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US Regulators Propose to Use Global Assets to Determine US Systemic Significance

Many experts have said that a determination of systemic significance requires an understanding of a wide range of characteristics of a financial institution and its business. Nonetheless, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") emerged from Congress with a threshold that effectively deems as systemically significant any company that controls a US bank and has US$50 billion or more in consolidated assets. Presumably because of their significance to the US financial system, each of these US bank holding companies will be subject to "enhanced prudential requirements."

But what about non-US banks that are deemed to be US bank holding companies because they have US banking operations? Many non-US banks are deemed to be US bank holding companies simply because they operate a branch or an agency in the United States. Now the Federal Reserve and the Federal Deposit Insurance Corporation (the "FDIC") have proposed rules that would bring under the scope of the Dodd-Frank Act provisions for systemically significant institutions any non-US bank with US banking operations that has US$50 billion or more in consolidated ***global*** assets. Consequently, it would not matter if a non-US-based bank had only insignificant US operations. If it has US$50 billion or more in consolidated global assets, it will be treated in the same manner as the most systemically significant US bank holding company.

The approach being taken by the US regulators has come to light in two recent rulemakings under the Dodd-Frank Act. In the first, the Federal Reserve proposed a definition of the phrase "significant bank holding company" for both Sections 113 and 165 of the Dodd-Frank Act in a manner that took account of global consolidated assets. In the second, the Federal Reserve and the FDIC jointly take this approach for "covered companies" in the rulemaking for resolution plans and credit exposure reports.

The comment period is now open on the Federal Reserve and FDIC joint rulemaking. Non-US-based banks should argue that it is contrary to the underlying purpose of the Dodd-Frank Act to take the framework applicable to financial institutions that are systemically significant to the US financial system and apply that framework to non-US banks that have relatively small US operations. Even if the regulators do not accept that argument because they believe that the statutory language leaves them with very little discretion to exempt the non-US institutions, the Dodd-Frank Act requires that, in applying the enhanced prudential standards to any non-US-based bank that is deemed to be a bank holding company, the Federal Reserve shall give due regard to

Even non-US-based banks with insignificant US operations could be subject to:

- enhanced risk-based capital requirements
- leverage limits
- liquidity requirements
- risk management requirements
- resolution planning "living will" requirements
- credit exposure requirements
- concentration limits
- contingent capital requirements
- enhanced public disclosures
- other prudential standards

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the principle of national treatment and equality of competitive opportunity, and shall take into account the extent to which the foreign financial company is subject on a consolidated basis to home country standards that are comparable to those applied in the United States. The non-US-based banks should try to use this provision to persuade the Federal Reserve to write its regulations in such a way that it would minimize to the greatest extent possible the impact of the enhanced prudential requirements.

In the worst case scenario, if the threshold is left to apply to global assets and the burden of the enhanced prudential requirements is not lightened, some non-US banks may wish to consider closing their US banking operations. Financial institutions that have previously "debanked" in the United States have found that they can achieve through other types of US offices many of their business goals without being subject to the US Bank Holding Company Act.