Meeting between Federal Reserve Board Staff and Representatives of the European Investment Bank June 20, 2012

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Summary: Staff of the Federal Reserve Board met with representatives of the European Investment Bank ("EIB") to discuss issues related to the proposed rule of the Board and other prudential regulators on margin and capital requirements for covered swap entities and to discuss issues related to implementation of other requirements under Title VII of the Dodd-Frank Act. The EIB representatives discussed their views and concerns regarding the manner in which the requirements under Title VII would apply to the institution's U.S. swap activities. The EIB representatives noted that they had been exempted from certain clearing and margin requirements under the European Market Infrastructure Regulation for OTC derivatives (see attachment) and indicated that the CFTC did not plan to require international financial institutions to register as swap dealers or major swap participants under its joint rule further defining these terms (see attachment). The EIB representatives stressed the low-risk nature of the organization's swaps activities and indicated that effective harmonization of the global rules related to the EIB would be a desirable outcome.

HAVE ADOPTED THIS REGULATION:

Subject matter, scope and definitions

Article 1

Subject matter and scope

1. This Regulation lays down ***clearing and bilateral risk management*** requirements for ***OTC*** derivative contracts, ***reporting requirements for derivative contracts*** and uniform requirements for the performance of activities of central counterparties and trade repositories.

2. This Regulation shall apply to ***CCPs and their clearing members*** , to financial counterparties and to trade repositories. It shall apply to non-financial counterparties ***and trading venues*** where so provided.

3. Title V shall ▌apply ***only*** to transferable securities and money-market instruments, as defined in ***Article 4(1)(18)(a) and (b) and (19)*** of Directive 2004/39/EC.

4. This Regulation shall not apply to:

(a) the ***members*** of the ***ESCB*** and other ***Member States'*** bodies performing similar functions and other ***Union*** public bodies charged with or intervening in the management of the public debt;

(b) the Bank for International Settlements.

5. This Regulation shall not apply to the following entities, with the exception of the reporting obligation under Article 6:

(a) multilateral development banks, as listed under Section 4.2 of Part 1 of Annex VI to Directive 2006/48/EC;

(b) public sector entities within the meaning of Article 4(18) of Directive 2006/48/EC where they are owned by central governments that have explicit guarantee arrangements provided by central governments;

(c) the European Financial Stability Facility and the European Stability Mechanism.

6. The Commission shall be empowered to adopt delegated acts in accordance with Article 82 to amend the list set out in paragraph 4.

To that end, the Commission shall present to the European Parliament and the Council a report by ... (21) ***assessing the international treatment of public bodies charged with or intervening in the management of the public debt and central banks.***

The report shall include a comparative analysis of the treatment of those bodies and of central banks within the legal framework of a significant number of third countries, including at least the three most important jurisdictions as regards volumes of contracts traded, and the risk-management standards applicable to the derivative transactions entered into by those bodies and by central banks in those jurisdictions. If the report concludes, in particular in regard to the comparative analysis, that the exemption of the monetary responsibilities of those third-country central banks from the clearing and reporting obligation is necessary, the Commission shall include them in the list set out in paragraph 4.

Article 2

Definitions

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(Acts whose publication is obligatory)

DIRECTIVE 2006/48/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 14 June 2006

relating to the taking up and pursuit of the business of credit institutions (recast)

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular the first and third sentences of Article 47 (2) thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Economic and Social Committee [1],

Having regard to the Opinion of the European Central Bank [2],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [3],

Whereas:

(1) Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions [4] has been significantly amended on several occasions. Now that new amendments are being made to the said Directive, it is desirable, in order to clarify matters, that it should be recast.

(2) In order to make it easier to take up and pursue the business of credit institutions, it is necessary to eliminate the most obstructive differences between the laws of the Member States as regards the rules to which these institutions are subject.

(3) This Directive constitutes the essential instrument for the achievement of the internal market from the point of view of both the freedom of establishment and the freedom to provide financial services, in the field of credit institutions.

(4) The Commission Communication of 11 May 1999 entitled 'Implementing the framework for financial markets: Action plan', listed a number of goals that need to be achieved in order to complete the internal market in financial services. The Lisbon European Council of 23 and 24 March 2000 set the goal of implementing the action plan by 2005. Recasting of the provisions on own funds is a key element of the action plan.

(5) Measures to coordinate credit institutions should, both in order to protect savings and to create equal conditions of competition between these institutions, apply to all of them. Due regard should however be had to the objective differences in their statutes and their proper aims as laid down by national laws.

(6) The scope of those measures should therefore be as broad as possible, covering all institutions whose business is to receive repayable funds from the public, whether in the form of deposits or in other forms such as the continuing issue of bonds and other comparable securities and to grant credits for their own account. Exceptions should be provided for in the case of certain credit institutions to which this Directive cannot apply. The provisions of this Directive should not prejudice the application of national laws which provide for special supplementary authorisations permitting credit institutions to carry on specific activities or undertake specific kinds of operations.

(7) It is appropriate to effect only the essential harmonisation necessary and sufficient to secure the mutual recognition of authorisation and of prudential supervision systems, making possible the granting of a single licence recognised throughout the Community and the application of the principle of home Member State prudential supervision. Therefore, the requirement that a programme of operations be produced should be seen merely as a factor enabling the competent authorities to decide on the basis of more precise information using objective criteria. A measure of flexibility should nonetheless be possible as regards the requirements on the legal form of credit institutions concerning the protection of banking names.

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(1) OJ C 234, 22.9.2005, p. 8.

(2) OJ C 52, 2.3.2005, p. 37.

(3) Opinion of the European Parliament of 28 September 2005 (not yet published in the OJ) and Decision of the Council of 7 June 2006.

(4) OJ L 126, 26.5.2000, p. 1. Directive as last amended by Directive 2006/29/EC (OJ L 70, 9.3.2006, p. 50).

4. EXPOSURES TO MULTILATERAL DEVELOPMENT BANKS

4.1. **Scope**

18. For the purposes of Articles 78 to 83, the Inter-American Investment Corporation, the Black Sea Trade and Development Bank and the Central American Bank for Economic Integration are considered to be Multilateral Development Banks (MDB).

4.2. **Treatment**

19. Without prejudice to points 20 and 21, exposures to multilateral development banks shall be treated in the same manner as exposures to institutions in accordance with points 29 to 32. The preferential treatment for short-term exposures as specified in points 31, 32 and 37 shall not apply.

20. Exposures to the following multilateral development banks shall be assigned a 0 % risk weight:

(a) the International Bank for Reconstruction and Development;

(b) the International Finance Corporation;

(c) the Inter-American Development Bank;

(d) the Asian Development Bank;

(e) the African Development Bank;

(f) the Council of Europe Development Bank

(g) the Nordic Investment Bank;

(h) the Caribbean Development Bank;

(i) the European Bank for Reconstruction and Development;

(j) the European Investment Bank;

(k) the European Investment Fund; and

(l) the Multilateral Investment Guarantee Agency.

21. A risk weight of 20 % shall be assigned to the portion of unpaid capital subscribed to the European Investment Fund.

5. EXPOSURES TO INTERNATIONAL ORGANISATIONS

22. Exposures to the following international organisations shall be assigned a 0 % risk weight:

(a) the European Community;

(b) the International Monetary Fund;

(c) the Bank for International Settlements.

major participants, the CFTC and SEC would seek to coordinate their regulatory oversight as appropriate to achieve the independent purposes of major participant regulation and those separate regulatory requirements, while avoiding unnecessary duplication.[1176]

c. Foreign entities

Commenters[1177] discussed the major participant definitions in the context of foreign governments and various entities related to foreign governments[1178] (i.e., foreign central banks,[1179] international financial institutions[1180] and sovereign wealth funds). The CFTC

[1176] For many years, the Commissions have coordinated their examination of dually-registered FCM/BDs through working groups including the Joint Audit Committee and the Intermarket Financial Surveillance Group. Moreover, pursuant to Title IV of the Dodd-Frank Act, the CFTC and SEC have issued joint reporting rules for advisors to private funds that are dually registered with the SEC as investment advisers and with the CFTC as commodity pool operators or commodity trading advisors. See CFTC and SEC, Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF; Final Rule, 76 FR 71127 (Nov. 16, 2011).

[1177] See letters from CIC, GIC, Milbank Tweed, Norges Bank Investment Management and the World Bank, and meetings with KfW and Weil.

[1178] For this purpose, we consider that the term "foreign government" includes KfW, which is a non-profit, public sector entity responsible to and owned by the federal and state authorities in Germany, mandated to serve a public purpose, and backed by an explicit, full, statutory guarantee provided by the German federal government.

[1179] For this purpose, we consider the Bank for International Settlements, in which the Federal Reserve and foreign central banks are members, to be a foreign central bank. See http://www.bis.org/about/orggov.htm.

[1180] For this purpose, we consider the "international financial institutions" to be those institutions defined as such in 22 U.S.C. 262r(c)(2) and the institutions defined as "multilateral development banks" in the Proposal for the Regulation of the European Parliament and of the Council on OTC Derivative Transactions, Central Counterparties and Trade Repositories, Council of the European Union Final Compromise Text, Article 1(4a(a)) (March 19, 2012). There is overlap between the two definitions, but together they include the following institutions: the International Monetary Fund, International Bank for Reconstruction and Development, European Bank for Reconstruction and Development, International Development Association, International Finance Corporation, Multilateral Investment Guarantee Agency, African Development Bank, African Development Fund, Asian Development Bank, Inter-American Development Bank, Bank for Economic Cooperation and Development in the Middle East and North Africa, Inter-American Investment Corporation, Council of Europe Development Bank, Nordic Investment Bank, Caribbean Development Bank, European Investment Bank and European Investment Fund. (The term international financial institution includes entities referred to as multilateral

provides the following guidance with respect to the major swap participant definition and the swap dealer definition.[1181]

As an initial matter, foreign entities are not necessarily immune from U.S. jurisdiction for commercial activities undertaken with U.S. counterparties or in U.S. markets.[1182] In accordance with the general rule, a per se exclusion for foreign entities from the CEA's major swap participant or swap dealer definition, therefore, is inappropriate. A foreign entity's swap activity may be commercial in nature and may qualify it as a swap dealer or major swap participant. Registration and regulation as a swap dealer or major swap participant under such circumstances may be warranted.[1183] This is particularly true for foreign corporate entities and sovereign wealth funds, which act in the market in the same manner as private asset managers.

On the other hand, the sovereign or international status of foreign governments, foreign

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development banks. The International Bank for Reconstruction and Development, the International Finance Corporation and the Multilateral Investment Guarantee Agency are parts of the World Bank Group.)

[1181] The SEC intends to address issues related to the application of the major security-based swap participant definition to non-U.S. entities as part of a separate release that the SEC is issuing in connection with the application of Title VII to non-U.S. persons. The SEC is also able to address concerns related to the individual substantive rules applicable to major security-based swap participants on a case-by-case basis.

[1182] See Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 ("under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned . . . Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter."). See also Mendaro v. World Bank, 717 F.2d 610 (D.C. Cir. 1983) (multilateral development banks generally do not have immunity in connection with their commercial dealings in the United States); Osseiran v. International Financial Corp., 552 F.3d 836 (D.C. Cir. 2009) (same); Vila v. Inter-American Investment Corp., 570 F.3d 274 (D.C. Cir. 2009) (same).

[1183] Such a registration requirement would have to satisfy the requirements of CEA section 2(i), 7 U.S.C. 2(i), which provides that the provisions of Title VII relating to swaps "shall not apply to activities outside the United States unless those activities—(1) have a direct and significant connection with activities in, or effect on, commerce of the United States; or (2) contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of [the CEA] that was enacted by" Title VII of the Dodd-Frank Act.

central banks and international financial institutions that themselves participate in the swap markets in a commercial manner is relevant in determining whether such entities are subject to registration and regulation as a major swap participant or swap dealer. Canons of statutory construction "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws."[1184] There is nothing in the text or history of the swap-related provisions of Title VII to establish that Congress intended to deviate from the traditions of the international system by including foreign governments, foreign central banks and international financial institutions within the definitions of the terms "swap dealer" or "major swap participant," thereby requiring that they affirmatively register as swap dealers or major swap participants with the CFTC and be regulated as such.[1185] The CFTC does not believe that foreign governments, foreign central banks and international financial institutions should be required to register as swap dealers or major swap participants.

K. Financing Subsidiary Exclusion from Major Swap Participant Definition

In connection with the definition of major swap participant, CEA section 1a(33)(D) excludes certain entities from the definition of a major swap participant whose primary business is providing financing and uses derivatives for the purpose of hedging underlying commercial risks related to interest rate and foreign currency exposures, 90 percent or more of which arise

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[1184] See F. Hoffman-LaRoche, Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004), citing Murray v. Schooner Charming Betsy, 2 Cranch 64, 118, 2 L.Ed. 208 (1804) ("[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains"); Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993) (Scalia, J., dissenting). See also Restatement (Third) Foreign Relations Law § 403 (scope of a statutory grant of authority must be construed in the context of international law and comity including, as appropriate, the extent to which regulation is consistent with the traditions of the international system).

[1185] To the contrary, section 752(a) of the Dodd-Frank Act requires the CFTC to consult and coordinate with other regulators "on the establishment of consistent international standards with respect to the regulation (including fees) of swaps [and] swap entities . . ."