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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 EFFORTS TURN TO IMPLEMENTATION OF DODD-FRANK ACT

On July 21st, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act following weeks of deliberations in a House-Senate conference committee on the sweeping financial regulatory reform legislation. Reflecting efforts by the Institute, the discussion of the bill in the Senate prior to final passage on July 15th included a colloquy regarding the so-called swap “push out” provisions (Section 716) between Senator Lincoln, Chairman of the Agriculture Committee and the principal sponsor of the bill’s OTC derivatives title, and Senator Dodd, Chairman of the Banking Committee, as further discussed below.

As previously reported, the Institute and a Working Group of our member institutions were involved in intensive efforts throughout the legislative process on issues of particular importance to internationally headquartered banking/financial institutions and our efforts are now turning to how key provisions of the Act will be implemented by the Federal Reserve and the other regulatory agencies. (Member institutions that have not already done so are urged to contact the Institute about joining the Working Group.)

Among the key aspects of the legislation of importance to our member institutions are the following:

- Collins Amendment. As ultimately incorporated into the legislation, the Collins Amendment was modified to provide that it applies only to U.S. entities, thereby clarifying that it is not intended to prescribe minimum capital standards (based on U.S. definitions and ratios) for foreign banking organizations that are registered bank holding companies. U.S. intermediate holding company subsidiaries of foreign banks that have relied on the Federal Reserve’s SR 01-1 supervisory letter are given 5 years from the date of enactment to come into compliance with the Amendment’s requirements. The GAO, in consultation with Treasury and the federal banking agencies, is directed to conduct a study of capital requirement applicable to U.S. intermediate holding companies of foreign banks and report its findings to Congress not later than 18 months after the date of enactment. We understand that this provision will also direct the GAO to include in its report recommendations for legislative or regulatory action on this question.
- Enhanced capital and other prudential standards. The legislation includes the language supported by the Institute directing the Federal Reserve, when applying the enhanced capital and other prudential standards to an international bank, to give due regard to the principles of national treatment and equality of competitive opportunity and take into account the extent to which the bank is subject to comparable home country standards. In addition, the 15-to-1 debt-equity ratio requirement applies only to bank holding companies with total consolidated assets of at least \$50 billion and systemically significant nonbank financial institutions and will be triggered only upon a finding by the new Financial Stability Oversight Council that such company poses a “grave threat” to the financial stability of the United States.
- Volcker Rule. The Volcker Rule prohibitions on proprietary trading and on investing in and sponsoring private equity and hedge fund investments apply to U.S. operations of international banks, with exceptions for certain activities conducted outside the United States. The approach of the Volcker Rule evolved somewhat, with less flexibility for a Council study to recommend modifications to the definitions and requirements of the statute, but more flexibility for traditional private equity and hedge fund management activities.

- **Swaps Push-out.** Section 716 of the Act in effect requires swap entities to divest their swap-related activities in order to use Federal assistance (including, for example, discount window loans), but “insured depository institutions” are provided a safe harbor with respect to (i) swaps used for “hedging and other similar risk mitigating activities directly related to the insured depository institution’s activities” and (ii) interest rate swaps and other types of swaps based on “bank permissible” reference assets. The Lincoln-Dodd colloquy clarifies that the omission of uninsured U.S. branches and agencies of international banks from the safe harbor provisions is “clearly unintended” and that this oversight needs to be addressed “to ensure that uninsured U.S. branches and agencies of foreign banks are treated the same as insured depository institutions under the provisions of section 716, including the safe harbor language.” Section 716 is effective 2 years after enactment. Consideration is already being given in Congress to the need for follow-up legislation to make “technical corrections” to the Dodd-Frank Act, although there is no agreement as of yet whether in fact to seek such legislation. The colloquy between Senators Lincoln and Dodd is very helpful in explaining Congressional intent regarding the treatment of uninsured U.S. branches and agencies under the Section 716 safe harbor and establishes a firm basis for clarifying its provisions in any subsequent corrective legislation.
- **Derivatives.** The Dodd-Frank Act includes language supported by the Institute expanding the legislation's international harmonization provision to encompass futures as well as swaps and security-based swaps. The Act also includes language supported by the Institute clarifying the territorial scope of the derivatives title, but it does not include the Institute's language providing the CFTC and the SEC with clear authority to exempt comparably regulated institutions or otherwise take comparable regulation into account. Instead, the Act includes language ensuring parity between the limited exemptive authority given the SEC and CFTC.

INSTITUTE SUBMITS COMMENTS TO NY BANKING DEPARTMENT ON REGULATORY BURDEN RELIEF

The Institute submitted a letter dated July 2nd to the New York State Banking Department (see link below) in response to the Department’s request for comments on aspects of its existing regulations that “impose unnecessary, burdensome or excessive costs, paperwork, reporting or other requirements.” The letter reflects the discussion of the Banking Department’s request with interested member institutions during a conference call in early June.

The Institute’s submission focused in particular on New York’s asset pledge requirement. While expressing appreciation for the revisions the Department has made to the asset pledge requirement over the years, the letter suggested further modifications that would reduce the impact of the asset pledge. Among other things, the letter suggested the exclusion of liabilities arising from borrowings from the Federal Reserve from the calculation of the asset pledge requirement.

Link to the Institute’s letter to the Banking Department:

<http://www.iib.org/associations/6316/files/20100702NYBDLetter.pdf>

INSTITUTE COMMENTS ON FDIC'S "LIVING WILL" PROPOSAL

The Institute submitted a comment letter dated July 16th (see link below) on the FDIC's proposed rule that would require certain identified insured depository institutions ("IDIs") that are subsidiaries of large and complex financial parent companies to submit to the FDIC analysis, information, and contingent resolution plans that address and demonstrate the IDI's ability to be separated from its parent structure, and to be wound down or resolved in an orderly fashion.

While the FDIC is responsible for the resolution of an IDI pursuant to the Federal Deposit Insurance Act, the Institute's letter noted that the exercise of those powers in the case of a foreign-owned IDI is unlikely to be undertaken in isolation. Instead, the parent company likely also will be in a distressed condition and may itself be undergoing resolution by its home country authority, and significant affiliates of the IDI likewise may be subject to similar actions by the appropriate authorities in other countries. To minimize the potential conflicts that can result between home country and U.S. law in these circumstances, the Institute's letter urged the FDIC to take appropriate actions to coordinate with these other authorities. While ideally such inter-jurisdictional differences would be resolved on a multi-lateral basis, in the absence of an agreed upon international resolution regime the Institute's letter recommended that the FDIC seek to minimize these differences bilaterally.

In addition to suggesting revisions to the proposal to more explicitly take into account the circumstances of covered IDIs that are foreign-owned, the Institute's letter also addressed, among other things, the timing of the proposal and the need to coordinate the current rulemaking with the rulemaking called for under Section 165(d) of the Dodd-Frank Act.

Link to the Institute's July 16th comment letter to the FDIC:

http://www.iib.org/associations/6316/files/20100716FDICLivingWill_Final.pdf

INSTITUTE SUBMITS LETTER TO TREASURY/IRS ON IMPLEMENTATION OF FATCA TAX PROVISIONS

The Institute submitted a letter to Treasury Department and IRS officials on June 16th (see link below) addressing key questions they raised during a meeting with them in Washington in May regarding implementation of the Foreign Account Tax Compliance Act (FATCA) provisions of the HIRE Act. As previously reported, a delegation of the Institute and the European Banking Federation (EBF) met with Treasury/IRS on May 3rd to discuss the recommendations in the joint IIB/EBF submission regarding guidance under FATCA (see link below).

We understand that Treasury and the IRS are very appreciative of the IIB-EBF submission and are carefully considering our comments and suggestions. Treasury and the IRS have indicated their intention to issue preliminary guidance during the summer, and we would expect to continue to dialogue with them about specific aspects of the guidance as it evolves.

FATCA significantly changes the U.S. withholding tax regime and as indicated above, there remains a considerable amount of work to be done on these critically important implementation issues. As we

continue our efforts, we again urge those interested Institute member institutions that have not already done so to join the Institute's FATCA Working Group.

Link to June 16 IIB Letter:

http://www.iib.org/associations/6316/files/20100616IIBFATCALetter_Treas.IRS.pdf

Link to April 23 joint IIB-EBF submission:

<http://www.iib.org/associations/6316/files/20100423EBF-IIBFATCALetter.pdf>

INSTITUTE PLANS TO COMMENT ON DRAFT IRS SCHEDULE UTP

Following an August 5th conference call with member institutions to discuss concerns arising from the IRS's announcement this Spring to require taxpayer disclosure of "uncertain tax positions" (UTP), the Institute plans to submit a comment letter to the IRS with suggested modifications to Schedule UTP.

The issues raised by the IRS requirement to disclose uncertain tax positions on Schedule UTP, which essentially are tax reserves disclosed on audited financial statements as well as positions taxpayers intend to litigate, affect all Institute member institutions by placing them in the invidious position of having to make these disclosures to the IRS and thereby give IRS agents a proverbial "road map" to incorporate in their audit plans. Absent further clarifications from the IRS, Institute members (and their tax advisors) will encounter serious difficulties in complying with and properly completing Schedule UTP.

We are grateful to Larry Hill, Chair of Dewey & LeBoeuf's Tax Controversy and Litigation Group and a well-known expert in the area, for offering his assistance on a *pro bono* basis in drafting the letter on behalf of the Institute's membership.