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20th Street & Constitution Avenue, N.W.
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Docket No. 1536
RIN No. 7100 AE-50

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Re: Reproposed Rule on Incentive-Based Compensation Arrangements (Docket ID OCC-2011-0001; Federal Reserve Docket No. 1536 and RIN No. 7100 AE-50; FDIC RIN 3064-AD86; FHFA RIN 2590-AA42; SEC File Number S7-07-16); IIB Comments on "Notice of Proposed Rulemaking for Incentive-Based Compensation Arrangements"

Ladies and Gentlemen:

Pursuant to Section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), the OCC, the Board, the FDIC, the NCUA, the SEC and the FHFA (collectively, the "Agencies") have jointly re-issued substantially identical proposed rules on

incentive-based compensation arrangements (the "Reproposed Rule").[1] The Institute of International Bankers ("IIB") submits this letter in response to the Agencies' request for comments regarding the Reproposed Rule.

The IIB represents internationally headquartered financial institutions from over 35 countries from around the world; our members include banking organizations and other financial institutions headquartered outside the United States that operate branches and agencies and/or various bank and nonbank financial subsidiaries (including broker-dealers) in the United States. As job creators, taxpayers and investors in American enterprise and infrastructure, and as supporters of American communities, IIB members contribute substantially to U.S. economic well-being and growth. In the aggregate, our members' U.S. operations have approximately $3.7 trillion in banking assets, fund 27% of all commercial and industrial bank loans made in this country and contribute to the depth and liquidity of U.S. financial markets. Our members also contribute more than $50 billion each year to the economies of major cities across the country in the form of investments, employee compensation, contributions to local and national charities, tax payments to local, state and federal authorities and other operating and capital expenditures.

The IIB appreciates the hard work of the Agencies and the opportunity to comment on the Reproposed Rule. The IIB and its members agree on the importance of having incentive-based compensation arrangements that promote the safety and soundness of financial institutions by discouraging inappropriate risk-taking by their executives and employees. As evidenced by our comment letter on the Agencies' original proposed rule issued in 2011 under Section 956, incentive-based compensation is an important issue to our membership.

Much has transpired since 2011. As noted by the Agencies, foreign jurisdictions (*e.g.*, the European Union) have introduced new compensation regulations that require certain financial institutions to meet certain standards in relation to compensation policies and practices. Other regulators have taken either a guidance-based approach to the supervision and regulation of incentive-based compensation or an approach that combines guidance and regulation consistent with the FSB Principles and Implementation Standards. Moreover, since 2011, all banking regulators have gained insight through their reviews of regulated institutions' compensation practices.

Our comments focus on issues of particular significance to our members by virtue of the fact that they are headquartered outside the United States.[2] From this perspective, a key consideration is how the significant progress achieved since the financial crisis through the initiatives of the FSB and the actions of U.S. and non-U.S. supervisory authorities, as well as the

[1] 81 Fed. Reg. 37670 (June 10, 2016). Capitalized terms used in this letter have the meanings ascribed in the Reproposed Rule except as otherwise indicated or required by the context.

[2] We generally agree with the concerns raised in respect of the broader aspects of the Reproposed Rule in the letters submitted by The Clearing House Association L.L.C. ("TCH") and the Securities Industry and Financial Markets Association ("SIFMA").

extensive experience and insights gained by supervisors and internationally-active financial institutions, with respect to incentive-based compensation arrangements can be incorporated most effectively into a regulatory regime under Section 956. Such progress includes the developments and enhancements in risk management systems that better recognize risk in incentive-based compensation decision-making. Risk management systems have been revised to institute improved practices that better balance risk and reward, expand the role control functions play in the design and operation of incentive-based compensation and build out frameworks to help validate the effectiveness of risk-adjustment mechanisms.

With this background in mind, we wholeheartedly endorse the Agencies' recognition that international coordination is important to ensure that internationally active financial institutions are subject to consistent requirements, and we welcome their commitment to continue to work on a going forward basis with their domestic and international colleagues to foster sound compensation practices across the financial services industry. As discussed below, we believe this purpose can be best served by the adoption of a substituted compliance approach. We then address considerations arising under the Reproposed Rule that are relevant specifically to financial institutions headquartered outside the United States ("Non-U.S. FIs") in the absence of substituted compliance.

I. Substituted Compliance

We respectfully urge the adoption of an approach whereby the U.S. operations, bank and nonbank subsidiaries, branches and agencies (collectively, "U.S. businesses") of Non-U.S. FIs whose home country regulatory or supervisory requirements, guidance and practices are in accordance with the FSB Principles and Implementation Standards ("Qualifying Non-U.S. FIs") would be deemed to be in compliance with the final rule adopted by the Agencies (the "Final Rule").

Preliminarily, we should ask whether an internationally active financial institution should be subject to a single regulatory regime concerning incentive compensation or multiple regulatory regimes. We strongly believe that a single regulatory regime is appropriate in the specific context of compensation regulation, in contrast to other contexts in which multiple jurisdictional layers of regulation may be more appropriate. More specifically:

1. Employees performing similar functions in different jurisdictions frequently work together. Requiring that they be paid differently for performing the same function based solely on the regulations of the country in which the employee is located would create inevitable tension and would likely make it difficult for a financial institution to recruit and retain employees in the jurisdictions in which they were needed. That difficulty could adversely affect safety and soundness. The need for uniformity in the way in which colleagues are paid is a unique aspect of the regulation of incentive compensation that sets it apart from other contexts in which multiple, territorially-imposed layers of regulation may be considered.

2. Within internationally active financial institutions, employees regularly relocate between jurisdictions and frequently travel between jurisdictions. Coordinating pay under different regulatory regimes for services rendered in the course of a year or a few years could give rise to pay anomalies (too much income in one year and not enough in another resulting from different deferral timing rules) and will, in any case, be unnecessarily confusing for employees and administratively complex. This is another consideration that is unique to the compensation context.

3. Financial institutions generally adopt global compensation systems, for the reasons noted in the preceding two paragraphs, as well as because such an approach enhances risk controls relative to the alternative of different compensation programs in different jurisdictions.

Accordingly, any benefits to having local compensation regulations apply to the local operations of global institutions, are outweighed by the foregoing considerations, especially in the event that the local regulations also satisfy the minimum standards and uniform principles adopted by the home country in accordance with the FSB Principles and Implementation Standards. The FSB's ongoing monitoring of the actions of the supervisory authorities of its member jurisdictions, as evidenced by its periodic progress reports, in implementing the FSB Principles and Implementation Standards (including the status of, and gaps in, national implementation on a member-by-member basis) should provide the Agencies with additional and continuing comfort regarding home country supervisory standards.

Adopting the proposed substituted compliance approach would address the following important concerns.

First and foremost, the substituted compliance approach would avoid the duplicative requirements and direct conflicts that the Reproposed Rule could raise under home country laws, consequences that are especially problematic given frequent movement of employees between the United States and home country jurisdictions. The Agencies themselves reference the many overlapping requirements that have been adopted by FSB member jurisdictions, including (i) the European Union's Capital Requirements Directive, which requires that variable remuneration be subject to "malus" and clawback, consist at least 50% of equity-linked interests and be at least 40% deferred over a period of three to five years; (ii) the PRA's and the FCA's Remuneration Code, which requires deferrals of 40% to 60% of variable remuneration for between five and seven years (based on the covered person) and a clawback period of at least seven years from the grant date; (iii) the EBA's processes and criteria for the identification of material risk-takers and for categorizing compensation as fixed or variable; and (iv) similar guidance-based and regulatory approaches by supervisory authorities in Australia, Canada, and Switzerland.[3] In addition to the design features noted above, the FSB Principles and Implementation Standards also address governance and monitoring requirements including oversight of the design and

[3] See 81 FR 37670, 37678 (June 10, 2016). As noted by the FSB, Japan has also implemented, through a supervisory approach, the FSB Principles and Implementation Standards. See Implementing the FSB *Principles for Sound Compensation Practices* and their *Implementation Standards,* Fourth Progress Report, 10 November 2015.

operation of compensation frameworks by a board committee, input from independent control function staff on effective risk-adjustment of compensation, necessity for robust controls and periodic reviews and recordkeeping.

Considerable confusion and complexity would arise for Qualifying Non-U.S. FIs trying to coordinate guidance, regulation and supervision by multiple regulators and supervisors in respect of global compensation arrangements for mobile work forces. The Agencies have based the Reproposed Rule on the foundation of the FSB Principles and Implementation Standards and have acknowledged that other supervisory authorities of FSB member jurisdictions have similarly built and are continuing to improve supervisory frameworks on that foundation.

To facilitate implementation of the proposed substituted compliance approach, we recommend that a checkbox be added to the Board's Form FR Y-7 whereby foreign banking organizations ("FBOs") annually would indicate that applicable home country regulatory and supervisory requirements, guidance and practices are in accordance with the FBS Principles and Implementation Standards. Similarly, Qualifying Non-U.S. FIs that are not FBOs would so indicate on an appropriate regulatory reporting form (*e.g.*, for broker-dealers, the Financial and Operational Combined Uniform Single (FOCUS) Reports).

Second, this approach would address issues that might otherwise be raised in the context of a controlled group with multiple covered institutions whose incentive-based compensation arrangements are centrally managed within a framework prescribed by applicable home country requirements and standards. Under a "top down" approach, these home-country-prescribed compensation arrangements would typically extend to a Qualifying Non-U.S. FI's U.S. businesses. Permitting the Qualifying Non-U.S. FI's home country supervisory authority to review compensation arrangements as a whole under one regime would ensure greater coordination and alignment of incentive compensation arrangements and more effective compensation-related risk management. A holistic approach to supervision would directly address Section 956's mandate to "prohibit any types of incentive-based payment arrangement, or any feature of any such arrangement, that the regulators determine encourages inappropriate risks by covered financial institutions …that could lead to material financial loss to the covered financial institution" (emphasis added).

Requiring incentive compensation programs for U.S. businesses to be designed separately and differently from the parent institution's home country compensation programs would present conflicts and inconsistencies in the application of compensation programs across the group that would be especially problematic given the frequent movement of employees between jurisdictions. For example, many Qualifying Non-U.S. FIs regularly have home country executives serve in leadership and management positions in their U.S. branches and subsidiaries. This practice supports home country management's ability to execute enterprise-wide risk management and supervision of its branches and subsidiaries located abroad. It would be extremely disruptive to have such executives' compensation (especially long-term) shifted from

a home country to a U.S.-style arrangement, subject to different regulations or policies, both during their time at the U.S. branch and after their return to the parent institution.

Moreover, given the extended duration of possible forfeiture, downward adjustment and clawback set forth in the Reproposed Rule and the different approaches to regulation and supervision found in non-U.S. jurisdictions, it would be likely that such individuals could have more than one (and potentially conflicting) provisions applying to the same compensation. The complexity of these differences in compensation schemes could lead to fewer home country executives having the practical ability to serve in leadership and management roles in the U.S., and the risk management and supervision benefits of such service would no longer be available to the parent institution.

Third, as recognized by the Agencies, Qualifying Non-U.S. FIs have undertaken extensive review and revision of their compensation programs under home country supervision as well as adopted rigorous processes for identification of individuals with positions which permit them to take risks that could lead to material financial loss to the institution. Requiring Qualifying Non-U.S. FIs to engage in additional costly and time-consuming procedures with respect solely to their U.S. operations – both in regard to program review and risk-taker identification – would not meaningfully advance the purposes of Section 956 and would be unduly burdensome and unnecessary. As Qualifying Non-U.S. FIs have taken, or are in the process of implementing, measures that are consistent with – as indicated by their adherence to the FSB Principles and Implementation Standards – those that the Agencies are now proposing, we believe those institutions should not be required to duplicate such efforts.

II. Specific Comments on the Reproposed Rule

The discussion below applies to the extent that either the Agencies do not accept the substituted compliance approach or, if substituted compliance is incorporated into the Final Rule, a Non-U.S. FI would not qualify for substituted compliance.

A. Determination of Coverage and Level of Covered Institutions. We generally support the determination of a Non-U.S. FI's coverage level under the Reproposed Rule based on U.S., and not global, assets. Limiting the scope and level of the Reproposed Rule in this way is entirely appropriate given the Agencies' focus on the stability of the U.S. financial system. However, we have certain concerns regarding the determination of the "U.S. operations" of an FBO under Section 236.2(dd)(6) of the regulations proposed by the Board. For the reasons discussed below, we request clarification of the scope of "U.S. operations" of an FBO, including the treatment of state-licensed uninsured branches and agencies, under the Reproposed Rule. Second, we respectfully recommend that "Section 2(h)(2) Companies" (as defined below) be excluded in their entirety from the Reproposed Rule.

1. The Scope of the "U.S. Operations" of an FBO Should Be Clarified and a More Flexible Approach Adopted. Under the Reproposed Rule, U.S. branches and agencies of foreign

banks are treated as separate "covered institutions" under the regulations proposed by the OCC (with respect to Federal branches and agencies), the FDIC (with respect to state-licensed insured branches) and the Board (with respect to state-licensed uninsured branches and agencies). This approach reflects the division of regulatory responsibilities at the Federal level for these various types of branches and agencies. It also underscores the importance of ensuring that the banking Agencies coordinate their approaches to U.S. branches and agencies under Section 956, a consideration that is especially relevant for FBOs which maintain multiple branches or agencies subject to the oversight of more than one Agency (*e.g.*, a Federal and state-licensed branch).

However, inasmuch as Federal branches and agencies and state-licensed insured branches (each of which are part of an FBO's combined U.S. operations) are excluded from the scope of an FBO's "U.S. operations" under Section 236.2(dd)(6) of the Board's proposed regulations, it is unclear why state-licensed uninsured branches and agencies similarly are not excluded for this purpose. We believe the rationale for excluding certain types of branches and agencies supports the exclusion of all types.

The designation of the "U.S. operations of an FBO" as a "regulated institution" (and thus, if those operations in the aggregate have average total consolidated assets of greater than or equal to $1 billion, as a "covered institution") is a matter of key importance for FBOs. We note that, under the Board's regulations in the case of a U.S.-headquartered bank holding company, the bank holding company itself is a "regulated institution" as is any subsidiary that is not a depository institution, broker-dealer or investment adviser (which in turn are "covered institutions" subject to regulations of the other Agencies). In our view, application of this approach to FBOs would limit "U.S. operations" to the FBO's U.S. "subsidiaries" (*i.e.*, excluding Section 2(h)(2) Companies and Merchant Banking Portfolio Companies (discussed below), as well as subsidiaries in which ownership or control is acquired in the ordinary course of collecting a debt previously contracted in good faith ("DPC"), but presumably including U.S. intermediate holding companies ("IHCs") that FBOs are required to establish under the Board's Regulation YY but that are not themselves bank holding companies). It would not, however, include any U.S. branch or agency of the FBO as appears to be contemplated in footnote 58 of the preamble.

Accordingly, if the intention is to distinguish the treatment of U.S. branches and agencies of FBOs from the treatment of their U.S. holding company and bank and nonbank subsidiaries, then the Reproposed Rule should be clarified to provide for the same treatment of state-licensed uninsured branches and agencies as for Federal branches and agencies and state-licensed insured branches – *i.e.*, they would be separate "covered institutions" and would not be within scope of an FBO's U.S. operations for purposes of Section 236.2(dd)(6) of the Board's proposed regulations. Such treatment would reflect the fact that branches and agencies typically participate, as offices of the foreign bank, in compensation arrangements of the foreign bank itself, and not separately established and managed arrangements at U.S.-domiciled subsidiaries. In addition, branches and agencies are also more likely to have parent bank-employed executives

working across jurisdictions in both U.S. and home country offices, which exacerbates issues of conflicting compensation arrangements and regulatory regimes.

Under this approach, coverage of an FBO's "U.S. operations," and its related "Level," under the Reproposed Rule would be determined by reference to the U.S. non-branch assets of an FBO as reported on the Boards' Form FR Y-7Q. This approach would accord with the test under the IHC Rule (as defined and discussed further below), aligning the two prudential regulatory schemes in a manner that would simplify application for both the covered institutions and the Agencies. For FBOs that are required to establish an IHC, the IHC would comprise the "U.S. operations" and, as is the case under the IHC Rule, generally be treated similarly to a U.S.-headquartered bank holding company for purposes of a consolidated approach to the identification of senior executive officers and significant risk-takers and governance-related requirements.[4]

However, in addition to IHC structures, there is great diversity in the types of organizational structures maintained by FBOs in the United States. In light of that diversity, which also characterizes other types of Non-U.S. FIs, we believe that the Agencies should reserve the discretion in the Final Rule to take into account the structure and operation of a Non-U.S. FI's compensation programs and the risks presented by a Non-U.S. FI's U.S. businesses when determining whether a consolidated, entity-by-entity or some type of "hybrid" approach would be most appropriate.

A flexible approach is particularly important for FBOs that are not required to establish IHCs – *i.e.*, those that have total U.S. non-branch assets of less than $50 billion. In sharp contrast to U.S.-headquartered bank holding companies, a variety of structures characterize the U.S. businesses of these FBOs, with some operating only through U.S. branches/agencies, some operating primarily through U.S. branches/agencies with limited operations conducted through U.S. subsidiaries, and others conducting significant operations through both U.S. branches/agencies and subsidiaries. In view of the limited U.S. systemic "footprint" of such FBOs, even if an FBO's U.S. non-branch businesses were considered in their entirety, we believe a tailored approach to the application of the requirements under Section 956 (including being mindful of the overlay of home country supervision in the case of a Qualifying Non-FI) would be especially appropriate and that a consolidated or entity-by-entity approach should be permitted based on the individual circumstances of the Non-U.S. FI.

2. Section 2(h)(2) Companies Should Be Excluded from the Definition of "Subsidiary" and from the Calculation of Average Total Consolidated Assets. The definition of "subsidiary" in the Board's proposed regulations excludes merchant banking investments that are owned or controlled pursuant to Section 4(k)(4)(H) of the Bank Holding Company Act of 1956, as amended (the "BHCA"), and Subpart J of the Board's Regulation Y thereunder (the "Merchant

[4] As to the application of the Reproposed Rule to IHCs, the concerns raised in the letters of TCH and SIFMA with respect to depository institution holding companies in general would be equally applicable.

Banking Rule" and such companies, "Merchant Banking Portfolio Companies").[5] We support this exclusion. Merchant Banking Portfolio Companies are commercial companies, they are not integrated into the operations of the financial holding company that controls them, and a financial holding company's relationships with its Merchant Banking Portfolio Companies are subject to significant restrictions under the Merchant Banking Rule.[6]

Similar considerations support the exclusion of U.S. commercial company subsidiaries held by an FBO pursuant to Section 2(h)(2) of the BHCA ("Section 2(h)(2) Companies").[7] As with Merchant Banking Portfolio Companies, the U.S. operations of Section 2(h)(2) Companies are limited to commercial activities and are not integrated into the U.S. financial operations of the FBO that controls them.

Moreover, Section 2(h)(2) Companies are excluded from the Board's requirement that certain large FBOs hold their U.S. subsidiaries under an IHC that is subject to enhanced prudential standards (the "IHC Rule").[8] The IHC Rule was implemented under Section 165 of the Dodd-Frank Act, the stated purpose of which is "to prevent or mitigate risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large, interconnected financial institutions." In the preamble to the proposed IHC Rule, the Board stated that it "would not require foreign banking organizations to hold section 2(h)(2) investments under the U.S. intermediate holding company because these commercial firms have not been subject to Board supervision, are not integrated into the U.S. financial operations of foreign banking organizations, and foreign banking organizations often cannot restructure their foreign commercial investments."[9] Because Section 2(h)(2) Companies are not included for purposes of determining coverage under the IHC Rule, they also are not included in an FBO's U.S. assets as periodically reported to the Board on Form FR Y-7Q.

Given the similar aim of Section 165 to that of Section 956, we believe the same approach should be taken and see no reason for the Board's departure from its treatment of Section 2(h)(2) Companies under the IHC Rule. Accordingly, we respectfully recommend that Section 2(h)(2) Companies be excluded from the definition of "subsidiary" and from the calculation of "average total consolidated assets" for purposes of the Final Rule. It therefore

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5 12 U.S.C. § 1843(k)(94)(H); 12 C.F.R. pt. 225, subpart J.

6 See 12 C.F.R. 225.171 et seq.

7 Under BHCA Section 2(h)(2) and Section 211.23(f)(5) of the Board's Regulation K, qualifying foreign banking organizations ("QFBOs") are authorized to hold controlling investments in non-U.S. commercial companies that engage in activities in the United States through U.S. offices and subsidiaries, subject to extensive restrictions. These restrictions include requirements that the investing FBO qualify as a QFBO, limits on the nature and relative size of the target company's U.S. operations, prohibitions on engaging in financial activities in the United States, and lending and cross marketing restrictions. See 12 U.S.C. § 1841(h)(2); 12 C.F.R. § 211.23(f)(5).

8 See 12 C.F.R. § 252.153(b)(1) and (e); 77 Fed. Reg. 76628, 76638 (Dec. 28, 2012).

9 77 FR 76638 (December 28, 2012).

would not be necessary to prescribe any separate reporting requirement for Section 2(h)(2) Companies, and the determination of the average total consolidated assets of an FBO's U.S. operations can be based on information already reported on Form FR Y-7Q.

B. Non-U.S. Investment Advisers Should Be Excluded from the Definition of "Covered Institution." The Reproposed Rule contemplates that the SEC would have responsibility for oversight of incentive-based compensation arrangements of all "investment advisers" as defined in Section 202(a)(11) of the Advisers Act, which can be read exceptionally broadly. We believe that the Reproposed Rule should specifically exclude from the definition of covered institution all investment advisers domiciled outside of the U.S. ("Non-U.S. Advisers"). We believe excluding Non-U.S. Advisers from the definition of "covered institution" aligns with the jurisdictional approach taken with respect to FBOs under the rules of the banking Agencies. As recognized by the banking Agencies, which limits regulation to the U.S. businesses of Non-U.S. FIs, compensation practices of a Non-U.S. Adviser (whether affiliated with a Non-U.S. FI subject to the Final Rule or not) simply do not warrant SEC regulation for risk-mitigation purposes.

In addition to the jurisdictional concerns raised by applying the Reproposed Rule to Non-U.S. Advisers, the specific circumstances of different types of Non-U.S. Advisers also support their exclusion from the definition of covered institution. For instance, under the narrowed Dodd-Frank Act exemptions to Investment Advisers Act registration, certain advisers with their principal place of business outside the United States have had to register with the SEC even if they have no or very few U.S. contacts or clients. Even if registered with the SEC, a Non-U.S. Adviser with no U.S. clients ("Non-U.S. Registered Advisers") is not required to apply the substantive provisions of the Investment Advisers Act to any of their client relationships under applicable SEC guidance.[10] It would not be consistent for the SEC to determine that it need not subject the non-U.S. business practices of Non-U.S. Registered Advisers to regulation but nonetheless regulate their compensation practices.

We also believe that it is also appropriate to exclude any unregistered Non-U.S. Adviser that conducts limited business in the U.S. or with U.S. persons ("Non-U.S. Unregistered Advisers") from the definition of covered institution. Unregistered advisers have already been determined to have a lower risk profile than other advisers (as evidence by their exemption both from registration) and applying the Reproposed Rule to Non-U.S. Unregistered Advisers does not implicate the risk-mitigation policy underlying Section 956.

C. Definitions of Covered Persons, Senior Executive Officers and Significant Risk-Takers for Purposes of the Reproposed Rules Should Be Closely Aligned with Home Country Practices. As acknowledged by the Agencies, foreign supervisory authorities in FSB member jurisdictions have established policies and procedures to identify the employees whose compensation should be subject to review and regulation, given their positions, responsibilities

[10] See "Registration Under the Advisers Act of Certain Hedge Fund Advisers", Rel. No. IA-2333 at nn. 215-222 and accompanying text.

and authorities. For any U.S. businesses of Non-U.S. FIs identified as covered institutions under the Final Rule, we would urge adapting methodologies based on home country practice to determine the scope of covered persons, senior executive officers and significant risk-takers. For example, Qualifying Non-U.S. FIs have developed criteria for this purpose which are implemented on a group-wide basis and are consistent with the FSB Principles and Implementation Standards.

Permitting such institutions to adapt their home country criteria for purposes of the Reproposed Rule will be consistent with the principles and standards underlying Section 956 while at the same time being more efficient and easier to implement. For example, instead of using the relative compensation test of the Reproposed Rule with respect to a covered institution and its 956 Affiliates, the compensation test used by Non-U.S. FI under home country regulations could be used instead in respect of the applicable covered institution. Similarly, instead of the definition of "senior executive officer" set forth under the Reproposed Rule, the test used to identify positions with material risk-taking authority on a group-wide basis could be utilized in respect of the applicable covered institution.

This approach would also help eliminate the conflicts raised by individuals with cross-border responsibilities. For example, in the event that an individual was identified as a material risk-taker for purposes of home country supervision and as a significant risk-taker for purposes of the Reproposed Rule, deference could be given to the home country rule. This approach is especially appropriate for U.S. branches and agencies of Non-U.S. FIs, which, as offices of the Non-U.S. FI, are directly subject to home country requirements and standards.

In any case, we believe strongly that identification of covered persons, senior executive officers and significant risk-takers should be based on an examination of risk-taking authority and, if a bright-line test is adopted, waivers should be permitted by the Agencies.[11] Moreover, given the focus of the Agencies on the safety and soundness of the U.S. financial system, we believe that employees whose activities do not implicate the risk profile of a Non-U.S FI's U.S. businesses should be excluded from the purview of the Reproposed Rule. For example, certain traders and trading desks, although located in the U.S., book their trades at the parent level, thereby limiting the credit and other exposure to parent assets but not putting U.S. assets at risk. Lastly, and consistent with the proposed treatment of "U.S. operations" discussed above, the identification of such group with respect to the U.S. non-branch operations of an FBO generally should be made on a consolidated (and not entity-by-entity) basis, with appropriate flexibility

[11] The European Union utilizes this approach. ("Presumptions based on quantitative criteria should not apply where institutions establish on the basis of additional objective conditions that staff do not in fact have a material impact on the institution's risk profile, taking into account all risks to which the institution is or may be exposed.") COMMISSION DELEGATED REGULATION (EU) No 604/2014 of 4 March 2014 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards with respect to qualitative and appropriate quantitative criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile.

provided to accommodate the variety of structures through which FBOs conduct their U.S. businesses.

D. Certain Exceptions from the Clawback Requirements Should Be Permitted. Under Section __.7(c), for Level 1 and Level 2 covered institutions all incentive-based compensation would be subject to a clawback for seven years after vesting.[12] The Reproposed Rule does not address the effect of the clawback provisions under non-U.S. employment or tax laws.

When working for global financial institutions, employees (especially at the more senior levels) will often move from one jurisdiction to another during the course of their careers. As a result, it is possible that an employee could earn incentive-based compensation that may be impossible to clawback in accordance with the Reproposed Rule without conflicting with non-U.S. labor law. For example, in Germany, it is extremely difficult to recoup compensation once it has been earned by an employee and would likely not be possible based on the breadth and discretionary nature of the clawback provisions set forth in the Reproposed Rule.[13]

Moreover, the clawback as proposed could have adverse tax consequences for employees subject to non-U.S. tax laws as in many jurisdictions it is unclear whether employees could obtain a tax refund. We believe that the Agencies should include an exception from clawback obligations when the clawback would be impermissible under non-U.S. law or cause material adverse tax consequences to employees under non-U.S. law.

We also believe that while the *in terrorem* effect of clawback policies is important, there may well be individual cases where the cost of enforcing the policy could far outweigh the benefits to financial stability of the financial institution. Therefore, the Reproposed Rule should permit institutions to exercise clawback authority based upon the facts and circumstances of the particular situation (as currently set forth in PRA guidelines[14]) and not require enforcement in circumstances where it would require unreasonable efforts.

In addition, as the Agencies have acknowledged, many employees of Qualifying Non-U.S. FIs are subject to clawbacks by home country supervisory authorities. As a result, it is possible that an employee could be subject to two different clawbacks on the same incentive-

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[12] As addressed in the TCH and SIFMA letters, the Final Rule should provide for the clawback period to start on the date of award.

[13] For a legal article referencing the general unenforceability of clawback provisions under German labor law, see Löw/Glück, Vergütung bei Banken im Spannungsfeld von Arbeits- und Aufsichtsrecht, NZA 2015, 137 et. seq. citing Geman Federal Labor Court rulings BAG, NZA 2014, 368 et. seq., BAG, NZA 2013, 1150 et. seq. and BAG, NZA 2011, 989 et. seq. (regarding the rights of employees to retain earned compensation).

[14] See United Kingdom PRA and FCA, "PRA PS12/15 / FCA PS15/16: Strengthening the Alignment of Risk and Reward: New Remuneration Rules" (June 25, 2015) available at http://www.bankofengland.co.uk/pra/Documents/publications/ps/2015/ps1215.pdf.

based compensation. In such a case, we believe that the Agencies should provide for deference to home country rule.

E. Deferral Requirements. The Reproposed Rule's deferral requirements are too prescriptive and inflexible. The Final Rule should not mandate the form of required deferrals. For example, different covered institutions grant deferred compensation in different forms and combinations, whether in cash, equity awards or other notional instruments. Covered institutions should be permitted to determine the appropriate mix, if any, of the types of deferred compensation that must be deferred under the Final Rule so long as such forms of compensation comply with the other requirements of the Final Rule.[15]

More specifically, the Final Rule should not require a "substantial portion" of deferred compensation be in cash. In all cases, officers and employees have a debt-equivalent stake in the continued viability of their employer that will far exceed any deferred cash holdings. If an employer fails, 100% of the expected future cash flows from employment are at risk and, by definition, all equity holdings will become worthless. Finally, all retirement savings and access to benefit arrangements will potentially be threatened. In that context, we believe adding a limited amount of deferred cash will have, at best, limited risk-balancing effects.

On the other hand, requiring deferred cash will have a meaningful cost. First, if the Final Rule requires deferred cash, covered institutions will either need to decrease the use of deferred equity to a level below what they previously determined to be optimal, or they will need to increase overall compensation to make room for the required minimum deferred cash component. Any interest paid on deferred cash will also represent an additional cost not associated with the increase in value of equity awards over time.

To the extent the Agencies retain the requirement that a "substantial portion" of deferred compensation must be in deferred cash, we ask for confirmation that awards tied to the market value of contingent capital securities (and potentially able to be settled in such securities) will be treated as deferred cash for purposes of the "substantial portion" requirement. The market value of these instruments varies directly with the market perception of the risk profile of the covered institution.

F. Governance Provisions Should Take into Account a Non-US FI's Overall Corporate and Management Structure. We acknowledge the vital role of strong governance and controls in ensuring the effectiveness of regulations prohibiting compensation arrangements that incentivize inappropriate risk-taking that could lead to material financial loss to the financial institution. We

[15] We also note that the FSB Principles and Implementation Standards state that "a substantial proportion, such as more than 50 percent, of variable compensation should be awarded in shares or share-linked instruments (or, where appropriate, other non-cash instruments), as long as these instruments create incentives aligned with long-term value creation and the time horizons of risk. Awards in shares or share-linked instruments should be subject to an appropriate share retention policy." Such an approach affords financial institutions with flexibility as to the types of non-cash awards granted.

greatly appreciate the recognition by the Agencies of the difficulties that might be presented by the requirements and responsibilities for a covered institution's "board of directors" and "compensation committee" under Section _.2(d) of the banking Agencies' proposed regulations for U.S. operations, branches and agencies of FBOs and agree the proposed approach provides a practical and flexible means to identify the appropriate oversight body.

We respectfully request clarification that similar flexibility would be afforded to adapting the requirements for the board of directors and compensation committee to Non-U.S. FIs' U.S. subsidiaries, including SEC-regulated broker-dealers and investment advisers. It would be extremely difficult for Non-U.S. FIs were the Agencies to determine that a compensation committee populated entirely by non-management directors was required to undertake the review and approval of individual compensation arrangements. Such a board likely would exist only at the foreign parent level, and a foreign parent board would not (and should not) be so narrowly focused. Further, it appears to be at odds with the provisions of the IHC Rule which permit management representation on the board of directors of an IHC and require that an IHC board include only one independent director. IHCs have been in operation for less than one month, and it would be especially disruptive to impose a separate and new requirement on their governance structures.

In sum, we fully support and appreciate the banking Agencies' willingness (as expressed in footnote 222 of the preamble) to work together with each covered institution to determine on a tailored basis the appropriate governing body.

G. Proposed Leverage Caps Should Not Apply If Plan Does Not Contain Target/Leverage Design. For the reasons outlined in the letter submitted by SIFMA, the Reproposed Rule should make clear that the inclusion of leverage caps on incentive-based compensation arrangements of Level 1 and Level 2 covered institution under __.8(b) of the Reproposed Rule would not require covered institutions to revise plan designs to incorporate a target/leverage structure. This issue is especially important to Non-U.S. FIs with global compensation plans as it would require reworking compensation programs to accommodate a hitherto unused and alien design for a portion of their employee population.

H. Additional Transition Time Should Be Provided to Foreign Institutions. We appreciate the Agencies' recognition that covered institutions will require substantial lead time to prepare for the effectiveness of the Reproposed Rule. We believe the proposed compliance date would be sufficient to the extent that the Agencies incorporate into the Final Rule our proposed substituted compliance approach.

However, should the Agencies not adopt this approach, we believe a longer transition period may be necessary. Among other things, Non-U.S. FIs would need to analyze and comprehend the Final Rule, determine what structural changes might be required on an institutional level, undertake an examination of all employees for purposes of determining the population for the prescriptive requirements applicable to Level 1 and Level 2 covered

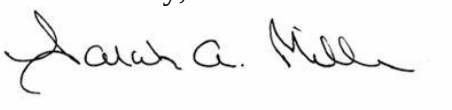
institutions, review and revise (if necessary) all affected compensation arrangements, ensure continued compliance with non-U.S. law and/or work with the Agencies to find solutions to legal conflicts, acquire the requisite approvals at the various levels of the organization, and socialize all of the changes in compensation arrangements, policies and practices with the foreign parent and all affected employees. This would be an enormous undertaking.

As a result, we respectfully request that the Agencies consider an extended transition period for Non-U.S. FIs to permit them to perform the vast amount of work necessary to implement these complex and detailed rules, including their interaction with the supervisory frameworks to which they are already subject under home country rules.

* * *

We thank you for the opportunity to submit this comment letter. We would be happy to discuss with you any of the comments described above or any other matters you feel would be helpful in your evaluation of the Reproposed Rule. Please do not hesitate to contact the undersigned if you would like to discuss these matters further.

Sincerely,



Sarah A. Miller
Chief Executive Officer