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FOR FINANCIAL REFORM
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November 25, 2014

The Honorable Timothy G. Massad, Chairman
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

The Honorable Mary Jo White, Chair
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

To whom it may concern,

On behalf of Americans for Financial Reform (AFR), we write today to ask you to ensure appropriate regulatory oversight of derivatives transactions conducted through foreign subsidiaries of multinational Wall Street banks. In particular, we urge you to prevent the inappropriate classification of such derivatives as 'non-guaranteed' by the parent company, a classification which could exempt them from numerous critical derivatives regulations.

Permitting 'de-guaranteeing' to create exemptions for foreign subsidiary derivatives could result in excluding over half of Wall Street derivatives transactions from new market regulations. This is particularly true since the Commodity Futures Trading Commission (CFTC) has at least for the moment exempted foreign subsidiary transactions from oversight even when they are arranged or negotiated on U.S. soil.[1] Thus, exemptions for 'non-guaranteed' derivatives could create a situation where many tens of trillions in notional derivatives transactions are negotiated on Wall Street and conducted by Wall Street banks, but are not subject to U.S. market regulation or any requirement to comply with equivalent foreign rules. This would amount to a de facto repeal of Title VII derivatives regulation for important segments of the swaps market.

Both the CFTC and the Securities and Exchange Commission (SEC) have ample regulatory authority to address this issue. But neither these agencies nor any other regulator has given a clear public accounting of the scope of the issue and whether or how it will be addressed. Given the risk to the U.S. economy and to government finances presented by a poorly regulated

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[1] Commodity Futures Trading Commission, "Extension of No-Action Relief: Transaction-Level Requirements For Non-U.S. Swap Dealers", CFTC Letter No 14-140, November 14, 2014.

derivatives market dominated by 'too big to fail' banks, the CFTC and the SEC must act to prevent large-scale avoidance of derivatives regulations through foreign subsidiary transactions.

At a minimum, the financial regulatory agencies must be more forthright about the extent to which new derivatives regulations actually will be enforced on the global business of U.S. banks. We urge the CFTC and SEC to provide public transparency concerning enforcement of derivatives rules by providing the public with a comprehensive assessment of the scope and nature of foreign subsidiary derivatives transactions which multinational U.S. entities are claiming to be 'non-guaranteed' and the impact of these claims on derivatives regulation. While various regulatory agencies, including the CFTC and the Treasury Department, have provided broad assurances that the issue is being investigated, there have been no concrete details whatsoever released to the public regarding the true scope of the phenomenon or its effect on oversight of financial markets. The public deserves clarity on your approach to regulation of multinational derivatives markets that pose clear risks to the U.S. financial system.

Background

AFR argued in a 2012 comment letter to the Commodity Futures Trading Commission (CFTC) that, given the numerous regulatory exemptions available for 'non-guaranteed' foreign subsidiaries, "the apparently extensive possibilities for classifying affiliates as non-guaranteed could create a truly major loophole in derivatives regulation." [2] Two years later, that prediction unfortunately appears to be coming true. Numerous press reports have stated that major Wall Street banks are now re-classifying many of their most significant foreign subsidiaries as 'non-guaranteed' by the parent company.[3] Under the terms of the CFTC's cross-border guidance, if the CFTC accepts this claim, it would exempt derivatives transacted through such subsidiaries from much U.S. regulatory oversight that would otherwise apply under the Dodd-Frank Act.[4]

The central question at issue is the treatment of derivatives that are booked in foreign affiliates of U.S. banks. Section 722 of the Dodd-Frank Act clearly grants the CFTC jurisdiction over derivatives transacted anywhere in the world, so long as such derivatives transactions have a "direct and significant connection with, or effect on, commerce of the United States". This expansive grant of jurisdiction shows a clear recognition by Congress of the global nature of the modern derivatives market, and the way in which risks incurred by foreign affiliates of a global

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[2] Americans for Financial Reform, "Comment to the CFTC On Proposed Cross Border Guidance", August 27, 2012.

[3] Brush, Silla, "Wall Street Defends Overseas Swaps Trading From U.S. Regulation", Bloomberg Business News, July 1, 2014. Ackerman, Andrew and Scott Patterson, "CFTC To Scrutinize Swaps Loophole", Wall Street Journal, September 5 2014.

[4] Commodity Futures Trading Commission, 17 CFR Chapter 1, RIN 3038-AD85, "Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swaps Regulations", Federal Register, Volume 78, No. 144, Friday July 26, 2013, CFR 45292-CFR 45372. See especially Appendices D, E, and F

bank can impact its U.S. parent entity.[5] This is not simply a theoretical concern. In cases ranging from Long Term Capital Management in the 1990s to Bear Stearns and AIG Financial Products in 2008 to the 'London Whale' transactions in 2012, transactions conducted through foreign subsidiaries or in foreign jurisdictions have led to failure or significant losses in the U.S. parent company.

The booking of derivatives transactions in foreign subsidiaries is the rule, not the exception, for major U.S. derivatives dealers. According to one estimate, even prior to the financial crisis over half of derivatives transactions conducted by major Wall Street banks were conducted through foreign subsidiaries.[6] According to the Securities and Exchange Commission (SEC), almost ninety percent of security-based swaps transactions involve overseas subsidiaries.[7]

Both the CFTC and the SEC assert jurisdiction over derivatives transactions conducted through foreign affiliates of U.S. entities when those transactions are directly guaranteed by the U.S. parent. In such cases, the requirement to follow U.S. derivatives rules may be satisfied through 'substituted compliance' with local regulations, where the regulations in the host country of the foreign affiliate are effectively equivalent to those that apply in the United States.

However, both agencies effectively exempt derivatives transactions from U.S. oversight in cases where a U.S. firm claims that the relevant foreign subsidiary is not guaranteed by the larger global bank, and when counterparties to the transaction are not U.S. persons. Removing the nominal parental guarantee exempts the transaction not only from the direct application of most U.S. derivatives rules, but also any requirement by U.S. regulatory agencies that equivalent foreign rules apply in the local host jurisdiction.[8] It is difficult to see any reasonable justification for such a complete exemption. Any intent to prevent redundant application of U.S. rules in cases where oversight by foreign regulators is sufficient could be satisfied through 'substituted compliance' with genuinely equivalent foreign rules.

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[5] This strong jurisdictional statement was recently confirmed by the US District Court for the District of Columbia. Ackerman, Andrew, "Court Dismisses Lawsuit Against CFTC Over Cross Border Swaps", Wall Street Journal, September 16, 2014.

[6] Brush, Silla, "Goldman Sachs Among Banks Lobbying To Exempt Half of Swaps From Dodd Frank", Bloomberg News, January 30, 2012.

[7] Securities and Exchange Commission, "Application of 'Security Based Swap Dealer' and 'Major Security Based Swap Participant' Definitions to Cross-Border Security Based Swap Activities", Final Rule, 17 CFR Parts 240, 241, and 250, Federal Register, Volume 79, No. 155, August 12, 2014. See CFR 47282-47283, which states "87% of current SBS transactions in the US market involve at least one foreign counterparty and in 39% both counterparties are foreign." These proportions could grow to take advantage of regulatory arbitrage opportunities.

[8] See the attached Appendix to this letter and the further discussion below for details of the scope of this regulatory exemption.

There Is No Evidence That De-Guaranteeing Truly Limits Risk to the U.S. Economy

The press is now reporting that large Wall Street banks are attempting to qualify for these regulatory exemptions by claiming that derivatives transactions in major foreign subsidiaries are 'un-guaranteed' or have been 'de-guaranteed' by the parent. The claim used to justify these exemptions is that a default by such a 'non-guaranteed' subsidiary on 'non-guaranteed' derivatives transactions does not present a risk to the U.S. parent company or the U.S. economy. This claim may be reasonable for certain types of corporate structures, such as subsidiaries that are explicitly firewalled from the parent, make clear to counterparties that the parent will not stand behind subsidiary obligations, and hold their own separate capital buffers. However, such cases are likely to be rare and would certainly not apply to major subsidiaries whose operations are closely integrated with the parent bank. The phenomenon of 'de-guaranteeing' appears to involve exactly this type of major subsidiary entity. The claim that such subsidiaries could simply default on their derivatives obligations without impacting the larger bank or the U.S. financial markets flies in the face of common sense.

Absent special circumstances, the effective financial integration between major foreign subsidiaries and the entire global bank is generally recognized in the market and by ratings agencies. Such integration implies that an implicit guarantee exists and that counterparties if necessary expect support for their transactions from the resources of the entire bank. In its response to reports of bank 'de-guaranteeing' of subsidiaries, Fitch Ratings has explained that regardless of such nominal removal of guarantees, their rating of a bank subsidiary is based on the health of the organization as a whole[9]:

> "Any removal of the existing guarantees between the U.S.-domiciled global trading and universal bank (GTUB) parents and their overseas subsidiaries that house over the counter (OTC) derivative (or swap) dealers will not immediately affect the ratings of these foreign subsidiaries, according to Fitch Ratings.
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> Under Fitch's rating criteria, ratings assigned to financial institution subsidiaries deemed to be "core" to parent banks' overall operations are typically equalized with the parents' issuer default ratings (IDRs). In the cases of the five U.S. GTUBs, our assessments that their subsidiaries are core to their respective parents generally hold regardless of the existence of (or reliance on) any parental guarantees, because many factors, such as operational integration, reputation, branding and ownership, among others, support these core designations."

Thus, they view 'de-guaranteeing' as essentially fictitious and irrelevant for assessing the credit worthiness of the subsidiary.

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[9] Fitch Ratings, "U.S. Banks De-Guaranteeing: No Immediate Ratings Impact", Fitch Wire, September 23, 2014.

Ratings agencies regularly assess the likelihood of parental support for subsidiaries of global financial and banking entities. As Moody's Ratings states in a description of their bank assessment methodology, "most groups can be expected to support banking entities within their consolidation", due to business interconnection, reputational effects, and the risk of other forms of value loss.[10] A ratings agency assessment that a subsidiary has a high probability of support from the overall corporate group should lead the CFTC and other agencies to reject claims that a subsidiary is 'non-guaranteed', as the ratings agency assessment alone will affect the terms and pricing of the swap due to the expectation of support. We urge the CFTC and SEC to examine ratings agencies assessments of support probabilities for subsidiaries of multinational banks.

Indeed, any common-sense assessment of major Wall Street firms shows the centrality of international operations to their business. Citigroup holds more than half of its global assets outside the United States.[11] Goldman Sachs reports in its 10-K that over 40 percent of its total revenues come from international operations, and that "Due to the highly integrated nature of international financial markets, the firm manages its businesses based on the profitability of the enterprise as a whole….a significant portion of the firm's activities require cross-border coordination in order to facilitate the needs of the firm's clients."[12] JP Morgan draws over a quarter of its total revenues from international operations. Similar figures could be found for other major Wall Street banks. It is not plausible to claim that major losses in these foreign operations would not affect the overall health of the bank and therefore the U.S. parent.

Regardless of the presence of an explicit written guarantee, then, derivatives risks taken in a major foreign subsidiary of a global Wall Street bank could impact the entire company and thus the U.S. economy. Given the possibility of taxpayer support for a 'too big to fail' U.S. bank, they could also create taxpayer exposure. If regulators are to accept any claim that a subsidiary is in fact 'non-guaranteed' they must demand concrete proof based on clear information provided to counterparties, specific measures taken to firewall and independently capitalize the subsidiary, and pricing terms in the market.

'De-Guaranteeing' Exempts Transactions From Critical Derivatives Regulations

Despite the centrality of these foreign subsidiaries to the operations of the global bank, if regulators accept the argument that they are 'unguaranteed' by the U.S. parent then derivatives transactions in such subsidiaries would be exempted from a broad range of U.S. derivatives regulations. The Appendix to this letter shows a list of rule exemptions that the CFTC would apply to a typical cross-border transaction involving a so-called 'non-guaranteed' foreign

[10] Moody's Investors Service, "Request for Comment: Proposed Bank Rating Methodology", September 9, 2014. See page 65.
[11] Schoenmaker, Dirk, "Governance of International Banking: The Financial Trilemma (Chapter 1)", April 1, 2013. Governance of International Banking: The Financial Trilemma, Oxford University Press, 2013.
[12] Goldman Sachs 2013 10-K Report, pages 215-216.

subsidiary.[13] Under current CFTC guidance, such transactions would not be subject to core Dodd-Frank requirements such as clearing, exchange trading, and derivatives margin.[14] They will also not be subject to any requirement to comply with comparable foreign rules that are equivalent to U.S. rules.[15] Thus, a derivatives transaction between, for example, Goldman Sachs International and Morgan Stanley International taking place in Singapore would not be subject to Dodd-Frank rules if the CFTC chooses to classify these subsidiaries and their transactions as 'non-guaranteed'.

It appears that such transactions may also not be counted towards the 'de minimis' levels of transactions that trigger registration as a swap dealer. As the CFTC cross-border guidance states, ""The Commission notes that under its interpretation of section 2(i), a non-U.S. person that is not a guaranteed or conduit affiliate would not have to count its swap dealing transactions with other non-U.S. persons that are not guaranteed affiliates". [16] This exemption could potentially permit U.S. banks that engage in a large volume of derivatives transactions to avoid registration as a swap dealer. Avoiding dealer registration would permit even broader avoidance of U.S. regulation and oversight, including reporting of derivatives transactions to regulators and a wide variety of entity-level risk management requirements. The SEC has granted an even broader exemption from the de minimis requirement for transactions involving so-called 'non-guaranteed' entities. As in the CFTC's exemption, this could permit subsidiaries of U.S. banks engaged in significant swap dealing activities to avoid registration as dealers, preventing application of a large number of entity-level risk management requirements.[17]

Regulators Have The Authority To Reject Inappropriate Claims That Transactions Are 'De-Guaranteed'

The CFTC guidance includes a broad definition of 'guarantee' as any factor affecting the terms or pricing of the swap transaction, and also includes provision for a facts and circumstances analysis of such factors.[18] This guarantee is considered as an integral part of the swap. The

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[13] SEC rules are not yet as complete, but a list for the SEC would be similar, except that margin rules for uncleared swaps would apply to foreign subsidiaries under the SEC rules.

[14] Commodity Futures Trading Commission, 17 CFR Chapter 1, RIN 3038-AD85, "Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swaps Regulations", Federal Register, Volume 78, No. 144, Friday July 26, 2013, CFR 45292-CFR 45372, Appendices D, E, and F

[15] While a local foreign regulator may on their own initiative choose to impose local regulations on a 'non-guaranteed' foreign subsidiary of a U.S. bank, the CFTC does not require any 'substituted compliance' with equivalent foreign rules for 'non-guaranteed' subsidiaries.

[16] See CFR 45324, Commodity Futures Trading Commission, 17 CFR Chapter 1, RIN 3038-AD85, "Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swaps Regulations", Federal Register, Volume 78, No. 144, Friday, July 26, 2013

[17] See CFR 47323-47324 in Securities and Exchange Commission, "Application of 'Security Based Swap Dealer' and 'Major Security Based Swap Participant' Definitions to Cross-Border Security Based Swap Activities", Final Rule, 17 CFR Parts 240, 241, and 250, Federal Register, Volume 79, No. 155, August 12, 2014.

[18] See CFR 48225, in "Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping" Federal Register, Vol. 77, No.

CFTC's statutory authority to take this broad view of guarantee is clearly supported by the statutory provision in Section 722 providing that its jurisdiction extends to all derivatives transactions that have a significant impact on U.S. commerce. This statutory authority has recently been upheld in court. The CFTC clearly does have the authority to carefully examine these transactions and, if appropriate, reject the claim that they are 'non-guaranteed'. There are also ample resources and information available from market participants available to assist in the assessment of whether a subsidiary has an implicit guarantee from the larger corporate group.[19]

Given the evidence that transactions of significant foreign subsidiaries of U.S. banks do involve risk to the entire bank, and thus have a significant connection with U.S. commerce, we would urge the CFTC to promptly reassess claims that subsidiaries are 'non-guaranteed'.

The statutory language concerning cross-border jurisdiction differs somewhat for the SEC as compared to the CFTC, and has not been tested in court as the CFTC jurisdiction has. For this reason, the agency may be more hesitant to address some of these issues. However, the fundamental underlying issue of prudential risk to the U.S. financial system is identical, and we would also urge the SEC to carefully examine its oversight of derivatives transactions conducted through foreign subsidiaries.

The Responsibility For Derivatives Oversight Cannot Be Delegated To Other Regulators

Under the Dodd-Frank regulatory framework, the CFTC and SEC are given the responsibility of applying comprehensive market regulation to the U.S. derivatives market. This is an explicit rejection of the model that existed prior to the financial crisis of 2008, under which there was no market regulation for derivatives. Instead, prior to the crisis it was assumed that prudential regulators such as the Federal Reserve and the Comptroller of the Currency (OCC), who are responsible for overall bank solvency, would provide adequate oversight over otherwise unregulated derivatives markets.

If significant foreign subsidiaries of U.S. banks are exempted from major elements of derivatives market regulation, this would return important parts of the derivatives market to the pre-crisis status quo. A lesson learned from the financial crisis is that derivatives markets require comprehensive market supervision. While the prudential regulators do (correctly) recognize that foreign subsidiaries are a critical part of the global bank, and do regulate consolidated bank capital at the level of the entire bank, their oversight does not apply to non-bank entities active in

156, August 13, 2012, which states "The CFTC finds that a guarantee of a swap (that is not a security-based swap or mixed swap) is a term of that swap that affects the price or pricing attributes of that swap".

[19] . For example, ratings agencies regularly assess probabilities of affiliate support for banking subsidiaries of global financial entities. A ratings agency assessment that a subsidiary has a high probability of support from the overall corporate group should clearly lead the CFTC and other agencies to reject any claim that a subsidiary is 'non-guaranteed', as the ratings agency assessment alone will affect the terms and pricing of the swap due to the expectation that support.

the derivatives market. More important, the broad capital supervision provided by banking regulators is no substitute for the detailed transaction-level risk control and reporting requirements mandated by Title VII of the Dodd-Frank Act. Market regulators cannot delegate their market oversight responsibilities to bank regulators who are not responsible for and will not enforce the specific transaction level, business conduct, and risk management rules mandated by Congress in the Dodd Frank Act.

Regulators also cannot assume that regulation of derivatives transactions involving 'de-guaranteed' foreign subsidiaries of U.S. entities will be handled by the foreign host country. Both the CFTC and SEC have exempted such 'de-guaranteed' transactions from any 'substituted compliance' requirement that foreign subsidiary transactions comply with local rules in their foreign host country that are equivalent to U.S. derivatives rules. This exemption is an open invitation to major banks to seek out foreign jurisdictions that apply inadequate derivatives oversight to U.S. bank subsidiaries and to channel transactions through subsidiaries located in such jurisdictions. Even major foreign jurisdictions significantly lag the U.S. in implantation of key derivatives reforms. Recent reports from international regulators show that by mid-2015, only a small fraction of G-20 countries expect to have fully implemented derivatives regulations in crucial areas like central clearing, margin requirements, and exchange trading.[20] If U.S. regulatory agencies expect to rely on foreign regulators for coverage of foreign subsidiary transactions, they should require that all such transactions are conducted under foreign rules and enforcement that are genuinely equivalent to U.S. rules.

Regulators Owe the Public A Clear Accounting

As they consider this matter, and regardless of their final decisions on regulation of so-called 'de-guaranteed' swaps, regulators also owe the public a full accounting of the scope and extent of 'de-guaranteeing' by U.S. banks and the effect of this 'de-guaranteeing' on the enforcement of Dodd-Frank derivatives rules. If the regulators choose to argue that exemption of 'de-guaranteed' swaps presents no risk to the U.S. economy and no threat to the effective enforcement of the Dodd-Frank Act, this claim must be supported by the provision of data on the extent, nature, and regulatory enforcement of 'de-guaranteed' claims, as well as evidence that so-called 'de-guaranteed' subsidiaries are genuinely firewalled from the U.S. parent corporation and U.S. markets, and are understood by market participants to be so.

The CFTC has apparently already gathered some data on the extent of 'de-guaranteed' claims, but none of this information has been released to the public, even in aggregated form. The CFTC should gather and release information on the volume and nature of the derivatives which are claimed to be 'de-guaranteed', the nature of the counterparties for such derivatives, the extent to which the CFTC has accepted claims that derivatives are not guaranteed, and the justification for

[20] Financial Stability Board, "OTC Derivatives Market Reforms: 8th Progress Report on Implementation", November 7, 2014. See Figure 1.1.

accepting such claims. In addition, the CFTC must inform the public as to the effect these claims have on its own enforcement of derivatives rules. Given the complexity of the CFTC's regulatory framework and the significant discretion the agency has in enforcing that framework, it will be difficult for the public to understand the effect of 'de-guaranteeing' unless the CFTC also makes clear exactly which rules it intends to enforce on foreign subsidiary derivatives transactions, under either direct U.S. rules or substituted compliance with foreign rules.

Although the SEC has not moved as far as the CFTC in enforcement and clarification of its derivatives rules, it also owes the public an assessment of the extent and impact of 'de-guaranteeing' in security based swaps markets, and on the impact of such 'de-guaranteeing' on regulatory oversight.

The events of the 2008 financial crisis and the profound and lasting economic costs that followed from them clearly demonstrate the strong public interest in understanding the effectiveness of our financial regulatory system, particularly as it applies to derivatives markets. In light of this, and in light of the apparently widespread efforts by major Wall Street banks to obtain wholesale exemptions from derivatives rules for potentially a majority of their derivatives transactions, it is incumbent on regulators to give the public a full and complete explanation of their oversight of the derivatives markets.

Thank you for your time and attention to this letter. We would appreciate a reply to the issues it raises.

Respectfully submitted,

cc: United States Department of Treasury
Federal Deposit Insurance Commission
Office of the Comptroller of the Currency
Federal Reserve System of the United States

<u>Appendix : CFTC Regulatory Exemptions for 'Non-Guaranteed' Cross Border Derivatives</u>

Source: Commodity Futures Trading Commission, 17 CFR Chapter 1, RIN 3038-AD85, "Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swaps Regulations", Federal Register, Volume 78, No. 144, Friday July 26, 2013, CFR 45292-CFR 45372, Appendices D, E, and F

Below is a list of U.S. derivatives rules that the CFTC has indicated it would not apply to a transaction between foreign swap dealer affiliate of a U.S. bank and a counterparty that is a 'non-guaranteed' foreign affiliate of a U.S. parent. For example, these exemptions could apply to a transaction between Goldman Sachs International and Morgan Stanley International, or between Citigroup Global Markets Japan and Merrill Lynch Japan, as long as the CFTC certifies that at one of the counterparties is not directly or indirectly guaranteed by the U.S. parent company.

<u>Rules Exempted For Cross-Border Transactions Involving a Swap Dealer</u>

No requirement to clear standardized swaps transactions on a clearinghouse to manage risk
No requirement to provide margin for non-cleared swaps to protect against losses
No requirement to trade swaps on a transparent competitive exchange
No requirement to observe business conduct standards with counterparty
No requirement to report trade to the public markets
No requirement to maintain daily trading records
No requirement to reconcile portfolios and perform portfolio compression to reduce exposures
No requirements for trade confirmation

Transactions between foreign affiliates of U.S. banks or other financial firms that do *not* involve a swap dealer counterparty also qualify for further exemptions, beyond those listed above.

Unlike other cross-border transactions that have been placed under a 'substituted compliance' requirement which mandates that they are governed by foreign rules that are fully equivalent to U.S. rules, these 'non-guaranteed' transactions would be fully exempted from U.S. oversight. In addition, under the terms of CFTC no-action letter 14-140, these exemptions would apply even if these transactions were conducted within the United States, for example on Wall Street, so long as they were booked in 'non-guaranteed' foreign subsidiaries. This no-action relief will be extended at least through September, 2015 and possibly longer.

'Non-guaranteed' foreign subsidiary entities engaged in transactions with other 'non-guaranteed' affiliates of U.S. banks would apparently not have to count such transactions toward the minimum transaction threshold triggering registration with the CFTC as a swap dealer. This could exempt such subsidiaries from capital requirements, reporting requirements, and other risk management requirements even if they engaged in a substantial volume of derivatives transactions.