that engage in transactions, taking place or operating outside of the United States.[23] This tradition reflects, among other things, the fact that such transactions and entities already are subject to local foreign regulation and that duplicative regulation will burden these entities with unnecessary cost and make them less competitive.

Foreign individuals or firms that deal solely with foreign customers and do not conduct business in or from the United States have not been required to register under the CEA.[24] For example, the CFTC generally does not require persons to register as an introducing broker when they are located outside the United States and transact business only with foreign customers. The CFTC has explicitly included foreign branches under this approach.[25] In addition, the CFTC does not require foreign brokers to register as futures commission merchants, or obtain an exemption from such registration, if the foreign brokers offer or sell foreign futures or options contracts to non-U.S. persons only.[26] The CFTC's precedent also supports the conclusion that the Companies' Non-U.S. Operations should not be subject to Dodd-Frank, in connection with transactions with non-U.S. persons, solely because of their legal affiliations with U.S. parent banking entities that may be registered swaps entities. Under existing precedent, it is generally the case that subsidiaries of registered futures commission merchants are not subject to the activity and prudential restrictions imposed on a registered entity, unless the subsidiary itself engages in activities that require registration. The CFTC has allowed a subsidiary of a registered foreign futures commission merchant to enter into options contracts without becoming subject to CFTC rules to the same degree as its parent.[27]

Finally, CFTC precedent supports a conclusion that the use by the Companies' Non-U.S. Operations of a swap execution facility, designated clearing organization, designated contract market or swap data repository that is registered and based in the United States should not establish the jurisdictional connection required by

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23 *See* 17 C.F.R. Part 30.

24 *See* CFTC Statement of Policy, *Exercise of Commission Jurisdiction Over Reparation Claims That Involve Extraterritorial Activities by Respondents*, 49 Fed. Reg. 14721 (1984).

25 *See supra* note 15.

26 *See* 17 C.F.R. Part 30.

27 *See* Authorizing Subsidiary of FCM to Enter Into Certain Contracts with a Federal Power Marketing Agency, CFTC Order (CCH) ¶ 24,297 (Aug. 2, 1988).

Title VII for the Commissions to otherwise subject such entities to Dodd-Frank.[28] The CFTC has taken the position that a foreign broker trading solely for its own account or the accounts of its non-U.S. customers is not required to register with the CFTC, even if it executes transactions on a U.S. exchange or clears through a U.S. clearinghouse, provided that it limits its customers to those located outside the United States.[29]

D. Principles of International Comity Do Not Support Subjecting the Swap Activities of the Companies' Non-U.S. Operations to Dual and Possibly Conflicting Regulation.

In the prior rulemakings, the CFTC noted the importance of international comity in determining the extraterritorial application of Federal statutes.[30] The CFTC's recognition is consistent with Title VII, judicial precedent and the jurisdictional principles of the CFTC, as discussed above. It would not be in the interests of international comity for non-U.S. persons engaged in swap activities with non-U.S. customers to have to register with U.S. regulators. Such persons, including the Companies' Non-U.S. Operations, already will be subject to all foreign country requirements with respect to their swap activities. In addition to the United States, other countries and the European Union are promulgating derivatives legislation that may apply to the same persons that would be regulated by the CFTC under Title VII, and duplicative regulation could result in inconsistencies and unnecessary cost. Dodd-Frank, through its Section 752, explicitly addresses the problem of duplicative regulation and requires the CFTC and the SEC, when they exercise jurisdiction over non-U.S. persons, to consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulations of swaps and swap entities.[31] Such international harmonization of regulatory regimes would work to eliminate arbitrage and counteract the attempted evasion of regulatory oversight.

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[28] However, if a Non-U.S. Affiliate executes or clears a swap transaction on a U.S.-registered facility, the entity will be subject to the jurisdiction of the facility and will be subject to the respective Commission's jurisdiction for certain purposes, such as reporting and position limits. The CFTC takes the view that it will look across all positions held by a U.S. entity in the U.S. and non-U.S. markets when establishing position limits, and the CFTC may take this same view with respect to non-U.S. entities because the overall size of an entity's positions affects its ability to have an impact on prices.

[29] *See* 17 C.F.R. § 3.10 and Part 30.

[30] *See* Registration of Swap Dealers and Major Swap Participants, 75 Fed. Reg. at 71382 (citing *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764 (1993) and Restatement (Third) of Foreign Relations Law of the United States §§ 402-403 (1987)).

[31] *See* Dodd-Frank § 752. *See also* Dodd-Frank § 715 (permitting the Commissions to prohibit a foreign-domiciled entity from participating in swap activities in the United States if the regulation of swap markets in the foreign country undermines the stability of the U.S. financial system); Dodd-Frank §§ 113(f) and 175(c) (requiring the Financial

In cases where two regulators may exert jurisdiction over the same non-U.S. person, one regulator should defer to the regulator with the greater ability to effectively supervise and examine the particular banking organization and the presumption would be that this would be the local regulator. In the case of the Companies' Non-U.S. Operations, the foreign country supervisors should be presumed to be the relevant authority because the foreign supervisor would already be supervising the Non-U.S. Operations under various laws and regulations applicable to financial institutions and would be supervising and examining other persons active in the same market. Such an approach is consistent with international comity. At a practical level, their close geographical proximity, as well as broader knowledge of the Non-U.S. Operation's financial, capital and general supervisory condition, may allow for more frequent examination and effective imposition of any sanctions for breach.

E. Maintaining the Competitive Position of U.S. Banking Organizations Weighs in Favor of Limiting the Extraterritorial Application of Title VII.

The jurisdictional scope of the Dodd-Frank regulatory regime is critical to the ability of U.S. banking organizations to maintain their competitive position in foreign marketplaces. Imposing the regulatory regime of Title VII on their Non-U.S. Operations would place them at a disadvantage to their foreign bank competitors because the Non-U.S. Operations would be subject to an additional regulatory regime which their foreign competitors would not. Being subject to a U.S. regulatory regime as well as a non-U.S. regime would impose additional costs on Non-U.S. Operations and would require the devotion of additional resources to compliance measures, making them less competitive with other firms in those markets. It would also prevent U.S. banking organizations from providing services on a global basis to customers that have businesses with a global reach in the same manner as their non-U.S. competitors will be able to do. This will disadvantage not only the Non-U.S. Operations but the U.S. franchise as well. Furthermore, subjecting Non-U.S. Operations to any transaction level requirements on local transactions is a most direct disadvantage and is likely to lead either to directly conflicting requirements, *e.g.* the requirement to clear the same transaction in two different clearing houses, or to direct competitive disadvantage, *e.g.* clearing or margin requirements that are not standard for the local market and therefore not applicable to the same transaction as between the client and a local competitor.

Non-U.S. banking organizations that are not so burdened by such dual and potentially conflicting requirements would be able to provide a wider range of services to customers, and on a global basis, which may cause customers to migrate away from the Non-U.S. Operations. A reduction in the customer pool would limit the Non-U.S. Operations ability to manage and transfer risks. Such an effect is contrary to one of the purposes of Dodd-Frank, which is to reduce systemic risk in the financial system.

Stability Oversight Council to consult with foreign regulatory authorities with respect to foreign entities).

U.S. banking organizations already are subject to comprehensive supervision and prudential regulation by the Federal Reserve Board, and this oversight framework has been strengthened in Dodd-Frank. The Federal Reserve Board's supervisory powers extend to all the Companies' subsidiaries, including subsidiaries in non-U.S. jurisdictions, such as the Non-U.S. Operations. Part of the Federal Reserve Board's mandate under Dodd-Frank is to help prevent or mitigate risks to U.S. financial stability. Any effects on the U.S. operations of the Companies from the swaps activities of the Non-U.S. Operations are more appropriately monitored through this existing supervisory mandate – in contrast to the imposition of duplicative Dodd-Frank regulatory requirements which are designed for specific requirements on certain activities and that will likely conflict with, or be in addition to, local regulations on the same activities.

Recognizing the need for U.S. banking organizations to be competitive in international markets would be consistent with the intent expressed in the Federal Reserve Act regarding the establishment of Edges and the broader scope of activities permissible for Edges and non-U.S. branches than for the U.S. bank itself. Edges are meant to permit U.S. banking organizations to engage in international or foreign banking and other financial operations to promote the foreign trade of the United States, and thus they are authorized to exercise "sufficiently broad powers to enable them to compete effectively with similar foreign-owned institutions in the United States and abroad."[32] Section 25A of the Federal Reserve Act enumerates specific powers of Edges (including their branches and subsidiaries) and authorizes the Federal Reserve Board to add such powers "as may be usual…in connection with the transaction of the business of banking or other financial operations in the countries…in which [the Edge] shall transact

[32] 12 U.S.C. § 611a.

business…"[33] Importantly, the only activities of an Edge permitted in the United States are those that are incidental to its international or foreign business.[34]

Although foreign branches of U.S. banks are not corporate entities separate and apart from their bank parents, foreign branches have long been allowed to engage in a wider range of activities than are their U.S. head offices and have benefitted from the presumption against applying U.S. law extraterritorially.[35] Under Section 25 of the Federal Reserve Act, Congress granted the Federal Reserve Board authority to permit foreign branches of U.S. banks to exercise such further powers "as may be usual in connection with the transaction of the business of banking in the places where such foreign branch shall transact business,"[36] even if those activities were not permissible for a U.S. bank domestically, and the Federal Reserve Board has exercised this authority in certain circumstances.[37] We make these points not because we are arguing for greater powers of Non-U.S. Operations, but because there is significant Federal statutory evidence of a policy decision by Congress to foster and encourage the competitive position of Non-U.S. Operations vis-à-vis their local counterparts and to allow such entities to be subject to the same rules as local entities.

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[33] 12 U.S.C. § 615(a). The Federal Reserve Board has previously determined, in Regulation K, that swaps activity is "usual . . . in connection with the transaction of the business of banking or other financial operations" in other countries. *See* 12 C.F.R. § 211.10(a)(19) (commodity swaps); § 211.10(b) (incorporating all of the activities permitted under Regulation Y, including § 225.28(b)(8)(ii) of Regulation Y which permits broad swaps activities). The "usual in connection with" provisions of the statute still retain independent significance, as the Federal Reserve Board is permitted to approve, and has approved, activities that may not be listed in Regulation K or Regulation Y. Some activities have been approved notwithstanding the fact that they are impermissible for depository institutions under U.S. regulations and impermissible under Regulation Y. *See, e.g.,* Citibank Overseas Inv. Corp., 1985 Fed. Res. Interpretive Ltr. (Dec. 9, 1985) (approving an Edge's application to conduct real estate brokerage activities through a subsidiary); 67 Fed. Res. Bull. 269, 366 (April 1981) (approving an Edge's application to engage in the underwriting of credit life, credit accident and credit health insurance regardless of whether the insurance is directly related to the extension of credit by the Edge or its affiliates); and 12 C.F.R. §§ 211.10(a)(14), (15) (permitting Edges to underwrite and deal in equity securities outside of the U.S.).

[34] *See* 12 U.S.C. § 616.

[35] *See generally* 12 C.F.R. § 211.4 (foreign branches may *inter alia* act as insurance agents or brokers, and may underwrite, distribute, deal, and invest in the obligations of foreign governments, agencies, instrumentalities and political subdivisions, all powers that would generally not be permissible for U.S. branches of the banks).

[36] *See* 12 U.S.C. § 604a.

[37] *See supra* note 34.

To the extent that there are concerns about a guarantee by a U.S. affiliate, those can be addressed as a safety and soundness matter as part of the supervisory process. The Companies and their respective subsidiaries are all subject to the Federal Reserve Board's ongoing supervision and prudential regulation, which has been further strengthened under Dodd-Frank. For a U.S. affiliate providing a guarantee that is itself a swaps entity, such as we anticipate certain of our subsidiaries will be, the affiliate will also be subject to the applicable requirements in Title VII.

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We appreciate the opportunity to comment to the CFTC on the proposed cross-border applications of Dodd-Frank and would be pleased to discuss any questions that the Commission may have with respect to this letter. Any questions about this letter may be directed to Sarah Lee, Associate General Counsel, Bank of America Corporation, at 646-855-0837; Carl V. Howard, Deputy General Counsel, Citigroup Inc., at 212-559-2938; Don Thompson, Managing Director, JPMorgan Chase & Co., at 212-648-0322; and Kenneth Raisler, Sullivan & Cromwell LLP, at 212-558-4675.

Sincerely,

cc: Honorable Gary Gensler, Chairman
Honorable Bart Chilton, Commissioner
Honorable Scott O'Malia, Commissioner
Honorable Jill E. Sommers, Commissioner
Honorable Mark Wetjen, Commissioner
Commodity Futures Trading Commission

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