INSTITUTE OF INTERNATIONAL BANKERS

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September 28, 2012

Basel Committee on Banking Supervision
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Re: Margin Requirements for Non-Centrally-Cleared Derivatives

Ladies and Gentlemen:

The Institute of International Bankers (IIB) appreciates the opportunity to comment on the July 2012 consultative document entitled "Margin requirements for non-centrally-cleared derivatives" (the "Margin Consultative Document"). The IIB is the only national association devoted exclusively to representing and advancing the interests of the international banking community in the United States. Its membership is comprised of internationally-headquartered banking and financial institutions from over 35 countries around the world doing business in the United States. Questions regarding the cross-border application of U.S. laws to the global operations of its member institutions are fundamental to the IIB's mission. Consistent with that mission, our comments below focus on the discussion of the interaction of national regimes in cross-border transactions in Part B, Element 7 of the Margin Consultative Document.

The IIB firmly agrees that there is a crucial need to improve the oversight and regulation of the over-the-counter (OTC) derivatives markets in the aftermath of the financial crisis that began in 2007. Proper calibration of margin requirements for non-centrally-cleared derivatives is a key element of this undertaking. Achieving an appropriate degree of cooperation and coordination among various national regulatory regimes is equally important in light of the global nature of these markets, the potential for regulatory arbitrage that is inherent in cross-border transactions and the very real possibility of subjecting these transactions to nationally-prescribed requirements that may be at best duplicative and at worst in outright conflict with each other. Certainty as to the rules that apply in a cross-border context is critical to the OTC derivatives markets and their participants. Accordingly, we strongly support basing the overall approach to regulating non-centrally-cleared derivatives across jurisdictions on the key principle of striving to ensure that different regulatory regimes interact in a manner that provides the markets and market participants sufficient consistency and certainty and avoids duplicative regulation.

According due deference to regulatory regimes whose requirements are sufficiently comparable to those prescribed by another country's regime is fundamental to implementing this key principle in practice with respect to cross-border, non-centrally-cleared derivatives transactions (in this connection, we agree that for these purposes a branch should be treated as part of the same legal entity as the headquarters). For example, where a regulator in one jurisdiction adopts margin requirements for non-centrally-cleared derivatives that are comparable to those of second jurisdiction, the regulator in the second jurisdiction should permit entities organized in the first jurisdiction (whether the entity itself or a branch) to comply with the first jurisdiction's requirements in lieu of requiring compliance with its own requirements.[1] We believe this approach is consistent with the outcomes illustrated by Circumstances 1 -4 in the Margin Consultative Document.

However, we urge that further consideration be given to determining which rules apply when the required degree of comparability between national regulatory regimes does not exist and the margin rules of a home and host jurisdiction are different. The Margin Consultative Document proposes that in these circumstances the more stringent of the two requirements applies, and that this is the case regardless of whether an entity involved in the cross-border transaction is a subsidiary or a branch. This aspect of the proposal appears to be based on the conclusion that such an approach resolves any compliance issues by ensuring that both jurisdictions' requirements are satisfied. It further appears that this rationale underlies the result reached with respect to the scenario described in Circumstance 5 – *i.e.*, presumably, in that scenario the application of the U.S. margin rule would resolve the conflict between the rules of Jurisdiction X and the United States.

In our view, Circumstance 5 fails to address fully the fact that the Jurisdiction X subsidiary of the U.S. bank nevertheless remains subject to the margin regime of Jurisdiction X. If the amount of margin required by the United States is greater than what is required by the margin regime of Jurisdiction X, then compliance with the U.S. rule satisfies that aspect of the Jurisdiction X regime as a matter of basic arithmetic. Yet, this simple quantitative comparison should not end the analysis. Instead, it also is necessary to determine whether the margin regime of Jurisdiction X, like the margin regime of the United States, includes other considerations, such as collateral eligibility standards and whether the Jurisdiction X subsidiary is subject to the prudential regulation regime of Jurisdiction X, that must be taken into account.[2] It is not clear

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[1] For a discussion of how this approach would work in the U.S. context, see the comment letter the IIB submitted on July 1, 2011 to the Commodity Futures Trading Commission, the three federal banking agencies, the Federal Housing Finance Agency and the Farm Credit Administration regarding their proposals to implement the margin requirements for uncleared swaps under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act: http://www.iib.org/associations/6316/files/20110701CapMarginComment_Final.pdf.

[2] With respect to collateral eligibility standards, for example, the "non-comparable" jurisdiction may permit use of collateral that is not considered eligible by the "stricter" jurisdiction and/or may apply different haircuts to the collateral (whether or not eligible under the "stricter" jurisdiction's regime) such that the collateral that would be permissible under the "non-comparable" jurisdiction's regime nevertheless would fully collateralize the transaction. It is not self-evident why, in this circumstance, compliance with the "stricter" jurisdiction's requirements should be

from the discussion in the Margin Consultative Document the degree to which the proposed resolution of conflicts in circumstances where a jurisdiction's margin regime is not considered to be sufficiently comparable to another's to permit reliance on the first jurisdiction's regime is based on only a quantitative comparison of margin requirements or extends further to encompass the entirety of the jurisdictions' margin regimes. If the latter, then it would appear that the conclusion assumes that the regime of the jurisdiction whose rules apply is stricter than the other regime in all of its details. Moreover, this type of comparability analysis would appear to require some granularity in analysis—an approach our membership strenuously opposes.

Rather, we strongly favor a principles-based approach to comparability. Even assuming such an approach underlies the conclusion in Circumstance 5, we believe there remains the prospect of a conflict between aspects of the margin regimes of two jurisdictions such that imposition of the requirements of one jurisdiction would conflict with the requirements of the other. Depending on the degree of the conflict, the entity involved in the transaction could be placed in the difficult position of complying with one set of requirements only at the potential risk of violating the other. The impact of this potential conflict is only compounded where the entity in question is a branch.

We believe that principles of comity are very relevant to the analysis of the type of scenario described in Circumstance 5 and the question of how to resolve conflicts between "non-comparable" regimes, but we are concerned that they have not been sufficiently taken into account. Accordingly, we suggest that further thought be given to these considerations before adopting the type of across-the-board rule proposed in the Margin Consultative Document. At the same time, we wholeheartedly agree that further efforts to promote and facilitate close cooperation and coordination among supervisors are crucial, and we urge supervisors to continue and deepen the cross-border dialogue on these issues.

The IIB appreciates the opportunity to comment on the Margin Consultative Document. Please contact us if we can provide any additional information or assistance.

Respectfully submitted,

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Chief Executive Officer

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mandated. Consideration also should be given to the prospect that the collateral permitted under the "stricter" jurisdiction's regime may be ineligible under the "non-comparable" regime. With respect to prudential regulation, account should be taken of whether the "non-comparable" jurisdiction's capital regime supports application of margin that satisfies the "non-comparable" jurisdiction's requirements but would be would be considered inadequate by the "stricter" jurisdiction. Here too it is not self-evident that the "stricter" jurisdiction's requirements should be mandated.