Dechert LLP

1775 I Street, N.W.
Washington, DC 20006-2401
+1 202 261 3300 Main
+1 202 261 3333 Fax
www.dechert.com

DAVID L. ANSELL

david.ansell@dechert.com
+1 202 261 3433 Direct
+1 202 261 3133 Fax

May 31, 2011

Submitted Electronically

Ms. Jennifer J. Johnson
Secretary, Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

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

Re: Incentive-Based Compensation Arrangements; FRB Docket No. R–1410 and RIN No. 7100–AD69; SEC File No. S7-12-11 and RIN No. 3235-AL06

Dear Ms. Johnson and Ms. Murphy:

We represent a subsidiary of a foreign bank that is treated as a bank holding company pursuant to Section 8 of the International Banking Act of 1978[1] (a Foreign Banking Organization ("FBO")). The subsidiary, among other things, conducts investment advisory activities in the United States.

We appreciate the opportunity to submit this comment to the Board of Governors of the Federal Reserve System ("Board") and the Securities and Exchange Commission ("SEC") in response to the captioned request for comments on their proposed rules regarding incentive based compensation arrangements (respectively, the "Board Compensation Rule" and the "SEC Compensation Rule" and, together, the

[1] 12 U.S.C. §3106(a).

"Compensation Rules") under Section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("DFA").[2]

1. Summary

We appreciate the important goals of Section 956 of the DFA and the Compensation Rules. However, it is our view that the provisions relating to the application of the Compensation Rules to FBOs should be clarified in two respects.

First, we believe the Board Compensation Rule should be re-proposed to set forth clear and objective methods of identifying "U.S. operations" and of determining "total consolidated U.S. assets," as those terms relate to FBOs. This action is necessary to allow FBOs to understand whether and to what extent their activities will be subject to the Board Compensation Rule.

Second, the Board Compensation Rule should be revised to specifically exclude investment adviser and broker-dealer entities of an FBO from the jurisdiction of the Board for purposes of the Board Compensation Rule. This is necessary to avoid subjecting such entities to duplicative and potentially conflicting regulation of the Board and the SEC.

2. The Board should Re-Propose the Portion of the Board Compensation Rule Regarding FBOs

The Board, under Section 956(e)(2)(G) of the DFA acting jointly with the other appropriate Federal regulators, has proposed to treat certain FBO operations as a "covered financial institution."[3] Specifically, the Board proposes to treat as a covered financial institution:

> (iv) The U.S. operations of a foreign bank that is treated as a bank holding company pursuant to section 8(a) of the

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2 Pub. L. No. 111-203 (2010).

3 12 C.F.R. §236.3(c) (proposed).

International Banking Act of 1978 (12 USC 3106(a)) that has total consolidated U.S. assets of $1 billion or more.[4]

We believe that the Board's proposal in regard to FBO operations does not provide an adequate basis for FBOs to determine whether and to what extent they would be covered by the Board Compensation Rule. The Board Compensation Rule identifies four categories of entities that are to be subject to the Rule. In three cases – state member banks, bank holding companies, and state licensed uninsured branches or agencies of foreign banks – the Board Compensation Rule provides clear guidance as to which entities would be subject to the Rule.[5] In each instance there is no question as to whether an entity is a state member bank, a bank holding company, or an uninsured branch. Moreover, the Board Compensation Rule provides precise guidance as to how the amount of total consolidated assets of such entity would be determined by reference to specified reports that are filed with the Board.[6]

In contrast, the Board provides no such mandate with respect to FBOs. The Board Compensation Rule does not explain what types of entities, activities or operations would fall within the undefined term "U.S. operations." Furthermore, the Board Compensation Rule provides no direction as to how the "total consolidated U.S. assets" of the "U.S. operations" of an FBO are to be calculated. If adopted as written, FBOs, on the date the Board Compensation Rule became applicable, would not have any guidance as to which entities or assets they should take into account in determining the potential application of the Rule. The Board, in effect, acknowledges this absence of guidance by stating that it will undertake this determination rather than establishing particular criteria for potentially-affected institutions to utilize. Specifically, the Board Compensation Rule indicates that total consolidated assets means:

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4 *See* 12 C.F.R. §236.3(c)(iv) (proposed).

5 *See* 12 C.F.R. §236.3(c)(i)-(iii) (proposed).

6 For state member banks and state-licensed uninsured branches or agencies of foreign banks, total consolidated assets would be based on an average of the total consolidated assets in the previous four Consolidated Reports of Condition and Income for the institution. With respect to a bank holding company, the total consolidated assets would be determined by an average of the company's previous four Consolidated Financial Statements for Bank Holding Companies. *See* 12 C.F.R. §236.3(i)(1)-(3) (proposed).

> (4) For the U.S. operations of a foreign bank total consolidated U.S. assets as determined by the Board.[7]

Neither the Board Compensation Rule nor the preamble provides any indication of how or when the Board would reach the required determination regarding the calculation of "total consolidated U.S. assets." It is inconsistent with the remainder of the Board Compensation Rule for FBOs to be left without the ability to determine objectively which of their entities and operations would be covered by the Board Compensation Rule and plan their conduct accordingly. FBOs alone among Board-regulated entities should not be placed at risk of supervisory action for noncompliance with the Board Compensation Rule where it is unclear whether they are subject to the Rule.

The uncertainty created by the absence of definitions of "U.S. operations" and "total consolidated U.S. assets" raises serious questions about whether the Board will be able to enforce the Board Compensation Rule with respect to FBOs. It is well settled that agencies cannot enforce regulations that fail to give "fair warning" of their requirements. For example, in *General Electric Co. v. U.S. Environmental Protection Agency*, the D.C. Circuit held that the Environmental Protection Agency could not punish General Electric for an alleged failure to comply with regulations that "on their face . . . reveal no rule or combination of rules providing fair notice" of the allegedly prohibited conduct.[8] This principle strongly supports the issuance of a re-proposal by the Board of the Board Compensation Rule as it relates to FBOs.

Moreover, the absence of definitions for "total consolidated U.S. assets" and "U.S. operations" may also render that portion of the Board Compensation Rule invalid under the Administrative Procedure Act ("APA"). The APA requires agencies to "disclose in detail the thinking that has animated the form of [the] proposed rule" so that the public has an adequate opportunity to comment on the reasoning and rationale

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7 *See* 12 C.F.R. §236.3(i)(4) (proposed).

8 *General Electric Co. v. U.S.E.P.A.*, 53 F.3d 1324, 1328 (D.C. Cir. 1995) (quoting *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986)).

underlying the proposed rule.[9] In the Board Compensation Rule, however, the Board has not explained how potentially affected entities are to determine their status under the Rule.

In light of the foregoing, we respectfully request that the Board re-propose the portion of the Board Compensation Rule in regard to FBOs in a manner that provides guidance to potentially affected institutions as to which entities will be covered and the assets that will be taken into account.[10]

3. The Board's Compensation Rule Should be Modified to Exclude Investment Advisors and Registered Broker-Dealers from Coverage under the Rule

As noted above, we respectfully request that the Board re-propose portions of the Board Compensation Rule to explain the circumstances in which entities or assets will be taken into account for purposes of applying the Rule to FBOs. As part of such re-proposal, and for the reasons discussed below, we believe it would be appropriate for the Board to clarify that any entities included within the U.S. operations of an FBO that qualify as covered financial institutions under Section 956(e)(2) of the DFA by virtue of being either (1) an investment adviser as defined in section 202(a)(11) of the Investment Advisers Act of 1940 ("IA"), or (2) a broker-dealer registered under Section 15 of the Securities Exchange Act of 1934 ("BD") will not be subject to the jurisdiction of the Board with respect to the Board Compensation Rule and that their assets will not be included in the determination of an FBO's total consolidated U.S. assets. Those entities

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9 *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 35 (D.C. Cir. 1977). *See also Connecticut Power & Light Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982) ("If the notice of proposed rulemaking fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals.").

10 In connection with such a re-proposal, we suggest that the Board limit the application of any rule regarding FBOs to individuals at the top tier entity or entities within the FBO's U.S.-based organization. *Cf.*, Guidance on Sound Incentive Compensation Policies, 75 Fed. Reg. 36395, 36402 n.12 ("In the case of [FBOs], the term 'board of directors' refers to the relevant oversight body for the firm's U.S. operations, consistent with the FBO's overall corporate and management structure.").

instead would be subject to the jurisdiction of the SEC as their appropriate Federal regulator under Section 956 of the DFA.

Under the Board Compensation Rule and the SEC Compensation Rule as proposed, an IA or a BD in the U.S. could be subjected to both the requirements of, and supervision under, the Board Compensation Rule and the SEC Compensation Rule. Such an outcome would clearly be at odds with the common sense imperative to avoid subjecting these entities to duplicative and potentially conflicting requirements, oversight, and enforcement.

President Obama has recently highlighted Administration concerns regarding the need to avoid unnecessary and duplicative regulation. On January 18, 2011, the President issued an Executive Order, which noted that some industries face a significant number of regulatory requirements, "some of which may be redundant, inconsistent, or overlapping" and that "reducing these requirements . . . [would] reduce[] costs."[11] In response to this Executive Order, on May 26, 2011, Cass Sunstein, Administrator of the White House Office of Information and Regulatory Affairs, announced that thirty departments and agencies have released action plans to reduce unnecessary, duplicative and burdensome regulation, which could save hundreds of millions of dollars each year and tens of millions of hours in annual paperwork burdens.[12] In addition, members of Congress have recently expressed concern about the adverse impact of duplicative regulation.[13]

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11 Improving Regulation and Regulatory Review, Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

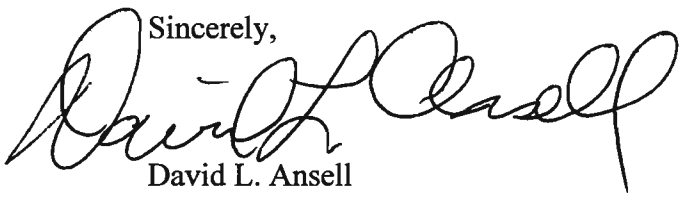
12 *See* Cass Sunstein, Adm'r, Office of Info. & Regulatory Affairs, Address to the American Enterprise Institute (May 26, 2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/speeches/oira-administrator-lookback-at-federal-regulation-05262011.pdf (noting that, for example, "[t]he Departments of Commerce and State are undertaking a series of steps to eliminate . . . duplicative and unnecessary regulatory requirements").

13 *See, e.g.,* 157 Cong. Rec. 45, E578 (2011) (statement of Rep. Van Hollen) ("I don't believe anyone in this House supports truly duplicative or redundant regulation—and we should all be prepared to eliminate the headache and expense of unnecessary red tape whenever we find it."); 157 Cong. Rec. 21, H652 (2011) (statement of Rep. Stivers) (stating that "overly burdensome and duplicative regulation . . . hurts access to capital and job growth").

Accordingly, we believe that the Board Compensation Rule should be modified to expressly provide that with respect to IAs and BDs included within the U.S. operations of an FBO, the appropriate Federal regulator will be the SEC. Thus, IAs and BDs included within the U.S. operations of an FBO would not be subject to the Board Compensation Rule and their assets would be excluded from any calculation of the total consolidated U.S. assets of the FBO. This approach avoids unnecessary and potentially conflicting regulation of such IAs and BDs and would be most faithful to the structure of Section 956(e), which clearly contemplated that IAs and BDs would be subject to the jurisdiction of the SEC. Section 956 does not expressly address U.S. operations of an FBO. Accordingly, we believe that in such circumstances, the intent of Congress for the SEC to have jurisdiction over such entities should prevail.

We appreciate your consideration of our comments.

Sincerely,



David L. Ansell