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The Institute's mission is to help resolve the many special legislative, regulatory and tax issues confronting **internationally headquartered** financial institutions that engage in banking, securities and/or insurance activities in the United States.

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**INSTITUTE SEEKS EQUAL TREATMENT FOR THE U.S. OPERATIONS
OF INTERNATIONAL BANKS IN CONNECTION WITH EFFORTS BY THE
U.S. GOVERNMENT TO STABILIZE THE FINANCIAL MARKETS**

The Emergency Economic Stabilization Act of 2008 (“EESA”) authorizes the Treasury Department to purchase troubled assets from, and extend guarantees of payment on troubled assets to, “financial institutions” (as defined in EESA). The Institute was actively involved in obtaining clarifying language in EESA to confirm that the U.S. operations of international banks, including their U.S. branches and agencies, U.S. depository institution subsidiaries and U.S. nonbank subsidiaries, are encompassed within the statutory definition of “financial institution” and therefore are eligible to participate in the Treasury rescue plan (provided that the international bank is not “owned by a foreign government”).

In connection with its implementation of the rescue plan, the Treasury Department has initiated a Capital Purchase Program (“CPP”) that entails the U.S. Government’s acquisition of equity interests in certain U.S. depository institutions and their holding companies, excluding those owned by a foreign bank or company. The Institute is addressing concerns that have arisen regarding the exclusion of international banks’ FDIC-insured depository institution subsidiaries (and their U.S. holding companies) from this program.

On October 7th, the Federal Reserve announced the creation of the Commercial Paper Funding Facility (“CPFF”) to provide a liquidity backstop to U.S. issuers of commercial paper. The Institute was active in securing the inclusion of commercial paper issued directly by U.S. branches of international banks as part of the CPFF.

The Institute also has been active in addressing questions regarding the treatment of international banks’ U.S. FDIC-insured depository institution subsidiaries and FDIC-insured branches, as well as their U.S. bank holding company subsidiaries, under the FDIC’s Temporary Liquidity Guarantee Program (the “TLGP”). That program in general provides for the FDIC’s guarantee of senior unsecured debt issued by insured depository institutions and their U.S. holding companies (the “Debt Guarantee”) and the extension of FDIC deposit insurance to funds held in non-interest-bearing transaction accounts that otherwise would be in excess of applicable deposit insurance limits (“Transaction Account Coverage”). On October 23rd, the FDIC issued (and requested comment on) an interim rule implementing both aspects of the TLGP. The interim rule applies Transaction Account Coverage to both international banks’ insured depository institution subsidiaries and insured branches, but it excludes their insured branches from the Debt Guarantee – as applied to international bank, the Debt Guarantee applies only to their U.S. insured depository institution subsidiaries and U.S. bank holding company subsidiaries. The Institute will address the exclusion of insured branches from the Debt Guarantee in its comment letter on the interim rule.

**INSTITUTE ADDRESSES QUESTIONS REGARDING THE REGULATORY TREATMENT OF
CREDIT DEFAULT SWAPS ARISING FROM THE NEW YORK INSURANCE DEPARTMENT’S
CIRCULAR LETTER NO. 19**

On September 22nd, the New York Insurance Department issued Circular Letter No. 19 setting forth “best practice” guidelines relating to transactions undertaken by financial guarantee insurance companies (“monolines”) with respect to credit default swaps purchased by persons who, at the time at which the swap agreement is entered into, “hold or reasonably expect to hold, a material interest in the [swap’s] referenced obligation.” In a reversal of the Insurance Department’s earlier position that the making of such credit default swaps does not constitute the doing of an insurance business, the Circular announces the Department’s determination that monolines’ activities with respect to such credit default swaps will be subject to the Insurance Law commencing January 1, 2009.

More broadly, the Insurance Department's determination raises the prospect that such credit default swaps will be treated as an insurance product, with the result that persons issuing, selling or otherwise conducting transactions with respect to such instruments would be characterized as conducting an insurance business and thereby become subject to the Insurance Department's regulation. We believe there are compelling policy reasons and legal precedent that strongly support the conclusion that credit default swaps issued, sold or otherwise transacted by banking institutions, including by the U.S. branches/agencies of international banks, qualify under New York laws as banking products and not insurance products and that activities with respect to credit default swaps that would trigger the requirements of Circular Letter No. 19 if undertaken by a monoline constitute part of the permissible business of banking when undertaken by a banking institution, are not part of any insurance business and therefore are not covered by the Circular. The Institute is coordinating its efforts in addressing question with the International Swaps and Derivatives Association and other industry groups.

INSTITUTE TO COMMENT ON NEW OFAC ENFORCEMENT GUIDELINES

On September 8th, the Treasury Department's Office of Foreign Assets Control published new Economic Sanctions Enforcement Guidelines as an interim final rule with a request for comments by November 7th (see OFAC's Federal Register notice: <http://edocket.access.gpo.gov/2008/pdf/E8-20704.pdf>). The Institute held a conference call in mid-October with member institutions to discuss the guidelines and plans to file a comment letter on them.

The Guidelines implement the provisions of the International Emergency Economic Powers Enhancement Act, which was enacted in October 2007 and significantly increases the maximum penalties assessable by OFAC. The Guidelines apply to all currently pending, as well as any future enforcement matters and supercede the guidelines applicable to banking institutions published by OFAC in January 2006.

Among the more significant aspects of the Guidelines are the following:

- In place of identifying "aggravating" and "mitigating" factors, as has been OFAC's practice, the Guidelines prescribe a set of ten "General Factors" that OFAC will consider in determining an appropriate enforcement response to an apparent violation. The General Factors also will be applied in establishing the amount of a civil money penalty (CMP) in those situations where OFAC determines a CMP is warranted.
- The Guidelines describe the various actions OFAC can take in responding to an apparent violation – OFAC may take no action, request additional information, issue a cautionary letter, issue a "finding a violation," impose a CMP, make a criminal referral, or take "other administrative action" (*i.e.*, deny, suspend, modify or revoke a license; issue a cease-and-desist order).

With respect to matters involving the imposition of a CMP, the Guidelines distinguish between "egregious" and "non-egregious" cases and prescribe procedures for determining the amount of a penalty, which, among other things, take into account whether or not the person subject to the penalty voluntarily disclosed the apparent violation to OFAC.

**INSTITUTE COMMENTS ON SEC'S PROPOSAL TO
INCREASE RANGE OF SERVICES BY FOREIGN BROKER-DEALERS**

The Institute filed a comment letter dated September 8th on the SEC's proposed revisions to Rule 15a-6 that are intended to liberalize existing restrictions on the range of services that foreign broker-dealers can offer to U.S. investors without triggering registration under Section 15 of the Securities Exchange Act of 1934. The Institute letter is available at <http://www.iib.org/associations/6316/files/2008908Final15a-6Letter.pdf>.

The letter expresses the Institute's strong support for the Commission's proposals to (i) expand the category of U.S. investors with which non-U.S. broker-dealers would be permitted to interact by permitting solicitation of U.S. persons that are "qualified investors"; (ii) permit qualifying non-U.S. broker-dealers to effect all aspects of a transaction with qualified investors, including maintaining custody of funds and assets, subject to prescribed disclosure requirements; (iii) permit qualifying non-U.S. broker-dealers to maintain the books and records relating to their transactions with qualified investors in the form, manner and for the periods of time prescribed by the foreign securities authority regulating the non-U.S. broker-dealer; (iv) eliminate the "chaperoning" requirement; and (v) codify staff interpretations issued under current Rule 15a-6, including with respect to transactions by non-U.S. broker-dealers with U.S. persons acting in a fiduciary capacity on behalf of non-U.S. resident clients.

The letter identifies several aspects of the proposed revisions that should be clarified: (i) the definition of "foreign broker or dealer"; (ii) the definition of "foreign business"; (iii) the role and responsibilities of a registered broker or dealer in connection with transactions conducted by a foreign broker or dealer in reliance on proposed Rule 15a-6(a)(3)(iii)(A)(1); and (iv) the number of days that can be spent in the United States on an "unchaperoned" basis by representatives of a foreign broker-dealer. In addition, the letter refers to the Institute's separate request to the SEC for an exemptive order with respect to international banks' global custody activities and discusses the relevance of the considerations underlying that request to the Commission's proposal.

**INSTITUTE SUBMITS COMMENTS AND MEETS WITH
TREASURY DEPARTMENT AND IRS REGARDING POSSIBLE
EXPANSION OF SECTION 475 SAFE HARBOR TO NON-US GAAP FILERS**

In August, the Treasury Department and the IRS issued Notice 2008-71, requesting additional comments regarding the possible expansion of the Section 475 safe harbor for the valuation of stocks, securities and derivatives to financial institutions that prepare their financial statements under International Financial Reporting Standards (IFRS) or other non-US GAAP standards. The Institute submitted a written response to the Notice (<http://www.iib.org/associations/6316/files/20080915Sect.475Submission.pdf>) then met with U.S. Treasury Department and Internal Revenue Service officials to discuss the Institute's request that the Section 475 safe harbor be expanded to financial institutions that prepare their financial statements under IFRS or other non-US GAAP standards.

The safe harbor, which was finalized last year, allows dealers in securities, commodities and derivatives to treat the values of positions reported on certain qualifying U.S. GAAP financial statements as the fair market value of those positions for purposes of the mark-to-market rules of section 475 (the "book/tax conformity safe harbor"). However, at present the book/tax conformity safe harbor is not available to most U.S. branches of foreign banks (since the call reports do not contain complete financial statements) or to most foreign-based dealers in respect of their global dealing activities because it requires that those institutions have U.S. GAAP financial statements.

The September 22nd meeting was attended by a dozen Treasury and IRS representatives, from both the financial products and international areas, including Eric Solomon, the Assistant Secretary for Tax Policy, and Michael Mundaca, the Deputy Assistant Secretary for International Tax Affairs.

We understand that the Treasury Department and IRS considered the meeting – together with the Institute’s written submission – to be very successful in addressing their questions. In addition to discussing the possible expansion of the safe harbor, we reviewed the concerns that the industry has been expressing regarding the narrow scope of the safe harbor and its inapplicability to many debt securities and derivatives. We are hopeful that the Treasury Department and the IRS will issue favorable guidance, although the timing of such guidance is uncertain given their focus on issues relating to the credit markets crisis and the impending change in administration.