



American  
Bankers  
Association

Building Success. Together.

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August 27, 2012

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

Re: Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, RIN 3038-AD57 (the "Cross-Border Guidance").

Dear Secretary Stawick:

The American Bankers Association (ABA),<sup>1</sup> appreciates the opportunity to provide comments regarding the Commodity Futures Trading Commission's (CFTC) proposed Cross-Border Guidance and Exemptive Order.<sup>2</sup> ABA supports the CFTC's efforts to improve transparency and reduce systemic risk in the swaps markets. However, those efforts must also comport with the CFTC's statutory mandate to apply its rules outside of the United States only in a very limited way. Before the Cross-Border Guidance was released, ABA urged the CFTC to take note that the United States remains the global leader in financial services, which continues to provide a strong surplus to our balance of trade, and to take care in crafting a cross-border framework in a manner that does not harm that economic activity or the longstanding manner by which many U.S. banks operate and compete overseas via non-U.S. branches.<sup>3</sup>

Unfortunately, the CFTC takes an overbroad extra-territorial reach in the Cross-Border Guidance. The CFTC has unilaterally proposed a framework that has a high likelihood of significantly hindering overseas branches of U.S. banks from participating in local swaps markets – because non-U.S. persons will avoid trading with them and U.S. persons generally whenever possible to avoid the effects of the CFTC's regulation. This reaction is not caused by a wish by non-U.S. market participants to evade regulatory requirements but instead by competitive realities and legitimate concerns about capability to comply given the accelerated timing and remaining uncertainties regarding the substantive requirements. These uncertainties are presented by both the CFTC's incomplete set of rulemakings and the lack of coordination with other jurisdictions' ongoing rulemakings to regulate the swaps markets. Ultimately, these market participants may be deterred from transacting with overseas branches of U.S. banks

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<sup>1</sup>The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's \$14 trillion banking industry and its two million employees. See the ABA's web page at [www.aba.com](http://www.aba.com).

<sup>2</sup>77 Fed. Reg. 41214 (July 12, 2012).

<sup>3</sup>See the attached letter from ABA dated June 19, 2012. ABA understands many of its members are separately providing their views on the Cross-Border Guidance, and encourages the CFTC to consider carefully those comments and the detrimental impact on U.S. economic activity they describe.

because compliance with U.S. requirements may be duplicative of and in conflict with local requirements.

The proposed Cross-Border Guidance still requires that non-U.S. counterparties treat overseas branches of U.S. banks as “U.S. persons” for purposes of determining whether registration as a major swap participant – with the attendant costly reporting and business conduct obligations – is required. The unavoidable result of this treatment is that commercial companies operating overseas that have or seek to enter into banking relationships which contemplate swaps activity in addition to lending or cash management services will curtail those business relationships with overseas branches of U.S. banks, and potentially with the U.S. bank overall. Also, asset managers which conduct business on behalf of multiple investors will avoid counterparties that are considered U.S. persons so that they can transact under local transaction level rules.

As we warned in our June 19 letter, by acting unilaterally and in such an expansive way, there is immediate risk that swaps and related business activity will move away from U.S. counterparties and U.S. regulation. Our member institutions have indicated that foreign competitors abroad are already actively seeking to limit their activity with U.S. persons and U.S.-based firms, while seeking to attract our customers by warning them that U.S. regulations will raise costs of service, decrease quality or availability of service, or, as we state above, even result in the customer becoming subject to U.S. regulatory requirements.

To avoid these competitive inequities and the resulting market disruptions and dislocations, the CFTC should treat overseas branches of U.S. banks as non-U.S. persons. The proposed entity level requirements would apply to any such branch of a U.S. bank considered a swap dealer or major swap participant, and U.S. transaction level requirements should only apply to transactions of overseas branches when entered into with U.S. persons.

Under the proposed Exemptive Order, non-U.S. branches of U.S. banks are now allowed one year to continue to comply with local transaction level rules when facing non-U.S. customers, but are thereafter subject to U.S. transaction level rules unless the CFTC finds substituted compliance with local rules sufficient. There remains much uncertainty about how the CFTC will reach such a finding in each jurisdiction where a U.S. bank has an overseas branch and the consequences should certain key trading centers not adopt comparable rules to the U.S. for some amount of time. The process by which the CFTC makes such findings should be transparent, subject to notice and comment, and conducted in a holistic manner to prevent cutting off overseas branches of U.S. banks from key global markets. Other jurisdictions may or may not adopt transaction standards comparable to those of the United States in the near term, and the consequence if they do not should not be to cause overseas branches of U.S. branches to become immediately uncompetitive in those markets.<sup>4</sup>

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<sup>4</sup> While we appreciate the CFTC’s proposal for relief in markets where a considerable amount of time may pass until a substituted compliance finding may be made, the limit of 5% is too low to permit growth in those markets over that time. We suggest that a limit of 15% of the overall aggregate swap notional of the U.S. bank would be more appropriate.

As we noted in our June 19 letter, overseas bank branching has a long and safe tradition, allowing a U.S. bank to retain capital and core managerial and operational support in the United States, while serving customers overseas via a branch office. Such branches apply local resourcing scaled to support the amount of local lending, deposit-taking, and banking activity in each jurisdiction. Moreover, the distinctions the CFTC makes in the proposed Cross-Border Guidance among overseas branches, overseas affiliates, and overseas affiliates supported by U.S. guarantees to reflect its views on what is considered a direct and significant effect on commerce in the United States are not supported by the illustrations the CFTC provides. Nor do they take account of the fact that overseas branches are subject to U.S. as well as local regulatory regimes and supervision.

We are already seeing the impact of the proposed Cross-Border Guidance. We urge the CFTC to act promptly to treat overseas branches of U.S. banks as non-U.S. persons to preserve the U.S. bank branching model and the economic activity such branches support.

Sincerely,

A handwritten signature in black ink, appearing to read 'Cecelia Calaby', with a long, sweeping horizontal stroke extending to the right.

Cecelia Calaby



Building Success. Together.

**Frank Keating**  
President & CEO  
202-663-5111  
fkeating@aba.com

Tuesday, June 19, 2012

The Honorable Gary Gensler  
Chairman  
Commodity Futures Trading  
Commission  
Three Lafayette Centre  
Washington, DC 20581

The Honorable Mary L. Schapiro  
Chairman  
The Securities and Exchange  
Commission  
100 F Street, NE,  
Washington, DC 20549

The Honorable Jill E. Sommers  
Commissioner, CFTC

The Honorable Elisse B. Walter  
Commissioner, SEC

The Honorable Bart Chilton  
Commissioner, CFTC

The Honorable Luis A. Aguilar  
Commissioner, SEC

The Honorable Scott O'Malia  
Commissioner, CFTC

The Honorable Troy A. Paredes  
Commissioner, SEC

The Honorable Mark P. Wetjen  
Commissioner, CFTC

The Honorable Daniel Gallagher  
Commissioner, SEC

The Honorable Ben S. Bernanke  
Chairman of the Board of  
Governors  
Federal Reserve System  
20<sup>th</sup> Street and Constitution  
Ave, NW, Room 2046  
Washington, DC 20551

The Honorable Thomas J. Curry  
Comptroller of the Currency  
Office of the Comptroller of the  
Currency  
Independence Square,  
250 E Street, SW  
Washington, DC 20219

The Honorable Martin J. Gruenberg  
Acting Chairman and Vice  
Chairman of the Board  
Federal Deposit Insurance  
Corporation  
550 17<sup>th</sup> Street, NW, Room 6000  
Washington, DC 20429

Re: CFTC Plan May Endanger Overseas Branching by U.S. Banks

Ladies and Gentlemen:

The United States remains the global leader in financial services, and financial services continue to provide a strong surplus to our balance of trade. Both of those positions could take an unnecessary hit from a regulatory plan being considered by the Commodity Futures Trading Commission (CFTC). Branching has a long and safe tradition, allowing a U.S. bank to retain capital and the jobs associated with core managerial and operational support in the United States, while operating overseas via a branch office. Such branches apply local resourcing scaled to support the amount of local lending, deposit-taking, and banking activity in each jurisdiction. Historically, and continuing under existing revisions to international standards, U.S. and foreign

regulators have permitted branching into their respective jurisdictions as a banking business model when operating abroad.

Many aspects of the implementation of the Dodd-Frank Act have the potential to disrupt and damage this historical business model, and we urge the regulators to exercise their respective authorities with care to avoid unnecessary harm to the branch banking model. We have a particular concern with guidance from the CFTC currently under discussion, which we understand may include provisions that would disadvantage overseas branches of U.S. banks compared to overseas subsidiaries. Ordinarily, we would review such a proposal and provide comment in the usual course once it had been formally proposed. In this case the formal publication of the proposal itself would have an immediate impact on markets to the detriment of U.S. banks with overseas branches. Our foreign competitors abroad are already actively seeking to attract customers of our overseas branches by warning them that U.S. regulations will raise costs of service, decrease quality or availability of service, or even result in the customer becoming subject to U.S. regulatory requirements. Publication of the CFTC proposal under discussion would give further credence to those claims.

We understand the CFTC is considering this week including, in interim guidance regarding the extra-territorial application of proposed and pending swaps rules, provisions that would do two things: one, fail to provide overseas branches of U.S. banks the same phase-in relief offered to both overseas subsidiaries and to foreign banks operating in the United States, and two, reverse the historical banking and securities law treatment of non-U.S. branches by considering them 'U.S. persons' for application of the swaps rules.

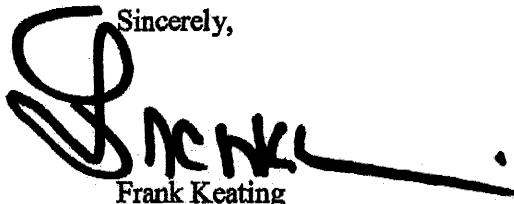
When the customers of our overseas branches see the proposed interim guidance they will immediately ask themselves—will the branch be able to support my transaction? Will the branch be able to continue to provide me cost-effective service? Will I be subject to additional regulatory requirements if I continue to do business with the branch? The possibility of a wrong answer to any one of these questions will prompt any commercial or financial business anywhere in the world to immediately cease doing business with that overseas branch.

In the intermediate and longer term, if these provisions progress, we can also expect a loss of U.S. jobs and capital to foreign jurisdictions as U.S. banks are forced to use subsidiaries overseas – with the requisite local capital and resources—so as to continue the business they are presently conducting through their overseas branches. U.S. banks will need to make a considerable additional economic investment in replacing operational and managerial infrastructures previously provided from the United States with new infrastructures in each foreign jurisdiction—transferring economic capital and jobs overseas. This fragmentation of the overseas operations of U.S. banks is an approach that will not be adopted by other regulators across the globe, and so foreign banks operating in the U.S. will not suffer the same inefficiencies and costs. Others have expressed a concern that branch activity may pose increased systemic risk to U.S. markets; such concern may not in fact be aligned with market

perception and more importantly fails to take account of the many strengths of the branch model including that branches are subject to U.S. as well as local regulatory regimes.

We urge the agencies with a role in implementing the Dodd-Frank Act to take care to avoid such unilateral impact on overseas branches of U.S. banks. Of immediate concern, we urge the CFTC to remove from its guidance—before publication—those provisions that would effectively take away from U.S. banks the opportunity to operate abroad through branches, a business model enjoyed by our foreign bank competitors here in the United States and elsewhere.

Sincerely,



Frank Keating

cc:

The Honorable Debbie Stabenow, Chairwoman  
U.S. Senate Committee on Agriculture

The Honorable Pat Roberts, Ranking Member  
U.S. Senate Committee on Agriculture

The Honorable Tim Johnson, Chairman  
U.S. Senate Committee on Banking, Housing, and Urban Affairs

The Honorable Richard Shelby, Ranking Member  
U.S. Senate Committee on Banking, Housing, and Urban Affairs

The Honorable Frank Lucas, Chairman  
House Committee on Agriculture

The Honorable Collin C. Peterson, Ranking Member  
House Committee on Agriculture

The Honorable Spencer Bachus, Chairman  
House Financial Services Committee

The Honorable Barney Frank, Ranking Member  
House Financial Services Committee

Mary John Miller, Assistant Secretary for Financial Markets  
U.S. Department of the Treasury

Cyrus Amir-Mokri, Assistant Secretary for Financial Institutions  
U.S. Department of the Treasury

**Timothy Bowler, Deputy Assistant Secretary for Capital Markets  
U.S. Department of the Treasury**

**Michael S. Gibson, Director  
Board of Governors of the Federal Reserve System**

**Scott G. Alvarez, General Counsel  
Board of Governors of the Federal Reserve System**

**Mark Van Der Weide, Senior Associate Director  
Board of Governors of the Federal Reserve System**

**Julie Williams, First Senior Deputy Comptroller and Chief Counsel  
Office of the Comptroller of the Currency**

**Kurt Wilhelm, Director, Financial Markets Group  
Office of the Comptroller of the Currency**

**Ellen Broadman, Director, Securities and Corporate Practices  
Office of the Comptroller of the Currency**

**James Basham, Assistant Director, Legislative and Regulatory  
Office of the Comptroller of the Currency**