December 12, 2014

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
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Robert deV. Frierson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

Robert E. Feldman, Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, DC 20429

Alfred M. Pollard, General Counsel
Attention: Comments/RIN 2590-AA45
Federal Housing Finance Agency
Constitution Center (OGC Eighth Floor)
400 7th Street, SW
Washington, DC 20024

Barry F. Mardock, Deputy Director
Office of Regulatory Policy
Farm Credit Administration
1501 Farm Credit Drive
McLean, VA 22102

Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, DC 20581

Re: **Margin and Capital Requirements for Covered Swap Entities, Docket ID OCC-2011-0008/RIN 1557-AD43, Docket No. R-1415/RIN 7100-AD74, RIN 3064-AE21, RIN 2590-AA45, RIN 3052-AC69; and**

Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, RIN 3038-AC97.

Ladies and Gentlemen,

The undersigned Australian banks welcome the opportunity to comment on margin rules[1] proposed by each of the Prudential Regulators and the Commodity Futures Trading Commission.

We are a group of banks incorporated outside of, but significantly impacted by reforms in, the US, Japan and EU. Because of this, we have chosen to focus in this comment letter on cross-border coordination and associated timing elements of the Proposed Rules.

[1] Proposed rule of the "**Prudential Regulators**" (being the Treasury Department (Office of the Comptroller of the Currency), Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Farm Credit Administration and the Federal Housing Finance Agency), *Margin and Capital Requirements for Covered Swap Entities*, 79 FR 57348 (the "**Prudential Regulator Rules**") and the Commodity Futures Trading Commission ("**CFTC**") proposed rule, *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants*, 79 FR 59848 (the "**CFTC Rules**", and together with the Prudential Regulator Rules, the "**Proposed Rules**").

While there are many other complex challenges inherent in implementing principles of the Working Group on Margin Requirements ("**WGMR**"), these have been well highlighted by submissions by industry groups such as ISDA, SIFMA and the IIB. Specifically, the IIB's comments provide thorough and practical recommendations on the cross-border application and extra-territorial scope of US rules; these are broadly supported. We particularly endorse calls for delays to the current December 2015 start date for the Proposed Rules. This would hopefully permit, along with other purposes, development by regulators in different jurisdictions of a coordinated approach to the interaction between margin regimes.

In summary, our recommendations are that:

(a) "regulatory deference" be given appropriate weight in applying the Proposed Rules to cross-border trades;

(b) substituted compliance (i.e. equivalence) determinations of foreign regimes are made ***prior*** to implementation of the Proposed Rules, and are made by reference to BCBS-IOSCO standards; and

(c) time be given to permit substituted compliance determinations to be made, which may necessitate a delay to effective dates of the Proposed Rules.

Addressing each of these points in turn:

(a) **Importance of "regulatory deference"**. Individual jurisdictions should implement the WGMR principles in a way that minimises conflict and overlap. This is achieved in part by limiting deviations from internationally-agreed principles. Where discrepancies cannot be avoided, it is necessary for regimes to defer to equivalent foreign regimes, in appropriate cases. As noted in the 2013 St Petersburg G20 Leaders' Declaration (reinforced recently at the G20 Brisbane Summit):

> *... [J]urisdictions and regulators should be able to defer to each other when it is justified by the quality of their respective regulatory and enforcement regimes, based on similar outcomes, in a non-discriminatory way, paying due respect to home country regulation regimes.*[2]

A full approach to deference is particularly important for margin rules. Differences in margin regimes are more likely to present barriers to cross-border trading than other rules, which have less impact on the way that a trade is structured, such as transaction reporting. Tools such as substituted compliance, and others given international endorsement,[3] can therefore be put to good use. This would further regulatory deference, and avoid problems with margining such as:

(i) margin models needing to be approved (and possibly slightly differently) by multiple regulators; and

(ii) simultaneous application of multiple rule requirements when exchanging margin. Take as an example an Australian swap dealer bank that is subject to CFTC margin rules dealing with a Canadian swap dealer that is subject to Prudential Regulator Rules. As many as four different regulators' rules could

[2] http://www.g20.utoronto.ca/2013/2013-0906-declaration.html, paragraph 71.

[3] For example, *The Cross-Border Regulatory* Toolkit in the 2014 Consultation Report of the IOSCO Task Force on Cross-Border Regulation, at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD466.pdf

govern margin exchange in that situation. In our view, the complexity associated with parties attempting to comply with four forms of a single WGMR framework is not justified on a systemic risk basis, or indeed any policy basis.

With both of the above examples, regulatory deference by the US regulators to Australian regulators will significantly reduce the sort of overlap and conflict that the G20 declarations, referred to above, are focused on. It will also result in no impairment of regulatory objective, if the Australian regime effectively implements the WGMR principles (as it is required to do).

As with other rules, deference by US regulators to foreign regimes should be achieved through a framework of substituted compliance determinations. Our view is that positive substituted compliance determinations should have the following results. For cross-border transactions, where an Australian bank trades with:

- *a US person covered swap entity (CSE)*, each party should collect margin in line with its home requirements, while obligations to post margin defer to foreign rules;

- *a US person non-CSE*, the Australian bank should collect and post margin in line with its home requirements; and

- *a non-US person*, relevant foreign rules and not US rules should apply.

If a foreign regime is seen as equivalent and given a positive substituted compliance determination, it should not matter that US requirements do not apply on both sides (or either side) of the transaction. We restate the importance of aligning US and foreign rules with the WGMR standard, to achieve a workable substituted compliance framework.

As noted in the WGMR final paper:[4]

> *When a transaction is subject to two sets of rules (duplicative requirements), the home and the host regulators should endeavour to (1) harmonise the rules to the extent possible or (2) apply only one set of rules, by recognising the equivalence and comparability of their respective rules.*

(b) **Substituted compliance determinations should occur early and against a global standard**. Substituted compliance determinations should be scheduled and take place prior to rule implementation. Past CFTC rule-making that preceded substituted compliance determinations (or even the creation of a substituted compliance framework) created significant uncertainty and compliance challenges to those of us that are foreign swap dealers.

Additionally, a globally-agreed framework on OTC margining requirements, like the WGMR, should be recognised as achieving a global standard. It would be inconsistent

[4] September 2013, Basel Committee on Banking Supervision and International Organization of Securities Commissions *Margin Requirements for non-centrally cleared derivatives*, page 22, Element 7 (Interaction of national regimes in cross-border transactions), at http://www.bis.org/publ/bcbs261.pdf.

with the notion of a "global standard" for non-US margin regimes to be assessed by reference to anything other than such global standard itself.

(c) **Time to be given to non-US/EU jurisdictions**. It is pragmatic and inevitable that the translation of WGMR principles into market-impacting regulations is not led by smaller jurisdictions such as ours. To promote global harmony in rulemaking, policy-makers in Australia and other smaller jurisdictions should be permitted to implement OTC G20 commitments, made in Pittsburgh and Cannes, following the lead of larger jurisdictions. This is necessary to permit a close alignment of the detailed rules across all jurisdictions. A reasonable period of time should be given for this to occur. Given that that the major jurisdictions are still consulting, it is now practically very difficult for the smaller jurisdictions to develop and implement rules which are closely aligned and meet a 1 December 2015 commencement date.

Time will also be required to make changes to legislation to remove obstacles to margin exchange. As an example (and there are others), under current Australian law, Australian banks cannot grant effective security over domestic assets.

We ask that the largest jurisdictions recognise and allow for a thoughtfully sequenced and globally coordinated rule-making approach. Time should be given for smaller foreign jurisdictions to develop "fast follower" rules. Developing systems and procedures to comply with US rules, and then subsequently having to alter these to respond to local requirements, imposes a disproportionate compliance cost on smaller foreign swap dealers like us. Scheduling substituted compliance determinations to occur prior to rule implementation removes the risk of such competitive distortion occurring.

Finally, we ask that you consider the risks of market fragmentation, market harm and adverse impacts on foreign market participants, stemming from implementation of WGMR principles.

Sincerely,

Australia and New Zealand Banking Group Ltd

Commonwealth Bank of Australia

Macquarie Bank Limited

National Australia Bank Limited

Westpac Banking Corporation