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The World Bank
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August 21, 2013

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
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International Bank for Reconstruction and Development, International Finance Corporation, and Other Multilateral Development Institutions in which the United States is a Member – Comment on the Proposed Rules and Proposed Interpretations Entitled "Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants" – Release No. 34-69490 - File Numbers S7-02-13, S7-34-10 and S7-40-11[1]

Dear Ms. Murphy:

This comment letter is submitted by the International Bank for Reconstruction and Development ("IBRD") and the International Finance Corporation ("IFC"), on behalf of IBRD, IFC, and other multilateral development banks in which the U.S. is a member (the "MDBs")[2] in respect of implementation of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

Our comments on the above-referenced release (the "Cross-Border Release") cover three distinct topics. First, consistent with decisions that have already been reached by the Commodity Futures Trading Commission ("CFTC"), we seek explicit confirmation that MDBs will not be required to register as Security-Based Swap Dealers or Major Security-Based Swap Participants, or to clear security-based swaps. Second, we request that the proposed rules set forth in the Cross-Border Release be further clarified to ensure that MDBs are not considered to be "U.S. persons" and that transactions between MDBs and non-U.S., non-registrant counterparties are not considered to be "transactions conducted within the United States" for purposes of various requirements, regardless of the fact that some of the MDBs maintain their principal places of business in the United States. Third, we take the opportunity provided in footnote 301 of the Cross-Border Release to recommend that affiliates of international organizations should likewise be excluded from the definition of "U.S. person" in the proposed rules.

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[1] 78 Fed. Reg. 30,968 (May 23, 2013).

[2] Multilateral development banks in which the United States is a member include IBRD, IFC, International Development Association, Multilateral Investment Guarantee Agency, African Development Bank, African Development Fund, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, and Inter-American Investment Corporation. Not all of these institutions currently use derivatives in their development operations, or do so only on a limited basis. Nevertheless, the principles set forth in this letter should apply to all MDBs.

1. Background, Prior Comments, and Context for Current Comments

IBRD, IFC, and other MDBs use interest rate and currency swaps to manage market risk in their development operations. MDBs do not currently make extensive use of security-based swaps. Nevertheless, we believe it is important to comment upon the above-referenced proposed rules, both because important issues of policy and principle are at stake, and because our business models may change over time to make more use of security-based swaps.

IBRD and IFC filed an earlier comment with the Securities and Exchange Commission (the "Commission") regarding a proposed rule entitled "Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker Dealers" on February 21, 2013, a copy of which is attached hereto as Attachment A (the "Capital and Margin Comment Letter"). (This letter can also be found at http://www.sec.gov/comments/s7-08-12/s70812.shtml#comments.) In that submission, we explained that hedging transactions were integral to the development effectiveness of MDBs and that attempts to regulate such activities would violate MDB privileges and immunities, as implemented in U.S. law. The Capital and Margin Comment Letter also included an October 5, 2011 opinion from Sullivan & Cromwell which confirmed that regulation of IBRD and IFC under Title VII of the Dodd-Frank Act would constitute a breach by the United States of its international obligations under the Articles of Agreement of each institution, as implemented in U.S. law under the Bretton Woods Agreements Act and the International Finance Corporation Act (the "S&C Opinion"). Given that the background information and analysis set forth in the Capital and Margin Comment Letter and in the S&C Opinion are equally relevant in respect of several pending issues, we will generally reference rather than repeat the earlier presentation.

2. Registration and Mandatory Clearing Requirement

Since the Cross-Border Release discusses both entity-level registration rules and security-based swap clearing requirements, we take this opportunity to supplement and reiterate the arguments and requests set forth in the above-referenced Capital and Margin Comment Letter.

IBRD, IFC, and other MDBs should be categorically excluded from potential registration as Security-Based Swap Dealers and Major Security-Based Swap Participants. Furthermore, security-based swap transactions entered into by MDBs should be excluded from the mandatory clearing requirements.

We believe that the arguments set forth in our earlier Capital and Margin Comment Letter are equally applicable to registration and clearing requirements. In particular, imposition of registration requirements on MDBs or clearing requirements on MDB security-based swap transactions would violate the privileges and immunities of the MDBs, as implemented in U.S. law. As noted in the Capital and Margin Comment Letter, MDBs have the benefit of privileges and immunities – including a broad immunity from regulation – in order to allow them to fulfill their global and regional development roles.[3] The S&C Opinion concluded that the Dodd-Frank Act does not authorize any curtailment of the privileges and immunities of IBRD and IFC.

We believe it is self-evident why potential registration as a Security-Based Swap Dealer or Major Security-Based Swap Participant – with all of the attendant regulatory requirements and inspections – would conflict with the privileges and immunities of MDBs, as enumerated in Annex 1. However, further comment on the issue of clearing may be useful. The Capital and Margin Comment Letter discussed in detail why imposing mandatory margin requirements on *non-cleared* security-based swaps entered into by MDBs would (1) conflict with the privileges and immunities of MDBs (citing and quoting in part the S&C Opinion), (2) serve no useful policy purpose and be inconsistent with the Commission's statutory mandate, given the low credit risk involved in such transactions, and (3) impair the development effectiveness of MDBs. This analysis would apply equally to mandatory clearing requirements for security-based swaps entered into by MBDs, given the margin requirements associated with clearing. (A mandatory clearing

[3] Annex 1 ("Privileges and Immunities of IBRD, IFC, and other MDBs") provides more detail on these provisions.

requirement – either imposed directly on MDBs or indirectly through regulation of our counterparties – would be objectionable on other grounds, but we believe the margin-related issues are dispositive.)

Furthermore, the treatment of MDBs under Title VII should be consistent, and the CFTC has already decided to exclude MBDs from potential registration as a Swap Dealer or Major Swap Participant and MDB swap transactions from clearing requirements. The CFTC (in conjunction with the Commission) adopted a rule entitled "Further Definition of 'Swap Dealer,' 'Security-Based Swap Dealer,' 'Major Swap Participant,' 'Major Security-Based Swap Participant' and 'Eligible Contract Participant'". In discussing the status of certain foreign entities, the CFTC cited an earlier comment letter filed by IBRD and IFC. In this rulemaking process, the CFTC expressly determined that:

> Canons of statutory construction "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." There is nothing in the text or history of the swap-related provisions of Title VII to establish that Congress intended to deviate from the traditions of the international system by including foreign governments, foreign central banks and international financial institutions within the definitions of the term "swap dealer" or "major swap participant," thereby requiring that they affirmatively register as swap dealers or major swap participants with the CFTC and be regulated as such. The CFTC does not believe that foreign governments, foreign central banks and international financial institutions should be required to register as swap dealers or major swap participants.[4]

The CFTC subsequently adopted a rule entitled "End-User Exception to the Clearing Requirement for Swaps". In discussing the status of certain foreign entities, the CFTC again cited the earlier comment letter filed by IBRD and IFC. In this rulemaking process, the CFTC followed the reasoning set forth in the above-referenced rulemaking and determined that:

> Canons of statutory construction "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." In addition, international financial institutions operate with the benefit of certain privileges and immunities under U.S. law indicating that such entities may be viewed similarly under certain circumstances. There is nothing in the text or history of the swap-related provisions of Title VII of the Dodd-Frank Act to establish that Congress intended to deviate from the traditions of the international system by subjecting foreign governments, foreign central banks, or international financial institutions to the clearing requirement set forth in Section 2(h)(1) of the CEA.

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[4] 77 Fed. Reg. 30,596, at 30,693 (May 23, 2012) (footnotes omitted) (the "Entity Definitions Release"). Footnote 1180 on page 30,692 defined the term "international financial institutions" to include, inter alia, IBRD, IFC, and other MDBs in which the United States is a member. While we generally agree with the CFTC's reasoning in making this determination, there is one potentially misleading passage. The Release included a statement that "foreign entities are not necessarily immune from U.S. jurisdiction for commercial activities undertaken with U.S. counterparties or in U.S. markets," and a related footnote that included citations to certain litigation involving MDBs (77 Fed. Reg. 30,692 and footnote 1182). We filed a letter suggesting a clarification to this discussion. In particular, we noted that the immunity of the MDBs from member state regulation and other actions, as set forth in their respective Articles of Agreement and related U.S. implementing legislation, is not affected by whether MDBs engage in commercial behavior. In other words, the general "commercial exception" to sovereign immunity set forth in the Foreign Sovereign Immunities Act (the "FSIA"), as cited in footnote 1182 of the Entity Definitions Release, does not apply to or limit the immunities conferred on MDBs – the FSIA applies to sovereigns, and MDB privileges and immunities are specified in independent international agreements and different U.S. statutes. Moreover, the court cases cited in the footnote referred to MDB immunity from suits by private parties rather than the entirely distinct immunities from regulation and other actions by members. These points apply equally to the margin rule currently under consideration – the specific immunities of the MDBs from regulation, requisition, seizure, and so on must be considered on their own merits. The regulatory immunity accorded to IBRD, IFC, and other MDBs, for example, expressly extends to "restrictions, regulations, controls, and moratoria *of any nature*", and should not be confused with more limited forms of immunity applicable to other types of entities and activities. See IBRD Article VII, Section 6 (emphasis added); equivalent provision at IFC Article VI, Section 4.

> Given these considerations of comity and in keeping with the traditions of the international system, the Commission believes that foreign governments, foreign central banks, and international financial institutions should not be subject to Section 2(h)(1) of the CEA.[5]

We welcome the determinations by the CFTC that IBRD, IFC, and the other MDBs will not be required to register as swap dealers or major swap participants, nor be subject to swap clearing requirements. In particular, we welcome the explicit CFTC recognition of the importance of the privileges and immunities accorded to international financial institutions. We recognize that the Commission will reach its own independent conclusions on these matters with regard to security-based swaps. However, we believe that the CFTC's earlier determinations are based on well-reasoned conclusions about the special status of MDBs under international and domestic U.S. law, which we have quoted at length. Furthermore, inconsistent regulatory treatment of transactions with MDBs by the CFTC and the Commission would create complexity and be burdensome for both MDBs and our counterparties. For all of these reasons, we believe that the Commission should adopt equivalent categorical exclusions from Security-Based Swap Dealer and Major Security-Based Swap Participant registration requirements and mandatory security-based swap clearing requirements at the transaction level.[6]

In summary, IBRD, IFC, and the other MDBs seek explicit confirmation from the Commission that:

- MDBs will not be required to register as Security-Based Swap Dealers or Major Security-Based Swap Participants, as discussed herein;
- MDB security-based swap transactions will not be subject to mandatory clearing requirements, either directly or indirectly (via regulation of our counterparties), as discussed herein;
- Non-cleared MDB security-based swap transactions will not be subject to mandatory margin requirements, either directly or indirectly (via regulation of our counterparties), as discussed in the Capital and Margin Comment Letter; and
- Capital requirements for non-cleared, non-margined security-based swap transactions between MDBs and non-bank Security-Based Swap Dealers and Major Security-Based Swap Dealers will reflect the exceptionally low risk profile of MDBs, as discussed in the Capital and Margin Comment Letter.

3. *"U.S. Person" and "Transaction conducted within the United States" Definitions*

We generally support – subject to the changes discussed in Section 4 of this letter – the proposed definition of "U.S. person" set forth in the Cross-Border Release (proposed §240.3a71-3(a)(7)), including the exclusion set forth in sub-paragraph (ii) thereof:

> The term U.S. person does not include the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies and pension plans, and any other similar international organization, their agencies and pension plans.[7]

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[5] 77 Fed. Reg. 42,560, at 42,562 (July 19, 2012) (footnotes omitted).

[6] The fact that MDBs are unlikely, at least under current business practices, to engage in the level and type of security-based swap transactions that would require registration as either a Security-Based Swap Dealer or a Major Security-Based Swap Participant does not make this issue moot. First, as a matter of principle, the Commission's rules implementing Title VII of the Dodd-Frank Act should be consistent with the international obligations of the United States. Second, the entity-level registration and transactional clearing requirements should be consistent for both swaps under the jurisdiction of the CFTC and security-based swaps under the jurisdiction of the Commission. Finally, should MDB business practices change, we should not need to revisit and reopen the Title VII regulations at that point.

[7] 78 Fed. Reg. 30,958, at 31,207 (May 23, 2013).

For purposes of clarity, however, we recommend that either all of the MDBs set forth in footnote 2 above be added to this exclusion, or alternatively, the Commission adds at least the other MDBs that maintain their headquarters in Washington, D.C. – namely, IFC, International Development Association ("IDA"), Multilateral Investment Guarantee Agency ("MIGA"), and Inter-American Investment Corporation ("IAIC"). IFC, IDA, MIGA and IAIC are independent international institutions (as opposed to "agencies" of IBRD or Inter-American Development Bank, respectively) and enter into transactions in their own names. Notwithstanding the useful reference to "their agencies and pension plans, and any other similar international organization" – which we support – expanding the exclusion by adding these entities specified by name will avoid any possible confusion among counterparties since transactions with such MDBs headquartered in the U.S. are likely to have been solicited, negotiated, executed or booked within the United States.

In addition, we believe that the definition of "Transaction conducted within the United States" (proposed §240.3a71-3(a)(5)) would benefit from a similar exclusion. On its face, this definition could be interpreted to include a security-based swap transaction between an MDB and a non-U.S. counterparty, merely because such MDB maintains its headquarters in the United States or otherwise engages in the relevant conduct within the borders of the United States.

Such an interpretation would have at least three deleterious impacts. First, non-U.S. counterparties would be required to include security-based swap transactions with MDBs in determining whether they are required to register as a Security-Based Swap Dealer or a Major Security-Based Swap Participant. Second, non-U.S. counterparties would become subject to reporting requirements for security-based swap transactions with MDBs. In both cases, the risk exists that non-U.S. counterparties – that would not otherwise be within the scope of the application of Title VII – become subject to U.S. regulation solely by virtue of conducting swap transactions with MDBs. We believe that this possibility would, at a minimum, discourage non-U.S. counterparties from entering into transactions with MDBs, without serving any useful public policy purpose Third, MDBs with headquarters in the U.S. could arguably be considered subject to reporting requirements themselves with regard to security-based swap transactions entered into with non-U.S. persons that are not registered as a Security-Based Swap Dealer or a Major Security-Based Swap Participant (re-proposed Rule 908(a)(1)(i) and re-proposed Rule 901(a)(5)(i)).

We note that the CFTC recently issued a release entitled "Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations" that deals with some similar issues.[8] Within the CFTC's regulatory framework, the application of certain rules depends on whether an entity is a "U.S. person". The CFTC explicitly referred to the status of MDBs in footnotes 531, 595, 598, and 605 of this release, the first of which is worth quoting at length:

> Where the counterparty to a non-U.S. swap dealer or non-U.S. MSP is an international financial institution such as the World Bank, the Commission also generally would not expect the parties to the swap to comply with the Category A Transaction-Level Requirements, even if the principal place of business of the international financial institution were located in the United States.
>
> For this purpose, the Commission would consider the international financial institutions to be the institutions listed as such in the Final Entities Rules, 77 FR at 30692 n. 1180, which include the International Monetary Fund, International Bank for Reconstruction and Development, International Development Association, International Finance Corporation, Multilateral Investment Guarantee Agency, the Inter-American Development Bank, and the Inter-American Investment Corporation. Even though some or all of these international financial institutions may have their principal place of business in the United States, the Commission would generally not consider the

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[8] 78 Fed. Reg. 45,292 (July 26, 2013).

application of the Category A Transaction-Level Requirements to be warranted, for the reasons of the traditions of the international system discussed in the Final Entities Rules.[9]

The discussion at footnote 605 of the CFTC's release is arguably even more relevant, since it deals with rules potentially applicable to swap counterparties that are not registered as swap dealers or MSPs ("non-registrants"), and concludes that the Non-Registrant Requirements (as defined in the CFTC's release) would not be applicable to transactions between an international financial institution and a non-registrant, "even if the principal place of business of the international financial institution were located in the United States."[10]

We believe that the SEC should take equivalent steps, within its own regulatory framework, to ensure that non-U.S. counterparties that are otherwise not subject to registration, reporting or other requirements under Title VII would not become subject to such requirements solely by virtue of entering into security-based swap transactions with MDBs that happen to have their headquarters in the U.S. This could be accomplished by including a new sub-paragraph (iii) within the proposed transaction definition that makes it clear that a security-based swap with an MDB is not considered to be a "Transaction conducted within the United States" solely by virtue of the fact that the relevant MDB maintains its principal place of business and conducts transactions within the United States.[11]

4. *Affiliates of MDBs*

In response to the question posed in footnote 301 of the Cross-Border Release, we believe that affiliates of MDBs should be considered to be non-U.S. persons for the purposes of the exclusion in sub-paragraph (ii) of proposed §240.3a71-3(a)(7)), just as these affiliates are excluded from consideration under Regulation S. We believe that the broad immunity from regulation that we refer to in Section 2 above applies to all of an MDB's operations, regardless of whether the MDB chooses to engage in such activities directly or through an affiliate. To this effect, we note that Sullivan & Cromwell is separately submitting comments on the Cross-Border Release which complement our own and which, for reference, we also attach to this letter as Attachment B. We will not repeat their arguments here, but wish to summarize some key points below.

For an MDB, an affiliate can play a key role in carrying out the MDB's core functions by effectively managing conflicts of interest between various operations, facilitating the administration and supervision of different activities within the organization and providing liability mitigation for certain activities, all of which further its ability to effectively fulfill its developmental role and contribute towards its mission to reduce poverty. The creation of an affiliate by an MDB must be done pursuant to the

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[9] 78 Fed. Reg. 45,292, at 45, 343 (July 26, 2013). The "international system" considerations referenced in footnote 531 are described in the excerpt quoted above in connection with the entity definition rules.

[10] 78 Fed Reg. 45,292, at 45,361. We note that the CFTC did not expressly address the issue of whether transactions with international financial institutions that maintain their headquarters in the United States would be counted for purposes of determining whether non-U.S. counterparties would be required to register as swap dealers or major swap participants. We have no reason to believe that the CFTC meant to reach a different conclusion on this specific issue. If there is any confusion in the market about this issue, we plan to follow up with the CFTC.

[11] We note the concern expressed by the Commission in the Cross-Border Release at page 31,074 that "without a regulatory report of such security-based swaps [involving Foreign Public Sector Financial Institutions, including MDBs], the Commission would have an incomplete view of the risk positions held by security-based swap market participants that are U.S. persons or registered with the Commission." We do not object to reporting of our transactions by U.S. counterparties or non-U.S. counterparties that are independently required to be registered with the Commission. Our concern is limited to ensuring that non-U.S. counterparties that are otherwise not subject to regulation could become subject to certain requirements solely because a transaction with us could be deemed to be a "Transaction conducted within the United States." We are amenable to any solution that fixes this problem.

"incidental powers" clause in its Articles in "furtherance of its purpose".[12] It is important to note therefore, that the activities of the affiliates must serve the same purpose as the MDB and that the affiliate can only perform those activities that the MDB which created it could itself perform. In this context and where the affiliate is subject the MDB's collective governance structure, the rationale for granting privileges and immunities to the MDB applies equally to operations it conducts through an affiliate. As such, just as in the case for the MDB itself, regulation of the MDB's affiliate is inappropriate and also unnecessary. We believe this is true, regardless of whether or not the affiliate is organized under U.S. law, as all U.S. laws should be implemented in a manner consistent with the MDB's privileges and immunities, granted to them to fulfill their functions, and as these have full force and effect under US law. Consistent with US legal precedent discussed in the attached Sullivan & Cromwell comment, the focus of the implementation of these privileges and immunities should be on their purpose, not on corporate structure.

In addition, subjecting an MDB's affiliate to regulation by an individual member state, when the affiliate's mandate and governance are inextricably linked to the MDB, not only undermines the privileges and immunities of the MDB, but it also introduces operational and other inefficiencies that may diminish the impact of its developmental activities. Finally, regulating an affiliate of an MDB would undermine the single collective governance system of member states to which the affiliate is already subject, and would also increase the risk that other member states may also wish to impose additional regulations on the operations of the MDB's affiliates.

5. *Conclusion*

We believe that implementation to date of Title VII of the Dodd-Frank Act by the CFTC has appropriately recognized the special status of IBRD, IFC, and the other MDBs, and respectfully request the Commission to reach a similar resolution of the issues described above.

Sincerely,

Anne-Marie Leroy
Senior Vice President and Group General Counsel
World Bank

Fady Zeidan
Acting Deputy General Counsel
International Finance Corporation

Attachments

[12] See, e.g., Article III, §6 of IFC' s Articles, giving IFC "the power . . . to exercise such other powers incidental to its business as shall be necessary or desirable in furtherance of its purposes".

Privileges and Immunities of IBRD, IFC, and other MDBs

The Articles of Agreement of IBRD and IFC include a comprehensive set of privileges and immunities. For the purposes of this discussion, the most salient provisions in the Articles of Agreement of IBRD (referred to as "the Bank" in its Articles) and IFC are as follows:

- "No actions shall . . . be brought [against the Bank] by members or persons acting for or deriving claims from members." (IBRD Article VII, Section 3; equivalent provision at IFC Article VI, Section 3);

- "Property and assets of the Bank, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of seizure by executive or legislative action" (IBRD Article VII, Section 4; equivalent provision at IFC Article VI, Section 4);

- "The archives of the Bank shall be inviolable" (IBRD Article VII, Section 5; equivalent provision at IFC Article VI, Section 5); and

- "To the extent necessary to carry out the operations provided for in this Agreement and subject to the provisions of this Agreement, all property and assets of the Bank shall be free from restrictions, *regulations*, controls and moratoria *of any nature*" (IBRD Article VII, Section 6 (emphasis added); equivalent provision at IFC Article VI, Section 6).

In addition to embodying these privileges and immunities in the international legal agreements that created IBRD, IFC, and the other MDBs, all member governments agreed to accept and implement these provisions in domestic law. For example, IBRD Article VII, Section 10 provides that "[e]ach member shall take such action as is necessary in its own territories for the purpose of making effective in terms of its own law the principles set forth in this Article and shall inform the Bank of the detailed action which it has taken". IFC Article VI, Section 10 is substantively identical. The United States fulfilled its obligations in respect of IBRD and IFC as follows:

- The Bretton Woods Agreements Act provides that: "the provisions of . . . article VII, sections 2 to 9, both inclusive, of the Articles of Agreement of the Bank, shall have full force and effect in the United States and its Territories and possessions upon acceptance of membership by the United States in, and the establishment of . . . the Bank . . ." (22 U.S.C. §286h)

- The International Finance Corporation Act provides that: "[t]he provisions of . . . article VI, sections 2-9, both inclusive, of the Articles of Agreement of the Corporation shall have full force and effect in the United States and its Territories and possessions upon acceptance of membership by the United States in, and the establishment of . . . the Corporation." (22 U.S.C. §282g)

In addition, the United States has adopted the International Organizations and Immunities Act (22 U.S.C. §288) and the Foreign Sovereign Immunities Act (28 U.S.C. §1602), both of which grant additional protections to IBRD, IFC, and other MDBs.

The organizational documents and charters of the other MDBs contain equivalent privileges and immunities, and the United States has taken appropriate actions to implement its international obligations in domestic law in respect of the other MDBs.[13]

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[13] *See, e.g.*, 22 U.S.C. §283g (Inter-American Development Bank Act), 22 U.S.C. §283hh (Inter-American Investment Corporation Act), 22 U.S.C. §284g (International Development Association Act), 22 U.S.C. §285g (Asian Development Bank Act), 22 U.S.C. §290g-7 (African Development Fund), 22 U.S.C. §290*i*-8 (African Development Bank Act), 22 U.S.C. §290*k*-10 (Multilateral Investment Guarantee Agency Act), and 22 U.S.C. §290*l*-6 (European Bank for Reconstruction and Development Act).

While the above discussion focuses on the steps the United States has taken to implement its international legal obligations in respect of MDBs, we note that the obligations on all other member countries are identical, and that members have provided evidence of the steps they have taken to implement such provisions in their own territories as part of their membership obligations.

The purpose of these privileges and immunities is to avoid subjecting international organizations to multiple, potentially conflicting requirements imposed by national regulators – not to free MDBs from official oversight. To the contrary, IBRD and IFC have resident Boards, with all members appointed or elected by our sovereign shareholders. The resident Boards (and the Audit Committee thereof) have in-depth familiarity with, and oversight authority over, IBRD's and IFC's financial operations. Among other responsibilities, the Boards authorize all categories of derivatives use by IBRD and IFC, and receive regular reports on treasury and risk management operations. While the Boards of MDBs are not acting as regulators, they are all concerned with the financial health and sustainability of their respective institutions, and take risk management issues seriously.

ATTACHMENT A

The World Bank
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February 21, 2013

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International Bank for Reconstruction and Development,
International Finance Corporation, and Other Multilateral
Development Institutions in which the United States is a Member –
Comment on the Proposed Rule Entitled "Capital, Margin, and Segregation
Requirements for Security-Based Swap Dealers and Major Security-Based Swap
Participants and Capital Requirements for Broker Dealers" – File Number S7-08-12[1]

Dear Ms. Murphy:

This comment letter is submitted by the International Bank for Reconstruction ("IBRD") and the International Finance Corporation ("IFC"), on behalf of IBRD, IFC, and other multilateral development banks in which the U.S. is a member (the "MDBs")[2] in respect of implementation of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). For the reasons set forth below, we request that the Commission ensures that the above-referenced proposal is implemented in a manner that does not impair the ability of MDBs to continue to engage in non-cleared swaps with security-based swap dealers ("SBSDs") and major security-based swap participants ("MSBSPs") on a mutually agreed, bilaterally negotiated basis, rather than being subject to regulatory margin requirements. Such an approach would also be consistent with the near-final global standards on margin requirements for non-cleared derivatives, which exempt MDBs from having to post or collect margin. U.S. regulators, including the Commission, have actively participated in the development of these global standards and have consistently voiced strong support for harmonized margin requirements. In addition to margin standards, we request regulatory clarifications to ensure that capital requirements applicable to non-cleared, non-margined swaps with MDBs accurately reflect the minimal risk involved in such exposures.

1. <u>Background and Context for Comments</u>

As discussed herein, IBRD, IFC, and other MDBs make extensive use of interest rate and currency swaps to manage market risk in their development operations. MDBs do not currently make extensive use of security-based swaps. Furthermore, most of the swap counterparties with whom we deal are subject to regulation by the prudential banking regulators in respect of margin and capital requirements. Nevertheless, we believe it is important to comment upon the above-referenced proposed rule, both because important issues of policy and principle are at stake, and because our business model may change over time to make more use of security-based swaps.

[1] 77 Fed. Reg. 70,214 (November 23, 2012).

[2] Multilateral development banks in which the Unites States is a member include IBRD, IFC, International Development Association, Multilateral Investment Guarantee Agency, African Development Bank, African Development Fund, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, and Inter-American Investment Corporation. Not all of these institutions currently use derivatives in their development operations, or do so only on a limited basis. Nevertheless, the principles set forth in this letter should apply to all MDBs.

We also note the Commission's statement that "[t]he potential international implications of the proposed capital, margin, and segregation requirements warrant further consideration,"[3] and the Commission's stated intention to publish a comprehensive release seeking public comment on the full spectrum of cross-border issues. However, we believe that certain critical legal and policy issues related to the status of MDBs can and should be addressed at this time in connection with the proposed margin and capital rules.

2. *Prior Comments by IBRD and IFC and Related Commodity Futures Trading Commission Determinations*

Prior to filing this comment letter, IBRD and IFC have engaged in extensive discussions with the Commodity Futures Trading Commission (the "CFTC") on various proposed rules implementing Title VII of the Dodd-Frank Act. For example, IBRD and IFC filed a comment on the proposed rule entitled "Further Definition of 'Swap,' 'Security-Based Swap,' and 'Security-Based Swap Agreement'; Mixed Swaps; Security-Based Swap Agreement Recordkeeping" on July 22, 2011.[4] In that comment, IBRD and IFC urged the CFTC to implement the Dodd-Frank Act in a manner that (1) fully respects the privileges and immunities of IBRD, IFC, and other MDBs, and (2) does not impair the development effectiveness of these institutions, noting that any other result would be contrary to decades of well-settled law. Our comment described the privileges and immunities accorded to IBRD, IFC, and other MDBs, and explained that application of Title VII of the Dodd-Frank Act to these institutions would be inconsistent with the international legal obligations of the United States and would conflict with U.S. statutory law.[5] Our comment further noted that there was no evidence that Congress intended such a result. While the comment was filed in response to the proposed "product definition" rules, IBRD and IFC noted that the MDB community would welcome any regulatory action (or actions) that met the two-pronged test set forth above.

As discussed in greater detail below, IBRD and IFC also commissioned the firm of Sullivan & Cromwell to analyze the potential application of the Dodd-Frank Act to our swaps activities. Edwin Williamson, currently Senior Counsel to Sullivan & Cromwell and former Legal Adviser of the U.S. Department of State, was the primary author of the opinion. The Sullivan & Cromwell opinion, issued on October 5, 2011, confirmed that regulation of IBRD and IFC under Title VII of the Dodd-Frank Act would constitute a breach by the United States of its international obligations under the Articles of Agreement of each institution, as implemented in U.S. law under the Bretton Woods Agreements Act and the International Finance Corporation Act. The opinion further concluded that the Dodd-Frank Act does not authorize any such curtailment of the privileges and immunities of IBRD and IFC.

The CFTC (in conjunction with the Commission) subsequently adopted a rule entitled "Further Definition of 'Swap Dealer,' 'Security-Based Swap Dealer,' 'Major Swap Participant,' 'Major Security-Based Swap Participant' and 'Eligible Contract Participant'". In discussing the status of certain foreign entities, the CFTC cited the above-referenced comment letter filed by IBRD and IFC. In this rulemaking process, the CFTC expressly determined that:

> Canons of statutory construction "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." There is nothing in the text or history of the swap-related provisions of Title VII to establish that Congress intended to deviate from the traditions of the international system by including foreign governments, foreign central banks and international financial institutions within the

[3] 77 Fed. Reg. 70,214, at 70,217

[4] A copy of this comment, which includes additional background material on the MDBs, is attached for reference as Attachment 1. We note that this was a joint proposed rule-making between the CFTC and the Commission, but we focused on the CFTC proposal at that time given its greater relevance to our business operations.

[5] Annex 1 hereto describes the relevant privileges and immunities of IBRD, IFC, and other MDBs, as well as the steps taken by the United States to implement these immunities in domestic law.

definitions of the term "swap dealer" or "major swap participant," thereby requiring that they affirmatively register as swap dealers or major swap participants with the CFTC and be regulated as such. The CFTC does not believe that foreign governments, foreign central banks and international financial institutions should be required to register as swap dealers or major swap participants.[6]

The CFTC subsequently adopted a rule entitled "End-User Exception to the Clearing Requirement for Swaps". In discussing the status of certain foreign entities, the CFTC again cited the above-referenced comment letter filed by IBRD and IFC. In this rulemaking process, the CFTC followed the reasoning set forth in the above-referenced rulemaking and determined that:

> Canons of statutory construction "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." In addition, international financial institutions operate with the benefit of certain privileges and immunities under U.S. law indicating that such entities may be viewed similarly under certain circumstances. There is nothing in the text or history of the swap-related provisions of Title VII of the Dodd-Frank Act to establish that Congress intended to deviate from the traditions of the international system by subjecting foreign governments, foreign central banks, or international financial institutions to the clearing requirement set forth in Section 2(h)(1) of the CEA.
>
> Given these considerations of comity and in keeping with the traditions of the international system, the Commission believes that foreign governments, foreign central banks, and international financial institutions should not be subject to Section 2(h)(1) of the CEA.[7]

We welcome the determinations by the CFTC that IBRD, IFC, and the other MDBs will not be required to register as swap dealers or major swap participants, nor be subject to swap clearing requirements. In particular, we welcome the explicit CFTC recognition of the importance of the privileges and immunities accorded to international financial institutions. These two determinations minimize the potential for direct regulation of MDB activities, which would be flatly inconsistent with the privileges and immunities of our organizations.

However, these determinations by the CFTC did not address certain other key issues, such as margin or capital requirements for non-cleared swaps. Accordingly, IBRD and IFC filed a subsequent comment with the CFTC on its proposed rule entitled "Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants"[8] on September 14, 2012.

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[6] 77 Fed. Reg. 30,596, at 30,693 (May 23, 2012) (footnotes omitted) (the "Entity Definitions Release"). Footnote 1180 on page 30,692 defined the term "international financial institutions" to include, inter alia, IBRD, IFC, and other MDBs in which the United States is a member. While we generally agree with the CFTC's reasoning in this making this determination, there is one potentially misleading passage. The Release included a statement that "foreign entities are not necessarily immune from U.S. jurisdiction for commercial activities undertaken with U.S. counterparties or in U.S. markets," and a related footnote that included citations to certain litigation involving MDBs (77 Fed. Reg. 30,692 and footnote 1182). We filed a letter suggesting a clarification to this discussion. In particular, we noted that the immunity of the MDBs from member state regulation and other actions, as set forth in their respective Articles of Agreement and related U.S. implementing legislation, is not affected by whether MDBs engage in commercial behavior. In other words, the general "commercial exception" to sovereign immunity set forth in the Foreign Sovereign Immunities Act, as cited in footnote 1182 of the Entity Definitions Release, does not apply to or limit the immunities conferred on MDBs – the FSIA applies to sovereigns, and MDB privileges and immunities are specified in independent international agreements and different U.S. statutes. Moreover, the court cases cited in the footnote referred to MDB immunity from suits by private parties rather than the entirely distinct immunities from regulation and other actions by members. These points apply equally to the margin rule currently under consideration – the specific immunities of the MDBs from regulation, requisition, seizure, and so on must be considered on their own merits. The regulatory immunity accorded to IBRD, IFC, and other MDBs, for example, expressly extends to "restrictions, regulations, controls, and moratoria *of any nature*", and should not be confused with more limited forms of immunity applicable to other types of entities and activities. See IBRD Article VII, Section 6 (emphasis added); equivalent provision at IFC Article VI, Section 4.

[7] 77 Fed. Reg. 42,560, at 42,562 (July 19, 2012) (footnotes omitted) (the "Clearing Release").

[8] 76 Fed. Reg. 23,732 (April 28, 2011).

On September 28, 2012, IBRD and IFC filed a comment with the Working Group on Margining Requirements of the Basel Committee on Banking Supervision ("Basel Committee") and the International Organization of Securities Commissions ("IOSCO") regarding the Consultative Document on Margin Requirements for Non-Centrally Cleared Derivatives. On February 16, 2013, the Basel Committee and IOSCO published near-final margin standards for non-cleared derivatives. Significantly, these internationally agreed-upon margin standards adopted the recommendation made in our comment by providing that MDBs are not required to "either collect or post margin."[9] We believe that the Commission and other U.S. regulators, as active participants in the Working Group on Margining Requirements,[10] should similarly exempt MDBs from their margin regulations under Title VII of the Dodd-Frank Act. The Commission and other U.S. regulators have consistently expressed strong support for uniform global margin requirements and the standards developed by the Basel Committee and IOSCO.[11]

Most recently, IBRD and IFC filed a comment with the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Federal Housing Agency (collectively, the "Prudential Regulators") regarding their proposed rule entitled "Margin and Capital Requirements for Covered Swap Entities".[12] Our comment today to the Commission completes our discussion of margin and capital rules with all of the relevant U.S. regulatory authorities.

We recognize that the Commission will reach its own independent conclusions on these matters. However, we believe that the CFTC's earlier determinations are based on well-reasoned conclusions about the special status of MDBs under international and domestic U.S. law, which we have quoted at length. We further believe that these conclusions are equally applicable to margin and capital requirements, and should be reflected in a consistent manner in all of the rules on these subject matters to be issued by the CFTC, the Prudential Regulators, and the Commission.

As discussed in more detail below, the swap operations of IBRD, IFC, and other MDBs do not present a risk to U.S. financial institutions or to the financial system as a whole. Therefore, imposing margin requirements on transactions with the MDBs would serve no useful purpose – instead, it would divert scarce public resources from development needs and degrade the financial capacity and credit standing of the MDBs. The United States is the largest shareholder in IBRD and IFC, as well as the largest contributor to IBRD's ongoing capital increases, and has a strong interest in ensuring that public funds appropriated by Congress have the maximum development impact.

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[9] Basel Committee and IOSCO, Margin Requirements for Non-Centrally Cleared Derivatives (Second Consultative Document) (Feb. 2013), Paragraph 2(c)("Similarly, the [Basel Committee] and IOSCO support not applying the margin requirements in a way that would require sovereigns, central banks, **multilateral development banks**, or the Bank for International Settlements, to **either collect or post margin**. Both of these views are reflected by the exclusion of such transactions from the scope of margin requirements.")(emphasis added). *See also id.* Paragraph 2.4 ("Central banks, sovereigns, **multilateral development banks**, the Bank for International Settlements, and non-systemic, non-financial firms are not covered entities.")(emphasis added); *id.* n.11 ("Multilateral development banks (MDB) exempted from this requirement are those MDBs that are eligible for a zero risk-weight under the Basel capital framework (at the time this margin framework is published, see footnote 24 of paragraph 54, part 2, Basel II: International Convergence of Capital Measurement and Capital Standards: A Revised Framework, http://www.bis.org/publ/bcbs128b.pdf").

[10] Members of the Working Group on Margining Requirements include Thomas McGowan of the Commission, John Lawton of the CFTC, Sean Campbell of the Board of Governors of the Federal Reserve System, Mari Baca of the Federal Reserve Bank of New York, Bobby Bean of the Federal Deposit Insurance Corporation, Kurt Wilhelm of the Office of the Comptroller of the Currency, and is co-chaired by Michael Gibson of the Board of Governors of the Federal Reserve System.

[11] *See e.g.*, Timothy F. Geithner, then U.S. Secretary of the Treasury, Remarks to the International Monetary Conference (June 6, 2011) ("Just as we have global minimum standards for bank capital – expressed in a tangible international agreement – we need **global minimum standards for margins on uncleared derivatives trades**")(emphasis added); Mary L. Schapiro, then Chairman, U.S. Securities and Exchange Commission, Testimony Before the U.S. House Committee on Financial Services (June 16, 2011) ("**U.S. regulators are working closely with foreign regulators to establish similar [margin] standards** that will reduce risk more broadly and address competitiveness concerns.")(emphasis added).

[12] 76 Fed. Reg. 27,5645 (May 11, 2011).

3. *Margin Requirements on MDB Transactions Would Conflict with the Privileges and Immunities of MDBs*

Regulation of non-cleared swap transactions between MDBs and security-based swap dealers or major security-based swap participants would amount to regulation of MDBs, and would be inconsistent with the privileges and immunities of IBRD, IFC, and the other MDBs. In response to a question raised by Gary Gensler, Chairman of the CFTC, at a July 6, 2011 meeting, we commissioned the above-referenced legal opinion from the firm of Sullivan & Cromwell, which we transmitted to Chairman Gensler on October 5, 2011.[13]

While we urge that the entire Sullivan & Cromwell opinion – as well as our own prior discussion of privileges and immunities – be reviewed in detail, certain sections of the opinion merit special emphasis in the context of the proposed rule at issue. The opinion noted at page 11 that regulation could be imposed either through "Direct Regulation" of IBRD and IFC, or via what it termed "Direct Regulation Equivalent" measures:

> Even if the Organizations [IBRD and IFC] are not required to register as MSPs, if their swap transactions are covered, then transactions with entities that are MSPs or "swap dealers" would subject the Organizations to several of the Direct Regulation measures. For example, the Organizations would be required to post collateral as security for their swap obligations . . . This is in many ways the substantive equivalent of the Organizations being subjected to Direct Regulation, as the Regulations would have the effect of requiring the Organizations to modify their current practices.

The Sullivan & Cromwell opinion then analyzed such collateral requirements in detail on page 12 and concluded as follows:

> The requirement that the Organizations post collateral would violate the Organizations' immunities from attachment and seizure, whether the requirement is imposed as a Direct Regulation or a Direct Regulation Equivalent measure. The Organizations' attachment immunity protects the Organizations' assets from an attachment before the entry of a final judgment. Posting collateral in order to enter into a transaction, particularly when there is no indication that the collateral will ever be called, is the economic equivalent of an attachment prior to a judgment having been entered. The Organizations' immunity from seizure protects the Organizations from any government's attempt to, among other things, requisition the Organizations' assets, such as by requiring that the Organizations use their assets in a prescribed manner. Likewise, requiring that the Organizations use their assets for a purpose other than for the furtherance of their development purposes is the economic equivalent of a requisition, even if it is for a limited purpose.

We believe that this reasoning is compelling, and makes the case that margin requirements on non-cleared swaps cannot be applied to transactions involving MDBs.

4. *Margin Requirements on MDB Transactions Would Be Inconsistent with the Statutory Mandate of the Commission and Would Serve No Policy Purpose*

While the privileges and immunities argument set forth above should be dispositive, we also believe that margin requirements on MDB transactions would be inconsistent with the statutory mandate of the Commission and would serve no policy purpose. Some of the specific comments and financial analysis in this section focus on IBRD and IFC, but they apply more broadly to the MDBs as a whole.

The Commission itself described its statutory mandate and articulated the policy goals of the proposed rules under consideration as follows:

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[13] A copy of our transmittal letter and the Sullivan & Cromwell opinion is set forth as Attachment 2.

> Section 15F(e)(3)(A) [of the Exchange Act] also provides that "[t]o offset the greater risk to the security-based swap dealer or major security-based swap participant and the financial system arising from the use of security-based swaps that are not cleared," the margin requirements proposed by the Commission and prudential regulators shall "help ensure the safety and soundness" of the SBSDs and the MSBSPs, and "be appropriate for the risk associated with non-cleared security-based swaps held" by an SBSD or MSBSP.[14]

Consistent with this statutory mandate, the relevant question should be whether transactions between MDBs and non-bank SBSDSs and MSBSPs present any substantial risks to such counterparties, and any margin requirements must be "appropriate" for the circumstances.

Under long-standing, bilaterally-negotiated practices, MDBs generally do not post margin – either initial or variation margin – with our counterparties. Such non-cleared, non-margined transactions do not present any material risks to our counterparties (including SBSDs and MSBSPs) or to the financial system as a whole. IBRD and IFC are highly credit-worthy entities. Our institutions carry the highest ratings issued by the major credit rating agencies. Moreover, the market valuation of bonds issued by IBRD and IFC demonstrate broad market consensus that our institutions (and other MDBs) are among the safest credits in the capital markets.

Additional compelling evidence for our position comes from the determinations of several of the Prudential Regulators in implementing capital requirements for transactions between MDBs and entities subject to their prudential regulation. For example, the federal banking agencies' rules implementing the Basel II internal ratings-based approach exempt any MDB from the minimum probability of default floor of 0.03% for purposes of calculating risk-weighted assets for general credit risk – i.e., they allow prudentially regulated entities to assess the MDB default probability as *zero*.[15] In addition, the recent U.S. Basel III proposals, which introduce a new "standardized approach" to replace the existing Basel I-based generally applicable capital rules, would reduce the risk weight for exposures to MDBs from 20% to *zero* (0%).[16] Finally, under the Market Risk Capital Rule recently adopted by the federal banking agencies, U.S. banking organizations that are subject to the rule may assign a *zero* specific risk-weighing factor to a debt position that is (or has) an (underlying) exposure to an MDB.[17]

We note that the Commission, in its discussion of overall capital requirements for non-bank SBSDs and MSBSPs, drew certain operational and financial distinctions between such institutions and banks subject to regulation by the federal banking regulators.[18] While these distinctions may be relevant in the context of overall capital requirements at the institutional level, we believe that the determinations of the federal banking regulators are compelling when it comes to the specific issue of assessing the risk involved in credit exposures to MDBs.

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[14] 77 Fed. Reg. 70,214, at 70,258 (footnote omitted).

[15] See e.g., 12 C.F.R. Part 225 Appendix G, Section 31(d) (2).

[16] As a rationale for assigning a zero percent risk weight to exposures to MDBs, the federal banking agencies stated that this is appropriate "in light of the generally high-credit quality of MDBs, their strong shareholder support, and a shareholder structure comprised of a significant proportion of sovereign entities with strong creditworthiness." Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, and Federal Deposit Insurance Corporation, Regulatory Capital Rules: Standardized Approach for Risk-Weighted Assets; Market Discipline and Disclosure Requirements, 77 Fed. Reg. 52,888 at 52,896 (Aug. 30, 2012).

[17] Similarly, in the preamble to the Market Risk Capital Rule, the federal banking agencies stated that the zero percent specific risk-weighting factor "is based on these MDBs' generally high-credit quality, strong shareholder support, and a shareholder structure comprised of a significant proportion of sovereign entities with strong creditworthiness." Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, and Federal Deposit Insurance Corporation, Risk-Based Capital Guidelines: Market Risk, 77 Fed. Reg. 53,060 at 53,077 (Aug. 30, 2012).

[18] 77 Fed. Reg. 70,214, at 70,218.

Finally, it is worth reiterating that IBRD, IFC, and the other MDBs use swaps solely for risk management purposes. We use these transactions in a straightforward manner, to manage market risk, stabilize income, and help our clients manage market risks. We do not use derivatives for speculation.[19]

As the Commission itself noted in proposing the margin rules, its statutory mandate is to adopt capital and margin requirements that are "appropriate" for the risks associated with non-cleared swaps involving non-bank SBSDs and MSBSPs. There is a clear consensus among credit rating agencies, capital markets participants, international regulators represented by the Working Group on Margining Requirements of the Basel Committee and IOSCO and the federal banking regulators that credit exposures to MDBs pose no serious risks. Accordingly, we believe that imposing margin requirements on non-cleared swap transactions between MDBs and non-bank SBSDs or MSBSPs would be inconsistent with the statutory mandate of the Commission, and would serve no policy purpose.[20]

5. *Margin Requirements on MDB Transactions Would Impair the Development Effectiveness of MDBs*

IBRD has undertaken an analysis of potential margin posting requirements under various scenarios, and concluded that it could face a potential posting requirement over the medium term of $20-30 billion under plausible scenarios. Assuming that IBRD would borrow in the financial markets to fund such a collateral requirement, we estimate that our funding cost for collateral would exceed the returns on the very narrow class of assets eligible for posting by approximately 20-30 bps. This suggests a possible cost of carry in the range of $40-90 million per year. This estimate is for IBRD alone; the costs for IFC and other MDBs would be on top of this amount. In addition to cost issues, this liquidity impact should be considered in the context that none of the MDBs has access to a liquidity facility of last resort from the Federal Reserve or other central banks. While some (but not all) MDBs have callable capital, even those MDBs with callable capital backing cannot call it for purposes other than servicing our bond debt and guarantee obligations. This potential loss of tens of millions of dollars per year is a pure deadweight loss that adversely impacts our financial position. Losses of this level will constrain our ability to increase IBRD's financial capacity and to make transfers of IBRD's net income to other development entities, such as the International Development Association ("IDA"), the concessional lending arm of the World Bank Group. This would be in contradiction of the stated policy objectives of the United States as the largest shareholder of IDA.

Some other potential implications are more difficult to quantify, but may be more serious over the long term. IBRD, IFC, and the other MDBs responded to the financial crisis by substantially increasing lending and investment operations, and the elevated level of such operations is expected to continue over the medium term. If we are forced to incur substantial additional borrowings to cover collateral posting requirements above and beyond the level necessary to fund lending and investments, the consequences are uncertain. At a minimum, IBRD, IFC, and the other MDBs will need to hold some capital against the assets that are posted with counterparties, which will either reduce our lending ability or increase our leverage above normal levels. While we will do everything we can to ensure that this situation is managed in a responsible manner, it is possible that the financial markets will take a negative view of a historically unprecedented degree of leverage in our operations.

There are other potential implications as well. IBRD currently provides swap intermediation services for IDA and other development clients. For example, IBRD's swap intermediation services hedge the pledges IDA receives in various currencies into its Special Drawing Right base, so that IDA is protected against foreign exchange risk and can make firm commitments. IDA is not required to post collateral on these transactions, since IBRD is not required to post collateral on its mirror swaps with the market. If

[19] For a more detailed description of how MDBs use derivatives, see Annex 2 hereto.

[20] As noted in the Sullivan & Cromwell opinion at page 14 – and confirmed by us herein – the ISDA Master Agreements under which IBRD and IFC conduct swap transactions with commercial counterparties in the U.S. and other jurisdictions provide that IBRD and IFC will not post margin as long as they are rated "AAA" by the major ratings agencies, but will post margin if they are downgraded. Thus, the only effect of imposing regulatory margin requirements on non-cleared swaps between non-bank SBSDs and MSBSPs and IBRD and IFC would be to require our institutions to post margin at a time when they present no risk to our counterparties.

IBRD is subject to margin requirements on its transactions with swap dealers and major swap participants, however, this arrangement would be difficult to continue and likely will require IDA and IBRD's other clients to begin posting collateral as well to avoid putting further pressure on IBRD's finances and credit standing. This may significantly increase the cost of doing business for these agencies which provide extremely low cost funding for development, including access to medicine, to the poorest of the poor.

In summary, applying margin requirements to non-cleared swaps with MDBs will increase costs, limit lending and investment operations, divert the use of scarce capital, and potentially affect concessional aid to the poorest of the poor – all for no real policy benefit. Since the United States is the largest shareholder in IBRD, IFC, and other MDBs, and the largest contributor to IBRD's current capital increases, we believe that such an outcome would frustrate U.S. policy interests.

6. Margin Requirements on MDB Transactions Would Create International Comity Concerns

Finally, we note that general international comity considerations independently argue for the results that we are requesting. For example, the CFTC articulated the following concern in the Clearing Release:

> The Commission expects that if any of the Federal Government, Federal Reserve Banks, or *international financial institutions of which the United States is a member* were to engage in swap transactions in foreign jurisdictions, the actions of those entities with respect to those transactions would not be subject to foreign regulation. However, if foreign government, central banks, or *international financial institutions* were subjected to regulation by the Commission in connection with their swap transactions, foreign regulators could treat the Federal Government, Federal Reserve Banks, or *international financial institutions of which the United States is a member* in a similar manner.[21]

To be clear, our primary argument for relief from clearing requirements on MDB transactions is that such relief is required as a matter of international and domestic U.S. law, as a consequence of our privileges and immunities. This is entirely independent of comity concerns.[22] However, the CFTC's reasoning regarding the international comity interests of the United States applies just as strongly to margin requirements on non-cleared swaps as to clearing requirements for other swaps, and provides yet another independent basis for reaching the conclusions recommended in this comment letter. It is particularly notable that CFTC's stated expectation is that "the actions of those [U.S.] entities with respect to those transactions would not be subject to regulation" – i.e., the concern is about whether the *transactions* of U.S. entities might be subject to regulation by overseas regulators. An identical concern would arise if a foreign regulator required financial institutions under its jurisdiction to require margin on non-cleared swaps from the aforementioned U.S. entities and international entities in which the U.S. had an interest – this would be just as intrusive and burdensome as requiring that such transactions to be cleared.

In this regard, we note that Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC Derivatives, Central Counterparties and Trade Repositories (also known as "EMIR") has addressed the issue of margin requirements on non-cleared swaps from a European perspective. EMIR exempts EU member central banks and the Bank for International Settlements entirely, and provides a further exemption for multilateral development banks (including the MDBs as defined in this comment letter) and certain other public sector entities, subject to certain reporting requirements. The EMIR also provides a mechanism for reviewing this list of exempted parties and adding central banks and other public bodies outside the EU after a review of the regulatory framework in other major jurisdictions.

IBRD, IFC, and the other MDBs support a common, consistent approach across major jurisdictions in respect of official sector institutions. Consistent with the reasoning of the earlier

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[21] 77 Fed. Reg. 42,560, at 42561-2 (emphasis added).

[22] Indeed, comity is not generally an issue in the case of MDBs, because all MDB members are similarly obligated as a matter of international law.

determinations of the CFTC in the U.S., the near-final global margin standards developed by the Basel Committee and IOSCO and the margin rules adopted in the EMIR, the Agencies should exclude transactions with MDBs from margin requirements.[23]

7. *Margin Rules - Conclusion*

Taking all of the above factors into account, we believe that the legal and policy considerations that led the CFTC to exclude IBRD, IFC, and the other MDBs from swap dealer and major swap participant registration requirements and swap clearing obligations should equally apply in the case of margin requirements, with a similarly comprehensive solution. In particular, just as in those other cases, there is nothing in the text or history of the swap-related provisions of Title VII of the Dodd-Frank Act to establish that Congress intended to deviate from the above-referenced international standards, including the privileges and immunities granted to the MDBs, in the case of margin rules. *Moreover, there is no analytical or evidentiary basis for applying mandatory, mechanistic margin requirements to swap transactions between MDBs and non-bank SBSDs or MSBSPs, when there is a consensus among rating agencies, financial market participants, international regulators represented by the Working Group on Margining Requirements of the Basel Committee and IOSCO and the federal banking agencies that credit exposures to MDBs pose essentially no risk to our counterparties.*

Accordingly, the final rule or release in the above-referenced matter should include a clear statement that the margin requirements on non-cleared swaps will not apply to transactions between MDBs and non-bank SBSDs and MSBSPs, and that such entities will continue to be authorized to negotiate agreements with and enter into transactions with MDBs on a mutually agreed basis.

8. *Capital Requirements*

IBRD, IFC, and the other MDBs believe that capital requirements for non-cleared, non-margined security-based swaps and other swaps between MDBs and non-bank SBSDs and MSBSPs should reflect the exceptionally low risk profile of MDBs. As discussed above, the U.S. federal banking regulators have established and/or proposed zero or near-zero risk weightings for exposures to MDBs, which will apply to SBSDs and MSPSDs under the jurisdiction of those agencies. We note that the Commission has explained that there are financial and operational distinctions between SBSDSs and MSBSPs subject to regulation by the federal banking agencies and those subject to regulation by the Commission, but this distinction was made in the context of overall capital requirements. On the narrow and specific issue of the risks involving credit exposures to MDBs, we believe the determinations of the federal banking agencies – which reflect a broad international consensus – are compelling and should be conclusive. Accordingly, we believe that the Commission's final rules should be tailored across the board to allow non-bank SBSDs and MSBSPs to take capital charges for non-cleared, non-margined swap exposures to MDBs that reflect the minimal risks involved in such exposures.

In particular, in response to Question 5 on page 70,244 of the Commission's proposed rule release, IBRD, IFC, and the other MDBs believe that entities that are authorized to use internal models, such as ANC broker-dealers and stand-alone SBSDs, should also be authorized to take a credit risk charge for uncollateralized exposures to MDBs, following the current rules for ANC broker-dealers. In particular, we believe that the proposal to *narrow* and *limit* the ability to take a credit risk approach for uncollateralized receivables on OTC derivatives *solely* to commercial end-users is unwarranted, on either risk-based or policy grounds. As noted above, there is ample evidence that allowing a credit risk based charge (likely to be zero or near-zero) for uncollateralized receivables on OTC derivative exposures to MDBs will not present any significant risk to MDB counterparties under the jurisdiction of any of the U.S. regulators. At a policy level, requiring a 100 percent deduction from net worth for unsecured receivables on OTC

[23] Regarding the need for consistent standards across jurisdictions, we note that Section 752 of the Dodd-Frank Act specifically provides that "[i]n order to promote effective and consistent global regulation of swaps and security-based swaps, the Commodity Futures Trading Commission, the Securities and Exchange Commission, and the prudential regulators . . . shall consult and coordinate with foreign regulatory authorities on the establishment of *consistent international standards* with respect to the regulation (including fees) of swaps, security-based swaps, swap entities, and security-based swap entities . . ." (emphasis added).

derivatives with MDBs would almost certainly lead to higher prices on such transactions with non-bank SBSDs, and impair the development effectiveness of MDBs.

Accordingly, the final rule and release should make it clear that the authorization for certain entities to use internal models and apply credit risk-based charges for uncollateralized receivables on OTC derivatives also applies to exposures to MDBs.[24]

9. MDB Employee Benefit Plans

As a distinct point, IBRD, IFC, and other members institutions of the World Bank Group sponsor employee benefit plans, including pension and medical benefit plans. Other MBDs also sponsor employee benefit plans. The pension and medical benefits plans sponsored by World Bank Group member institutions are organized as trusts, for which IBRD acts as Trustee. IBRD holds legal title to the assets of the plans, and the plans are covered by the privileges and immunities of IBRD in all respects. For clarity, the final rules should make clear that references to MDBs also include their respective employee benefit plans.

10. Conclusion

We believe that implementation to date of Title VII of the Dodd-Frank Act by the CFTC has appropriately recognized the special status of IBRD, IFC, and the other MDBs, and respectfully request the Commission to reach a similar resolution of the margin rules and capital requirements discussed above.

Sincerely,

Anne-Marie Leroy
Senior Vice President and Group General Counsel
World Bank

David Harris
Acting Vice President and General Counsel
International Finance Corporation

Attachments

[24] In previous comments to other regulators, IBRD and IFC have taken the position that there should be clear, categorical exclusions for MDBs, rather than attempting to apply terms such as "financial end user" or "commercial end user" to MDBs.

Annex 1: Privileges and Immunities of IBRD, IFC, and other MDBs

The Articles of Agreement of IBRD and IFC include a comprehensive set of privileges and immunities. For the purposes of this discussion, the most salient provisions in the Articles of Agreement of IBRD (referred to as "the Bank" in its Articles) and IFC are as follows:

- "No actions shall . . . be brought [against the Bank] by members or persons acting for or deriving claims from members." (IBRD Article VII, Section 3; equivalent provision at IFC Article VI, Section 3);
- "Property and assets of the Bank, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of seizure by executive or legislative action" (IBRD Article VII, Section 4; equivalent provision at IFC Article VI, Section 4);
- "The archives of the Bank shall be inviolable" (IBRD Article VII, Section 5; equivalent provision at IFC Article VI, Section 5); and
- "To the extent necessary to carry out the operations provided for in this Agreement and subject to the provisions of this Agreement, all property and assets of the Bank shall be free from restrictions, *regulations*, controls and moratoria *of any nature*" (IBRD Article VII, Section 6 (emphasis added); equivalent provision at IFC Article VI, Section 6).

In addition to embodying these privileges and immunities in the international legal agreements that created IBRD, IFC, and the other MDBs, all member governments agreed to accept and implement these provisions in domestic law. For example, IBRD Article VII, Section 10 provides that "[e]ach member shall take such action as is necessary in its own territories for the purpose of making effective in terms of its own law the principles set forth in this Article and shall inform the Bank of the detailed action which it has taken". IFC Article VI, Section 10 is substantively identical. The United States fulfilled its obligations in respect of IBRD and IFC as follows:

- The Bretton Woods Agreements Act provides that: "the provisions of . . . article VII, sections 2 to 9, both inclusive, of the Articles of Agreement of the Bank, shall have full force and effect in the United States and its Territories and possessions upon acceptance of membership by the United States in, and the establishment of . . . the Bank . . ." (22 U.S.C. §286h)
- The International Finance Corporation Act provides that: "[t]he provisions of . . . article VI, sections 2-9, both inclusive, of the Articles of Agreement of the Corporation shall have full force and effect in the United States and its Territories and possessions upon acceptance of membership by the United States in, and the establishment of . . . the Corporation." (22 U.S.C. §282g)

In addition, the United States has adopted the International Organizations and Immunities Act (22 U.S.C. §288) and the Foreign Sovereign Immunities Act (28 U.S.C. §1602), both of which grant additional protections to IBRD, IFC, and other MDBs.

The organizational documents and charters of the other MDBs contain equivalent privileges and immunities, and the United States has taken appropriate actions to implement its international obligations in domestic law in respect of the other MDBs.[25]

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[25] *See, e.g.*, 22 U.S.C. §283g (Inter-American Development Bank Act), 22 U.S.C. §283hh (Inter-American Investment Corporation Act), 22 U.S.C. §284g (International Development Association Act), 22 U.S.C. §285g (Asian Development Bank Act), 22 U.S.C. §290g-7 (African Development Fund), 22 U.S.C. §290*i*-8 (African Development Bank Act), 22 U.S.C. §290*k*-10 (Multilateral Investment Guarantee Agency Act), and 22 U.S.C. §290*l*-6 (European Bank for Reconstruction and Development Act).

While the above discussion focuses on the steps the United States has taken to implement its international legal obligations in respect of MDBs, we note that the obligations on all other member countries are identical, and that members have provided evidence of the steps they have taken to implement such provisions in their own territories as part of their membership obligations.

The purpose of these privileges and immunities is to avoid subjecting international organizations to multiple, potentially conflicting requirements imposed by national regulators – not to free MDBs from official oversight. To the contrary, IBRD and IFC have resident Boards, with all members appointed or elected by our sovereign shareholders. The resident Boards (and the Audit Committee thereof) have in-depth familiarity with, and oversight authority over, IBRD's and IFC's financial operations. Among other responsibilities, the Boards authorize all categories of derivatives used by IBRD and IFC, and receive regular reports on treasury and risk management operations. While the Boards of MDBs are not acting as regulators, they are all concerned with the financial health and sustainability of their respective institutions, and take risk management issues seriously.

Annex 2: Use of Derivatives by Multilateral Development Banks (MDBs)[26]

MDBs use over-the-counter (OTC) derivatives to manage their exposure to fluctuations in interest and currency rates, to reduce funding costs of their borrowing activities, to control risk and improve return in their reserves portfolios, and to provide risk management solutions for clients. We do not use derivatives for speculation.

MDBs use derivatives in connection with their liabilities to diversify funding sources and offer new debt products to investors. Generally, MDBs swap new funding into the main currency(ies) of denomination and interest rate bases of their emerging market loan assets to minimize currency and interest rate risks in their balance sheets. Conversion to other currencies or into fixed-rate funding is carried out subsequently, also through swaps, in accordance with clients' choices of loan terms. MDBs also use interest rate swaps and currency swaps for asset-liability management purposes to match the pool of liabilities as closely as possible to the interest rate and currency characteristics of liquid assets and loans.

In addition to activity for their own accounts, MDBs facilitate access to hedging tools for their clients and other international development institutions to help meet risk management needs.[27] Provision of instruments such as currency swaps (including into clients' local currencies) and interest rate swaps, caps and collars assists clients in managing interest rate and currency risks, while less common tools such as drought risk contracts have helped with more fundamental environmental and development issues. MDBs fully offset the exposure they create providing these services by hedging them in the derivatives market.

Customized derivatives are an important part of MDBs' development banking operations. These tools allow MDBs to transform the cashflows of their loans to meet changing clients' risk management needs. Clients can eliminate foreign exchange risk by hedging cashflows into their local currency, and eliminate debt service fluctuations by fixing the interest rates on their loans.

MDBs have the capacity to effectively manage OTC derivatives operations, including transaction valuation tools and collateral management operations. All MDBs control the credit exposures on swaps through specific credit-rating requirements for counterparties and other credit assessment tools used by independent credit risk units. MDBs also manage risk through netting, collateralization and other arrangements in the legal agreements governing derivatives transactions.

MDBs have robust capital structures and backing from sovereign shareholders. MDBs are among the safest counterparties in the markets, as recognized by the low risk weightings assigned to transactions with MDBs by banking regulators under the Basel II framework and the high ratings assigned by credit rating agencies. While MDBs are an important part of the international financial system, the aggregate volume of derivatives transactions involving MDBs are not so large as to create systemic risk in the market.

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[26] The information contained herein pertains to the following MDBs that are active users of the international capital markets. Besides the IBRD and the IFC, these are: African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, and Inter-American Development Bank.

[27] For example, at present IBRD intermediates currency and interest rate hedging tools for two other international development institutions: the International Finance Facility for Immunisation (IFFIm) and the International Development Association (IDA), another member of the World Bank Group. In both cases, IBRD's derivatives intermediation helps to ensure that the value of multi-year pledges by donor governments in various currencies are insulated from foreign exchange movements, so that IFFIm and IDA can plan multiyear vaccine purchase and development projects, respectively, all for the benefit of the poorest countries.

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August 21, 2013

By Electronic Filing

Elizabeth M. Murphy, Secretary,
Securities and Exchange Commission,
100 F Street NE.,
Washington, DC 20549-1090.

Re: Release No. 34-69490
File Numbers S7-02-13, S7-34-10 and S7-40-11

Dear Mrs. Murphy:

We are submitting these comments as a supplement to those of the International Bank for Reconstruction and Development (generally known as the "World Bank") and the International Finance Corporation ("IFC") in response to the Securities and Exchange Commission's ("SEC") request for comments on its proposed rules and interpretive guidance to address the application of the provisions of the Securities Exchange Act of 1934 ("Exchange Act") that were added by Subtitle B of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "DFA") to cross-border security-based swap activities, as set forth in the above release (the "Release"). These comments, like the World Bank and IFC's comments, apply to the other multilateral development institutions in which the United States is a member and which are listed on Schedule A hereto (collectively with the World Bank and IFC, the "MDBs"), and are being submitted (a) to reiterate their and our concern that the SEC, in its proposals of regulations under DFA, has not fully addressed the potential breach of the MDBs' privileges and immunities posed by certain of those proposed regulations and (b) to explain that their affiliates are also covered by those privileges and immunities, as well as to respond to the request set forth in footnote 301 of the Release for comments with respect to affiliates of the international organizations specifically excluded from the definition of "U.S. person" in the proposed rules.

I. BACKGROUND

At the request of the World Bank and IFC, we rendered an opinion to them, dated October 5, 2011 (the "Opinion"), to the effect that the application to the

World Bank and IFC and the derivatives transactions to which they are a party ("swaps") of the regulations proposed or adopted by the Commodity Futures Trading Commission ("CFTC") implementing Title VII of the Dodd-Frank Act (17 C.F.R. Parts 1, 23, 41, 190, 240) (the "Regulations") would violate the privileges and immunities provided to the World Bank and IFC by their respective Articles of Agreement (the "Articles") and implemented as U.S. domestic law by the Bretton Woods Agreements Act in 1945 (22 U.S.C. § 286 (2006)) and the International Finance Corporation Act in 1955 (22 U.S.C. § 282 (2006)) (the "Implementing Legislation"), thus constituting a breach by the United States of its international law obligations contained in the Articles and a violation of the domestic law of the United States established by the Implementing Legislation. Because we understood that the World Bank and IFC did not engage in "security-based swaps", our opinion only addressed regulation by the CFTC, but we added that were the World Bank or IFC to engage in "security-based swaps", our conclusions would also apply to the counterpart "security-based swaps" regulations of the SEC. The Opinion did not address the application of the anti-fraud provisions of any laws or regulations administered by the CFTC or the SEC.

By letter dated October 5, 2011, the World Bank submitted the Opinion to the CFTC and SEC on behalf of itself, IFC and the other MBDs.[1] Although the Opinion was addressed to the World Bank and IFC, it would apply equally to the other MDBs, which have substantially identical privileges and immunities in their respective Articles of Agreement (or equivalent) that have been similarly enacted into domestic U.S. law by legislation similar to the Implementing Legislation.[2]

In Release No. 34-66868 (File No. S7-39-10), 77 Fed. Reg. 30596 (May 23, 2012) (the "Definitions Release"), the CFTC and the SEC adopted new rules and interpretive guidance under the Commodity Exchange Act ("CEA") and the Exchange Act to further define the terms "swap dealer" ("SD"), "security-based swap dealer" ("SBSD"), "major swap participant" ("MSP") and "major security-based swap participant" ("MSBSP"). In the Definitions Release, the CFTC stated that it did not believe that foreign governments, foreign central banks and international financial institutions (defined by the CFTC to include the MDBs) should be required to register as SDs or MSPs.[3] In reaching its decision, the CFTC noted that "foreign entities are not

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1 The Opinion and the World Bank cover letter can be found in the CFTC file of comments on the joint CFTC-SEC release entitled "Further Definition of 'Swap Dealer,' 'Security-Based Swap Dealer,' 'Major Swap Participant,' 'Major Security-Based Swap Participant' and 'Eligible Contract Participant'," 75 FR 80174, at http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=48505.

2 A list of the MDBs, together with the Articles of their Articles of Agreement containing their privileges and immunities and the citation for their Implementing Legislation, is set forth in Schedule A hereto.

3 Definitions Release in text accompanying footnotes 1177-1185. Footnote 1181 indicated that the SEC would address issues related to the application of the MSBSP

necessarily immune from U.S. jurisdiction for commercial activities undertaken with U.S. counterparties or in U.S. markets", citing the Foreign Sovereign Immunities Act, 28 U.S.C. 1602 ("FSIA"), exemption of commercial transactions from sovereign immunity, and therefore, "a per se exclusion for foreign entities from the CEA's [MSP] or [SD] definition . . . is inappropriate." On the other hand, the CFTC pointed out that the "sovereign or international status" of, among others, foreign financial institutions (such as the MDBs) "is relevant in determining whether such entities are subject to registration and regulation as" an MSP or an SD and noted that "[t]here is nothing in the text or history of the swap-related provisions of Title VII to establish that Congress intended to deviate from the traditions of the international system by . . . requiring" that, among others, foreign financial institutions (such as the MDBs) register as SDs or MSPs "and be regulated as such". The Definitions Release cited the Supreme Court's reliance in *F. Hoffman-LaRoche, Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164 (2004), on the "Charming Betsy" canon from *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208 (1804) ("[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains"), also cited by us in the Opinion.

After reviewing a draft of the Definitions Release prior to its publication in the Federal Register, by a letter dated May 17, 2012 (a copy of which is attached for background), the General Counsels of the World Bank and IFC, with our strong concurrence, wrote to the CFTC and the SEC, pointing out the analytical errors in the explanation of the CFTC's no-registration conclusion, insofar as that conclusion applied to the MDBs. The errors pointed out by the General Counsels were that:

1. The statement in the text accompanying footnote 1182 in the Definitions Release with respect to foreign entities not necessarily being immune from U.S. jurisdiction for commercial activities did not apply to the MDBs, because the immunity of the MDBs is not derived from the FSIA but is specifically provided for in their respective Articles of Agreement, and thus differs from the sovereign immunity provided for in the FSIA in the following important ways:

    a. The MDBs' Articles of Agreement are international agreements binding on the United States and have been enacted into U.S. domestic law.

    b. The MDBs' Articles of Agreement not only provide immunity from suits by their Member states[4] (and persons acting on their behalf), they also provide immunity from Member state regulation.

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definition to non-U.S. entities as part of a separate release on the application of Title VII to non-U.S. persons.

[4] The Members of each MDB are the sovereign states, including the United States, that are parties to their Articles of Agreement, an international agreement. They are referred to herein as "Members".

c. The immunities of the MDBs are not affected by whether they engage in commercial activities (which they do engage in).

2. The summary of holdings in the three cases cited in footnote 1182 of the Definitions Release was not correct and those cases did not support the conclusion in the text accompanying footnote 1182 with respect to foreign entities not necessarily being immune from U.S. jurisdiction for commercial activities, particularly if applied to the MDBs. Those cases dealt with the MDBs' immunity from suits by private parties and did not deal with their immunity from suits by Member states or their regulatory immunity.[5]

In its subsequent rule-making entitled "End-User Exception to the Clearing Requirement for Swaps" (77 Fed. Reg. 42,560 (July 19, 2012)) (the "Clearing Release"), the CFTC reached the same conclusion as it did in the Definitions Release and concluded that international financial institutions (including the MDBs) should not be subject to the clearing requirement set forth in Section 2(h)(l) of the CEA. In doing so, the CFTC specifically acknowledged that "international financial institutions operate with the benefit of certain privileges and immunities under U.S. law", and are thus entitled to the benefit of the same canons of statutory interpretation applicable to "the legitimate sovereign interests of other nations". In reaching its conclusion not to subject the international financial institutions to the clearing requirements of the CEA, the CFTC again relied on the "Charming Betsy" canon.

The CFTC did not, however, exclude the international financial institutions from compliance with the Regulations and the CEA in transactions with counterparties that are themselves subject to the CFTC's regulations and the CEA, citing in particular the recordkeeping and reporting requirements. The CFTC did not discuss the fact that counterparties that are themselves subject to the CFTC's regulations and the CEA would be obligated to require the international financial institutions to post collateral to secure their obligations (the "margin requirement").

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[5] The three cases cited in footnote 1182 and their holdings are: *Mendaro* v. *World Bank*, 717 F.2d 610 (DC Cir. 1983)(the World Bank's "articles waive [its] immunity from actions arising out of [its] *external* relations with its debtors and creditors", but "a waiver of immunity to suits arising out of [its] *internal* operations, such as its relationship with its own employees, would contravene the express language of" its Articles of Agreement (emphasis in original)); *Osseiron* v. *International Financial Corp.*, 552 F.3d 836 (DC Cir. 2009) (following *Mendaro*, no immunity from suits based on "commercial transactions with the outside world", because such immunity "can hinder an organization's ability to operate in the marketplace"); and *Vila* v. *Inter-American Investment Corp.*, 570 F.3d 274 (DC Cir. 2009) (following *Mendaro* and *Osseiron*, no immunity from suit by independent consultant for unjust enrichment).

In a letter dated September 14, 2012 commenting on the CFTC's proposed regulations entitled "Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants" (76 Fed. Reg. 23732 (April 28, 2011)) (the "CFTC Margin Release Comment Letter"), the General Counsels of the World Bank and IFC objected to requiring the MDBs to post margin, pointing out (in reliance on the Opinion) that "[r]egulation of non-cleared swap transactions between MDBs and swap dealers or major swap participants would amount to regulation of MDBs, and would be inconsistent with the privileges and immunities of" of the MDBs.[6] The provisions of the Opinion relied on by the General Counsels are set forth below under "Summary of the Opinion".[7]

The CFTC Margin Release Comment Letter went on to point out that:

1. Subjecting the MDBs to the margin requirements would be inconsistent with the CFTC's statutory mandate "to adopt capital and margin requirements that (1) Help ensure the safety and soundness of the [SD or MSP] registrant; and (2) are appropriate for the risk associated with the uncleared swaps" held by SDs[8] and MSPs and would serve no policy purpose, given the MDBs' credit-worthiness and the fact that they use swaps only for risk management purposes and not for speculation, citing "a clear consensus among credit rating agencies, capital markets participants, and regulatory capital standard setters that exposures to MDBs pose no serious risks".

2. Imposing margin requirements on MDBs would impair the development effectiveness of MDBs, by increasing costs, limiting lending and investment operations, diverting the use of scarce capital, and potentially affecting concessional aid to the poorest of the poor.

3. Imposing margin requirements on MDBs would create international comity concerns, citing the concern expressed by the CFTC in the Clearing Release.[9]

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[6] The CFTC Margin Release Comment Letter is on file with the CFTC at http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58958.

[7] In the CFTC Margin Release Comment Letter, the General Counsels noted in footnote 5 that the MDBs "have no objection to reporting by our commercial counterparties of swap transactions with our institutions". (Emphasis added.) The reference to "commercial counterparties" was to counterparties which are themselves subject to the CFTC's regulations and the CEA.

[8] See 76 Fed. Reg. at 23733 (capitalization in original).

[9] The CFTC Margin Release Comment Letter pointed out that comity is not generally an issue in the case of the MDBs, because all MDB Members are similarly obligated as a matter of international law to respect the privileges and immunities of the MDBs.

The CFTC Margin Release Comment Letter also urged the CFTC to exclude the MDBs (and related entities, such as the World Bank's employee benefit plans) from the definition of "financial entity", rather than having to address every issue, such as reporting, that will otherwise arise, and to exclude the MDBs from the definition of "U.S. person" for all purposes of Title VII, in order to avoid the inadvertent regulation of transactions where the counterparty is a non-regulated, non-U.S. person (see the further discussion of this issue in Paragraph III.4 below under "Comments on the Proposed Rule").

On February 22, 2013, the General Counsel of the World Bank and the Acting General Counsel of IFC submitted a letter to the SEC commenting on its release entitled "Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker Dealers" (77 Fed. Reg. 70,214) (November 23, 2012) (the "SEC Margin Release Comment Letter").[10] The SEC Margin Release Comment Letter was substantively the same as the CFTC Margin Release Comment Letter, adding the following:

- Subjecting the MDBs to the SEC's margin requirements, as in the case of the CFTC's counterpart rules, would be inconsistent with what the SEC has described as its statutory mandate and articulated as the policy goals of the proposed rules (to "help ensure the safety and soundness" of the SBSDs and the MSBSPs and "be

[10] The SEC Margin Release Comment Letter is on file with the SEC at http://www.sec.gov/comments/s7-08-12/s70812.shtml#comments. The World Bank and IFC also filed a comment with the Bank for International Settlements' Basel Committee on Banking Supervision ("BCBS") and the Board of the International Organization of Securities Commissions' ("IOSCO") Working Group on Margining Requirements on the Consultative Document on Margin Requirements for Non-Centrally Cleared Derivatives on September 28, 2012 (the letter can be found at http://www.bis.org/publ/bcbs226/comments.htm). In February 2013, BCBS and IOSCO issued a "near-final policy framework that establishes minimum standards for margin requirements for non-centrally cleared derivatives", which supported excluding the MDBs from the requirements to collect or post margin. Members of the Working Group on Margining Requirements include Thomas McGowan of the SEC, John Lawton of the CFTC, Sean Campbell of the Board of Governors of the Federal Reserve System, Mari Baca of the Federal Reserve Bank of New York, Bobby Bean of the Federal Deposit Insurance Corporation, Kurt Wilhelm of the Office of the Comptroller of the Currency, and is co-chaired by Michael Gibson of the Board of Governors of the Federal Reserve System. On November 26, 2012, the World Bank and IFC filed a comment letter with the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Federal Housing Agency (collectively, the "Prudential Regulators") regarding their proposed rule entitled "Margin and Capital Requirements for Covered Swap Entities" (the letter can be found at http://www.federalreserve.gov/apps/foia/ViewAllComments).

appropriate for the risk associated with non-cleared security-based swaps held" by an SBSD or MSBSP).

- Evidence supporting the MDBs' position can be found in the determinations of several of the "prudential regulators" identified in the SEC Margin Release Comment Letter in implementing capital requirements for transactions between MDBs and entities subject to their prudential regulation.
- Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC Derivatives, Central Counterparties and Trade Repositories (also known as "EMIR") has addressed the issue of margin requirements on non-cleared swaps from a European perspective. EMIR exempts, among others, the MDBs.

II. SUMMARY OF THE OPINION

The Opinion concluded that the application of the Regulations to the World Bank and IFC (which we refer to in the Opinion and this Summary as the "Organizations") and the swaps transactions to which they are a party would violate the privileges and immunities provided to the Organizations by their respective Articles and implemented as U.S. domestic law by the Implementing Legislation, thus constituting a breach by the United States of its international law obligations contained in the Articles and a violation of the domestic law of the United States established by the Implementing Legislation.

Following is a summary of how the Opinion reached its conclusions:

1. The Basis of the Organizations' Privileges and Immunities

a) *The Articles of Agreement and the Implementing Legislation.* Article VII of the World Bank Articles of Agreement and Article VI of the IFC Articles of Agreement include the following privileges and immunities: (i) immunity from suit by or on behalf of Member states (Section 3 of Articles VII and VI) ("immunity from Members' suits"), (ii) immunity from attachment prior to entry of a final judgment (Section 3) ("attachment immunity"), (iii) immunity of their property and assets from "search, requisition, confiscation, expropriation or seizure *by executive or legislative action*" (Section 4) ("immunity from seizure"), (iv) inviolability of their archives (Section 5) ("archival immunity"), and (v) "to the extent necessary to carry out the operations [of the Organizations as] provided for in" their respective Articles of Agreement, freedom of their property and assets from "*restrictions*, *regulations*, *controls* and moratoria of any nature" (Section 6) ("regulatory immunity") (emphasis added). The express purpose of the privileges and immunities is "to enable the [Organizations] to fulfill the functions with which [they are] entrusted. . . ." (Section 1 of World Bank Article VII and IFC Article VI.)

The Articles of Agreement obligate all Member governments to accept and implement the privileges and immunities espoused in the Articles of Agreement into domestic law (Section 10 of World Bank Article VII and IFC Article VI). The United

States executed these obligations by passing the Implementing Legislation, which expressly provides that the privileges and immunities set forth in the Articles of Agreement have "full force and effect in the United States and its Territories and possessions" (22 U.S.C. § 286(h) (2006); 22 U.S.C. § 282(g) (2006)).

b) *The International Organizations Immunity Act*. The Opinion also described the International Organizations Immunity Act, 22 U.S.C. §288a ("IOIA"), which provides that the property and assets of international organizations designated by the President of the United States "shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments" and "shall be immune from search" and "confiscation" (22 U.S.C. §288a(b), (c)). It also provides that the archives of such organizations are inviolable. Id.[11]

While the primary source of the Organizations' privileges and immunities are their Articles of Agreement and the related Implementing Legislation, the IOIA does supplement and reinforce certain of the privileges and immunities accorded to the Organizations under their Articles of Agreement and the Implementing Legislation,[12] and interpretations of the IOIA are instructive in understanding the privileges and immunities accorded by the Articles of Agreement. The Opinion notes another important difference between the Articles/Implementing Legislation and the IOIA immunities is that the latter may be denied by Presidential action, but the President does not have similar authority under the Articles of Agreement and the Implementing Legislation.[13]

c) *Purposes of the Privileges and Immunities*

The Opinion then outlined the premises on which the Organizations' immunities – and indeed, the Articles of Agreement as a whole – are based: (i) some measure of immunity from the legislation and application of individual sovereign rules is necessary if the Organizations are to effectively operate in an international environment and fulfill their development missions and (ii) the Articles of Agreement create a single

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[11] The Organizations have been designated by the President as enjoying the provisions of the IOIA (Exec. Order No. 9751, 3 C.F.R. 558 (1943-1948); Exec. Order No. 10,680, 21 Fed. Reg. 7,647 (Oct. 2, 1956)).

[12] One instance where the IOIA grant of immunity is, on its face, broader than the Articles' grant of immunity is IOIA's immunity from judicial process. The *Mendaro* case referred to in footnote 5 and in Paragraph II.1(c) below, however, held that the World Bank's Articles waive immunity from "actions arising out of [its] external relations with its debtors and creditors". 717 F.2d at 618. (Emphasis in original.)

[13] This is one of the more significant differences between the immunities provided by the IOIA and immunities provided by the MDBs' Articles. The IOIA immunities may be denied by the President, but because the Articles have been implemented into U.S. domestic law, the Articles' immunities may be denied or limited only by an Act of Congress.

collective governance system through which the sovereign Members of the Organizations control the Organizations and through which appropriate rules and practices, such as financial controls, employment rules and financial disclosure practices, are imposed by the Members. As the largest shareholder and capital contributor of the Organizations, the United States plays a very important role within this structure.

Consistent with these premises, the Organizations have functioned for decades free from national regulatory regimes. The Opinion cited several occasions on which the United States has confirmed that the Organizations are not subject to U.S. financial regulations, such as the securities of the Organizations not being subject to the provisions of the Securities Act of 1933 ("Securities Act") and the Exchange Act. The Opinion also noted examples where the European Commission and other European governmental bodies have similarly exempted the Organizations from their regulations.

The Opinion noted that although there are relatively few court decisions interpreting the scope of the privileges and immunities of international organizations, and no case had been found that is directly on point with the facts and circumstances under consideration, the privileges and immunities of international organizations have been considered by courts and the executive branch in other regulatory contexts. The Opinion reviewed these authorities, including *Mendaro* v. *World Bank* (see footnote 5), which, as indicated above in the text accompanying footnote 5, was incorrectly summarized by the CFTC and the SEC in the Definitions Release. Perhaps the best summary of what these authorities hold is found in *Broadbent* v. *OAS*, 628 F.2d 27 (D.C. Cir. 1976), where the court, in finding immunity from suit on an employment contract, said: "[t]he United States has accepted without qualification the principles that international organizations must be free to perform their functions and *that no member state may take action to hinder the organization*. . . . Undercutting uniformity in the application of staff rules or regulations would undermine the ability of the organization to function effectively." Id. at 34-35. (Emphasis added.)

2. The Dodd-Frank Act Does Not Repeal or Provide Authority for the Curtailment of the Organizations' Privileges and Immunities

The Organizations' privileges and immunities are established by their Articles of Agreement, which are international agreements to which the United States is a party. They have been made part of the domestic law of the United States by an act of Congress. Given the relevant canons of statutory interpretation and the absence of any indication that Congress intended otherwise, the Dodd-Frank Act must not be interpreted in a way that would result in the violation of the domestic law of the United States established by the Implementing Legislation or in the violation by the United States of its international law obligations contained in the Organizations' Articles of Agreement.

The Opinion relied on two long-recognized canons of statutory interpretation in reaching this conclusion: *generalia specialibus non derogant* ("the general do not derogate from the specific") and the "Charming Betsy canon".[14]

3. The Organizations' Purposes and Uses of Derivatives

Perhaps the most important underlying factors on which the Opinion is based are the Organizations' purposes and the purposes and manners in which they use derivatives.

The Organizations exist to promote economic development in their Member countries. Envisioned at the Bretton Woods Conference in 1944 and established in 1945, the focus of the World Bank is on providing financing to its sovereign Member countries. In 1956, the IFC was established with the stated goal of furthering economic development in the private sector through investments and other activities in the developing world. To realize their objectives, the Organizations employ a number of tools, including direct lending in major and local currencies. IFC, for example, invests in equity in private sector enterprises and mobilizes capital from the private sector in order to supplement its direct investments.

The Organizations informed us that they use over-the-counter ("OTC") derivatives to hedge currency, interest rate and other market risks arising in connection with their lending, borrowing, equity management and investment operations, and to enable clients in developing countries and other official sector institutions to manage the risks to which they are exposed as a result of their activities. For example, the Organizations are able to borrow in currencies and interest bases that offer the lowest possible cost. Typically, interest rate or currency derivatives are used to hedge these liabilities into floating rate dollars, the basis on which the Organizations manage their assets. Interest rate and currency derivatives are used by the Organizations to manage their liquidity and for asset/liability management (*e.g.*, to hedge mismatches between their floating rate dollar balance sheets and lending operations conducted in both major and emerging market currencies and at fixed and floating rates of interest). In furtherance of the Organizations' development objectives, they also make hedging tools available to their sovereign and private sector clients, doing so by engaging in back-to-back principal transactions that allow the Organizations to take the credit risk of their clients and bridge the credit gap preventing their clients from obtaining direct access to hedging markets, while simultaneously hedging any associated market risk with major

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14 As indicated above, the Charming Betsy canon was similarly relied on in the Definitions Release in the text accompanying footnote 1185 in reaching the conclusion that "[t]here is nothing in the text or history of the swap-related provisions of Title VII to establish that Congress intended to deviate from the traditions of the international system by including foreign governments, foreign central banks and international financial institutions within the definitions of the terms 'swap dealer' or 'major swap participant'".

international banks and swap dealers. These risk management transactions are part of a comprehensive suite of development financing tools that, in the Organizations' view, are integral to the development operations of the Organizations, both as part of the Organizations' own tools for managing their funding, liquidity management and asset/liability management functions, and in providing needed access to financing strategies for the Organizations' sovereign and private sector clients. Indeed, the Organizations advised us that, in their opinion, without access to derivatives markets, the Organizations could not operate effectively in a multi-currency, floating rate environment as they do today. The Organizations use derivatives for such hedging purposes as part of providing financing solutions to emerging market countries and do not engage in speculative transactions.

Furthermore, the Organizations advised that they have the necessary capabilities for managing the risks associated with over-the-counter derivatives, including transaction valuation tools and collateral management operations. In addition, both Organizations have established risk management procedures that set and monitor commercial counterparty credit exposure. Notably, both Organizations currently require even highly rated major market counterparties to collateralize trades undertaken with the Organizations. They informed us that the strong practices of both Organizations have led them to be consistently rated as highly credit-worthy counterparties by credit rating agencies, and that banking regulators have consistently assigned low risk weightings to transactions with the Organizations under the Basel framework.[15]

A determination that the privileges and immunities of the Organizations do not insulate them from compliance with the provisions of the Dodd-Frank Act and the Regulations would impede the Organizations' abilities to effectively fulfill their functions by opening the door to the imposition of a multitude of national regulatory regimes on the Organizations. Regulation by several Member states would inevitably result in conflicting regulation in many respects, which would hinder their ability to realize the international development objectives of their Member governments, including the United States.

Finally, the Opinion pointed out that it is quite important to note that the Organizations are wholly owned by their sovereign shareholders; there are no equity shares held by individuals or financial institutions. Furthermore, there are no substantial bonuses or differential compensation arrangements that depend on financial performance. Thus, in their view, neither management nor staff of the Organizations has any individual or collective financial incentive to undertake undue risk.

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[15] For greater detail, see the text accompanying footnotes 16-18 in the SEC Margin Release Comment Letter.

4. Application of the Regulations to the Organizations' Derivatives Would Violate Their Privileges and Immunities

To explain how and why the Opinion reached its conclusions, it first summarized the regulatory scheme embodied in the Regulations and then addressed how the major factors in that scheme would violate the Organizations' privileges and immunities. Although a number of those concerns have been addressed by the CFTC in the Definitions Release, its Clearing Release and, to a limited extent, in its final Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45292 (the "Final Interpretive Guidance"), we nevertheless summarize this portion of the Opinion in order to provide a clear understanding of the breadth of the privileges and immunities and the regulatory measures that violate them.

a) *The Regulatory Scheme of the Regulations*. The Opinion pointed out that there were basically two types of regulatory measures to which the Organizations and their swaps would be subject, were they to be covered by the Regulations, that would violate the Organizations' privileges and immunities – "direct regulations" and "direct regulation equivalents":

i. <u>Direct Regulation of Entities Under Title VII Based on Their Derivatives Activities ("Direct Regulation")</u>. If the Organizations were covered by the Regulations, they could be required to register as "MSPs".[16] As an MSP, each would likely be required to, among other things:

   A. Prepare and retain books and records in such manner and for such period as may be prescribed by the CFTC and submit to examinations and investigations by the CFTC;

   B. Maintain daily trading records (including records of oral and electronic communications and recording telephone calls);

   C. Post collateral as security for its swap obligations;

   D. Comply with capital requirements prescribed by the CFTC;

   E. Execute its swaps on a designated contract market or swap execution facility and clear them through a derivatives clearing organization;

   F. Conform to specific business conduct standards as adopted by the CFTC;

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[16] Given the status of the Regulations as of the date of the Opinion, particularly the definition of SD and our inability to conclude that the Organizations' activities would cause them to come within the definition of SD, the Opinion did not address the effect of their being required to register as SDs, but we noted that the measures that would be applicable would create substantially the same conflicts with the Organizations' privileges and immunities as those that would be imposed on them as MSPs.

G. Conform its swaps documentation to the standards proscribed by the CFTC; and

H. Establish other practices that would be monitored by the CFTC.

Failure to comply with these measures, if they were applicable, would, of course, subject the Organizations to enforcement action.

ii. <u>Regulation of Derivatives Entered into by the Organizations with Regulated Entities ("Direct Regulation Equivalent")</u>. Even if the Organizations were not required to register as MSPs, transactions with entities that were MSPs or SDs would nevertheless subject the Organizations to several of the Direct Regulation measures. The example cited by the Opinion that is the most troublesome is the requirement that the Organizations post collateral as security for their swap obligations. This is the substantive equivalent of the Organizations' being subjected to Direct Regulation.

b) *Why the Regulations Would Violate the Organizations' Privileges and Immunities*. The Opinion then addressed the specific regulatory measures that would be applied to the Organizations, given the status of the Regulations as of the date of the Opinion, and set forth the following reasons they would violate specific aspects of their privileges and immunities:[17]

i. The books and records requirements, as well as the CFTC's examination and investigative powers, would violate the Organizations' archival immunity. Being subject to enforcement action would violate their immunity from Members' suits, as well as their immunity from searches.

ii. The requirement that the Organizations post collateral would violate the Organizations' immunities from attachment and seizure, whether the requirement is imposed as a Direct Regulation or a Direct Regulation Equivalent measure. The Organizations' attachment immunity protects the Organizations' assets from an attachment before the entry of a final judgment. Being required to post

[17] Our conclusions set forth in the Opinion as to the scope of the privileges and immunities of the Organizations in the context of the Regulations were, and in this letter are, based on our reading of the Organizations' respective Articles of Agreement, and our understanding of the policies underlying the scope and purposes of the privileges and immunities of international organizations generally, as illustrated in applicable court decisions and regulatory actions, as discussed in Section I.C. of the Opinion. In light of the scarcity of authority, and the absence of controlling authority in this specific context, the Opinion noted that the scope of the privileges and immunities of the Organizations in this context is not entirely free from doubt. Nevertheless, as stated in the Opinion, we believe that a court, if presented with a properly pleaded and argued case, should agree with our conclusions in the Opinion and herein as to their scope.

collateral in order to enter into a transaction, particularly when there is no indication that the collateral will ever be used, is the economic equivalent of an attachment prior to a judgment having been entered. The Organizations' immunity from seizure protects the Organizations from any government's attempt to, among other things, requisition the Organizations' assets, such as by requiring that the Organizations use their assets in a prescribed manner. Likewise, requiring that the Organizations use their assets for a purpose other than for the furtherance of their development purposes is the economic equivalent of a requisition, even if it is for a limited purpose.

iii. Because the imposition of regulations by one Member state could lead to the imposition of additional, or varying or even conflicting, regulations by other Member states, we believe that any regulatory measures that, while not necessarily prohibiting essential activities, increase the costs of such activities, reduce their effectiveness, adversely affect uses of capital or encourage other Members to attempt to regulate or impose controls on the Organizations, violate the Organizations' regulatory immunity. According to the Organizations, compliance with many of the Regulations would come at a substantial cost of capital, personnel and time, causing the Organizations to divert resources intended for clients in the developing world. Alternative measures to avoid regulation, such as removing themselves from the larger marketplace and transacting wholly with other non-regulated entities or limiting their activities to jurisdictions where their activities are not regulated, limiting lending activities and discontinuing the provision of risk management tools to borrowing countries and other clients, would impede the development effectiveness of the Organizations.

5. Regulation of the Organizations or Their Swaps Is Not Necessary

The Opinion pointed out that one of the premises on which the Organizations' privileges and immunities are based is that their Articles of Agreement create a single collective governance system through which the sovereign Members of the Organizations control the Organizations and through which appropriate rules and practices are imposed by the Members. The use of derivatives by the Organizations is authorized, monitored and controlled by their sovereign Members, including the United States, in accordance with the Organizations' operative documents. Thus, not only is there no need for a country-specific layer of regulation, but if the United States were to regulate the Organizations under the Dodd-Frank Act, it would open the door to other individual Member states imposing their own regulations. This would undercut the Organizations' governance system, which is based on the participation of each Member government in the collective system as the exclusive method of governance.

The Opinion pointed out that, of course, there is nothing to prevent the Organizations from voluntarily complying with provisions of Title VII, if the Organizations conclude that such actions are financially efficient and consistent with their development mandates. In any event, the history of responsible risk management by the Organizations and the overall mission of the Organizations helps to give comfort that the Organizations are unlikely to engage in the offending practices that Title VII was intended to curtail. Furthermore, the United States and the other Member states, through their role in the Organizations' governance structures, should be able to prevent the Organizations' engagement in such practices.

With respect to Title VII's margin requirements, which the Organizations have advised us would be particularly burdensome to the Organizations, it is of note that each of the Organizations' ISDA agreements with counterparties, under which its swaps are entered into, contains a provision obligating the Organization to post collateral if its credit rating is downgraded below triple-A. (Currently, the Organizations are not required to post collateral.) Accordingly, the protections that Title VII seeks to impose in this regard are already built into the Organizations' contractual agreements. The Organizations' governance structures provide the Member governments with a vehicle for maintaining these protective measures.

6. Conclusion

The Opinion concluded that Direct Regulation and Direct Regulation Equivalent measures may not apply to the Organizations or their swap transactions, because (i) such application would be inconsistent with the Organizations' broad privileges and immunities provided in their Articles of Agreement, (ii) the United States has adopted implementing legislation giving full force to these privileges and immunities as domestic law of the United States, and (iii) such application would violate the international obligations of the United States. Moreover, nothing in the text of Title VII of the Dodd-Frank Act or its extensive legislative history suggests that the Organizations or their swaps were intended to be subject to the requirements of Title VII. We also noted the Organizations' concern that inclusion of them and their swap transactions in the regulatory structure prescribed by the Dodd-Frank Act regarding derivative transactions is unnecessary in light of the governance structures of the Organizations, and that subjecting the Organizations or their swaps to regulation would likely have substantial negative consequences for the Organizations and their clients.

III. COMMENTS ON THE RELEASE

Many of the specific regulatory measures addressed in the Opinion have been satisfactorily addressed by the various subsequent releases of the CFTC and the SEC (even though, in some cases, we would argue that the regulatory action taken was legally required by the MDBs' privileges and immunities, rather than being a question of prior practice, policy or comity). On the other hand, other measures (a) have been satisfactorily addressed by the CFTC but either the SEC has not addressed the issue or the position of the SEC is not clear or (b) have not been satisfactorily addressed by either the CFTC or the SEC. Finally, there is a category of measures that were not addressed in the Opinion, because they had not been definitively proposed as of the date of the Opinion, and raise issues under the Organizations' privileges and immunities. Following is a discussion of the different categories of regulatory measures and our comments on them:

1. Registration as SBSDs or MSBSPs

The central issue is, of course, the possibility of requiring the MDBs to register as SBSDs or MSBSPs.

The Definitions Release made it clear that the MDBs would not be required to register as SDs or MSPs, although it based this conclusion on mistaken concepts of immunity, as applied to the MDBs. As stated above, in the Opinion and in the World Bank/IFC letter attached hereto commenting on the Definitions Release (see the text at footnote 5), the exclusion of the MDBs from the registration requirements is dictated by the U.S. domestic law found in the Implementing Legislation and the United States' international law obligations found in the Articles. The MDBs' immunities are not determined by whether they are engaged in commercial activities, and they cannot be limited except by an Act of Congress.

The Release is not satisfactory with respect to SBSD and MSBSP registration:[18]

- With respect to SBSD registration, it indicates that it is unlikely that any foreign public sector financial institution ("FPSFI") engages in dealing activities sufficiently to come within the definition of foreign SBSD. Our comment is that this is not the test for whether the MDBs should be regulated as SBSDs. Rather, the test is whether such regulation would violate their privileges and immunities, thus causing the United States to violate its domestic law or its international law obligations. In our opinion, such regulation would.

- With respect to MSBSP status, the Release does not deal with the issue, but instead asks for additional information on the FPSFIs' security-based swap activities. We understand that the MDBs do not currently engage in security-based swap transactions at the level that would trigger MSBSP registration by a non-immune entity, but were they to do so, that information would not be relevant as to whether they should be regulated, but rather the question is whether such regulation would violate their privileges and immunities. Again, in our opinion, it would.

2. Other Direct Regulations

For the most part, the Direct Regulation measures that would flow from the SEC's regulations under the Exchange Act (a) would be addressed by not requiring the MDBs to register as SBSDs or MSBSPs or (b) are addressed by the Release.

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18 Registration, if required, would, of course be as "foreign" SBSDs and MSBSPs, since the Release excludes the MDBs from the definition of "U.S. person".

3. Direct Regulation Equivalents

In the Opinion, we defined as Direct Regulation Equivalents a category of Regulations that, while imposed on the MDBs counterparties, are in many ways the substantive equivalents of the MDBs being subjected to Direct Regulation.

The Direct Regulation Equivalent that is the most egregious is the requirement that some of the MDBs' counterparties collect margin from the MDBs. As noted by the World Bank and IFC in their letters commenting on the various regulatory proposals and cited in the Opinion, subjecting them to the margin requirement and requiring them to post collateral to secure their swap obligations would impair their development efforts. As noted above under Background, the World Bank and IFC's CFTC and SEC Margin Release Comment Letters also point out, respectively, that the imposition of margin obligations on the MDBs is unnecessary and would be inconsistent with the CFTC's statutory mandate "to adopt capital and margin requirements that . . . [h]elp ensure the safety and soundness of the [SD or MSP] registrant" and the SEC's statutory mandate and policy goals to "help ensure the safety and soundness" of the SBSDs and the MSBSPs and "be appropriate for the risk associated with non-cleared security-based swaps held" by an SBSD or MSBSP, because given the credit-worthiness of the MDBs, obtaining collateral from them does not enhance the safety and soundness of SD, MSP, SBSD or MSBSP registrants. The Opinion's conclusion that requiring the MDBs to post collateral would violate their immunities from attachment and seizure, whether the requirement is imposed as a Direct Regulation or a Direct Regulation Equivalent measure, is summarized above under Paragraph II.4(b).

Other Direct Regulation Equivalent measures could also violate the MDBs' privileges and immunities. So far, the others that have been proposed to date appear to be the clearing, documentation and reporting requirements:

- With respect to clearing, in the Clearing Release the CFTC correctly reached the conclusion that swap transactions with the MDBs should not be subject to the mandatory clearing provisions of Section 2(h)(1) of the CEA. The SEC's counterpart release[19] did not take the same approach. As a result, provided the MDBs are not required to register as foreign SBSDs or foreign MSBSPs and the definition of "transaction conducted within the United States" is changed as suggested in sub-Paragraph 4 below, the MDBs would themselves not be subject to the mandatory clearing provisions of the Exchange Act, but transactions with regulated counterparties would. We strongly urge the SEC to follow the CFTC and exclude security-based swap transactions with the MDBs from the Exchange Act's mandatory clearing provisions.
- The MDBs have not made the case that the imposition of the documentation and reporting requirements directly on their regulated counterparties and only indirectly

[19] The SEC's Clearing Procedures Adopting Release, 77 Fed. Reg. 41602.

on the MDBs will interfere with or hinder their development efforts by, for example, increasing the costs of any essential activities, reducing their effectiveness, adversely affecting uses of capital or encouraging other Members to attempt to regulate or impose controls on the MDBs that would violate their regulatory and other immunities. As a result, we have not addressed whether such imposition would violate the MDBs' privileges and immunities.

4. Measures Not Previously Addressed

The Release proposes measures that would or could impose obligations on non-U.S. persons where the only jurisdictional nexus is the fact that they engage in transactions with the MDBs. We believe that this result is an indirect form of regulation of the operations of the MDBs that is inconsistent with their privileges and immunities. These measures are:

- Including transactions with MDBs in the determination of whether a person engaged in swap transactions exceeds the *de minimis* threshold for determining whether that person is a foreign SBSD or the threshold for a foreign MSBSP. The MDBs are excluded from the definition of "U.S. person",[20] but because some MDBs, particularly the World Bank and the IFC, given current practices, would conduct a security-based swap transaction from their offices in Washington, D.C., the transaction would likely be "solicited, negotiated, executed, or booked within the United States" on their behalf (and on behalf of their counterparty), thus causing the transaction to come within the definition of a "transaction conducted within the United States" and therefore would have to be included in the determination of the counterparty's status. Where the counterparty would not otherwise be within the scope of the application of Title VII, this is tantamount to regulation of the operations of the World Bank and the IFC, in violation of their privileges and immunities. This could be remedied by simply excluding the solicitation, negotiation, execution or booking of a security-based swap with an MDB from the definition of "transaction conducted within the United States".[21]

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[20] Although it is doubtful that there would be any doubt as to which MDBs are excluded from the definition of U.S. person, a degree of clarity would be added by listing all of the MDBs (as was done by the CFTC in the Definitions Release and the Clearing Release), rather than making them rely on the phrase "other similar international organizations".

[21] We note that in determining whether a U.S. person engaged in swap transactions exceeds the *de minimis* threshold for determining whether that person is an SD or an SBSD or the threshold for an MSP or an MSBSP, transactions with MDBs would be included. We do not believe that the same issue arises under the MDBs' privileges and immunities, because the SEC would have jurisdiction to regulate that U.S. person for other reasons and that U.S. person would not be regulated simply because it does business with the MDBs.

- Requiring that a non-registered, non-U.S. counterparty to a transaction with an MDB report that transaction. The problem would also be remedied by the change suggested in the preceding bullet point—simply excluding the solicitation, negotiation, execution or booking of a security-based swap with an MDB from the definition of "transaction conducted within the United States".

  Reporting by an entity that does not regularly engage in swap or security-based swap transactions could be quite burdensome and could discourage non-U.S. persons not otherwise subject to such requirements from doing business with the MDBs, thereby interfering with their fulfillment of their development purposes.[22]

IV. SPECIFIC COMMENTS ON THE TREATMENT OF AFFILIATES

The Release asks for comments on the question whether affiliates of the MDBs should be treated as non-U.S. persons under proposed Rule 3a71-3(a)(7) under the Exchange Act. We believe that the short answer to that question is "yes", but not so much for the limited purpose for which the MDBs are excluded from the definition of U.S. person. For the reasons set forth below, we believe that an affiliate controlled by an MDB[23] should be treated the same as the controlling MDB under the MDB's privileges and immunities, provided the controlled affiliate meets the criteria set forth below (a controlled affiliate meeting such criteria is referred to as a "Controlled Affiliate").

1. Property, Assets and Operations of MDBs Are Immune From Regulation, Whether Conducted Directly or Through Controlled Affiliates

Regulating a properly formed and governed Controlled Affiliate of an MDB would violate the MDB's privileges and immunities to the same extent that regulation of the same operations conducted directly by the MDB would. In our opinion, an MDB's privileges and immunities, whether explicitly stated or not, apply to its property and assets, as well as its operations, whether or not its property or assets are

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[22] In the text accompanying footnote 974 of Release, the SEC summarizes the World Bank/IFC position (citing their letter defined in the Release as "World Bank letter II") with respect to reporting by counterparties as "the World Bank believed that the definition of "swap" could be qualified by a requirement that counterparties would treat such transactions as swaps solely for reporting purposes." A careful reading of World Bank letter II indicates that the comment was made in the context of counterparties which had their own reporting obligations. A similar comment can be made with respect to the summary of World Bank letter II in footnote 976.

[23] It should be noted that the question only arises in respect of "controlled affiliates", because an affiliate under common control with an MDB would most likely itself be an MDB, and the MDBs do not have any controlling affiliates, because they are controlled by their sovereign Members under the collective governance structures.

owned directly or through a Controlled Affiliate and whether or not its operations are conducted directly by it or through a Controlled Affiliate.

The foregoing is based on our reading of two sections of the MDBs' Articles of Agreement.

- First, as we indicate in the Opinion, summarized in Paragraph II.1(c) above, the express purpose of the privileges and immunities set forth in each MDBs' Articles, and indeed one of the two basic premises on which the privileges and immunities are based, is "[t]o enable [the MDB] to fulfill the functions with which it is entrusted . . . ."[24]
- Second, each MDB's Articles provide the MDB with regulatory immunity for the MDB's "property and assets" "[t]o the extent necessary to carry out the operations provided for in" its Articles.[25]

Thus, we do not believe that the specific reference to immunity for the MDB's "property and assets" (or those found in the provisions providing for attachment immunity and immunity from searches and seizures) is intended to imply that only property and assets directly held by the MDB, or only operations performed directly by the MDB, are immune. Rather, we believe that particularly each MDB's regulatory immunity is intended to make its operations, however conducted, immune from regulations and controls. Thus, if conducting a portion of its operations through a Controlled Affiliate facilitates the MDB's ability to fulfill its development mission, then the MDB's privileges and immunities are also accorded to the operations, property and assets of that Controlled Affiliate. Likewise, we do not believe that the drafters intended to bar Members from having access to the MDB's archives or bringing legal actions against the MDB, but nevertheless intended to give them access to records held by a Controlled Affiliate that is performing a function of the MDB or to permit them to sue such a Controlled Affiliate. The latter actions or regulation of a Controlled Affiliate could have an adverse effect on the MDB's ability to perform its functions just as serious as actions taken directly against the MDB or regulation of operations performed directly by the MDB.

Because Member government attempts to regulate an MDB's Controlled Affiliate would have the same adverse effect on the MDB's functions performed by the Controlled Affiliate as they would have if those functions were performed directly by the MDB, freedom from Member government interference is as necessary to the success of the MDB's operations conducted through a Controlled Affiliate as it is to the MDB's direct operations.

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[24] *See, e.g.*, Section 1 of Article VII of the World Bank's Articles and of Article VI of IFC's Articles.

[25] *See, e.g.*, Section 6 of Article VII of the World Bank's Articles and of Article VI of IFC's Articles.

Because the second premise of the MDBs' privileges and immunities is that their Articles of Agreement create a single collective governance system through which the sovereign Members of the Organizations control the Organizations and through which appropriate rules and practices are imposed by the Members, for an MDB's privileges and immunities to apply to a Controlled Affiliate:

- the Controlled Affiliate must be subject to the MDB's governance structure,
- all of its activities must be consistent with and in furtherance of the MDB's purpose and mission,[26]
- its governing instruments must restrict it to engaging in activities in which the MDB could itself engage and provide that it is not authorized to engage in any other activities, and
- the MDB must, of course, "control" the Controlled Affiliate, as that term is used in the securities laws.[27]

The premise of each MDBs' privileges and immunities of a single, collective governance system through which its sovereign Members control it and through which appropriate rules and practices are imposed by the Members not only dictates the conditions a Controlled Affiliate must meet, but it also explains why regulation of a Controlled Affiliate is unnecessary. Indeed, if the United States were to regulate an MDB's Controlled Affiliate, it would open the door to other individual Member states imposing their own regulations. This would undercut the MDB's governance systems, which are based on the participation of each Member government in the collective system as the exclusive method of governance.

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[26] We note that none of the MDBs' Articles specifically authorize them to form or create controlled affiliates. Therefore, the creation of a Controlled Affiliate by an MDB must be done pursuant to the "incidental powers" clause of its Articles. *See, e.g.*, Article III, §6 of IFC's Articles, giving IFC "the power . . . to exercise such other powers incidental to its business as shall be necessary or desirable in furtherance of its purposes." Thus, the purpose of the Controlled Affiliate must be "necessary or desirable" to the MDB's purpose and mission.

[27] *See, e.g.*, Rule 405 under the Securities Act (17 C.F.R. § 230.405). "The term control . . . means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."

2. The Supreme Court Holding in *Watters* v. *Wachovia Bank* Requires that the CFTC and the SEC Focus on an MDB's Controlled Affiliate's Purposes and Not on the MDB's Corporate Structure

Our conclusion that an MDB's Controlled Affiliate itself, as well as its property, assets and operations, are protected by the MDB's privileges and immunities, and therefore the Controlled Affiliate is excluded, to the same extent as the MDB, from regulation is not a surprising result, in light of the U.S. Supreme Court's decision in *Watters* v. *Wachovia Bank*, 550 U.S. 1 (2006). In that case, the Supreme Court held that a provision of the National Bank Act, 12 U.S.C. § 1 *et seq.* ("NBA"), that preempts state regulation of national banks applied to operations conducted by a national bank through a state-chartered subsidiary.

We believe that the holding in that case, together with the 1966 authorization by the Office of the Comptroller of the Currency ("OCC") of national banks to do any authorized banking operation through subsidiaries, which is the subject of that case, provides compelling support for our argument that the reading of MDBs' Articles should focus on the purpose of their privileges and immunities (*i.e.*, to permit them to fulfill their "functions to which [they are] entrusted") and not on the details of their corporate structure. Therefore, we provide a summary of the OCC action and the Court's holding.

a) *Action by the OCC.* In 1966, the Comptroller of the Currency ("CC") confirmed that a national bank could own a subsidiary "the functions or activities of which are limited to one or several of the functions or activities that a national bank is authorized to carry on." The CC reached this conclusion despite the fact that there was no explicit provision in the NBA authorizing a national bank to conduct any portion of its activities through a subsidiary. The CC found authorization for a national bank to conduct operations through a subsidiary "among 'such incidental powers' of the bank 'as shall be necessary to carry on the business of banking,' within the meaning 12 U.S.C. § 24 (7)" of the NBA.

In its release, the OCC stated: "The use of controlled subsidiary corporations provides national banks with additional options in structuring their businesses. National banks may desire to exercise such option for many reasons, including controlling operations costs, improving effectiveness of supervision, more accurate determination of profits, decentralizing management decisions or separating particular operations of the bank from other operations."

The OCC chided those who would make a distinction between a bank's conducting an authorized operation through a subsidiary rather than directly as "jaundiced" and "antediluvian". The OCC summed up its action as follows: "While zealous to maintain the standards which have been demonstrated to be essential for the continued safety of national banks, this Office believes care should be exercised not to cripple national banks or break down their activities by narrow and unreasonably strict construction of statutes which will result in unwisely limiting their usefulness in the transaction of business under modern conditions." (All of the quotations in the preceding paragraphs are taken from the OCC's August 25, 1966 release, which can be found at 31 Fed. Reg. 11459.)

b) *Watters* v. *Wachovia Bank*. The issue in *Watters* v. *Wachovia Bank* was whether the provision of the NBA that preempts state regulation of national banks applied to operations conducted through a subsidiary. In holding that it did, Justice Ginsburg summarized the 5-3 majority's decision as follows: "we hold that Wachovia's mortgage business, whether conducted by the bank itself or through the bank's operating subsidiary, is subject to OCC's superintendence, and not to the licensing, reporting, and visitorial regimes of the several States in which the subsidiary operates." (550 U.S. at 7.) (Emphasis added.)

The Michigan Banking Commissioner, who was seeking to regulate Wachovia's mortgage lending subsidiary, agreed that the application of those regulations to Wachovia would be preempted by the NBA, but argued that the subsidiary, a North Carolina corporation, was subject to multistate control, as well as the control of the OCC. In rejecting this and other arguments, Justice Ginsburg noted that OCC applies "the same controls whether banking 'activities are conducted directly or through an operating subsidiary.'" 550 U.S. at 17.

Justice Ginsburg went on to explain that "in analyzing whether state law hampers the federally permitted activities of a national bank, we have focused on the exercise of a national bank's powers, not on its corporate structure. And we have treated operating subsidiaries as equivalent to national banks with respect to powers exercised under federal law (except where federal law provides otherwise)." 550 U.S. at 18. (Citation omitted. Emphasis in original.) Explaining the Court's decision in another case upholding the OCC's determination of a bank's "incidental" authority to act as an agent in the sale of securities, Justice Ginsburg said: "It was not material that the function qualifying as within 'the business of banking' was to be carried out not by the bank itself, but by an operating subsidiary," i.e., an entity "subject to the same terms and conditions that govern the conduct of [the activity] by national banks [themselves]." 550 U.S. at 18. (Citations omitted.)

Justice Ginsburg, explaining the premise underlying federal preemption as being "[s]ecurity against significant interference by state regulators", went on to say: "[t]hat security should adhere whether the business is conducted by the bank itself or is assigned to an operating subsidiary licensed by OCC whose authority to carry on the business coincides completely with that of the bank", summarizing the conclusion from another case that "the determination whether to conduct business through operating subsidiaries or through subdivisions is 'essentially one of internal organization.'" 550 U.S. at 19.

We believe the holding in *Watters* v. *Wachovia Bank* is binding on the CFTC and the SEC in respect of the regulation of a Controlled Affiliate of an MDB as a matter of U.S. domestic law. Just as the premise underlying federal preemption of state regulation of national banks is "[s]ecurity against significant interference by state regulators", a premise of the MDBs' privileges and immunities is to protect them against hindrance by Members of the MDBs' development purposes. Just as Justice Ginsburg, "in analyzing whether state law hampers the federally permitted activities of a national bank, . . . focused on the exercise of a national bank's powers, not on its corporate structure", the CFTC and the SEC, in analyzing whether an MDB's Controlled Affiliate is entitled to the benefits of the MDB's privileges and immunities, should focus on the MDB's and the Controlled Affiliate's purposes and not on the MDB's corporate structure.

* * *

As indicated above, a Controlled Affiliate can be established by an MDB only if it is necessary or desirable for the enhancement of the MDB's ability to further its development activities. It must be limited to functions that the MDB is authorized to perform. The focus on MDBs' immunities should be on their purpose and not on their corporate structure. A "narrow and unreasonably strict construction of" an MDB's Articles will result in "unwisely limiting" the usefulness of a structure that the MDB's Board of Directors would have found to be "necessary or desirable in the furtherance of its purposes", thus impeding the MDB's ability to enhance its development potential. An MDB's ability to perform activities that its Board of Directors determines to be within the MDB's authorized powers and in furtherance of its mission should not turn on whether it engages in such activities directly or indirectly through a Controlled Affiliate.

3. Comments on the Specific Issue Raised by the Release

The specific issue with respect to affiliates of MDBs raised in footnote 301 of the release is whether they, like the MDBs, should be excluded from the definition of "U.S. person". The answer to that question, as indicated above, is yes. That issue, however, is not the key issue.

Excluding Controlled Affiliates from the definition of U.S. person (and excluding the solicitation, negotiation, execution or booking of a transaction with an MDB or a Controlled Affiliate from the definition of "transaction conducted within the United States") would avoid regulating transactions with non-U.S. persons not otherwise subject to regulation under the Exchange Act, which is necessary to avoid violating the MDBs' privileges and immunities. Excluding Controlled Affiliates from the definition of U.S. person does not, however, determine the other issues raised by the Release, particularly the issue whether the Controlled Affiliate would be required to register as a foreign SBSD or a foreign MSBSP. That issue must be addressed as well.

Not excluding an MDB's Controlled Affiliate from the definition of U.S. person would mean that the Controlled Affiliate could be required to register as an SBSD or an MSBSP and otherwise be regulated to the same extent as any U.S. person, all of which would, in our opinion, violate the privileges and immunities of the MDB.

Finally, we would note that to the extent that the definition of "U.S. person" determines the geographical scope of the SEC's Title VII rules, it is similar in purpose to the definition of "U.S. person" found in Regulation S under the Securities Act. For the same reasons that the Regulation S definition excludes affiliates of MDBs, so should the definition of U.S. person exclude Controlled Affiliates of MDBs for purposes of Title VII. Regulation S does not, of course, use the concept "transaction conducted within the United States", but in order to achieve the same result as under Regulation S, the Title VII definition of "transaction conducted within the United States" should exclude the solicitation, negotiation, execution or booking of transactions with MDBs or their Controlled Affiliates.

* * *

We appreciate the opportunity to comment on the Release. Any questions relating to these comments should be directed to Edwin D. Williamson (williamsone@sullcrom.com; (202) 956-7505).

Very truly yours,

SULLIVAN & CROMWELL LLP

(Attachment)

cc: David A. Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

SCHEDULE A		
Name	**Article/Chapter in Articles of Agreement Containing Privileges and Immunities**	**Implementing Legislation**
European Bank for Reconstruction and Development	Chapter VIII	22 U.S.C. § 290l-6
Inter-American Development Bank	Article XI	22 U.S.C. § 283g
International Development Association	Article VIII	22 U.S.C. § 284g
Multilateral Investment Guarantee Agency	Articles 43-48	22 U.S.C. § 290k-10
African Development Bank	Articles 50-59	22 U.S.C. § 290i-8
African Development Fund	Articles 41-50	22 U.S.C. § 290g-7
Asian Development Bank	Articles 49-56	22 U.S.C. § 285g
Inter-American Investment Corporation	Article VII	22 U.S.C. § 283hh

We understand that the Bank for Economic Cooperation and Development in the Middle East and North Africa has never become active, despite the signing by the United States of its Articles of Agreement in 1996 and the authorization by its Implementing Legislation for the United States to join it (22 U.S.C. § 290o). Accordingly, it is not included in the MDBs for the purposes of this letter.

The World Bank
INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT
INTERNATIONAL DEVELOPMENT ASSOCIATION

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May 17, 2012

David A. Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-7010

Re: Title VII of the Dodd-Frank Act
– Proposed Release Regarding Further Definition of:
"Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant,"
"Major Security-Based Swap Participant," and "Eligible Contract Participant"
(the "Proposed Release")

Dear Mr. Stawick and Ms. Murphy:

We would like to express our appreciation for the positive decisions the CFTC and the SEC made on the proposed definitions of "swap dealer" and "major swap participant" in the Proposed Release – in particular, the determination that multilateral development banks should not be required to register as swap dealers or major swap participants.

We are, however, concerned that there are a couple of technical issues in the Proposed Release that could lead to confusion in the future. While we agree with the statement in the text accompanying footnote 1182 in the Proposed Release that "foreign entities are not necessarily immune from U.S. jurisdiction for commercial activities undertaken with U.S. counterparties or in U.S. markets", we do not believe that that statement applies to our organizations or the other "multilateral development banks" referred to in footnote 1180 of which the United States is a member (the "MDBs"). The immunity of the MDBs from suits by member states (and persons acting on their behalf) and from member state regulation is specifically provided for in their respective Articles of Agreement, which are international agreements binding on the United States and which have been enacted into U.S. domestic law. The MDBs' immunity from suit and regulation by member states is not affected by whether they engage in commercial activities (which they do engage in). As the Proposed Release correctly points out in, in the text accompanying footnotes 1184 and 1185, there is nothing in the text or history of Title VII to indicate that Congress intended to repeal those immunities. As a result, the sentence accompanying footnote 1183 ("Registration and regulation as a swap dealer or major swap participant under such circumstances may be warranted.") is incorrect if applied to the MDBs.

Furthermore, we do not believe that the holdings in Mendaro, Osseiran and Vila, cited in footnote 1182 of the Proposed Release, support the conclusion in the text accompanying footnote 1182, which is quoted in the previous paragraph, particularly if applied to the MDBs. Those cases dealt with the MDBs' immunity from suits by private parties and did not deal with their immunity from suits by member states or their regulatory immunity.

Therefore, we would like to propose that the following technical changes be made in the Proposed Release before it is submitted for publication in the Federal Register:

1. The second sentence of footnote 1182, consisting solely of citations and summaries of Mendaro, Osseiran and Vila, should be deleted from footnote 1182. Were it not for the references to the MDBs in the summaries of those cases, the paragraph accompanying footnote 1182 would not be read as applying to the MDBs. The suggested deletion would make this clearer.

2. There should be added to footnote 1185 (or inserted in a new footnote) something along the following lines: "Under their respective Articles of Agreement, the "multilateral development institutions" defined as such in 22 U.S.C. §262r(c) (3) are immune from suit and regulation by member states."

We thank you for your attention to this matter.

Sincerely,

Anne-Marie Leroy
Senior Vice President and Group General Counsel
World Bank

Rachel J Robbins

Rachel Robbins
Vice President and General Counsel
International Finance Corporation

cc: Office of General Counsel, Commodity Futures Trading Commission:
Jeffrey P. Burns, Assistant General Counsel
Mark Fajfar, Assistant General Counsel
Julian E. Hammar, Assistant General Counsel
David E. Aron, Counsel

Division of Trading and Markets, Securities and Exchange Commission:
Joshua Kans, Senior Special Counsel
Richard Grant, Special Counsel
Richard Gabbert, Attorney Advisor