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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 URGES THE FEDERAL RESERVE TO INCLUDE
FOREIGN GOVERNMENT-CONTROLLED BANKS IN THE
TERM ASSET-BACKED SECURITIES LOAN FACILITY**

The Federal Reserve has initiated a program – the Term Asset-Backed Security Loan Facility (TALFTM) – intended to promote lending to consumers and small businesses by facilitating renewed issuance and trading of consumer and small business asset-backed securities. The U.S. operations of internationally headquartered banks, including their U.S. subsidiaries and branches/agencies, are generally eligible borrowers under the program, but the program guidelines published by the Federal Reserve exclude from the program “any entity that is controlled by a foreign government.” The guidelines explain that for these purposes control exists if, among other things, there is a 25% -or-greater voting interest.

The Institute has asked the Federal Reserve to reconsider the exclusion of foreign government-controlled banks from the TALF on the grounds that their inclusion would promote the purposes of the program and be consistent with both statutory requirements and the principle of national treatment and related U.S. treaty obligations. The rationale for permitting foreign government-controlled banks to participate in the TALF is especially strong with respect to those banks whose home country government has acquired a controlling interest (as determined for purposes of the TALF) in connection with recent G-20 coordinated financial stabilization and capital support programs. The relief requested by the Institute also would permit participation by institutions where control is exercised by a governmental unit below the national level.

**INSTITUTE RAISES NATIONAL TREATMENT CONCERNS
REGARDING THE EXCLUSION OF FOREIGN-OWNED U.S. BANKS
FROM THE CAPITAL PURCHASE PROGRAM**

As previously reported, reflecting the efforts of the Institute and others during the legislative debates on the Emergency Economic Stabilization Act (“EESA”), the U.S. subsidiaries and offices of internationally headquartered banks are generally eligible to receive assistance as “financial institutions” under the Trouble Assets Relief Program (“TARP”). While the EESA contemplates the purchase or guarantee of “troubled assets” from eligible financial institutions, the Treasury Department to date has implemented its authority under that Act principally by making direct equity investments in “qualifying financial institutions” through the so-called Capital Purchase Program (“CPP”). As announced by the Treasury Department on October 20, 2008, CPP equity investments by Treasury are limited to U.S. domestic depository institutions and their holding companies; institutions “controlled by a foreign bank or company” are expressly excluded from the program.

Soon after the announcement of the program, the Institute and a group of interested member banks asked the Treasury Department to revise the CPP eligibility criteria to include foreign-owned U.S. banks on the grounds, among others, that their exclusion from the program solely because of their foreign ownership is inconsistent with both the principle of national treatment and U.S. treaty commitments. In December, the Treasury Department informed the Institute of its decision to continue to exclude foreign-owned U.S. banks from the CPP, and in January the Institute submitted a written request to Secretary Geithner to reconsider this issue. The matter is still pending with the Treasury Department.

The conditions imposed on recipients of assistance under the CPP, especially with respect to limits on executive compensation, have attracted considerable attention in the press and have become a key focus in the debates regarding efforts to stabilize the banking industry. The exclusion of foreign-owned U.S. banks from the CPP is an unfavorable precedent from a national treatment perspective, even though as a result of this exclusion such banks are not subject to the executive compensation and other conditions imposed on recipients

of TARP assistance. Notwithstanding these considerations, the Institute believes it is critically important to defend the principle of national treatment in the context of the CPP regardless of whether individual institutions ultimately might choose not to participate in the program. As matters currently stand, foreign-owned U.S. banks, which have almost \$1 trillion of total assets and employ tens of thousands of U.S. citizens, do not have the opportunity to make that decision.

**INSTITUTE RESPONDS TO TREASURY DEPARTMENT
REQUEST FOR COMMENTS ON THE ESTABLISHMENT OF A
GUARANTEE PROGRAM UNDER SECTION 102 OF THE
EMERGENCY ECONOMIC STABILIZATION ACT**

At the end of October 2008, the Institute submitted a comment letter to the Treasury Department regarding the establishment of a guarantee program for troubled assets as provided for under Section 102 of the Emergency Economic Stabilization Act (“EESA”). The Institute’s letter focused in particular on Treasury’s request for comments on the key issues that should be considered in determining the eligibility of various types of financial institution to participate in such a program and whether such eligibility provisions should differ from those applied under Section 101 of the EESA, which authorizes Treasury to purchase “troubled assets” from eligible financial institutions. The letter expressed that view that, consistent with the statutory scheme set forth in the EESA, an entity that is eligible for the troubled asset purchase program because it is a “financial institution” as defined in Section 3(5) of the EESA therefore also should be eligible for any guarantee program established under Section 102. (The Institute’s letter is available at: http://www.iib.org/associations/6316/files/20081028TARP_102_CommentLetter.pdf .)

As to application of the statutory definition of “financial institution” to the U.S. operations of international banks, the letter suggested that it would be reasonable to interpret the requirement that a financial institution have “significant operations” in the United States by reference to the totality of an affiliated financial group’s U.S. activities. As the exclusion of institutions “owned by a foreign government” from the statutory definition, the letter suggested that this provision should be interpreted in the context of the EESA as meaning ownership (1) of at least a majority voting or equity interest; (2) by a national government; that (3) did not result from an investment made by the institution’s home country government in connection with a recent financial stabilization/capital support program.

Subsequent to its request for comments on Section 102, the Bush Treasury Department announced that a substantial portion of the initial funds provided for under the EESA would be allocated under the Capital Purchase Program (see the article above), thereby largely mooted questions regarding the establishment of a Treasury guarantee program. While the Financial Stability Plan announced by Secretary Geithner on February 10th did not call for establishment of a guarantee program under Section 102, the inclusion of a Public-Private Investment Fund (“PPIF”) as part of the Plan has resulted in renewed attention to how an asset purchase program under the EESA should be structured. Consistent with our approach to Section 102, the Institute firmly believes that the U.S. operations of international banks that are not “owned by a foreign government” (within the contemplation of the EESA statutory definition) should be eligible for the PPIF on equal terms with “financial institutions” that are domestically headquartered.

**REVISIONS TO THE FEDERAL RESERVE'S INTRADAY OVERDRAFT POLICY
RESPOND TO THE COLLECTIVE EFFORTS OF THE INSTITUTE AND
INTERESTED MEMBER BANKS AND INCLUDE INTERIM MEASURES
DIRECTED SPECIFICALLY AT FOREIGN BANKING ORGANIZATIONS**

Over the last several years, the Institute and a group of interested member banks engaged in extensive discussions with the Federal Reserve regarding the disparity in treatment of foreign banking organizations (FBOs) as compared to domestic banks under the current Payments System Risk (PSR) Policy with respect to intraday overdrafts. For domestic banks, the amount of available intraday credit (as determined by a bank's "net debit cap"), and the deductible used to calculate fees for such credit, is based on 100 percent of their capital, whereas in the case of FBOs these amounts are based on not more than 35 percent of their worldwide capital – *i.e.*, the amount of unsecured intraday credit available to a domestic bank, and the size of its deductible, is almost three times greater than what is given to an FBO of comparable capital size and credit standing.

Addressing the serious concerns raised by the Institute and interested member banks, the Federal Reserve in December 2008 announced the following revisions to its PSR Policy: (i) eliminate the deductible applied to all intraday overdrafts, whether or not collateralized; (ii) increase the fee charged for unsecured intraday overdrafts from an annual rate of 36 basis points to an annual rate of 50 basis points; and (iii) permit banks to avoid intraday overdraft fees altogether with respect to intraday overdrafts that are collateralized by the discount window-eligible collateral. These revisions will be effective sometime during either the fourth quarter of 2010 or the first quarter of 2011 to provide the Reserve Banks time to implement required changes to their collateral management/monitoring systems and processes.

While on the one hand the Federal Reserve retained the differential treatment of FBOs vis-à-vis U.S. domestic banks, on the other hand it announced the following interim measures intended to enable FBOs that have a self-assessed net debit cap and either are financial holding companies or have a "SOSA 1" rating ("eligible FBOs") to calculate their net debit cap on the same basis as their domestic bank peers through the pledging of discount window-eligible collateral: (i) adoption of a streamlined procedure whereby eligible FBOs will qualify for a maximum amount of intraday credit from the Federal Reserve based on 100 percent of their worldwide capital (a "streamlined max cap"), *provided* that the amount that is based on more than 35 percent of their worldwide capital is collateralized by discount window-eligible collateral; and (ii) for those FBOs operating with a streamlined max cap, calculation of the deductible amount based on 100 percent of their worldwide capital, *provided* that the full amount of the deductible is likewise collateralized. The interim measures take effect on March 26, 2009. The streamlined max cap procedure will remain in place upon the effectiveness in 2010/11 of the revisions that are intended to encourage the voluntary collateralization of intraday overdrafts, at which time the deductible will be eliminated for all banks.

On balance, then, the revisions are in important ways beneficial to FBOs. It is clear that the Federal Reserve gave serious consideration to the collective concerns raised over the last several years by the Institute and interested member banks. The revisions to the PSR Policy can be understood as an effort to address these concerns in a manner that maintains in principle the distinction between domestic banks and FBOs with respect to *unsecured* intraday overdrafts while providing strong incentives that make the distinction largely moot for all practical purposes with respect to *fully collateralized* overdrafts.

INSTITUTE SEEKS CLARIFICATION OF CERTAIN ASPECTS OF THE FDIC'S TEMPORARY LIQUIDITY GUARANTEE PROGRAM

The FDIC's final regulations implementing the Temporary Liquidity Guarantee Program ("TLGP") exclude insured U.S. branches of internationally headquartered banks from the Debt Guarantee Program, but include them in the Transaction Account Guarantee Program. Responding to the Institute's request in its comment letter that such branches be included in the Debt Guarantee Program, the FDIC explained that it does not intend that program to guarantee debt issued by "foreign entities, including domestic branches of foreign banks or foreign subsidiaries of eligible U.S. entities." The FDIC further observed that "[f]oreign entities may be eligible for similar debt guarantee programs available in the countries in which they are domiciled."

Responding to concerns raised by member institutions, the Institute requested the FDIC to confirm two aspects of the provisions in the final regulations with respect to coverage under the Debt Guarantee Program of U.S. dollar denominated deposits issued by eligible FDIC-insured depository institutions ("U.S. dollar denominated deposits"): first, that such deposits are covered when owed to an Edge Act corporation engaged in banking activities in the United States (a "banking Edge corporation"); and, second, that they are covered when owed to a U.S. branch or agency of a non-U.S. bank, regardless of whether or not the U.S. office is FDIC-insured. The FDIC has confirmed that U.S. dollar denominated deposits owed to U.S. branches or agencies of non-U.S. banks are covered under the Debt Guarantee Program regardless of whether the U.S. office is FDIC-insured. Regarding the coverage of U.S. dollar denominated deposits owed to banking Edge corporations, the FDIC applied a strict interpretation of the regulation, concluding that they are not covered. The reason given for excluding U.S. dollar denominated deposits owed to banking Edge corporations is that the regulation refers specifically only to U.S. dollar denominated deposits owed to either "insured depository institutions" or "foreign banks", and banking Edge corporations are neither type of institution.

INSTITUTE COMMENTS ON OFAC ENFORCEMENT GUIDELINES

On November 7, 2008, the Institute submitted its comment letter on the Economic Sanctions Enforcement Guidelines (the "Guidelines") issued by the Office of Foreign Assets Control ("OFAC"). The Guidelines implement the significant increase in the maximum penalties assessable by OFAC for violation of U.S. economic sanctions programs provided for in the International Emergency Economic Powers Enhancement Act of 2007. The Institute's letter expressed serious concerns regarding several key aspects of the Guidelines and urged OFAC to modify the Guidelines accordingly. The Institute's comments focused in particular on (i) the need to clarify the implications of OFAC's withdrawal of its January 2006 "Economic Sanctions Enforcement Procedures for Banking Institutions"; (ii) certain of the General Factors applied by OFAC when determining the degree of sanctions that should be imposed in a particular situation, including especially the need to incorporate into the Guidelines recognition of the difficulties that internationally headquartered banking/financial institutions encounter in their good faith efforts to comply with U.S. economic sanctions program requirements that conflict with applicable non-U.S. laws; and (iii) the approach taken in the Guidelines to determining the amount of civil monetary penalties that should be imposed in those cases where OFAC concludes such penalties are appropriate. (The Institute's letter is available at: http://www.iib.org/associations/6316/files/20081107_OFACComment_Final.pdf.)

**IIB SUBMITS COMMENTS ON IRS PROPOSED CHANGES TO
QUALIFIED INTERMEDIARY (“QI”) AGREEMENTS AND
EXTERNAL AUDIT GUIDELINES**

As previously reported, in October the IRS announced proposed amendments to the QI agreement and to guidance for external auditors of QIs. The purpose of these amendments is to improve the QI program by ensuring QIs and their auditors comply with their obligations and responsibilities. The proposed amendments are to take effect for taxable years beginning after December 31, 2009.

These proposed changes to the QI agreements and the external audit guidance follow in the wake of press reports, Congressional hearings and a Government Accounting Office study regarding perceived abuses and weaknesses in the QI regime and the need to take swift action to rectify these abuses and weaknesses by enhancing internal controls and the auditing process. The Senate Homeland Security and Governmental Affairs Subcommittee on Investigations will hold another hearing on this matter in the near future.

The Institute submitted a comment letter making a number of technical suggestions designed to narrow the scope and cost of the proposed changes. In particular, the letter recommends that the IRS reconsider its potentially costly proposal to require that all non-U.S. external auditors of QIs associate a U.S. auditor with the audit. However, our comments are necessarily tempered by the inhospitable climate for QIs in Congress, the IRS and the press. (The Institute’s comment letter is available at: <http://www.iib.org/associations/6316/files/Comment%20on%20Announcement%202008-98.pdf> .)