

December 5, 2011

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

**Re: Application of Section 716 Exemptions under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act to Japanese Bank Groups' Swaps Businesses**

Dear Ms. Johnson:

The undersigned three Japanese financial institutions respectfully submit the attached comment letter to the Board of Governors of the Federal Reserve System in relation to Section 716 under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Should you have questions or concerns, please feel free to contact any of the undersigned or Theodore A. Paradise (+81-3-5561-4430) at the Tokyo office of Davis Polk & Wardwell LLP at your convenience.

Sincerely,

The Bank of Tokyo-Mitsubishi UFJ, Ltd.  
Mizuho Corporate Bank, Ltd.  
Sumitomo Mitsui Banking Corporation

cc: The Honorable Timothy F. Geithner, The Secretary of the Treasury  
The Honorable Gary Gensler, Chairman, Commodity Futures Trading Commission  
The Honorable Martin J. Gruenberg, Acting Chairman, Federal Deposit  
Insurance Corporation  
The Honorable Mary L. Schapiro, Chairman, Securities and Exchange Commission  
The Honorable John Walsh, Acting Comptroller of the Currency, Office of  
the Comptroller of the Currency

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**Re: Application of Section 716 Exemptions under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act to Japanese Bank Groups' Swaps Businesses**

Dear Ms. Johnson:

The undersigned are Japan's three largest bank groups, each of which engages in swap dealing activities throughout the world, including in the United States. We book swaps primarily in our well-capitalized, highly-rated banking institutions, with most swaps in the U.S. market being booked in our licensed and regulated U.S. branches. To more accurately support the legislative intent, we are writing to request interpretive guidance regarding the prohibition on provision of Federal assistance under Section 716 ("**Section 716**") of Title VII ("**Title VII**") of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**").

Specifically, for the reasons expressed herein, we respectfully request that the Board of Governors of the Federal Reserve System (the "**Federal Reserve**") provide interpretive guidance that U.S. branches of foreign-based banks receive treatment under Section 716 equal to that afforded insured depository institutions.

For convenience, in this letter we refer to swaps and security-based swaps collectively as "**swaps**," and, likewise, the term "**swap dealers**" refers to both swap dealers and security-based swap dealers.

**Overview of Section 716 and its Effect on U.S. Branches of Foreign Banks**

Section 716(a) prohibits Federal assistance to any swaps entity with respect to any swap, security-based swap or other activity of the swaps entity. Insured depository institutions, however, are afforded certain benefits under Section 716 that are not explicitly provided to uninsured U.S. branches of foreign banks. Specifically, Section 716 provides:

- an exclusion from the definition of "swaps entity" for any major swap participant that is an insured depository institution. [Subsection (b)(2)(B)].
- that the prohibition on Federal assistance shall not prevent an insured depository institution from having or establishing an affiliate that is a swaps entity. [Subsection (c)].
- that the prohibition on Federal assistance to swap entities shall not apply to insured depository institutions that limit their swaps activities to (1) hedging and other similar risk mitigating activities, or (2) activities

involving swaps on national bank permissible investments. [Subsection (d)].

- that the prohibition on Federal assistance shall only apply to swaps entered into by an insured depository institution after the end of a transition period of up to 24 months. [Subsections (e) and (f)].

We believe that uninsured U.S. branches of foreign banks, while not explicitly mentioned in Section 716, should be afforded the same treatment under Section 716 that is given to insured depository institutions, as described above. This interpretation is appropriate because the purpose of Section 716 is to protect customers of insured depository institutions from certain swap activities. Unfortunately, absent interpretive guidance or a technical legislative amendment, it is not clear that these exemptions are available to U.S. branches of foreign banks, including our U.S. branches, most of which do not have deposits insured by the Federal Deposit Insurance Corporation (the "FDIC").

The legislative history states that this exclusion of uninsured U.S. branches of foreign banks from the exemptions of Section 716 was inadvertent. The inclusion of uninsured U.S. branches of foreign banks under the exemptions of Section 716 would furthermore be consistent with the principle of competitive equality, the enhancement of which was the main thrust of the International Banking Act of 1978. Moreover, the equal treatment of uninsured U.S. branches of foreign banks with insured depository institutions would benefit U.S. consumers by maintaining the current competitive landscape.

#### **Request for Interpretive Guidance**

While we believe that the optimal solution to the inadvertent discriminatory effect of Section 716 on U.S. branches of foreign banks would be the enactment of a technical legislative amendment, we respectfully request interpretive guidance that U.S. branches of foreign-based banks receive treatment under Section 716 equal to that afforded insured depository institutions.

Extension of the exemptions to Section 716(a) to uninsured U.S. branches of foreign banks would be consistent with statutory logic and purpose, as reflected both by the specific legislative history of Section 716 and the broader stated objectives of the Dodd-Frank Act. First, as unequivocally asserted in the colloquy between Senators Lincoln and Dodd, the discriminatory effect of Section 716 on foreign banks was inadvertent and was by no means a representation of the statutory purpose. Second, the American taxpayer will not be called upon to bail out U.S. branches of foreign banks, particularly those that do not offer FDIC insured deposits. While U.S. branches of foreign banks have access to collateralized loans from the discount window of the Federal Reserve, the absence of FDIC insured deposits at an uninsured U.S. branch of a foreign bank limits the exposure of American taxpayers to such U.S. branches. One of the fundamental objectives of the Dodd-Frank Act, as stated in its introductory paragraph, is "to protect the American taxpayer by ending bailouts." Given that American taxpayers shoulder little to no risk of bailing out U.S. branches of foreign banks, denying the safe harbor protections of Section 716 to U.S. branches of foreign banks, while extending them to insured depository institutions to which American taxpayers are exposed, would be contrary to the logic of the Dodd-Frank Act.

We would like to emphasize that we do not seek preferential treatment of U.S. branches of foreign banks, but simply equal treatment of domestic and foreign banks. We request only that the discriminatory effect on foreign banks be remedied, in light of the statutory purpose reflected by the specific legislative history of the Dodd-Frank Act conceding the inadvertent nature of such discriminatory treatment, as well as by the broader legislative objective of protecting American taxpayers, a purpose that is not advanced by the discriminatory treatment of foreign banks. Furthermore, the discriminatory treatment of certain foreign banks under Section 716 would be inconsistent with international commitments of the United States to non-discriminatory banking regulation, as reflected in its G-20 obligations and the national treatment principle in the International Banking Act of 1978.

In the June 2010 G-20 Meeting of Finance Ministers and Central Bank Governors in Busan, Korea, shortly before the Dodd-Frank Act was signed into law by President Obama, members committed to accelerate the implementation of OTC derivatives regulation "in an internationally consistent and non-discriminatory way." Subsequent G-20 Meetings of Finance Ministers and Central Bank Governors have reiterated such commitment to the non-discriminatory implementation of OTC derivatives regulation. For example, in the G20 Meeting of Finance Ministers and Central Bank Governors in Paris, France in October 2011, members "reaffirm[ed] our commitment to implement fully, consistently and in a non-discriminatory way agreed reforms on OTC derivatives" in implementing the recommendations of the Financial Stability Board in their legislations and regulations in the OTC derivatives markets. The discriminatory treatment of Section 716 against foreign banks discernibly conflicts with such commitments by the United States as a member of the G-20 and with the consensus among worldwide regulators regarding the significance of fair and non-discriminatory regulation in the global derivatives market.

Moreover, in their July 15, 2010 colloquy on the Senate floor, both Senator Blanche Lincoln, Chairman of the Agriculture Committee, (who drafted and sponsored Section 716) and Senator Christopher Dodd, Chairman of the Banking Committee, acknowledged that the omission of uninsured U.S. branches of foreign banks from the listed exemptions from the push-out requirement of Section 716 was an unfortunate and unintended oversight. The Senators recognized the need to address this issue to ensure that the treatment afforded insured depository institutions is equally extended to uninsured U.S. branches of foreign banks. As Senator Lincoln mentioned in her colloquy with Senator Dodd, under the U.S. policy of national treatment, uninsured U.S. branches of foreign banks are authorized to engage in the same activities as insured depository institutions. The exclusion of U.S. branches of foreign banks from the exemptions to Section 716(a) contradicts this principle of national treatment, a hallmark of U.S. banking regulation since the International Banking Act of 1978. Preserving the equal treatment of uninsured U.S. branches of foreign banks with insured depository institutions would furthermore benefit U.S. consumers by maintaining the current competitive landscape.

#### **Request for Support for a Technical Legislative Amendment**

In addition to our request for interpretive guidance, we respectfully request that the Federal Reserve support a technical legislative amendment to clarify that U.S. branches of foreign banks are eligible for the exemptions to Section 716 requirements. Such an amendment would codify the intent of Congress.

The exemptions to Section 716(a), as provided by subsections (b)(2)(B), (c), (d), (e) and (f) of Section 716, apply to insured depository institutions. While our U.S. branches do not have deposits that are insured by the FDIC, they have access to the Federal Reserve discount window. Since the exemptions to Section 716 expressly apply to "insured depository institutions," U.S. branches of foreign banks, including our U.S. branches, that are deemed "swaps entities" may be unfairly placed at a significant competitive disadvantage vis-à-vis insured depository institutions.

Consistent with the recognition by the legislators themselves that the exclusion of U.S. branches of foreign banks from the exemptions was unintended, we respectfully request your support for a legislative correction to provide that such U.S. branches become eligible for the exemptions to Section 716(a). We have attached our proposals for the specific language of the revisions in **Exhibit A**.

### **Conclusion**

We request nothing beyond non-discriminatory treatment consistent with the specific legislative history and the broader statutory purpose of the Dodd-Frank Act, and furthermore with the commitments of the United States to international principles of competitive equality. While a legislative correction would be the optimal solution, we believe that interpretive guidance by the Federal Reserve could similarly fulfill our ultimate goal of fairness in the international banking arena. We appreciate the opportunity to share our views and recommendations and look forward to working with the Federal Reserve on these and other issues affecting foreign banks.

We are available at your convenience to discuss any matters that may be useful to the Federal Reserve in crafting rules applicable to foreign banks. Please feel free to contact any of the undersigned banks via Theodore A. Paradise (+81-3-5561-4430) at the Tokyo office of Davis Polk & Wardwell LLP at your convenience.

Sincerely,

The Bank of Tokyo-Mitsubishi UFJ, Ltd.  
Mizuho Corporate Bank, Ltd.  
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Insurance Corporation  
The Honorable Mary L. Schapiro, Chairman, Securities and Exchange Commission  
The Honorable John Walsh, Acting Comptroller of the Currency, Office of  
the Comptroller of the Currency

## **Exhibit A**

### **Proposed Revisions to Section 716 of the Dodd-Frank Wall Street Reform and Consumer Protection Act**

1. Add "or U.S. branch or agency of a foreign bank" at the end of the sentence in (b)(2)(B).
2. Add "or U.S. branch or agency of a foreign bank" after "insured depository institution" each time it appears in paragraph (c).
3. Add "or, an office of a foreign bank that is or is regulated as a bank holding company, in each case" after "savings and loan company," in paragraph (c).
4. Add "or U.S. branch or agency of a foreign bank" after "insured depository institution" each time it appears in paragraph (d).
5. Add "or the U.S. branch or agency's" after "the insured depository institution's" in paragraph (d)(1).
6. Add "or U.S. branch or agency of a foreign bank" after "insured depository institution" in paragraph (e).
7. Add "or U.S. branch or agency of a foreign bank" after "insured depository institution" each time it appears in paragraph (f).
8. Add "or the U.S. branch or agency's" after "the insured depository institution's" each time it appears in paragraph (f).
9. Add "or branches or agencies of a foreign bank" after "swaps entities that are FDIC insured institutions" in paragraph (i)(1)(A).
10. Add "or taken possession of by their primary regulator" after "declared insolvent" in paragraph (i)(1)(A).