February 17, 2011

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

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

Re: Supplemental Submission Concerning the Application of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act to the Global Swap Dealing Businesses of Foreign Financial Institutions

Dear Mr. Stawick, Ms. Murphy and Ms. Johnson:

The undersigned 12 foreign-headquartered financial institutions respectfully submit the attached comment letter to the Commodity Futures Trading Commission ("**CFTC**"), the Securities and Exchange Commission ("**SEC**") and the Board of Governors of the Federal Reserve System in relation to the following rule proposals:

- CFTC and SEC Proposed Rule on Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," RIN 3235–AK65, File No. S7–39–10;
- CFTC Proposed Rule on Registration of Swap Dealers and Major Swap Participants, RIN 3038–AC95;
- CFTC Proposed Rule on Duties for Swap Dealers and Major Swap Participants, RIN 3038–AC96;
- CFTC Proposed Rule on Designation of Chief Compliance Officer and Preparation of Annual Compliance Report, RIN 3038–AC96;
- CFTC Proposed Rule on Implementation of Conflicts of Interest Policies and Procedures by Swap Dealers and Major Swap Participants, RIN 3038–AC96;
- CFTC Proposed Rule on Swap Data Recordkeeping and Reporting, RIN 3038–AD19;
- CFTC Proposed Rule on Reporting, Recordkeeping and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants, RIN 3038–AC96;

- CFTC Proposed Rule on Real-Time Public Reporting of Swap Transaction Data, RIN 3038–AD08;
- CFTC Interim Final Rule on Reporting Certain Post-Enactment Swap Transactions, RIN 3038–AD29;
- SEC Proposed Rule on Reporting of Security-Based Swap Information to Registered Security-Based Swap Data Repositories or the SEC and Public Dissemination of such Information, File Number S7–34–10;
- CFTC Proposed Rules Regarding Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties, RIN 3038–AD25;
- SEC Proposed Rule on Review of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies, File Number S7–44–10; and
- CFTC Proposed Rule on Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, RIN 3038–AC96.

Please feel free to contact any of the undersigned or Lanny A. Schwartz (212-450-4174), Arthur S. Long (212-450-4742), Robert L.D. Colby (202-962-7121) or Courtenay U. Myers (212-450-4943) at Davis Polk & Wardwell LLP with any questions.

Sincerely,

BARCLAYS BANK PLC

BNP PARIBAS S.A.

CREDIT SUISSE AG

DEUTSCHE BANK AG

HSBC

NOMURA SECURITIES INTERNATIONAL, INC.

RABOBANK NEDERLAND

ROYAL BANK OF CANADA

THE ROYAL BANK OF SCOTLAND GROUP PLC

SOCIETE GENERALE

THE TORONTO-DOMINION BANK

UBS AG

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Re: <u>Supplemental Submission Concerning the Application of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act to the Global Swap Dealing Businesses of Foreign Financial Institutions</u>

Dear Mr. Stawick, Ms. Murphy and Ms. Johnson:

The undersigned 12 foreign-headquartered financial institutions are writing as a follow-up to the letter dated January 11, 2011 (the "**initial comment letter**"),[1] previously submitted to each of your agencies (the "**Agencies**"). On January 14, 2011, certain of our representatives met with Agency staff members to discuss the initial comment letter. In those meetings, it was suggested that it would be helpful to receive a second submission that would provide greater specificity on the key features of the regulatory structure proposed as well as a more detailed analysis of the legal justifications of the proposal.

The initial comment letter discussed the importance of implementing Title VII ("**Title VII**") of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**") in a manner that would allow comprehensively regulated and supervised foreign banks[2] to continue to book their global swaps[3] using a centralized

[1] *Available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27063.

[2] References to "foreign bank" refer to foreign banking entities as well as foreign securities firms. Under our proposal, in order to qualify for the reliance on home country requirements for entity-level rules, a foreign bank must be comprehensively regulated by its home country regulator in a manner comparable to the U.S. regulatory framework. The term "foreign bank swap dealer" should be similarly construed.

[3] Unless the context otherwise requires, references herein to "swaps" and "swap dealers" will include security-based swaps and security-based swap dealers, respectively.

booking model[4] (*e.g.*, booking swaps through a non-U.S. branch of a foreign bank) in a manner that does not subject them to inconsistent or duplicative regulatory requirements. To this end, the letter proposed a framework for regulatory implementation that distinguishes between rules that apply to swap dealers at the entity level (such as capital and margin for non-cleared swaps) and transaction-level rules that regulate activities in respect of particular swap transactions. Under this framework, Title VII would be applied to a foreign bank swap dealer in a way that relies on home country regulation in the case of entity-level rules. Title VII's transaction-level rules would generally apply to a foreign bank swap dealer's swaps activities with U.S. persons, but not to its swaps activities with non-U.S. persons. In other words, the proposed application of Title VII's transaction-level rules to a foreign bank swap dealer would be based on the identity of the counterparty.

In this letter, we provide *specific* modifications to the proposed regulations contained in the joint proposal by the Commodity Futures Trading Commission ("**CFTC**") and the Securities and Exchange Commission ("**SEC**," and, together with the CFTC, the "**Commissions**") concerning the definitions of "swap dealer" and "security-based swap dealer" and other related terms (the "**Joint Definitions Proposal**") as a means to implement the regulatory structure that was outlined in the initial comment letter.[5] We discuss in detail the Agencies' legal authority to implement these modifications, which does not require the ability to grant exemptive relief. Additionally, we address certain other related matters concerning the extraterritorial application of swap dealer registration requirements. Our proposed modifications, which we discuss below, are attached in Annex A.

Although there could be many registration and organizational structures consistent with Title VII for foreign banks to organize their swaps operations, our proposed revisions to the Commissions' proposed rules envision two specific "swap dealer" and "security-based swap dealer" registration scenarios:

1. A *foreign (non-U.S.) branch* of a foreign bank registers as a swap dealer the entire branch or a group of persons within the branch who conduct swap dealing activities with U.S. persons.[6] This registered swap dealer would be a centralized booking location for swaps and may directly deal with U.S. customers in connection with swap transactions. Title VII and implementing

[4] As more fully described in the initial comment letter, a centralized booking model has many important benefits. Specifically, operating a global swaps business out of one or more well-capitalized, financially strong and comprehensively regulated booking centers reduces systemic risk and makes any orderly resolution process more efficient. For many foreign banks, swap dealer registration other than through a centralized booking model may be incompatible with home country requirements, unacceptable to home country supervisors, prohibitively expensive, inefficient or untenable from a capital perspective, impossible to achieve in the necessary timeframe and operationally impractical. These negative consequences could force foreign banks to scale back their U.S. swaps businesses which would result in a significant loss of competition, depth and liquidity in the market.

[5] Proposed Rule - Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 75 Fed. Reg. 80,174 (Dec. 21, 2010).

[6] Such group of persons may include a separately identified department or division within the branch.

regulations relevant to the U.S. swap dealing activities of the foreign bank would apply to the registered swap dealer. Title VII would not apply to other activities of the branch or to the swaps activities of other parts of the foreign bank. One or more U.S. affiliates of the registrant may act as agent in arranging transactions with U.S. counterparties and also potentially assist it in discharging certain of its obligations as a registered swap dealer under contractual arrangements;[7] and

2. A *U.S. affiliate* of the foreign bank registers as a swap dealer to conduct swap dealing activities with U.S. persons.[8] In addition, a *foreign branch* of the foreign bank that is a booking center for swaps with U.S. persons but that does not otherwise deal directly with U.S. persons might also register as a swap dealer *solely* with respect to its activities as a booking center for swaps with U.S. persons. Under this scenario, different aspects of Title VII's requirements would apply to each of the two registrants due to the different swap dealing activities with respect to which they are registered. The sum of the two registrants' obligations under Title VII would result in comprehensive regulation by the Commissions of the swap dealing activities of the foreign bank with U.S. persons.

[7] If necessary, a foreign bank would register these U.S. affiliates, or use existing registered affiliates, as futures commission merchants or introducing brokers, broker-dealers or swap dealers depending upon their respective roles in soliciting transactions, acting as principal in respect of swap transactions, receiving customer margin, effecting transactions as an agent on exchanges and swap execution facilities ("**SEFs**") and in OTC markets, and clearing customer transactions.

[8] As in the first registration scenario above, the U.S. affiliate might choose to register as a swap dealer only a separately identified department or division.

PROPOSED MODIFICATIONS

The proposed modifications are premised on the notions that swap dealer registration and regulation would be triggered only by a foreign bank swap dealer's swap dealing activities with U.S. persons and may be limited to specific swap dealing activities. The proposed modifications address the following general matters:

- **Who is required to register as a swap dealer and with respect to what activities?**
  - Swap dealer registration triggered only by swaps with U.S. persons that are not registered swap dealers
  - Registration may be limited to specified activities
  - Definition of "U.S. person"
  - Registration of a separately identified department or division

- **How does Title VII apply to limited registrants?**
  - Consequences of limited registration: Title VII's requirements are tailored to the nature of activities for which a swap dealer is registered
  - Application of Title VII is limited to the registered branch or separately identified division or department

- **When will the Federal Reserve and the Commissions rely on home country requirements for entity-level regulation?**
  - Capital and margin: reliance on home country requirements if certain standards are met, including being subject to comprehensive home country regulation.
  - Adequacy of capital and margin judged with respect to the entity as a whole
  - Other entity-level rules: reliance on home country requirements if certain standards are met, including being subject to comprehensive home country regulation.[9]

- **How do transaction-level rules apply to foreign banks whose registration is limited to swap dealing activities with U.S. persons?**
  - Application of Title VII transaction-level rules to a foreign branch of a foreign bank whose registration is limited to swaps dealing activities with U.S. persons
  - Delegation of specific obligations to affiliate
  - Mandatory clearing and swap data reporting

[9] In some cases, a foreign bank may seek to register as a swap dealer a branch or a subsidiary in a jurisdiction other than the foreign bank's jurisdiction of incorporation. In this situation, "home country" regulation refers to the combination of rules to which the branch is subject. For example, in the EU, the regulator in the member state where a bank has its head office (the "**home country**" supervisor) is in charge of supervising the financial adequacy and the systems and controls of a bank as well as its overall conduct. The regulator in each member state in which a foreign bank offers its services (the "**host country**" supervisor) relies on the home country supervisor to ensure that the systems and controls and financial adequacy of a bank are in good order. The host country supervisor supervises the conduct of foreign banks, including rules on treating clients fairly, only to the extent that activities are carried out within its jurisdiction.

We set forth below the specific proposed modifications to the rules contained in the Joint Definitions Proposal and analyze the effects of such modifications together with the legal bases for the Agencies to adopt these modifications.[10] The Agencies are authorized by the Dodd-Frank Act to adopt these modifications without the need to grant exemptions from Title VII's requirements.

A. Who is Required to Register as a Swap Dealer and with respect to What Activities?

1. *Swap Dealer Registration Only Triggered by Swaps with U.S. Persons*

Proposed new Section 1.3(ppp)(3)(B)[11]:

> *"(B) For purposes of this Section 1.3(ppp), references to the term "swaps" is to swaps with U.S. persons that are not swap dealers and references to the term "counterparties" is to counterparties that are U.S. persons that are not swap dealers."*

Effect of the Proposed Modification: The general definition of "swap dealer" in the Dodd-Frank Act and in the Joint Definitions Proposal refers to a person's activities with respect to *swaps*, such as making a market in *swaps* or regularly entering into *swaps* with *counterparties* for one's own account. The proposed modification limits the scope of the terms "swaps" and "counterparties" *solely* for the purpose of the "swap dealer" definition. A person, such as a foreign branch of a foreign bank that only deals in swaps with non-U.S. persons, would not fall within the general definition of swap dealer and, accordingly, would not be required to register with the Commissions as a swap dealer.[12] In addition, we propose that a foreign bank swap dealer whose only U.S. swap activity is with a U.S.-registered swap dealer would not meet the definition of "swap dealer" and would not have to register as such.

Legal Authority: The proposed modification further defines the term "swap dealer." Section 712(d) grants the Commissions broad authority to further define the terms "swap," "security-based swap," "swap dealer" and "security-based swap dealer." Section 712(d) also authorizes the Commissions to "adopt *such other rules* regarding such definitions as [they] determine are necessary and appropriate." The proposed limitations to the scope of "swaps" and "counterparties" for purposes of the "swap dealer" definition would constitute "such other rules."

In addition, the Commissions can reflect in their rules the limitations on their authority over persons engaging in *non-U.S.* activities arising from Sections 722 (CFTC) and 772 (SEC), which essentially limit the Commissions' territorial jurisdiction under

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[10] For convenience of presentation, the section by section analysis refers to our proposed modification to the definition of "swap dealer." Our parallel modifications for "security-based swap dealer" are contained in Annex A.

[11] Parallel modification for security-based swap dealers: § 240.3a71–1(d).

[12] Dodd-Frank Act §731 ("It shall be unlawful for any person to act as a swap dealer unless the person is registered as a swap dealer with the Commission."); § 764 (parallel provision).

Title VII to U.S. matters.[13] Although the provisions are not linguistically identical,[14] they adopt a similar structure. The provisions begin by providing that the Commissions' jurisdictions under Title VII are limited to the United States, and then set out certain exceptions. Both sections contain exceptions allowing the Commissions' anti-evasion regulations to apply extraterritorially. Section 722 contains a further exception for activities outside the United States that "have a direct *and* significant connection with activities in, or effect on, commerce of the United States . . . ."[15] Under the principles of statutory interpretation most recently pronounced by the Supreme Court in *Morrison* v. *National Australia Bank Ltd.*,[16] Sections 722 and 772 should be presumed to be concerned primarily with U.S. matters[17] and the exceptions that provide for extraterritorial jurisdiction should be narrowly construed.[18] Accordingly, a foreign bank swap dealer, wherever located, that only deals in swaps with foreign counterparties is "without the jurisdiction of the United States" for purposes of Section 772 and its swaps activities are similarly "outside the United States" for purposes of Section 722. Beyond Sections 722 and 772, the congressional intent behind Title VII and the Dodd-Frank Act is to protect U.S. customers, U.S. markets and the U.S. financial system and not to authorize the Commissions to expend their limited resources regulating foreign swap transactions.[19]

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[13] *See* CFTC Proposed Rule on Swap Data Repositories, 75 Fed. Reg. 80,898, 80,900.

[14] Section 722 (CFTC) states that Title VII's provisions relating to swaps shall not apply to "*activities* outside the United States," whereas Section 772 (SEC) provides that Title VII shall not apply to "any person insofar as such *person transacts a business* in security-based swaps without the jurisdiction of the United States . . . ."

[15] This additional provision in Section 722 appears to confer upon the CFTC different extraterritorial jurisdiction from that of the SEC. However, even if the scope of the CFTC's extraterritorial jurisdiction is arguably broader than that of the SEC, there is no statutory requirement that the CFTC must exercise such jurisdiction to the fullest extent. Further, the CFTC should not rely on the "direct and significant connection . . . or effect" provision to adopt swap dealer regulations with different extraterritorial scope to the SEC's regulations. Since many swap dealers would register with both Commissions or engage in mixed swaps, it is imperative that the Commissions adopt consistent approaches to regulation of cross-border swaps and activities.

[16] 130 S. Ct. 2869 (2010).

[17] *Id.* at 2877.

[18] In *Morrison*, the Supreme Court stated Sections 30(a) and 30(b) of the Securities Exchange Act of 1934 ("**Exchange Act**") "strongly confirmed" "the [Exchange Act's] exclusive focus on *domestic* purchases and sales" because "[u]nder *both* provisions it is the foreign location of the transaction that establishes (or reflects the presumption of) the Act's inapplicability, absent [anti-evasion] regulations by the Commission." 130 S. Ct. at 2885 (emphasis added). Section 30(b) of the Exchange Act is virtually identical to Section 30(c) of that Act, as inserted by Section 772 of the Dodd-Frank Act. The Supreme Court also narrowly interpreted the anti-evasion provision in Section 30(b), which is substantively identical to the anti-evasion provisions in Sections 722 and 772, noting that the provision seems to be "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." 130 S. Ct. at 2882-83.

[19] *See e.g.*, Dodd-Frank Act § 721(a)(16) (defining major swap participant by reference to "adverse effects on the financial stability of the *United States* banking system or financial markets") ; § 722(h) (requiring Treasury to consider the "financial stability of the *United States*" in determining whether to exempt foreign exchange swaps and forwards from the definition of "swap").

Finally, there are several reasons to exclude dealing activities with U.S.-registered swap dealers. First, as stated in the Joint Definitions Proposal: "[t]he Commissions can most efficiently achieve the purposes underlying Title VII . . . by focusing their attention on those persons whose function is to serve as the points of connection" between *non-dealers*.[20] Second, a swap between a foreign dealer and a U.S.-registered swap dealer would already be subject to Title VII by virtue of the latter's involvement. As such, there is little reason to require the foreign dealer to also register as a swap dealer. Third, cross-border interdealer swaps provide significant benefits to U.S. swap dealers which could be undermined if foreign swap dealers were deterred from entering into such trades by the registration requirement.[21]

2. *Registration May Be Limited to Specified Activities*

Proposed new Section 1.3(ppp)(3)(A)[22]:

> *"(A) . . . . The activities covered in such limited registration may be confined to specified functions of a swap dealer (such as functioning as a booking location) and may be confined to those activities involving swaps with U.S. persons. . . . "*

Effect of the Proposed Modification: This proposed modification would permit a person to register as a swap dealer with respect to certain swap dealing activities and not others. Activity-based registration would permit the second registration scenario where a U.S. affiliate registers as a swap dealer for the activity of dealing in swaps directly with U.S. persons and a foreign branch of the foreign bank registers solely with respect to acting as a booking center for swaps with U.S. persons. As we discuss below, Title VII's requirements would be tailored based on the nature of the activities with respect to which each swap dealer is registered.

Legal Authority: Section 721(a)(21) states that "[a] person may be designated as a swap dealer for a single type or single class or category of . . . *activities* and considered not to be a swap dealer for other types, classes, or categories of . . . activities."[23] Therefore, Section 721(a)(21) and Section 761(a)(6) (parallel provision for security-based swap dealers) plainly permit a person to register as a swap dealer with respect to certain activities such that it would not be considered a swap dealer with respect to other activities.[24] Furthermore, the types of activities for which a person may register as a swap dealer are not limited to the broad categories of dealer activities listed in the Dodd-

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[20] Joint Definitions Proposal at 80,177.

[21] It is also worth noting that a foreign broker-dealer that deals only with registered U.S. broker-dealers would not have to register with the SEC as a broker-dealer. 17 C.F.R. § 240.15a-6(a)(4)(i).

[22] Parallel modification for security-based swap dealers: § 240.3a71–1(c).

[23] Dodd-Frank Act § 721(a)(21)(emphasis added); § 761(a)(6) (parallel provision for security-based swap dealers). *See also* Joint Definitions Proposal at 80,175 (noting that "[t]he Dodd-Frank Act defines the terms 'swap dealer' and 'security-based swap dealer' in terms of whether a person engages in certain types of *activities* involving swaps or security-based swaps.")(emphasis added).

[24] Limiting swap dealer registration to certain swap dealing activities is expressly contemplated in the Joint Definitions Proposal. *See* Proposed 17 C.F.R. § 1.3(ppp)(3); Proposed 17 C.F.R. § 240.3a71–1(c).

Frank Act itself.[25] The fact that Sections 721(a)(21) and 761(a)(6) do not specify the types of activities for which a swap dealer may be designated suggests that the Commissions have considerable discretion in this respect. Just as the Commissions are willing to apply the swap dealer definition flexibly to account for "new types of [swap] dealer activity,"[26] they should similarly accommodate the different types of swap dealing activities conducted by foreign banks that use a central booking model.

3. *Definition of U.S. Person*

Our proposed definition of "U.S. person" is the same as that term is defined in Rule 902(k) of Regulation S.[27] The full text of the definition is contained in Section 1.3(ppp)(3)(B)[28] and is included in Annex A.

Effect of the Proposed Modification: The proposed modifications use terms such as "U.S. person" or "U.S. counterparty" to clarify that Title VII's transaction-level rules apply to a foreign bank swap dealer's swap activities with U.S. persons or U.S. counterparties.[29] We propose to use Regulation S's definition of "U.S. person" because it is familiar to regulators and financial market professionals, avoids multiple definitions for the same term and provides consistent application and legal certainty for a financial institution that offers a swap and a security-based swap (or a security-based swap and a security that is not a security-based swap) to the same customer.

Legal Authority: Section 712(d) authorizes the Commissions to "adopt *such other rules*" regarding [the definition of 'swap dealer' as they] determine are necessary and appropriate." Adopting our proposed definition of "U.S. person" is both "necessary" to provide legal certainty to foreign banks regarding Title VII's application to cross-border swaps and "appropriate" to give effect to the jurisdiction provisions in Sections 722 and 772.

The Commissions are authorized to adopt our proposed definition of "U.S. person" with the consequence that Title VII's transaction-level rules would *generally* not apply to a foreign bank's swap transactions with non-U.S. persons. As mentioned above, express authority to grant exemptions under Title VII is not necessary to achieve this result as it can be achieved by relying on Section 722.[30] Specifically, the Commissions are authorized to adopt our approach because Sections 722 and 772 are presumed to be "primarily concerned with domestic conditions,"[31] and a swap between a foreign-

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[25] *See* Dodd-Frank Act §§ 721(a)(21); § 761(a)(6).

[26] Joint Definitions Proposal at 80,179.

[27] 17 C.F.R. § 230.902(k).

[28] Parallel modification for security-based swap dealers: § 240.3a71–1(d).

[29] *See e.g.*, proposed § 1.3(ppp)(3)(A) (permitting registration as a swap dealer only with respect to swaps activities with "U.S. persons"); § 1.3(ppp)(3)(E) (unless otherwise specified by the Commission, Title VII shall not apply to swaps activities conducted with a person other than a "U.S. counterparty").

[30] *See* CFTC Proposed Rule on Swap Data Repositories, 75 Fed. Reg. 80,898, 80,900.

[31] *Morrison*, 130 S. Ct. at 2877.

incorporated entity -- a non-U.S. person under Regulation S -- and a foreign bank swap dealer is not a domestic condition.[32]

4. *Registration of a Separately Identified Department or Division*

Proposed new Section 1.3(ppp)(3)(C)[33]:

"(C) For purposes of this Section 1.3(ppp), "person" shall be deemed to include (i) a branch of a foreign bank or (ii) a separately identified division or department of a foreign bank– i.e., a department or division that is organized and administered so as to permit independent examination and enforcement of applicable provisions of the Wall Street Transparency and Accountability Act of 2010 and rules and regulations of the Commission thereunder. Where a foreign bank has established a branch or a separately identified division or department as a swap dealer, the term "person" shall refer to such branch or to such division or department, as the case may be, and not to the foreign bank as a whole. Where a foreign bank has established the entire bank as a swap dealer, the term "person" shall refer to the foreign bank as a whole. For purposes of this Section 1.3(ppp), references to "foreign bank" include a banking entity organized under the laws of a country other than the United States as well as a securities firm organized under such laws."

Effect of the Proposed Modification: This provision expands upon the meaning of "person," as that term is used in the general definition of "swap dealer."[34] First, a "person" may be limited to a particular branch of a foreign bank, and not the entire bank or its other branches. This has the effect of permitting a branch of a foreign bank to register as a swap dealer separately from the entire bank.[35] Second, a "person" may be limited to a separately identified division or department of a foreign bank, *provided* that the division or department "is organized and administered so as to permit independent examination and enforcement of applicable provisions of Title VII of the Dodd-Frank Act and rules and regulations of the Commission thereunder."[36] This has the

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[32] *See In re Société Générale Sec. Litig.*, No. 08. Civ. 2495 (RMB), 2010 U.S. Dist. LEXIS 107719 at *17 (S.D.N.Y. Sept. 29, 2010) (holding that Section 10(b) of the Exchange Act is inapplicable to a U.S. customer's purchase of: (1) securities of a foreign issuer traded on a foreign exchange or (2) that issuer's ADRs traded on a U.S. over-the-counter market); *Elliott Associates, L.P.* v. *Porsche Automobil Holding SE*, No. 10 Civ. 532 (HB) (S.D.N.Y. Dec. 30, 2010) at 13 ("Although *Morrison* permits a cause of action by a plaintiff who has concluded a 'domestic transaction in other securities,' this appears to mean 'purchases and sales of securities explicitly solicited by the issuer in the U.S.,' rather than . . . swap agreements that reference them [ ] where only the purchaser is located in the United States.").

[33] Parallel modification for security-based swap dealers: § 240.3a71–1(e).

[34] Dodd-Frank Act § 721 (a)(21) ("The term 'swap dealer' means any *person* who . . . ."); § 761(a)(6) (parallel provision).

[35] We note that registration of a U.S. branch of a foreign bank as a swap dealer should not result in the entire foreign bank being treated as a swap dealer. Likewise, registration of the foreign bank or a foreign branch of the foreign bank should not result in the U.S. branches of the foreign bank being treated as a swap dealer.

[36] This is consistent with the CFTC's definition for "business trading unit" in its proposed rules. *See* 75 Fed. Reg. 71,391, 71,395 (Nov. 23, 2010) (Proposed 17 C.F.R. § 23.605(a)(2) defines "business trading unit" as "any department, division, group, or personnel of a swap dealer . . . or any of its affiliates,
(…continued)

effect of permitting a separately identified division or department of a foreign bank to register as a swap dealer separately from the entire bank.

Legal Authority: *Branch-by-Branch Registration*. By adopting our proposed definition of "person," the Commissions would be further defining "swap dealer" insofar as the definition of swap dealer makes reference to "person," as permitted by Section 712(d). Moreover, the express authority contained in Sections 721(a)(21) and 761(a)(6) to designate an entity as a swap dealer with respect to certain activities implies an authority to designate only the portion of the entity that engages in such activities as a swap dealer.[37] Furthermore, in defining prudential regulator, Section 721(a)(17) expressly contemplates that a "federally chartered *branch* . . . of a foreign bank" or a "State-chartered *branch* . . . of a foreign bank" could itself be a swap dealer. Finally, precedents for treating a bank branch as separate and distinct exist in many other contexts.[38]

Legal Authority: *Registration of a Separately Identified Division or Department of a Bank*. The Commissions could similarly exercise their broad definitional authority under Section 712(d) and their implied authority under Sections 721(a)(21) and 761(a)(6) to permit a separately identified division or department of a foreign bank to register as a swap dealer. This possibility was expressly raised in the Joint Definitions Proposal[39] and precedents for registering a separately identified division or department of a bank exist in other contexts.[40] Our proposed reference to permitting "independent examination and enforcement" is consistent with these precedents.[41]

(continued…)

whether or not identified as such, that performs [certain enumerated business activities] on behalf of a swap dealer"); 75 Fed. Reg. 76,666, 76,673 (Dec. 9, 2010).

[37] In the Joint Definitions Proposal, the CFTC discussed limiting swap dealer requirements to the swap dealing activities of a *division* of an entity as part of a broader discussion about activity-based designation authorized by Sections 721(a)(21) and 761(a)(6). Joint Definitions Proposal at 80,182.

[38] The Federal Reserve has treated U.S. branches of foreign banks in certain circumstances as if they were separate legal entities. *See e.g.*, 12 C.F.R. §§ 223.61; 225.90; s*ee also* New York State Banking Law § 606(4) (branch ring fencing statute). Similarly, the SEC has taken the position that although U.S. branches of foreign banks are not separate legal entities in a strictly technical sense, for purposes of the exemption from registration provided by Section 3(a)(2) of the Securities Act of 1933, a U.S. branch of a foreign bank may be deemed to be a "bank." *See* SEC Release 33-6661 (Sept. 23, 1986).

[39] *See* Joint Definitions Proposal at 80,182 ("The CFTC understands that there may potentially be non-financial entities, such as physical commodity firms, that conduct swap dealing activity through a division of the entity, and not a separately-incorporated subsidiary . . . . [T]he CFTC anticipates that certain swap dealer requirements would apply to the swap dealing activities of the division, but not necessarily to the swap activities of other parts of the entity.").

[40] *See e.g.*, Investment Advisers Act of 1940 § 202(a)(11)(A), 15 U.S.C. § 80b-2(a)(11)(A) (if investment adviser services are performed through a separately identifiable department or division, the department or division, and not the bank itself, shall be deemed to be the investment adviser.). *See also*, Securities Exchange Act of 1934 § 3(a)(30), 15 U.S.C. § 78c(a)(3) (permitting a separately identifiable department or division of a bank to register as a municipal securities dealer).

[41] *See e.g.*, Investment Advisers Act of 1940 § 202(a)(26), 15 U.S.C. § 80b-2(a)(26) (to qualify as a separately identifiable department or division, a unit must, among other things, maintain records in a way so as to "permit independent examination and enforcement by the [SEC]").

B. How Does Title VII Apply to Limited Registrants?

1. *Consequences of Limited Registration*

Proposed new Section 1.3(ppp)(3)(A)[42]:

> *". . . . Where a person's registration as a swap dealer is limited with respect to its activities, such person shall be subject to only such obligations of the Wall Street Transparency and Accountability Act of 2010 and the rules and regulations of the Commission thereunder as pertain to such activities."*

Effect of the Proposed Modification: Under this provision, where a person registers as a swap dealer *only* with respect to certain activities, Title VII's swap dealer requirements would only apply to those activities. The phrase "as pertain to such activities" would allow the Commissions and the Board of Governors of the Federal Reserve System ("**Federal Reserve**") to tailor the application of Title VII based on the nature of the activities with respect to which a swap dealer is registered.

For example, under the second registration scenario described above, where a U.S. affiliate *and* a foreign branch of the foreign bank each register as a swap dealer with respect to different swap dealing activities, different aspects of Title VII would apply to each. Collectively, the two registrants would be subject to the full set of Title VII's swap dealer requirements. As a general matter, under this registration scenario, the U.S. affiliate that registers *only* with respect to its swap dealing activities with U.S. persons would be subject to Title VII's transaction-level rules in carrying out those activities. The foreign branch that registers as a swap dealer for its role as the booking center and that ultimately bears the risks would be subject to Title VII's entity-level rules.[43] Because the foreign branch is acting only as the booking center and does not deal directly with U.S. customers, it would not be subject to Title VII's transaction-level rules.[44]

Legal Authority: The term "designate[ ]" in Sections 721(a)(21) and 761(a)(6) authorizes the Commissions to not only limit the scope of swap dealer *registration* to specific activities, but to correspondingly limit the scope of *application* of Title VII's swap dealer requirements to such activities.[45] Furthermore, the Commissions' rulemaking authority under Sections 731 and 764[46] and many Title VII duties are expressly limited to "registered swap dealers," reflecting a scope of application of Title VII that is coterminous with the scope of registration. Since activity-based designation is

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[42] Parallel modification for security-based swap dealers: § 240.3a71–1(c).

[43] As discussed below and in the initial comment letter, the Commissions should rely on entity-level requirements established by the home country supervisor if they meet certain standards.

[44] We have not specified in this letter the particular requirements of Title VII that would attach to each registrant under the second registration scenario. We are happy to work with the Agencies to define the specific obligations that should apply to each registrant depending on the nature of the activities for which it is registered.

[45] To adopt a contrary interpretation of the term "designate[ ]" would render the limited-purpose registration regime expressly contemplated by the Act meaningless.

[46] Dodd-Frank Act § 731 ("The Commission shall adopt rules for persons that are *registered* as swap dealers or major swap participants under this section.") (emphasis added); § 764 (parallel provision).

expressly permitted by the Dodd-Frank Act, the Commissions have authority under Section 712(d) to adopt "such other rules" to ensure that the application of Title VII to these limited activities is appropriate in light of the nature of such activities.

2. ***Application of Title VII is Limited to the Registered Branch or the Registered Separately Identified Division or Department***

Proposed new Section 1.3(ppp)(3)(D)[47]:

"(D) Where a separately identified division or department or a branch of a foreign bank has been registered as a swap dealer, all applicable provisions of the Wall Street Transparency and Accountability Act of 2010 and the rules and regulations of the Commission thereunder that refer to or impose obligations upon a "swap dealer," "Commission registrant," "counterparty," "individual," "person" or "registered entity" shall be deemed to refer to, or to impose such obligations solely upon such division or department or branch, as the case may be, and not upon the foreign bank as a whole."

Effect of the Proposed Modification: This provision limits the application of Title VII's requirements to the branch or separately identified division or department of a bank that registers as a swap dealer, so that these requirements do not apply to the bank as a whole.[48] Focusing regulation on the relevant parts of a foreign bank is efficient and avoids interfering with the non-swaps businesses of global banks, which often dwarf their swaps activities.

Legal Authority: The Commissions' authority under Section 712(d) to further define "swap dealer" and to "adopt such other rules," and their implied authority under Sections 721(a)(21) and 761(a)(6), permits them to adopt a rule that limits Title VII's requirements to the registered swap dealer, be it a branch or separately identified division or department of a bank. The CFTC also anticipated in the Joint Definitions Proposal that "certain swap dealer requirements would apply to the swap dealing activities of the division, but not necessarily to the swap activities of other parts of the entity."[49] Additionally, the Commissions' rulemaking authority under Sections 731 and 764 and many Title VII obligations are expressly limited to "registered swap dealers."

[47] Parallel modification for security-based swap dealers: § 240.3a71–1(f).

[48] As discussed later, the adequacy of capital and margin for non-cleared swaps would still be measured on a firm-wide basis.

[49] Joint Definitions Proposal at 80,182.

C. When Will the Federal Reserve and the Commissions Rely on Home Country Requirements for Entity-level Regulation?

1. *Capital and Margin: Reliance on Home Country Requirements*[50]

Proposed new Section 1.3(ppp)(4)[51]:

"(4) Capital and Margin Requirements for Foreign Swap Dealers for which there is a Prudential Regulator.[52] *Notwithstanding any other provision of this Rule, for purposes of Section 4s(e) of the Act, the capital and initial and variation margin requirements established by the home country regulator of a foreign bank shall be the capital and initial and variation margin requirements for any swap dealer that is a foreign bank or a foreign branch or separately identified division or department thereof for which there is a prudential regulator, if:*

> *(a) the foreign bank has been determined by the Federal Reserve to be subject to "comprehensive consolidated supervision" (as such term is used in 12 C.F.R. § 211.24(c)(1)), or*
>
> *(b) the Federal Reserve has made a determination that (i) the capital requirements to which such foreign bank is subject in its home country are comparable to those established for other banks as to which the Federal Reserve is the prudential regulator, and (ii) the initial and variation margin requirements to which such swap dealer is subject in its home country are comparable to those established for other banks as to which the Federal Reserve is the prudential regulator.*

For purposes of clause (b), the Federal Reserve may determine that capital and initial and variation margin requirements for a foreign bank or swap dealer by its home country are comparable if they are established under a regime that is determined by the Federal Reserve to have regulatory objectives and supervision that are generally consistent with those applicable to banking organizations as to which the Federal Reserve is a prudential regulator. Initial and variation margin requirements established by a swap dealer's home country may be determined to be comparable even if they are set at zero or are substantially

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[50] Proposed new Section 1.3(ppp)(5) (swap dealer definition) and Section 240.3a71–1(j) (security-based swap dealer definition) are parallel provisions concerning the capital and margin requirements for foreign non-banking entities such as comprehensively regulated foreign securities firms. In some jurisdictions, securities firms are subject to risk-based capital requirements that are modeled on the Basel Accords. For example, the EU's Capital Adequacy Directive, which reflects Basel II standards, "lays down the capital adequacy requirements applying to investment firms and credit institutions, the rules for their calculation and the rules for their prudential supervision." *See* Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions, Art 1.

[51] Parallel modification for security-based swap dealers: § 240.3a71–1(i).

[52] We understand that the Federal Reserve's (and other prudential regulators') rules relating to capital and margin will not be included in the Commissions' rulemakings or be adopted by the Commissions. We include these provisions for clarity of presentation in the context of the overall proposal and in the absence of proposed capital and margin rules from the prudential regulators.

lower than those applicable to other swap dealers as to which the Federal reserve is the prudential regulator if the capital regime in such home country is determined to take account appropriately of unmargined or undermargined swaps by imposing additional capital charges."[53]

Effect of the Proposed Modification: This provision allows the swap dealer's prudential regulator[54] to rely on home country capital and margin requirements if certain standards are met. Such reliance avoids potential conflicts between home country and U.S. capital and margin requirements and the need to perform separate sets of capital calculations. It also enhances efficiency for market participants as well as their regulators.[55] Our proposed modification sets two alternative standards for the Federal Reserve's reliance on home country capital and margin rules. The first standard permits the Federal Reserve to leverage existing determinations that a particular foreign bank is subject to "comprehensive consolidated supervision." The alternative "comparability" standard focuses on similarities in regulatory objectives as opposed to identity of technical rules.[56] Specifically, the provision provides the Federal Reserve with the flexibility to make a comparability determination even where the home country regulator does not technically require margin for non-cleared swaps, so long as functionally equivalent capital charges are imposed with respect to such transactions.[57]

Legal Authority: Sections 731 and 764 do not set specific, quantitative requirements for capital and margin. Rather, they are couched in general terms; requiring the promulgation of "comparable" capital and margin requirements that promote the safety and soundness of the swap dealer, are tailored to risk and, in the case of margin, preserve "the financial integrity of markets trading swaps" and "the stability of the United States financial system."

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[53] Inserted into the Commissions' rules for purposes of discussion; foreign bank capital and margin generally to be set by the Federal Reserve. *See* Dodd-Frank Act §§ 731 *and* 764.

[54] Under Sections 731 and 764, generally, the Federal Reserve, in consultation with the Commissions, prescribes capital and margin requirements for swap dealers that are foreign banks.

[55] *See* Letter to the SEC from Carlos Travares, Vice-Chairman of European Securities and Markets Authority ("**ESMA**") (Jan. 17, 2011) ("if [ ] foreign supervision were not taken into account . . . a foreign [entity would] to be subject to multiple regimes . . . . [which would be] very challenging for regulated entities and would significantly raise the costs for both the industry and supervisors."), *available at* http://www.esma.europa.eu/popup2.php?id=7439.

[56] By way of example, in granting no-action relief to foreign boards of trade and issuing Rule 30.10 exemptions to foreign intermediaries, the CFTC has adopted a "comparability" analysis that looks broadly to whether a foreign regulatory authority "supports and enforces substantially equivalent regulatory objectives, such as prevention of market manipulation and customer protection. . . ." Proposed Rule - Registration of Foreign Boards of Trade, 75 Fed. Reg. 70,974, 70,977-78 (Nov. 19, 2010).

[57] *See e.g.*, European Commission, Public Consultation on Possible Measures to Strengthen Bank Capital Requirements for Counterparty Credit Risk (Feb. 9, 2011) (imposing higher capital requirements for non-cleared derivatives than centrally cleared derivatives); European Commission, Proposal for a Regulation of the European Parliament and of the Council on OTC Derivatives, Central Counterparties and Trade Repositories ("**EMIR**") (Sept. 15, 2010) Art. 8(1) (with respect to non-cleared OTC derivative contracts, counterparties "shall ensure that appropriate procedures and arrangements are in place to measure, monitor and mitigate operational and credit risk, including at least . . . . the appropriate and proportionate holding of capital.").

We believe that reliance on home country capital standards where a foreign bank is subject to comprehensive regulation by a home country supervisor that has adopted risk-based capital standards consistent with the Basel Accord would meet the comparability standard in Sections 731 and 764 as well as the requirement that capital be tailored to risk. Such reliance appropriately allocates supervisory responsibility to the home country regulator, which is best situated to conduct effective entity-wide supervision. It is also consistent with established Federal Reserve precedent[58] and is particularly appropriate given the greater uniformity that will result from the adoption of Basel III. Similarly, the home country regulator has the greatest interest in and is in the best position to protect a foreign bank swap dealer under its primary supervision by setting appropriate margin requirements or functionally equivalent capital charges for non-cleared swaps. Where such home country requirements are deemed comparable under our proposed standards, relying on them would satisfy the swap dealer protection objectives in Sections 731 and 764. Finally, adopting the proposed modifications would not require the Commissions to rely on any exemptive authority and would satisfy their rulemaking obligations.

2. *Adequacy of Capital and Margin Judged with respect to the Entity as a Whole*

Relevant extract from proposed new Section 1.3(ppp)(4)[59]:

"(4) . . . . the capital and initial and variation margin requirements established by the home country regulator of a foreign bank shall be the capital and initial and variation margin requirements for any swap dealer that is a . . . foreign branch or separately identified division or department thereof for which there is a prudential regulator . . . ."

Effect of the Proposed Modification: The phrase "foreign branch or separately identified division or department of a foreign bank" ensures that if such branches, divisions or departments register as swap dealers, the appropriate prudential regulator would rely on home country capital and margin requirements provided the same standards are satisfied. Specifically, the adequacy of capital and margin for non-cleared swaps would be measured on a firm-wide basis such that a branch, division or department of a foreign bank that registers as a swap dealer would not need to be separately capitalized.[60]

Legal Authority: Capital and margin requirements should apply at the entity-wide level. For example, in determining whether a branch or agency of a foreign bank is

[58] *See* 12 C.F.R. § 225.90.

[59] Parallel modification for security-based swap dealers: § 240.3a71–1(i).

[60] Similarly, pursuant to the proposed parallel provisions for foreign non-banking entities such as comprehensively regulated foreign securities firms, the adequacy of capital and margin for non-cleared swaps would be measured on an entity-wide basis such that a branch, division or department of a foreign securities firm that registers as a swap dealer would not need to be separately capitalized. *See* Proposed § 1.3(ppp)(5) (swap dealer definition) *and* § 240.3a71–1(j) (security-based swap dealer definition).

well-capitalized the Federal Reserve deems the branch or agency to have the same capital ratios as the foreign bank as a whole.[61]

3. *Other Entity-level Rules; Reliance on Home Country Requirements*[62]

Proposed new Section 1.3(ppp)(4)(c)[63]:

> *"(c) For purposes of this subparagraph, the term "other entity-level rules" shall include rules and regulations promulgated by the Commission concerning a registered swap dealer's risk management procedures, conflict-of-interest systems and procedures, chief compliance officer, recordkeeping of corporate, financial and compliance matters, and such other rules and regulations concerning a registered swap dealer's operations, management and governance as the Commission may issue from time to time. The other entity-level rules established by the home country regulator of a foreign bank shall be the other entity-level rules for any registered swap dealer of that foreign bank or any foreign branch or separately identified division or department thereof if the Commission has made a determination that the other entity-level rules to which such foreign bank is subject in its home country are comparable to those established by the Commission for other swap dealers regulated under the Wall Street Transparency and Accountability Act of 2010."*

Effect of the Proposed Modification: Similar to the provisions on capital and margin, this provision states that other entity-level rules for a swap dealer that is a foreign bank swap dealer shall be the rules established by its home country regulator, if the Commissions determine these home country's rules to be "comparable." The provision appropriately accounts for the fact that many foreign banks already have efficient and extensive systems, mechanisms and procedures as required by existing home country rules as well as imminent swaps-specific regulation. The Commissions will be in a position to make comparability determinations, in part, based on the results of the comparative study mandated by Section 719(c), which will "identif[y] areas of [swap] regulation that are similar in the United States, Asia and Europe."[64]

Legal Authority: Title VII does not specify how other entity-level rules should be implemented.[65] Specifically, there is no requirement that the Commissions implement these rules uniformly among different classes, categories or types of swap dealers. The Commissions could exercise their considerable discretion to adopt the proposed provision. This provision does not depend on any exemptive authority, is consistent the CFTC's

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[61] 12 C.F.R. § 225.2(r)(3)(ii).

[62] As noted above in footnote 9, in some cases, a foreign bank may seek to register as a swap dealer a branch in a jurisdiction other than the foreign bank's jurisdiction of incorporation. In this situation, "home country" regulation refers to the combination of rules to which the branch is subject.

[63] Parallel modification for security-based swap dealers: § 240.3a71–1(i)(3).

[64] Dodd-Frank Act § 719(c). To the extent additional sources of information would be useful, the undersigned financial institutions are willing to assist the Commissions with identifying home country entity-level regulations that are comparable with requirements under Title VII.

[65] *See e.g.,* Dodd-Frank Act §§ 731 and 764.

existing comparability analysis[66] and would satisfy the Commissions' rulemaking obligations under Title VII.

As with margin and capital, the home country regulator is in the best position to comprehensively regulate a foreign bank swap dealer under its primary supervision. Where the home country regulator has already set entity-level requirements for the foreign bank, the principle of comity would militate against the Commissions' imposition of potentially inconsistent or unnecessarily duplicative requirements under Title VII.[67] Additionally, if U.S. regulators do not rely on comparable home country supervision, foreign regulators may similarly refuse to rely on U.S. regulators' supervision of U.S.-based swap dealers.[68] In such a situation, U.S. swap dealers would be compelled to use separate, country-by-country special purpose companies to book swaps. This would be detrimental to U.S. financial institutions, their customers and their regulators.

D. How do transaction-level rules apply to foreign banks whose registration is limited to swap dealing activities with U.S. persons?

1. *Application of Title VII Transaction-Level Rules to a Foreign Branch of a Foreign Bank Whose Registration is Limited to Swaps Dealing Activities with U.S. Persons*

Proposed insert at the end of Section 1.3(ppp)(3)(A)[69]:

> *"(A) . . . . The activities covered in such limited registration may be confined to specified functions of a swap dealer (such as functioning as a booking location) and may be confined to those activities involving swaps with U.S. persons. Where a person's registration as a swap dealer is limited with respect to its activities, such person shall be subject to only such obligations of the Wall Street Transparency and Accountability Act of 2010 and the rules and regulations of the Commission thereunder as pertain to such activities."*

Proposed new Section 1.3(ppp)(3)(C)[70]:

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[66] As mentioned above, the CFTC has adopted an objectives-based approach for determining the comparability of regulatory regimes that does not turn on the contents of specific rules.

[67] *See* Restatement § 403(2). *See also* Letter to the CFTC from Carlos Travares, Vice-Chairman of ESMA (Jan. 17, 2011) (urging the Commissions to "avoid extraterritorial application to the extent possible" and to instead focus on "effective co-operation between the home and host regulatory authorities . . . . in order to . . . avoid unnecessary duplication of rules and controls."), *available at* http://www.esma.europa.eu/popup2.php?id=7438.

[68] We note that the European Commission is in the early stages of considering whether to adopt a uniform approach to recognizing non-EU investment firms that are subject to equivalent foreign regulatory regimes. Such an approach would allow U.S. swap dealers greater access to the EU market. *See* European Commission, "Public Consultation: Review of the Markets in Financial Instruments Directive (MiFID)" at 79-80 (Dec. 8, 2010), *available at* http://ec.europa.eu/internal_market/consultations/docs/2010/mifid/consultation_paper_en.pdf.

[69] Parallel modification for security-based swap dealers: § 240.3a71–1(d).

[70] Parallel modification for security-based swap dealers: § 240.3a71–1(e).

> *" (C) For purposes of this Section 1.3(ppp), "person" shall be deemed to include (i) a branch of a foreign bank or (ii) a separately identified division or department of one or more entities of a foreign bank . . . ."*

Proposed insertion of Section 1.3(ppp)(3)(E)[71]:

> *"(E) Where a foreign bank or a separately identified division or department or a branch of a foreign bank is registered as a swap dealer, all provisions of the Wall Street Transparency and Accountability Act of 2010 and the rules and regulations of the Commission thereunder that refer to or impose obligations upon a "swap dealer," "Commission registrant," "counterparty," "individual," "person" or "registered entity" shall exclude any swaps booked in or any activities conducted by such foreign bank, division, department or branch, as the case may be, from a location outside the United States with a person other than a U.S. counterparty."*

Effect of the Proposed Modification: Taken together, Section 1.3(ppp)(3)(A) and Section 1.3(ppp)(3)(C) would permit a foreign branch[72] of a foreign bank to register as a swap dealer only with respect to its swap dealing activities with U.S. persons such that Title VII's swap dealer requirements would *only* apply to those activities and not others. In other words, these rules would permit the first registration scenario discussed above. They would also give effect to our proposal that Title VII's transaction-level rules should not apply to a foreign bank swap dealer's swap transactions with non-U.S. persons.

The combined effect of Section 1.3(ppp)(3)(A) and Section 1.3(ppp)(3)(C) would also permit the second registration scenario in which a foreign branch of a foreign bank registers as a swap dealer with respect to acting as a booking center for swaps with U.S. persons and a U.S. affiliate of the foreign bank registers with respect to its swap dealing activities with U.S. persons.

Section 1.3(ppp)(3)(E) ensures that Title VII would not impose obligations on a registered swap dealer (be it a foreign bank or a branch or separately identified division or department of a foreign bank) with respect to: (1) swaps booked in a location outside the United States with a non-U.S. counterparty or (2) swaps activities conducted by the registrant from outside the United States with a non-U.S. counterparty. This provision also gives effect to our proposal that Title VII's transaction-level rules should not apply to a foreign bank swap dealer's swap transactions with non-U.S. persons. This outcome would be achieved even where certain aspects of a swap transaction involving a non-U.S. counterparty is facilitated by U.S.-based employees of the swap dealer or its affiliate, as long as the swap is ultimately "booked in a location outside the United States."[73]

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[71] Parallel modification for security-based swap dealers: § 240.3a71–1(g).

[72] Or a separately identified division or department within that branch.

[73] As noted in the initial comment letter, the Commissions may extend Title VII's business conduct requirements to the U.S.-based employees of the swap dealer in such circumstances. The Commissions should not, however, extend other Title VII transaction-level requirements in these situations.

Legal Authority: The basis for the Commissions' authority to limit the application of Title VII to a foreign bank swap dealer's swaps transactions with U.S. persons is provided in Sections 722 and 772 and supported by the principle of international comity.

Comity refers to the deference that sovereign nations afford to one another by limiting the reach of their laws. Congressional respect for comity is evident throughout the Dodd-Frank Act[74] and would be presumed by the courts as a matter of statutory construction.[75] In the context of swap dealer regulation, the CFTC also acknowledged the important role that "considerations of international comity play in determining the proper scope of extraterritorial application of federal statutes" and specifically referred to Restatement (Third) of Foreign Relations Law of the United States (the "**Restatement**").[76] According to the Restatement, even where a nation has jurisdiction over persons or activities that have connections with another nation, it must refrain from unreasonably exercising such jurisdiction.[77] In applying the Restatement, the Supreme Court stated that reasonableness is determined "on [the] basis of such factors as connections with regulating nation, harm to that nation's interests, *extent to which other nations regulate*, and the *potential for conflict*."[78] Another relevant factor is the "existence of justified expectations that might be protected or hurt by the regulation."[79]

All of these factors point against the application of Title VII to a foreign bank swap dealer's swap transactions with non-U.S. persons. First, these transactions are most likely to be *already* subject to foreign swaps regulation. Second, the foreign regulator has a legitimate interest in regulating this activity, especially where the non-U.S. counterparty is established in its jurisdiction. Third, applying Title VII's requirements to such transactions could subject them to conflicting or inconsistent U.S. and foreign requirements.[80] For instance, there are many potential inconsistencies between Title VII and the European Market Infrastructure Regulation ("**EMIR**")[81] proposed by the

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[74] Consistent with Section 403(2) of the Restatement, the Dodd-Frank Act directs regulators to consider the extent to which a foreign entity is comprehensively regulated in its home country before deciding whether to extend U.S. regulation to that entity. *See, e.g.*, Dodd-Frank Act §§ 725(b); 733; 763(b); 738(a); 113(b)(2)(H).

[75] *See F. Hoffmann-La Roche Ltd* v. *Empagran S.A.*, 542 U.S. 155, 164-65 (2004) ("[The Supreme] Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.").

[76] *See* Proposed Rule - Registration of Swap Dealers and Major Swap Participants, 75 Fed. Reg. 71,379, 71,382 (Nov. 23, 2010); *id.* at 71,382 n. 32 (citing Restatement §§ 402–03).

[77] Restatement § 403(1).

[78] *Empagran*, 542 U.S. at 165 (citing Restatement § 403(2)) (emphasis added).

[79] Restatement § 403(2)(d).

[80] Congress' general intent to avoid inconsistent global swaps regulations is evident in Section 752(a), which requires the Commissions and the Federal Reserve to "coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation . . . of swaps [and] swap entities . . . ."

[81] European Commission, Proposal for a Regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories (Sept. 15, 2010), *available at* http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/20100915_proposal_en.pdf.

European Commission.[82] Finally, the non-U.S. counterparty would not reasonably expect the swap to be subject to Title VII's requirements,[83] which could complicate the transaction.

2. *Delegation of Specific Obligations to Affiliate*

Proposed new Section 1.3(ppp)(3)(F)[84]:

> *"(F) A foreign bank that is a swap dealer may delegate specified obligations under the Wall Street Transparency and Accountability Act of 2010 and the rules and regulations of the Commission thereunder for which it is responsible for compliance to an affiliate, provided that such bank shall remain responsible for compliance with such obligations."*

Effect of the Proposed Modification: This provision enables a foreign bank swap dealer to delegate certain Title VII obligations for which it is responsible for compliance to a U.S. affiliate. Such delegation should be encouraged because the U.S. affiliate is closer and more accessible to U.S. customers and regulators.

Legal Authority: Delegation of specific obligations is expressly envisioned in the Commissions' proposals[85] and is permitted in similar regulatory contexts.[86]

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[82] Below are some examples of inconsistencies between Title VII and EMIR:

Different deadlines for swap data reporting: Title VII's real-time public reporting requirement means that swap data, including price and volume, must be reported "as soon as technologically practicable" after the swap is executed. Dodd-Frank Act §§ 727 *and* 763. By contrast, under EMIR, details of any derivatives contract would need to be reported no later than the working day following execution. EMIR Arts. 6 (1) *and* 7(1). As a result of these inconsistencies, if a swap between a foreign bank swap dealer and an EU counterparty were subject to both EMIR and Title VII, swap data may need to be reported well in advance of the next working day, contrary to the parties' reasonable expectations.

Different exemptions from the clearing requirement: Under Title VII, non-financial entities that use swaps to hedge or mitigate commercial risk and notify the Commissions regarding how they meet their financial obligations associated with non-cleared swaps are exempt from the mandatory clearing and trade execution requirements. By contrast, under EMIR, only a non-financial counterparty whose positions fall below certain clearing thresholds would be exempt from the clearing requirement. EMIR Art. 7(3). Further, a non-financial entity for purposes of Title VII may not be a non-financial counterparty for purposes of EMIR. As a result, if a swap between a foreign bank swap dealer and an EU counterparty were subject to both EMIR and Title VII, there might be uncertainty as to whether it needs be cleared.

Other examples of potential conflicts between U.S. and EU swap regulations include: different requirements regarding where swaps must be cleared and to whom they must be reported; different business conduct rules and different swap data reporting fields.

[83] *Cf.* Final Rule – Registration Requirements for Foreign Broker-Dealers, 54 Fed. Reg. 30,013, 30,017 (Jul. 18, 1989) (concerning expectations of U.S. citizens residing abroad in relation to U.S. registration and regulation of foreign broker-dealers).

[84] Parallel modification for security-based swap dealers: § 240.3a71–1(h).

[85] *See, e.g.*, Proposed Rule - Swap Data Recordkeeping and Reporting, 75 Fed. Reg. 76,574, 76,604 (Dec. 8, 2010) (Proposed 17 C.F.R. § 45.6(d) would permit counterparties to contract with third-party service providers to facilitate reporting).

3. *Mandatory Clearing and Swap Data Reporting*

Proposed new Section 1.3(ppp)(6)[87]:

"(6) Mandatory Clearing. *Pursuant to its authority under Section 2(h)(2)(A) of the Act, the Commission has determined that a swap which is required to be cleared under foreign law (including by virtue of the fact that any counterparty thereto is required under foreign law to submit the same for clearing) is not required to be cleared under the Act."*

Proposed new Section 1.3(ppp)(7)[88]:

"(7) Swap Data Reporting. *For purposes of Section 2(a)(13) and Section 4r of the Act and the rules and regulations promulgated by the Commission under those sections, the term "swap" shall exclude any swap that is required, under foreign law, to be reported to a swap data repository or a person performing functions similar to a swap data repository that is not registered with the Commission as a swap data repository."*

Effect of the Proposed Modifications: The effect of the mandatory clearing provision is that if a swap is required by applicable foreign law to be cleared through a foreign clearinghouse (including by virtue of the fact that any counterparty to the swap is required under foreign law to clear it through a foreign clearinghouse), it is *not* required to be cleared through a clearinghouse that is registered with the Commissions or exempted by the Commissions from registration.[89] Similarly, under the swap data reporting provision, if a swap is required by applicable foreign law to be reported to a foreign entity performing functions similar to a U.S. swap data repository ("**SDR**"), it is not required to be reported to a U.S.-registered SDR.[90] Mandatory clearing and swap data reporting are key components of the G-20's commitments to reform the global

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(continued…)

[86] For example, broker-dealers may, subject to certain conditions, rely on other financial institutions (including *affiliates*) for the performance of obligations under the broker-dealer's customer identification program. 31 C.F.R. § 103.122(b)(6). Broker-dealers may similarly rely on investment advisers to perform these customer identification obligations. Secs. Indus. and Fin. Mkts. Ass'n (SIFMA), SEC No-Action Letter (Jan. 11, 2011). Rule 15a-6(a)(3) under the Exchange Act permits a foreign broker-dealer to deal with certain institutional investors only if specified functions related to the transaction are delegated to a U.S. registered broker-dealer intermediary. *See* 17 C.F.R. § 240.15a-6(a)(3). NASD Rule 3230 permits members that are introducing broker-dealers to enter into contracts with registered clearing broker-dealers that allocate certain functions and responsibilities, such as providing execution services, custody, and margin; maintaining books and records; and receiving, delivering, and safeguarding funds. *See also* NYSE Rule 382.

[87] Parallel modification for security-based swap dealers: § 240.3a71–1(k).

[88] Parallel modification for security-based swap dealers: § 240.3a71–1(*l*).

[89] Dodd-Frank Act § 723(a)(3) (requiring a person to submit a swap for clearing to a derivatives clearing organization that is registered with the Commission or that is exempt by the Commission from registration); § 763(a) (parallel provision).

[90] Dodd-Frank Act § 727 (requiring a swap (whether cleared or uncleared) to be reported to a *registered* security-based swap data repository); § 763 (parallel provision).

swaps market.[91] As such, many major jurisdictions, including the United States, are developing regulation requiring swaps to be cleared and reported to trade repositories. The proposed modifications would avoid imposing unnecessarily duplicative and inconsistent clearing and trade reporting obligations on swap dealers and their counterparties.[92]

Legal authority: To adopt the first position, the Commissions would exercise their authority under Sections 723 and 763 to make a determination that a swap which is required to be cleared under foreign law (including by virtue of the fact that any counterparty thereto is required under foreign law to submit the same for clearing) is not required to be cleared under Title VII.[93] To adopt the second position, the Commissions would exercise their broad definitional authority under Section 712(d) to define "swap" and "security-based swap" to exclude transactions that are required to be reported to a foreign SDR *solely* for purposes of the swap data reporting requirements. In addition, as suggested in our initial comment letter, the Commissions should work with foreign regulators to permit SDRs in all major jurisdictions to register with the appropriate regulators in each jurisdiction.[94]

* * * * *

[91] *See* G-20, "Leaders' Statement: The Pittsburgh Summit," ¶ 13 (24–25, Sept. 2009) (agreeing that "[a]ll standardized OTC derivative contracts should be . . . cleared through central counterparties by end-2012 at the latest . . . . [and] should be reported to trade repositories.") *available at* http://www.pittsburghsummit.gov/mediacenter/129639.htm.

[92] Title VII's mandatory clearing and swap data reporting requirements may conflict with foreign laws that require swaps to be cleared through *local* clearinghouses or reported to *local* trade repositories. Local clearing and trade reporting is generally required under proposed EMIR. Specifically, counterparties subject to EMIR's clearing requirement must clear their trades through a CCP that is established in the EU or a foreign CCP that is recognized by ESMA based on specified criteria. EMIR Art. 23(1). EMIR also requires financial and certain non-financial counterparties established in the EU to report OTC derivatives to a trade repository that is registered with ESMA. *Id.* Arts. 6(1); 7(1). In order to be registered, trade repositories must either be established in the EU or recognized by ESMA. *Id.* Arts. 51(2); 63(2)(c). Similarly, under Japan's Financial Instruments and Exchange Act, OTC derivatives transactions in which the clearing criteria relates closely to the corporate bankruptcy criteria under Japanese law must be cleared by licensed domestic CCPs. Financial Stability Board, Implementing OTC Derivatives Market Reforms, Annex 1 (Oct. 25, 2010) *available at* http://www.financialstabilityboard.org/publications/r_101025.pdf.

[93] Dodd-Frank Act § 723 ("The Commission . . . shall review each swap, or any group, category, type, or class of swaps to make a determination as to whether the swap or group, category, type, or class of swaps should be required to be cleared."); § 763(a) (parallel provision).

[94] *See* Letter to the CFTC from Carlos Travares, Vice-Chairman of ESMA (Jan. 17, 2011) *available at* http://www.esma.europa.eu/popup2.php?id=7438.

We would be most pleased to discuss any matters that may be useful to the Commissions and the Federal Reserve in crafting rules that apply to foreign banks. Please feel free to contact any of the undersigned or Lanny A. Schwartz (212-450-4174), Arthur S. Long (212-450-4742), Robert L.D. Colby (202-962-7121) or Courtenay U. Myers (212-450-4943) at Davis Polk & Wardwell LLP with any questions.

Sincerely,

BARCLAYS BANK PLC

BNP PARIBAS S.A.

CREDIT SUISSE AG

DEUTSCHE BANK AG

HSBC

NOMURA SECURITIES INTERNATIONAL, INC.

RABOBANK NEDERLAND

ROYAL BANK OF CANADA

THE ROYAL BANK OF SCOTLAND GROUP PLC

SOCIETE GENERALE

THE TORONTO-DOMINION BANK

UBS AG

ANNEX A

Specific modifications to the proposed regulations contained in the Joint Definitions Proposal.

Swap Dealer Provision

17 CFR Part 240

§1.3 Definitions

(ppp) *Swap Dealer.* (1) *In general.* The term *"swap dealer"* means any person who:
(i) Holds itself out as a dealer in swaps;
(ii) Makes a market in swaps;
(iii) Regularly enters into swaps with counterparties as an ordinary course of business for its own account; or
(iv) Engages in any activity causing it to be commonly known in the trade as a dealer or market maker in swaps.
(2) *Exception.* The term *"swap dealer"* does not include a person that enters into swaps for such person's own account, either individually or in a fiduciary capacity, but not as a part of regular business.
(3) *Scope.* (A) A person who is a swap dealer shall be deemed to be a swap dealer with respect to each swap it enters into, regardless of the category of the swap or the person's activities in connection with the swap. However, if a person makes an application to limit its designation as a swap dealer to specified categories of swaps or specified activities of the person in connection with swaps, the Commission shall determine whether the person's designation as a swap dealer shall be so limited. A person may make such application to limit its designation at the same time as, or at a later time subsequent to, the person's initial registration as a swap dealer. The activities covered in such limited registration may be confined to specified functions of a swap dealer (such as functioning as a booking location) and may be confined to those activities involving swaps with U.S. persons. Where a person's registration as a swap dealer is limited with respect to its activities, such person shall be subject to only such obligations of the Wall Street Transparency and Accountability Act of 2010 and the rules and regulations of the Commission thereunder as pertain to such activities.

(B) For purposes of this Section 1.3(ppp), references to the term "swaps" is to swaps with U.S. persons that are not swap dealers and references to the term "counterparties" is to counterparties that are U.S. persons that are not swap dealers. "*U.S. person*" means: (i) Any natural person resident in the United States; (ii) Any partnership or corporation organized or incorporated under the laws of the United States; (iii) Any estate of which any executor or administrator is a U.S. person; (iv) Any trust of which any trustee is a U.S. person; (v) Any agency or branch of a foreign entity located in the United States; (vi) Any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a U.S. person; (vii) Any discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated, or (if an individual) resident in the United States; and (viii) Any partnership or corporation if: (A) Organized or incorporated under the laws of any foreign jurisdiction; and (B) Formed by a U.S. person principally for the purpose of investing in securities not registered under the Securities Act of 1933, unless it is organized or incorporated, and owned, by accredited investors (as defined in 17 C.F.R. § 230.501(a)) who are not natural persons, estates or trusts.
Notwithstanding the foregoing, the following are not "U.S. person":(i) Any discretionary account or similar account (other than an estate or trust) held for the benefit or account of a non-U.S. person by a dealer or other professional fiduciary organized, incorporated, or (if an individual) resident in the United States; (ii) Any estate of which any professional fiduciary acting as executor or administrator is a U.S. person if: (A) An executor or administrator of the estate who is not a U.S. person has sole or shared investment discretion with respect to the assets of the estate; and (B) The estate is governed by foreign law; (iii) Any trust of which any professional fiduciary acting as trustee is a U.S. person, if a trustee who is not a U.S. person has sole or shared investment discretion with respect to the trust assets, and no beneficiary of the trust (and no settlor if the trust is revocable) is a U.S. person; (iv) An employee benefit plan established and administered in accordance with the law of a country other than the United States and customary practices and documentation of such country; (v) Any agency or branch of a U.S. person located outside the United States if: (A) The agency or branch operates for valid business reasons; and (B) The agency or branch is engaged in the business of insurance or banking and is subject to substantive insurance or banking regulation, respectively, in the jurisdiction where located; and (vi) The International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies, affiliates and pension plans, and any other similar international organizations, their agencies, affiliates and pension plans.
"*United States*" means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

(C) For purposes of this Section 1.3(ppp), "person" shall be deemed to include (i) a branch of a foreign bank or (ii) a separately identified division or department of a foreign bank– *i.e.*, a department or division that is organized and administered so as to permit independent examination and enforcement of applicable provisions of the Wall Street Transparency and Accountability Act of 2010 and rules and regulations of the Commission thereunder. Where a foreign bank has established a branch or a separately identified division or department as a swap dealer, the term "person" shall refer to such branch or to such division or department, as the case may be, and not to the foreign bank as a whole. Where a foreign bank has established the entire bank as a swap dealer, the term "person" shall refer to the foreign bank as a whole. For purposes of this Section 1.3(ppp), references to "foreign bank" include a banking entity organized under the laws of a country other than the United States as well as a securities firm organized under such laws.

(D) Where a separately identified division or department or a branch of a foreign bank has been registered as a swap dealer, all applicable provisions of the Wall Street Transparency and Accountability Act of 2010 and the rules and regulations of the Commission thereunder that refer to or impose obligations upon a "swap dealer," "Commission registrant," "counterparty," "individual," "person" or "registered entity" shall be deemed to refer to, or to impose such obligations solely upon such division or department or branch, as the case may be, and not upon the foreign bank as a whole.

(E) Where a foreign bank or a separately identified division or department or a branch of a foreign bank is registered as a swap dealer, all provisions of the Wall Street Transparency and Accountability Act of 2010 and the rules and regulations of the Commission thereunder that refer to or impose obligations upon a "swap dealer," "Commission registrant," "counterparty," "individual," "person" or "registered entity" shall exclude any swaps booked in or any activities conducted by such foreign bank, division, department or branch, as the case may be, from a location outside the United States with a person other than a U.S. counterparty.

(F) A foreign bank that is a swap dealer may delegate specified obligations under the Wall Street Transparency and Accountability Act of 2010 and the rules and regulations of the Commission thereunder for which it is responsible for compliance to an affiliate, provided that such bank shall remain responsible for compliance with such obligations.

(4) [*Capital and Margin Requirements for Foreign Swap Dealers for which there is a Prudential Regulator.*[1] Notwithstanding any other provision of this Rule, for purposes of Section 4s(e) of the Act, the capital and initial and variation margin requirements established by the home country regulator of a foreign bank shall be the capital and initial and variation margin requirements for any swap dealer that is a foreign bank or a foreign branch or separately identified division or department thereof for which there is a prudential regulator, if: (a) the foreign bank has been determined by the Federal Reserve to be subject to "comprehensive consolidated supervision" (as such term is used in 12 C.F.R. § 211.24(c)(1)), or (b) the Federal Reserve has made a determination that (i) the capital requirements to which such foreign bank is subject in its home country are comparable to those established for other banks as to which the Federal Reserve is the prudential regulator, and (ii) the initial and variation margin requirements to which such swap dealer is subject in its home country are comparable to those established for other banks as to which the Federal Reserve is the prudential regulator.
For purposes of clause (b), the Federal Reserve may determine that capital and initial and variation margin requirements for a foreign bank or swap dealer by its home country are comparable if they are established under a regime that is determined by the Federal Reserve to have regulatory objectives and supervision that are generally consistent with those applicable to banking organizations as to which the Federal Reserve is a prudential regulator. Initial and variation margin requirements established by a swap dealer's home country may be determined to be comparable even if they are set at zero or are substantially lower than those applicable to other swap dealers as to which the Federal reserve is the prudential regulator if the capital regime in such home country is determined to take account appropriately of unmargined or undermargined swaps by imposing additional capital charges.]

(c) For purposes of this subparagraph, the term "other entity-level rules" shall include rules and regulations promulgated by the Commission concerning a registered swap dealer's risk management procedures, conflict-of-interest systems and procedures, chief compliance officer, recordkeeping of corporate, financial and compliance matters, and such other rules and regulations concerning a registered swap dealer's operations, management and governance as the Commission may issue from time to time. The other entity-level rules established by the home country regulator of a foreign bank shall be the other entity-level rules for any registered swap dealer of that foreign bank or any foreign branch or separately identified division or department thereof if the Commission has made a determination that the other entity-level rules to which such foreign bank is subject in its home country are comparable to those established by the Commission for other swap dealers regulated under the Wall Street Transparency and Accountability Act of 2010.

(5) Capital and Margin Requirements for Foreign Swap Dealers for which there is Not a Prudential Regulator. Notwithstanding any other provision of this Rule, for purposes of Section 4s(e) of the Act, the capital and initial and variation margin requirements established by the home country regulator of a foreign entity shall be the capital and initial and variation margin requirements for any swap dealer that is a foreign entity or a foreign branch or separately identified division or department thereof for which there is not a prudential regulator, if: the Commission has made a determination that (i) the capital requirements to which such foreign entity is subject in its home country are comparable to those established by the Commission for swap dealers for which there is not a prudential regulator, and (ii) the initial and variation margin requirements to which such foreign entity is subject in its home country are comparable to those established by the Commission for swap dealers for which there is not a prudential regulator.

For purposes of the foregoing, the Commission may determine that capital and initial and variation margin requirements for a foreign entity or swap dealer by its home country are comparable if they are established under a regime that is determined by the Commission to have regulatory objectives and supervision that are generally consistent with those applicable to swap dealers for which there is not a prudential regulator. Initial and variation margin requirements established by a swap dealer's home country may be determined to be comparable even if they are set at zero or are substantially lower than those applicable to swap dealers for which there is not a prudential regulator if the capital regime in such home country is determined to take account appropriately of unmargined or undermargined swaps by imposing additional capital charges.

(6) *Mandatory Clearing.* Pursuant to its authority under Section 2(h)(2)(A) of the Act, the Commission has determined that a swap which is required to be cleared under foreign law (including by virtue of the fact that any counterparty thereto is required under foreign law to submit the same for clearing) is not required to be cleared under the Act.

(7) *Swap Data Reporting.* For purposes of Section 2(a)(13) and Section 4r of the Act and the rules and regulations promulgated by the Commission under those sections, the term "swap" shall exclude any swap that is required, under foreign law, to be reported to a swap data repository or a person performing functions similar to a swap data repository that is not registered with the Commission as a swap data repository.

(8) *De minimis exception.* A person shall not be deemed to be a swap dealer as a result of swap dealing activity involving counterparties that meets each of the following conditions:

(i) The swap positions connected with those activities into which the person enters over the course of the immediately preceding 12 months have an aggregate gross notional amount of no more than $100 million, and have an aggregate gross notional amount of no more than $25 million with regard to swaps in which the counterparty is a "special entity" (as that term is defined in Section 4s(h)(2)(C) of the Commodity Exchange Act). For purposes of this paragraph, if the stated notional amount of a swap is leveraged or enhanced by the structure of the swap, the calculation shall be based on the effective notional amount of the swap rather than on the stated notional amount.

(ii) The person has not entered into swaps in connection with those activities with more than 15 counterparties, other than swap dealers, over the course of the immediately preceding 12 months. In determining the number of counterparties, all counterparties that are members of a single group of persons under common control shall be considered to be a single counterparty.

(iii) The person has not entered into more than 20 swaps in connection with those activities over the course of the immediately preceding 12 months. For purposes of this

[1] We understand that the Federal Reserve's (and other prudential regulators') rules relating to capital and margin will not be included in the Commission's rulemakings or be adopted by the Commission. We include these provisions for clarity of presentation in the context of the overall proposal and in the absence of proposed capital and margin rules from the prudential regulators.

paragraph, each transaction entered into under a master agreement for swaps shall constitute a distinct swap, but entering into an amendment of an existing swap in which the counterparty to such swap remains the same and the item underlying such swap remains substantially the same shall not constitute entering into a swap.

(9) *Insured depository institution swaps in connection with originating loans to customers.* Swaps entered into by an insured depository institution with a customer in connection with originating a loan with that customer shall not be considered in determining whether such person is a swap dealer.

(i) A swap shall be considered to have been entered into in connection with originating a loan only if the rate, asset, liability or other notional item underlying such swap is, or is directly related to, a financial term of such loan. The financial terms of a loan include, without limitation, the loan's duration, rate of interest, the currency or currencies in which it is made and its principal amount.

(ii) An insured depository institution shall be considered to have originated a loan with a customer if the insured depository institution:

(A) Directly transfers the loan amount to the customer;

(B) Is a part of a syndicate of lenders that is the source of the loan amount that is transferred to the customer;

(C) Purchases or receives a participation in the loan; or

(D) Otherwise is the source of funds that are transferred to the customer pursuant to the loan or any refinancing of the loan.

(iii) The term *loan* shall not include:

(A) Any transaction that is a sham, whether or not intended to qualify for the exclusion from the definition of the term *swap dealer* in this rule; or

(B) Any synthetic loan, including without limitation a loan credit default swap or loan total return swap.

Security-based Swap Dealer Provision

§ 240.3a71–1 Definition of "Security-based Swap Dealer."

(a) *General*. The term *security-based swap dealer* in general means any person who:

(1) Holds itself out as a dealer in security-based swaps;

(2) Makes a market in security-based swaps;

(3) Regularly enters into security-based swaps with counterparties as an ordinary course of business for its own account; or

(4) Engages in any activity causing it to be commonly known in the trade as a dealer or market maker in security-based swaps.

(b) *Exception*. The term *security-based swap dealer* does not include a person that enters into security-based swaps for such person's own account, either individually or in a fiduciary capacity, but not as a part of regular business.

(c) *Scope of designation.* A person that is a security-based swap dealer in general shall be deemed to be a security-based swap dealer with respect to each security-based swap it enters into, regardless of the category of the security-based swap or the person's activities in connection with the security-based swap, unless the Commission limits the person's designation as a major security-based swap participant to specified categories of security-based swaps or specified activities of the person in connection with security-based swaps. The activities covered in such limited registration may be confined to specified functions of a security-based swap dealer (such as functioning as a booking location) and may be confined to those activities involving security-based swaps with U.S. persons. Where a person's registration as a security-based swap dealer is limited with respect to its activities, such person shall be subject to only such obligations of the Wall Street Transparency and Accountability Act of 2010 and the rules and regulations of the Commission thereunder as pertain to such activities.

(d) For purposes of this Section 3a71–1, references to the term "security-based swaps" is to security-based swaps with U.S. persons that are not security-based swap dealers and references to the term "counterparties" is to counterparties that are U.S. persons that are not security-based swap dealers. "*U.S. person*" has the same meaning as in 17 C.F.R. § 230.902(k) and "*United States*" has the same meaning as in 17 C.F.R. § 230.902(*l*).

(e) For purposes of this Section 3a71–1, "*person*" shall be deemed to include (i) a branch of a foreign bank or (ii) a separately identified division or department of a foreign bank– *i.e.*, a department or division that is organized and administered so as to permit independent examination and enforcement of applicable provisions of the Wall Street Transparency and Accountability Act of 2010 and rules and regulations of the Commission thereunder. Where a foreign bank has established a branch or a separately identified division or department as a security-based swap dealer, the term "person" shall refer to such branch or to such division or department, as the case may be, and not to the foreign bank as a whole. Where a foreign bank has established the entire bank as a security-based swap dealer, the term "person" shall refer to the foreign bank as a whole. For purposes of this Section 3a71–1, references to "foreign bank" include a banking entity organized under the laws of a country other than the United States as well as a securities firm organized under such laws.

(f) Where a separately identified division or department or a branch of a foreign bank has been registered as a security-based swap dealer, all applicable provisions of the Wall Street Transparency and Accountability Act of 2010 and the rules and regulations of the Commission thereunder that refer to or impose obligations upon a "security-based swap dealer," "Commission registrant," "counterparty," "individual," "person" or "registered entity" shall be deemed to refer to, or to impose such obligations solely upon such division or department or branch, as the case may be, and not upon the foreign bank as a whole.

(g) Where a foreign bank or a separately identified division or department or a branch of a foreign bank is registered as a security-based swap dealer, all provisions of the Wall Street Transparency and Accountability Act of 2010 and the rules and regulations of the Commission thereunder that refer to or impose obligations upon a "security-based swap dealer," "Commission registrant," "counterparty," "individual," "person" or "registered entity" shall exclude any security-based swaps booked in or any activities conducted by such foreign bank, division, department or branch, as the case may be, from a location outside the United States with a person other than a U.S. counterparty.

(h) A foreign bank that is a security-based swap dealer may delegate specified obligations under the Wall Street Transparency and Accountability Act of 2010 and the rules and regulations of the Commission thereunder for which it is responsible for compliance to an affiliate, provided that such bank shall remain responsible for compliance with such obligations.

(i) [*Capital and Margin Requirements for Foreign Security-based Swap Dealers for which there is a Prudential Regulator.* [2] Notwithstanding any other provision of this Rule, for purposes of Section 15F(e) of the Act, the capital and initial and variation margin requirements established by the home country regulator of a foreign bank shall be the capital and initial and variation margin requirements for any security-based swap dealer that is a foreign bank, or a foreign branch or separately identified division or department thereof for which there is a prudential regulator, if: (1) the foreign bank has been determined by the Federal Reserve to be subject to "comprehensive consolidated supervision" (as such term is used in 12 C.F.R. § 211.24(c)(1)), or (2) the Federal Reserve has made a determination that (i) the capital requirements to which such foreign bank is subject in its home country are comparable to those established for other banks as to which the Federal Reserve is the prudential regulator, and (ii) the initial and variation margin requirements to which such security-based swap dealer is subject in its home country are comparable to those established for other banks as to which the Federal Reserve is the prudential regulator. For purposes of clause (b), the Federal Reserve may determine that capital and initial and variation margin requirements for a foreign bank or security-based swap dealer by its home country are comparable if they are established under a regime that is determined by the Federal Reserve to have regulatory objectives and supervision that are generally consistent with those applicable to banking organizations as to which the Federal Reserve is a prudential regulator. Initial and variation margin requirements established by a security-based swap dealer's home country may be determined to be comparable even if they are set at zero or are substantially lower than those applicable to other security-based swap dealers as to which the Federal reserve is the prudential regulator if the capital regime in such home country is determined to take account appropriately of unmargined or undermargined security-based swaps by imposing additional capital charges.]

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[2] We understand that the Federal Reserve's (and other prudential regulators') rules relating to capital and margin will not be included in the Commission's rulemakings or be adopted by the Commission. We include these provisions for clarity of presentation in the context of the overall proposal and in the absence of proposed capital and margin rules from the prudential regulators.

(3) For purposes of this paragraph, the term "other entity-level rules" shall include rules and regulations promulgated by the Commission concerning a registered security-based swap dealer's risk management procedures, conflict-of-interest systems and procedures, chief compliance officer, recordkeeping of corporate, financial and compliance matters, and such other rules and regulations concerning a registered security-based swap dealer's operations, management and governance as the Commission may issue from time to time. The other entity-level rules established by the home country regulator of a foreign bank shall be the other entity-level rules for any security-based swap dealer of that foreign bank, or any foreign branch or separately identified division or department thereof, if the Commission has made a determination that the other entity-level rules to which such foreign bank is subject in its home country are comparable to those established by the Commission for other security-based swap dealers regulated under the Wall Street Transparency and Accountability Act of 2010.

(j) *Capital and Margin Requirements for Foreign Security-based Swap Dealers for which there is Not a Prudential Regulator.* Notwithstanding any other provision of this Rule, for purposes of Section 15F(e) of the Act, the capital and initial and variation margin requirements established by the home country regulator of a foreign entity shall be the capital and initial and variation margin requirements for any security-based swap dealer that is a foreign entity or a foreign branch or separately identified division or department thereof for which there is not a prudential regulator, if: the Commission has made a determination that (i) the capital requirements to which such foreign entity is subject in its home country are comparable to those established by the Commission for security-based swap dealers for which there is not a prudential regulator, and (ii) the initial and variation margin requirements to which such foreign entity is subject in its home country are comparable to those established by the Commission for security-based swap dealers for which there is not a prudential regulator.

For purposes of the foregoing, the Commission may determine that capital and initial and variation margin requirements for a foreign entity or security-based swap dealer by its home country are comparable if they are established under a regime that is determined by the Commission to have regulatory objectives and supervision that are generally consistent with those applicable to security-based swap dealers for which there is not a prudential regulator. Initial and variation margin requirements established by a security-based swap dealer's home country may be determined to be comparable even if they are set at zero or are substantially lower than those applicable to security-based swap dealers for which there is not a prudential regulator if the capital regime in such home country is determined to take account appropriately of unmargined or undermargined security-based swaps by imposing additional capital charges.

(k) *Mandatory Clearing.* Pursuant to its authority under Section 3C(b)(1) of the Act, the Commission has determined that a security-based swap which is required to be cleared under foreign law (including by virtue of the fact that any counterparty thereto is required under foreign law to submit the same for clearing) is not required to be cleared under the Act.

(*l*) *Swap Data Reporting.* For purposes of Section 13(m) and Section 13A of the Act and the rules and regulations promulgated by the Commission under those sections, the term "security-based swap" shall exclude any security-based swap that is required, under foreign law, to be reported to a swap data repository or a person performing functions similar to a security-based swap data repository that is not registered with the Commission as a security-based swap data repository.

§ 240.3a71–2 De minimis Exception.

For purposes of section 3(a)(71) of the Act, 15 U.S.C. 78c(a)(71), and § 240.3a71–1 of this chapter, a person shall not be deemed to be a security-based swap dealer as a result of security-based swap dealing activity involving counterparties that meets each of the following conditions:

(a) *Notional amount of outstanding security-based swap positions*. The security-based swap positions connected with those activities into which the person enters over the course of the immediately preceding 12 months have an aggregate gross notional amount of no more than $100 million and have an aggregate gross notional amount of no more than $25 million with regard to security-based swaps in which the counterparty is a "special entity" (as that term is defined in 15 U.S.C. 78o–8). For purposes of this paragraph (a), if the stated notional amount of a security-based swap is leveraged or enhanced by the structure of the security-based swap, the calculation shall be based on the effective notional amount of the security-based swap rather than on the stated notional amount.

(b) *No more than 15 counterparties*. The person does not enter into security-based swaps in connection with those activities with more than 15 counterparties, other than security-based swap dealers, over the course of the immediately preceding 12 months. In determining the number of counterparties, all counterparties that are members of a single affiliated group shall be considered to be a single counterparty.

(c) *No more than 20 security-based swaps.* The person has not entered into more than 20 security-based swaps in connection with those activities over the course of the immediately preceding 12 months. For purposes of this paragraph, each transaction entered into under a master agreement for security-based swaps shall constitute a distinct security-based swap, but entering into an amendment of an existing security-based swap in which the counterparty to such swap remains the same and the notional item underlying such security-based swap remains substantially the same shall not constitute entering into a security-based swap.