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Proposal and Comment Information

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Re: FFIEC 009 and FFIEC 009a / Joint Notice and Request for Comment (OCC OMB Number 1557-0100; Federal Reserve Board OMB Number 7100-0035; FDIC OMB Number 3064-0017)

The Institute of International Bankers ("IIB") appreciates the opportunity to comment on the Federal Financial Institutions Examination Council ("FFIEC") Form 009 ("FFIEC 009") and the related comment request and joint notice of proposed agency information collection activities.[1] The IIB represents internationally headquartered financial institutions from over 35 countries around the world doing business in the United States. The IIB's members consist principally of international banks that operate branches, agencies, bank subsidiaries and broker-dealer subsidiaries in the United States ("international banks").

[1] Office of the Comptroller of the Currency ("OCC"), Board of Governors of the Federal Reserve System ("Federal Reserve Board") and Federal Deposit Insurance Corporation ("FDIC", and together with the OCC and the Federal Reserve Board, the "Agencies"), *Proposed Agency Information Collection Activities: Comment Request*, 90 Fed. Reg. 40891 (Aug. 21, 2025) (the "Proposal").

We understand that the FFIEC 009 is to be extended, without revision, based on an information request earlier this year. We also understand that the Agencies received a comment letter which continues to be "under review by the [A]gencies."[2] We wish to supplement the submitted comment letter with our views on several flaws related to the information collected by the FFIEC 009 and to the use of the FFIEC 009 in determining the stringency of regulations applicable to U.S. banking organizations (as defined in the Proposal), including the intermediate holding companies ("IHCs") of international banks.

Prior to the enactment of the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018, data collected from banking organizations on the FFIEC 009 was used to determine the amount of "foreign exposure" a banking organization may have had. After the Federal Reserve Board finalized a categorization structure for differentiating among large banking organizations over $100 billion in assets,[3] the FFIEC 009 data feeds significantly into the "cross-jurisdictional activity" ("CJA") risk-based indicator for banking organizations determined through the Form FR Y-15.[4] In both time periods, the data collected on the FFIEC 009 has been incorporated into the determination of the stringency of regulations applied to banking organizations. Indeed, currently, a $75 billion CJA amount can cause a banking organization to leap over Category III from Category IV to Category II and to become subject to significantly more stringent and more operationally burdensome (as well as a greater number of) prudential standards. The CJA indicator is the only risk-based indicator that can cause such a leap, as other risk-based indicators generally cause a one category leap or may change the stringency of certain liquidity requirements within a category.

Therefore, in our view, careful attention must be paid to how the data in the FFIEC 009 is collected, how it is used, and how it is calibrated. The IIB has been commenting on all of these factors for over a decade. Yet, the FFIEC 009 continues to be approved and extended, as if it were just one of the administrative reporting forms from the Agencies, without taking into account its critical legal and substantive importance in the overall tailoring framework for banking organizations.[5] The FFIEC 009 and other forms that are incorporated into the Form FR Y-15 continue to drive regulatory outcomes, rather than serve their original role of data collection, and therefore it is critical that the Forms be clear and understandable *on an integrated basis*.

Through this comment letter, we urge either:

- revisions to be made to the FFIEC 009, consistent with our recommendations below, or

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2 Proposal at 40892.

3 Federal Reserve Board, *Prudential Standards for Large Bank Holding Companies, Savings and Loan Holding Companies, and Foreign Banking Organizations*, 84 Fed. Reg. 59032 (Nov. 1, 2019).

4 *See* Instructions for the Preparation of the Systemic Risk Report, Reporting Form FR Y-15 (effective September 2021) (the "Y-15 Instructions"), at Schedule L (Cross-Jurisdictional Activity Indicators for Foreign Banking Organizations) ("Schedule L").

5 *See* Y-15 Instructions at GEN-6 (certain FFIEC 009 data "will be populated [into the Form FR Y-15] automatically").

- for the tailoring framework and its data collection forms (e.g., Form FR Y-15) to be materially modified either to not incorporate, or to modify before incorporating, the flaws and inflated metrics from the FFIEC 009 into the categorization framework.

I. Recognizing True Exposure

a. *Collateral should be taken into account in securities financing transactions.*

Under the Instructions for the Preparation of Country Exposure Report, Reporting Form FFIEC 009 (effective Dec. 2022) (the "FFIEC 009 Instructions"), although collateralized loans and other credit exposure can be shifted away from being foreign exposure to a foreign counterparty and shifted to U.S. exposure if liquid U.S. collateral (e.g., U.S. treasuries) is received, without explanation the same does not apply for reverse repurchase agreements or securities borrowing transactions.[6]

And, yet, under the Y-15 Instructions the foreign claims included in Schedule L are supposed to be on an "ultimate-risk basis" and not on an "immediate-counterparty basis." The Form FR Y-15 pulls in data from the FFIEC 009, Schedule C, Part II (which is supposed to include claims on a "guarantor" or "ultimate-risk" basis (thereby taking into account the origin of the collateral, in contrast to Part I)), but because of the overriding FFIEC 009 instruction,[7] no reverse repurchase agreements or securities borrowing transactions with U.S.-denominated collateral can be shifted out of the definition of a foreign claim.[8]

This has been a long-standing concern for the IIB and its members, and the FFIEC 009 Instructions fail to provide a reason why securities financing transactions should be treated differently from a secured loan under this Form. The calculations should permit the U.S. operations of international banks to treat securities financing transactions under which the international bank receives U.S.-issued collateral (e.g., U.S. treasuries) as domestic activity.[9] Indeed, a repurchase transaction is treated better than secured loans in bankruptcy of the counterparty because the party that reverses in the collateral is deemed to own the collateral

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6 FFIEC 009 Instructions, Section II.F.5. at GEN-9.

7 Part II continues to follow the lack of risk transfer for these repurchase and securities borrowing transactions that is mandated in Section II.F of the FFIEC 009 Instructions, even though Part II is supposed to be on an ultimate risk or guarantor basis. In particular, *see* Examples (14), (15) and (16) of the FFIEC 009, Schedule C, Part II instructions where no transfer of the risk to the issuer of the collateral in securities financing transactions is contemplated, even under the "guarantor basis" section of the FFIEC 009. *See also* Schedule C. Part II, Column 18 where repurchase and securities borrowing information is collected by taking into account the country of the collateral; this Column *is not* incorporated into the Form FR Y-15.

8 The FFIEC 009, Schedule C, Part II, Columns 1 through 10 are pulled in automatically, without revision, to the Form FR Y-15. *See* Y-15 Instructions at GEN-6.

9 We note that the FFIEC 009, Schedule C, Part II, Columns 13 through 18 *already* collect information about the country of the collateral received in repurchase and securities borrowing/lending transactions, and therefore it would be a simple modification to incorporate appropriate columns for collateral when translating data into the Form FR Y-15 (such as column 14 for cash collateral and column 18 ("claims should be reported based on the issuing country of the collateral" in repurchase and securities financing transactions; FFIEC 009 Instructions at C-3)).

through title transfer; therefore an IHC owns the U.S. treasuries it receives under the repurchase agreement and should be deemed to have a U.S. domestic exposure.

Making such a change would be consistent with (i) the use of FFIEC 009, Schedule C, Part II (which requires reporting on a "guarantor basis"), (ii) the comparative treatment of secured loans and letters of credit, and (iii) the comparative treatment of securities financing transactions under the Agencies' capital rules (which calculate exposure by using the collateral haircut method, offsetting the collateral against the exposure to the counterparty), as well as under many international bankruptcy codes. Not making the change in either the FFIEC 009 or the FR Y-15 penalizes IHCs and domestic bank holding companies alike for engaging in prudent risk-mitigating collateral strategies, by ignoring those strategies and inflating an organization's systemic risk metrics.

b. ***The FFIEC 009 should collect information on <u>net</u> claims and liabilities with a counterparty.***

The FFIEC 009 Instructions generally require gross counterparty exposure calculations,[10] in contrast to the risk-based capital rules which apply a net exposure concept to transactions such as repurchase agreements, securities borrowing, margin loans and derivatives with a counterparty under netting agreements. This gross exposure capture also inflates the exposure numbers that are incorporated from the FFIEC 009 into the Form FR Y-15. It is not clear why information in the FFIEC 009 could not be collected on a net-of-collateral basis (even if it were in a separate column to be incorporated into the Form FR Y-15) for an understanding of the true exposure for systemic risk and for risk-based capital purposes.

A banking organization that receives an asset that may be liquidated in case of default of its counterparty should only have exposure that is measured by the difference between the amount the counterparty owed and the liquidation value of the assets received. Inclusion of the gross notional in the foreign exposure calculation vastly overestimates the risk and interconnectedness embedded in these transactions. Furthermore, a gross notional approach is contrary to the exposure calculations used for determining risk-weighted assets ("<u>RWA</u>") under the collateral haircut approach, which capture only the difference, if any, between the price of instruments/cash lent and the price of instruments/cash received, subject to a supervisory haircut.[11] Therefore, when such figures are incorporated into the Form FR Y-15, which is designed to measure risk, they are not being incorporated in a manner that recognizes appropriate risk mitigants.

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[10] FFIEC 009 Instructions, Section II.G, at GEN-9-10. Importantly, these instructions do not appear to permit netting for any Schedule C, Part II, Columns 1-10 exposures which are pulled directly into the Form FR Y-15.

[11] *See, e.g.*, 12 C.F.R. §§ 217.37(c) (collateral haircut approach), 217.132(b)(2) (collateral haircut approach), 217.132(b)(3) (VaR methodology using similar formula). The Federal Reserve Board has recognized this method of calculation in other contexts where determining the amount of exposure is critical. *See, e.g.*, letter, dated Oct. 31, 2001, from Jennifer J. Johnson, Secretary of the Board, to Marjorie E. Gross of J.P.Morgan Chase & Co. (agency securities lending exposures under Section 23A); letter, dated June 7, 2005, from Robert deV. Frierson, Deputy Secretary of the Board, to John H. Huffstutler of Bank of America Corporation (securities borrowing exposures under Section 23A).

c. *Other risk mitigation techniques should be recognized and not penalized through the Form FR Y-15's use of FFIEC 009 data.*

Risk mitigating guarantees provided by a non-U.S. parent of a U.S. counterparty or borrower,[12] and risk-mitigating insurance provided by non-U.S. firms for U.S. based credit exposures[13] are recorded as foreign exposures under FFIEC 009, because of the "ultimate risk" or "guarantor" basis metrics of the Form FR Y-15 and the FFIEC 009. Use of these risk-mitigation instruments thus penalizes prudent risk management by increasing a banking organization's foreign exposure and CJA metrics in the Form FR Y-15. By contrast, in calculating RWAs, firms are given the option, but are not required, to substitute the risk weight of an eligible guarantee or credit derivative covering the exposure for the risk weight of the exposure.[14]

The FFIEC 009 should collect information first without reallocating this exposure to the guarantor or insurance provider, so that, as a systemic risk matter, the Form FR Y-15 may pull the immediate-counterparty basis figures into the Form FR Y-15.

II. The treatment of exposure to U.S. branches of international banks should be modified.

All exposures to a U.S. branch of an international bank are deemed to be foreign exposures. This includes exposure of an IHC to its affiliate's U.S. branch, as well as exposure of any bank holding company or IHC to any U.S. branch of an international bank. The FFIEC 009 forces this result regardless of whether the branch's head office writes a separate guarantee and notwithstanding mechanisms in U.S. federal and state law to mitigate risk to counterparties of a U.S. branch.[15]

This result penalizes exposure of U.S. and non-U.S. institutions to a U.S. branch of an international bank because the FFIEC 009 is not just a reporting form, but is incorporated into Form FR Y-15 systemic risk calculations. This FFIEC 009 reporting rule discriminates against geographically domestic exposure simply because the counterparty is a branch of an international bank (affiliated or not) and, therefore, violates the principles of national treatment and equality of competitive opportunity. Any banking organization (U.S. or non-U.S.) that is monitoring and managing its CJA exposure under its Form FR Y-15 will be reluctant to transact with a U.S. branch of an international bank. In addition, this also inflates IHC FR Y-15 metrics because it includes IHC transactions with its own affiliated U.S. branch.[16]

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12 FFIEC 009 Instructions, Section II.F.1. at GEN-8.

13 FFIEC 009 Instructions, Section II.F.2. at GEN-8.

14 *See* 12 C.F.R. §§ 217.36, 217.134 -.135. *Cf.* 12 C.F.R. § 217.161 (allowing credit for insurance as a mitigant to operational risk capital charges).

15 FFIEC 009 Instructions, Section II.F.3. at GEN-8, Section II.C. at GEN-6, and Section III.B. at GEN-11-12.

16 Because this letter focuses on the FFIEC 009, we do not reiterate in this letter the support for IIB's position in other comment letters that affiliated exposures should be eliminated altogether when calculating

III. Exposures to international and regional organizations should be deemed riskless or as domestic exposure.

Under the FFIEC 009 Instructions, exposures to international and regional organizations are treated as foreign exposures regardless of whether the head office of the organization is located in the United States.[17] By contrast, such organizations are treated as riskless under the U.S. regulatory capital rules (i.e., with risk weights of 0%) regardless of where they are organized or their headquarters are located.[18] Exposure to international and regional organizations, such as multinational and development banks, should not be treated as foreign exposure regardless of where the organization is established or its head office is located.

IV. Multiple party issues

a. *Multiple guarantors or collateral.*

For reporting on an "ultimate risk" basis, certain claims with multiple guarantors or a mix of guarantors and collateral are required to be shifted to exposure to the country of the entity or collateral that bears the highest rating.[19] This shifting would occur regardless of the actual portion of the exposure to that specific entity or collateral in the overall transactions. For example, if a AA-rated foreign company guaranteed an exposure of a U.S. entity that had posted third-party A-rated bonds of a U.S. issuer as collateral, the entire exposure would be deemed foreign exposure because it would be shifted to the AA-rated foreign guarantor and would ignore the U.S. counterparty and the U.S. bond collateral.

In contrast, under RWA calculations, certain provisions permit a bank to calculate separate RWA for each portion of the covered exposure, thus more closely approximating the actual risk faced by the banking organization.[20]

The policy behind the FFIEC 009 Instructions on this point is unclear to us. We have included recommendations in relation to recognition of collateral in Section I above, and we recommend here that the Agencies seek to establish principles in the FFIEC 009 Instructions that are consistent with those proposals.

b. *CLO Co-issuers.*

CLO structures often have co-issuers – a U.S. entity that is treated as the issuer in the U.S., and is a subsidiary of a Cayman issuer that is treated as the issuer outside the United States. Primary exposure in a CLO structure is not to the entity, but to the underlying loans – the

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exposures under the Form FR Y-15. The IIB has also commented frequently that exposures to an international bank's home country sovereign should also be eliminated when calculating exposures under the Form FR Y-15.

17 FFIEC 009 Instructions, Section III.C. at GEN-12.

18 *See* 12 C.F.R. § 217.32(b).

19 FFIEC 009 Instructions, Section II.F. at GEN-8 and Section II.F.5. at GEN-9.

20 *See, e.g.,* 12 C.F.R. § 217.36(a)(4).

securities are limited recourse to the co-issuers, with primary recourse to the pool of loans. The vast majority of the loan pool is required to be U.S. obligors. Asset managers related to the structures are typically U.S. entities and U.S. registered investment advisers. Cash in the structure is maintained with the U.S. bank trustee in an account in the U.S. The debt securities are typically governed by U.S. (typically New York) law under New York law indentures. Yet, we understand that Federal Reserve Board examiners have advised that investments in co-issued structures are required to be counted as 50% foreign exposure, which overstates the actual foreign exposure.

A BHC or an IHC, as onshore entities, would expect to treat this exposure as U.S. credit exposure, both because of the underlying assets and cash as well as the U.S. co-issuer. Therefore, investments in co-issued CLOs should be treated as U.S. exposure.

c. *Exposures transacted through agents*.

Determining the ultimate obligor, and hence managing an organization's foreign exposures, is particularly challenging in the context of transacting with or through an agent for an undisclosed principal. A banking organization may find out late in the transaction or after the fact that it faces a foreign counterparty as principal, which raises a number of operational issues. Because of the "penalty" nature of "units" of additional foreign exposure, many firms have begun setting internal limits on the incurrence of foreign exposure, and operationally this can be very difficult to monitor, or can lead to inadvertent exceedances of allocations or limits, if the actual obligor is not informed to the banking institution prior to commitment.

One such example involves an investment manager for a fund complex that negotiates transactions on behalf of the complex, but may notify counterparties how certain transactions are allocated to the funds only after the fact.[21] Specifically, the information regarding the actual exposure can often be confidential at the outset of the transaction and hence would be impossible for the firm to uncover ahead of time. Therefore, in practice, the only way to avoid incurring additional foreign exposures through an agent would be to stop doing business with that agent, which would appear to be an unnecessary and impractical result.

As a matter of market realities, a banking organization would expect to have U.S. exposure when negotiating with a U.S. agent or manager. Therefore, to avoid the operational difficulties described, a practical approach should be adopted. Exposures created through negotiations with agents or managers should be presumed to create exposure based on the jurisdiction of location of the agent or manager for an undisclosed principal, unless, based on the exercise of reasonable diligence, the banking organization knew or should have known that it would have foreign exposure.

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[21] *See* FFIEC 009 Instructions, Section III.B at GEN-12 (investment funds not recorded based on location of fund managers); *see also* FFIEC 009 Instructions, Section II.F.1. at GEN-8 ("Ownership of fund shares in an unconsolidated investment entity should be reported on an immediate *and* guarantor basis according to the country and sector of the investment entity. The underlying assets of the investment fund do not provide an effective guarantee for purposes of the FFIEC 009 report" (emphasis in original).)

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We appreciate your consideration of our comments on the Proposal. If we can answer any questions or provide any further information, please contact me at 646-213-1147, bzorc@iib.org or Stephanie Webster, General Counsel at 646-213-1149, swebster@iib.org.

Very truly yours,

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