

**WHITE PAPER ON THE SEPARATE ENTITY DOCTRINE AS APPLIED TO  
THE U.S. BRANCHES OF FOREIGN HEADQUARTERED (NON-U.S.) BANKS**

The hybrid treatment of the U.S. branches of foreign headquartered banks has become a subject of focus in the wake of the financial crisis and in light of the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). A branch is sometimes treated as having no separate legal persona from the home country bank, but, more frequently (and for a number of legal purposes) is treated as being a separate legal entity. This treatment of branches has a long history in U.S. banking law, both at the federal and state level.

Interpretive questions and policy choices as to the appropriate treatment of these branches arise in a large number of Dodd Frank’s provisions, including under Titles I and VII of Dodd-Frank. This paper indicates that a regulatory or administrative determination to apply these provisions to the U.S. branches of foreign banks as if they were separate entities would, in fact, be consistent with interpretive and policy choices made in many other contexts.

This paper provides a summary of places in U.S. federal and state law where we believe the separate entity doctrine is, and is not, traditionally applied. Our hope is that this paper will both provide a convenient summary of the regulatory treatment of U.S. branches of foreign headquartered banks under various legal regimes, and highlight the hybrid nature of such branches. Although not covered in this paper, we believe that this hybrid nature of branches is also replicated in many other countries’ treatment of the overseas branches of U.S. headquartered banks.

Respectfully,

CLEARY GOTTLIEB STEEN & HAMILTON LLP  
DAVIS POLK & WARDWELL LLP  
SULLIVAN & CROMWELL LLP

## U.S. BRANCHES OF FOREIGN BANKS

Although a branch of a bank is not a separate juridical entity from the bank of which it is a component, U.S. law treats branches as separate from the head office and other branches of a bank when such differentiation is appropriate for various purposes. Branches are a hybrid structure, at the same time both an integral part of the banks of which they are merely offices and separate legal entities for a number of U.S. regulatory and commercial law purposes. This feature of bank branches is a central tenet of federal banking statutes, and the law governing U.S. branches of foreign banks in particular.

At times the status of a U.S. branch of a foreign bank under a particular statutory scheme is explicit. Such is the case with the U.S. law treatment of U.S. branches of foreign banks in insolvency. As discussed below, U.S. law treats those branches virtually as separate entities in insolvency.

In other circumstances, a particular statute does not explicitly address the status of U.S. branches of foreign banks, and the treatment has to be arrived at through an analysis of the purpose of the statutory scheme. For example, as discussed below, after a long series of no-action letters, the Securities and Exchange Commission (“SEC”) issued interpretive guidance providing that securities issued or guaranteed by U.S. branches of a foreign bank (but not its non-U.S. branches) could rely on the exemption from registration afforded to securities issued or guaranteed by a bank under Section 3(a)(2) of the Securities Act of 1933 (“Securities Act”). Thus, U.S. branches can rely on the Section 3(a)(2) exemption while the bank itself is required to register to distribute its securities in the United States.

This paper will review the treatment of U.S. branches of foreign banks under a variety of statutory schemes and explore the rationale for that treatment.

### I. Background on Branches

#### (a) Parallel Federal and State Regulatory Regimes

The establishment of a branch is the most prevalent form in which foreign banks operate in the United States. Foreign banks seeking to open U.S. branches face essentially the same regulatory regime as new U.S.-domiciled institutions. As with U.S.-based banks, foreign banks choose whether to seek a federal or state license for their U.S. branches.

Federal branches are authorized and subject to regulation and supervision by the Office of the Comptroller of the Currency (“OCC”). State-chartered branches are authorized and subject to regulation at the state level.

(b) The International Banking Act Provides for National Treatment of U.S. Branches

The International Banking Act of 1978<sup>1</sup> (“IBA”) establishes a comprehensive framework for the supervision and regulation of non-U.S. banks in the United States. The IBA’s guiding principle of “national treatment”—or parity of treatment between domestic and foreign banks—has informed all subsequent U.S. legislation affecting foreign banks.<sup>2</sup>

Under the IBA framework, a U.S. branch of a non-U.S. bank is treated for most purposes as if it were a U.S. bank.<sup>3</sup> Importantly, despite the fact they are the same juridical entity, it is the U.S. branch—and not the non-U.S. bank as a whole—that is treated as the U.S. bank under the IBA. For example, while the Federal Reserve has authority to examine the foreign bank because it is treated as a bank holding company,<sup>4</sup> the OCC’s examination authority is limited to the federal branch.<sup>5</sup>

(c) Only U.S. Branches Have Been Eligible for Federal Deposit Insurance

The distinction between a foreign bank and its U.S. branch is also reflected in the Federal Deposit Insurance Act (“FDIA”),<sup>6</sup> pursuant to which a U.S. branch, and not the bank as a whole, is eligible to apply for federal deposit insurance for deposits payable at the branch.<sup>7</sup> With the passage of the Federal Deposit Insurance Corporation Improvement Act of 1991 (“FDICIA”),<sup>8</sup> no

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<sup>1</sup> Pub. L. No. 95-369, 92 Stat. 607 (1978) (codified at 12 U.S.C. §§ 3101 *et seq.* (2010)).

<sup>2</sup> See JOHN C. DUGAN, MARK E. PLOTKIN, KEITH A. NOREIKA & MICHAEL NONAKA, *Forms of Entry, Operation, Expansion, and Supervision of Foreign Banks in the United States*, in REGULATION OF FOREIGN BANKS & AFFILIATES IN THE UNITED STATES ch.1 § 1:1 at 4 (Randall D. Guynn, Mark E. Plotkin & Ralph Reisner eds., Thomson Reuters Westlaw, 6th ed. 2012).

<sup>3</sup> See 12 U.S.C. § 3102(b) (“Except as otherwise specifically provided in this chapter or in rules, regulations, or orders adopted by the Comptroller under this section, operations of a foreign bank at a Federal branch or agency shall be conducted with the same rights and privileges as a national bank at the same location and shall be subject to all the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply under the National Bank Act to a national bank doing business at the same location.”).

<sup>4</sup> 12 U.S.C. § 1844. The Federal Reserve also has authority under the IBA to examine the branch. 12 U.S.C. § 3105(c).

<sup>5</sup> See 12 U.S.C. § 3102.

<sup>6</sup> 12 U.S.C. § 1811 *et seq.*

<sup>7</sup> 12 U.S.C. 1815(b).

<sup>8</sup> Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236 (1991) (codified in scattered sections of 12 U.S.C.).

more insured branches may be created.<sup>9</sup> However, the provision of the FDIA that established eligibility was not repealed and the 52 then-insured U.S. branches of foreign banks retained their eligibility pursuant to a grandfathering provision.<sup>10</sup> The FDIC can be appointed as receiver or conservator of the insured branch under the FDIA in the same manner as the FDIC can be appointed as receiver or conservator of an insured U.S. bank.<sup>11</sup> In addition, prior to the enactment of FDICIA, FDIC insurance coverage for U.S. branches of foreign banks was granted on a branch-by-branch basis such that a foreign bank could have a branch in one U.S. state that was insured by the FDIC and another branch in another U.S. state that was not insured by the FDIC.<sup>12</sup>

(d) Foreign Banks with U.S. Branches Are Subject to Regulation as Bank Holding Companies under the Bank Holding Company Act

The separateness of a foreign bank and its U.S. branch is also reflected in the application of the Bank Holding Company Act (“BHC Act”)<sup>13</sup> to foreign banks with U.S. branches. The BHC Act generally limits the activities of bank holding companies to those of banking or managing and controlling banks, and to those that are closely related thereto or that are financial in nature.<sup>14</sup> By virtue of maintaining a U.S. branch, a foreign bank is deemed a bank holding company,<sup>15</sup> and the BHC Act is applied to the foreign bank and U.S. branch as though they were a holding company and subsidiary bank, respectively. Thus, the foreign bank is subject to the activity restrictions of the BHC Act and to the supervisory and enforcement powers of the Federal Reserve applicable to bank holding companies, including its authority to issue cease-and-desist orders<sup>16</sup> and assess civil money penalties.<sup>17</sup> For purposes of the interstate banking

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<sup>9</sup> *Id.* § 214(a) (codified in 12 U.S.C. § 3104(d)).

<sup>10</sup> *See* JOHN C. DUGAN, MARK E. PLOTKIN, KEITH A. NOREIKA & MICHAEL NONAKA *FDIC Insurance and Regulation of U.S. Branches of Foreign Banks*, in REGULATION OF FOREIGN BANKS & AFFILIATES IN THE UNITED STATES ch. 8 § 8:2 at 610 n.21 (Randall D. Guynn, Mark E. Plotkin & Ralph Reisner eds., Thomson Reuters Westlaw, 6th ed. 2012) (citing FDICIA, Pub. L. No. 102-242, § 214(a), 105 Stat. 2236, 2203 (1991)).

<sup>11</sup> *See* 12 U.S.C. § 1821(c) (appointment of FDIC as conservator or receiver for any “insured depository institution”), § 1813(a) (definition of “bank”), and § 1813(c) (definition of “insured depository institution”).

<sup>12</sup> 12 C.F.R. § 347.203.

<sup>13</sup> 12 U.S.C. § 1841 *et seq.*

<sup>14</sup> *See* 12 U.S.C. § 1843(a)(2).

<sup>15</sup> 12 U.S.C. § 3106(a).

<sup>16</sup> *See* 12 U.S.C. § 1818(b).

restrictions of the BHC Act, branches were treated as banks, and thus a foreign bank could not acquire a bank in another state, or establish a branch in another state,<sup>18</sup> until the advent of interstate banking with the passage of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994.<sup>19</sup> The separateness of a foreign bank and its U.S. branch is also reflected in the Federal Reserve’s Regulation K, which permits a qualified foreign banking organization to “[e]ngage in activities of any kind outside the United States,”<sup>20</sup> even though a U.S. branch or subsidiary of the same legal entity would generally be subject to the activity restrictions in the BHC Act and the IBA because activities engaged in by such a U.S. branch or subsidiary are considered to be activities engaged in in the United States.<sup>21</sup>

## II. Insolvency Laws

### (a) State-Chartered Branches Are Liquidated as Separate Legal Entities

State-chartered branches of foreign banks are subject to liquidation at the state level according to state insolvency laws. State laws generally provide a “ring-fence” mechanism, pursuant to which regulators have broad power to liquidate *all* of the domestic assets of the foreign bank—including those owned by the foreign bank in its own name as opposed to that of the branch—for the benefit of (domestic) claimants against the branch.<sup>22</sup>

The New York bank insolvency law,<sup>23</sup> which is often regarded as a model for state bank insolvency laws,<sup>24</sup> is illustrative. Under this regime, the Superintendent of Financial Services has the authority to seize all the assets of the foreign bank that are located in New York.<sup>25</sup> Upon

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<sup>17</sup> See 12 U.S.C. § 1818(c).

<sup>18</sup> IBA, Pub. L. No. 95-369, § 5(a), 92 Stat. 607, 613 (1978).

<sup>19</sup> Pub. L. No. 103-328, 108 Stat. 2338 (1994).

<sup>20</sup> See 12 C.F.R. § 211.23(f)(1).

<sup>21</sup> See 12 C.F.R. § 211.2(g) (definition of “[e]ngaged in business or engaged in activities in the United States?”); 12 U.S.C. § 3102(b) (activities restrictions applicable to a U.S. branch of a non-U.S. bank); 12 C.F.R. § 211.29.

<sup>22</sup> Steven L. Schwarcz, *The Confused U.S. Framework for Foreign Bank Insolvency: An Open Research Agenda*, 1 REV. OF L. & ECON. 81, 88 (2005).

<sup>23</sup> N.Y. BANKING LAW §606 *et seq.* (McKinney).

<sup>24</sup> Schwarcz, *supra* note 21, at n.28 (citing Thomas C. Baxter, Jr. et al., *Two Cheers for Territoriality: An Essay on International Bank Insolvency Law*, 78 AM. BANKR. L.J. 57 (2004)).

<sup>25</sup> See N.Y. BANKING LAW § 606(4)(C) (McKinney).

liquidation, proceeds go first to pay the claims of creditors arising from the transaction of business with the New York branch.<sup>26</sup> The Superintendent is expressly prohibited from honoring claims that would not constitute enforceable legal obligations against the branch if it were a separate and independent legal entity, and claims against other offices, branches and other affiliates of the foreign bank.<sup>27</sup> After claims against the branch are satisfied, any excess proceeds are then paid over to the liquidators, if any, of any of the foreign bank's other U.S. branches or offices.<sup>28</sup> Only after all such claims are satisfied are any remaining proceeds returned to the principal office of the foreign bank.<sup>29</sup>

(b) Federally Chartered Branches Are Liquidated as Separate Legal Entities

A similar ring-fence regime governs insolvency on the part of a foreign bank that has one or more federally chartered U.S. branches. The IBA empowers the OCC to appoint a receiver to take possession of all U.S. assets of the foreign bank and serve as receiver for all of the foreign bank's U.S. branches.<sup>30</sup> Only claims arising out of transactions with the foreign bank's U.S. branches that would be valid obligations against such branch if it were a separate legal entity are honored, and only after all such claims against all U.S. branches are satisfied are excess proceeds returned to the foreign bank's home office.<sup>31</sup>

(c) Congress Amended the U.S. Bankruptcy Code to Protect the Separateness of Foreign Banks and Their U.S. Branches

In 2003, a district court overturned a bankruptcy court's ruling that the Bankruptcy Code barred a foreign representative of two failed foreign banks with branches licensed in New York from seeking an injunction to prevent state regulators from giving preference to New York creditors in the liquidation of the U.S. assets of those banks.<sup>32</sup> This decision, which was widely criticized as departing from established authority, effectively disregarded the distinction between the foreign banks and their U.S. branches.

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<sup>26</sup> N.Y. BANKING LAW §606(4)(A) (McKinney).

<sup>27</sup> *Id.*

<sup>28</sup> N.Y. BANKING LAW § 606(4)(B) (McKinney).

<sup>29</sup> *Id.*

<sup>30</sup> 12 U.S.C. § 3102(j)(1).

<sup>31</sup> 12 U.S.C. § 2102(j)(2).

<sup>32</sup> *In re Agency for Deposit Ins. Rehabilitation, Bankruptcy and Liquidation of Banks*, 310 B.R. 793 (S.D.N.Y. 2004).

In 2005, Congress responded by amending the Bankruptcy Code to clarify that a foreign bank with a U.S. branch is ineligible to file for bankruptcy in the United States,<sup>33</sup> thereby ensuring the dichotomy between a foreign bank and its U.S. branches will continue to be reflected in U.S. bankruptcy proceedings.

### III. Securities Laws

#### (a) Securities Act Exemption for U.S. Branches of Foreign Banks

Section 3(a)(2) of the Securities Act provides an exemption from the general registration requirements for securities “issued or guaranteed by... any national bank, or any banking institution organized under the laws of any State.”<sup>34</sup> On its face, the statute is unclear as to whether a foreign bank’s compliance with the licensure and related requirements to charter a U.S. branch is akin to the branch’s being “organized under” U.S. law. However, at least as early as 1964, the SEC began issuing no-action letters permitting the U.S. branches of foreign banks to rely on this “bank” exemption to issue various types of securities in specific states.<sup>35</sup>

In 1986, after issuing more than 100 such no-action letters, the SEC issued guidance that it would thereafter take the position that, although U.S. branches of foreign banks are not separate legal entities in a strictly technical sense, they would be deemed banks for purposes of the bank exemption.<sup>36</sup> The release noted the public policy of “national treatment” reflected in the IBA,<sup>37</sup> and the SEC’s conclusion that U.S. branches of foreign banks are subject to domestic supervision sufficient to render them “functionally indistinguishable from their domestic counterparts.”<sup>38</sup> Notably, while U.S. branches of foreign banks qualify for this exemption, foreign banks themselves do not.

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<sup>33</sup> See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, §801(a) 119 Stat. 23, 146 (2005) (codified at 11 U.S.C § 109(b)(3)(B)).

<sup>34</sup> 15 U.S.C. § 77c(a)(2).

<sup>35</sup> See Michael Gruson and Philip L. Jackson, *Issuance of Securities by Foreign Banks and the Investment Company Act of 1940*, 1980 U. Ill. L.F. 185, 187 n.15.

<sup>36</sup> Securities Issued or Guaranteed by United States Branches or Agencies of Foreign Banks, SEC Interpretive Release No. 33-6661, 51 Fed. Reg. 34,460 (Sept. 29, 1986) (to be codified at 17 C.F.R. pts. 231 and 261).

<sup>37</sup> *Id.* at 34,461 (quoting S. Rep. No. 1073, 95th Cong., 2d Sess. 2 (1978)).

<sup>38</sup> *Id.*

The definition of “U.S. person” for purposes of the SEC’s Regulation S, which governs securities offerings and sales outside of the United States that are not registered under the Securities Act, also reflects the separateness of branches and agencies of a legal entity. For example, while the definition of “U.S. person” in Regulation S does not include an entity organized or incorporated under foreign law, it expressly includes “[a]ny agency or branch of a foreign entity located in the United States.”<sup>39</sup> Similarly, while the “U.S. person” definition includes entities incorporated under U.S. law, expressly excluded from such definition is “[a]ny agency or branch of a U.S. person located outside the United States if: (A) The agency or branch operates for valid business reasons; and (B) The agency or branch is engaged in the business of insurance or banking and is subject to substantive insurance or banking regulation, respectively, in the jurisdiction where located.”<sup>40</sup>

(b) Exchange Act Exemption for U.S. Branches of Foreign Banks

Section 3(a)(6) of the Securities Exchange Act of 1934 (“Exchange Act”) defines the term “bank” to include, subject to certain conditions, a “banking institution or savings association, as defined in section 2(4) of the Home Owners’ Loan Act, whether incorporated or not, doing business under the laws of any state or of the United States.” This provision has been construed by the SEC to include a U.S. branch of a non-U.S. bank. This in turn allows a U.S. branch of a non-U.S. bank to engage in certain types of activities that are permissible for banks under the Exchange Act in the absence of broker-dealer registration. This authority is granted only to a U.S. branch of a non-U.S. bank and not to the bank itself.

Moreover, the SEC has construed the broker-dealer “push-out” provisions of the Gramm-Leach-Bliley Act<sup>41</sup> to restrict the ability of a U.S. branch of a non-U.S. bank to engage in certain brokerage and dealing activity, but not to apply to any non-U.S. branches of the same non-U.S. bank.

(c) Investment Company Act Exemption for U.S. Branches of Foreign Banks

Section 3(c)(3) of the Investment Company Act of 1940 (“Investment Company Act”) excludes from the definition of “investment company,” and thus from the Act’s registration requirements, any entity that falls within the definition of “bank,” as set forth in section 2(a)(5) of the Investment Company Act.<sup>42</sup> Before the statute was amended in 1999 to address the issue, practitioners had long taken the view that U.S. branches of foreign banks met the criteria of

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<sup>39</sup> 17 C.F.R. § 230.901(k)(1)(v).

<sup>40</sup> 17 C.F.R. § 230.901(k)(2)(v). *See* Foreign Agencies and Branches of United States Banks and Insurance Companies, SEC No-Action Letter (Feb. 25, 1988).

<sup>41</sup> Gramm-Leach-Bliley Act, Pub.L. 106-102, Title II, 113 Stat. 1338 (1999).

<sup>42</sup> 15 U.S.C. § 80a-3(c)(3).



clause (C) of this definition,<sup>43</sup> which included any “banking institution . . . doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks . . . and which is supervised and examined by State or Federal authority having supervision over banks.”<sup>44</sup>

In 1990, the SEC issued guidance providing that, for the purpose of issuing securities in the United States, it would deem U.S. branches of foreign banks to be “banks” falling within the exemption,<sup>45</sup> provided their counsel could determine “that the nature and extent of Federal and/or State regulation and supervision of the particular branch [] are substantially equivalent to those applicable to banks chartered under Federal or state law in the same jurisdiction.”<sup>46</sup> This position was based on the SEC’s determination that U.S. branches of foreign banks were “functionally equivalent to their domestic counterparts, as well as similarly regulated.”<sup>47</sup>

In 1999, the definition of “bank” in section 2(a)(5)(A) was amended to expressly include U.S. branches of foreign banks, but not the foreign banks themselves.<sup>48</sup>

#### **IV. Commodity Exchange Act**

(a) Foreign Branches of U.S. and Foreign Banks Are Treated as Separate Entities for Introducing Broker and Futures Commission Merchant Registration Purposes

The Commodity Futures Trading Commission (“CFTC”) generally does not require foreign branches of U.S. or foreign banks to register as introducing brokers (“IBs”) or futures commission merchants (“FCMs”) when they transact business only with foreign customers.<sup>49</sup>

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<sup>43</sup> See Barry Barbash, *Foreign Banks as Investment Companies Under the Investment Company Act of 1940*, in REGULATION OF FOREIGN BANKS AND AFFILIATES IN THE UNITED STATES ch.8 § 8.04[1]-[2] (Michael Gruson & Ralph Reisner eds., LexisNexis 5th ed. 2008).

<sup>44</sup> 15 U.S.C. § 80a-2(a)(5)(C).

<sup>45</sup> Status Under the Investment Company Act of 1940 of United States Branches or Agencies of Foreign Banks Issuing Securities, SEC Investment Company Act Release No. 17,681, 55 Fed. Reg. 34,550 (Aug. 23, 1990) (to be codified at 12 C.F.R. pt. 271).

<sup>46</sup> *Id.* at 34,551.

<sup>47</sup> *Id.*

<sup>48</sup> Gramm-Leach-Bliley Act, Pub.L. 106-102, § 223, 113 Stat. 1338, 1401 (1999).

<sup>49</sup> See CFTC Staff Letter No. 10-04, Comm. Fut. L. Rep. (CCH) ¶ 31,5538 (Feb. 1, 2010) (granting relief from IB registration requirements to foreign branches of a U.S. bank engaged in introducing

Based in large part on the treatment of bank branches under banking laws, the CFTC staff has consistently “treated a bank in one country as a separate legal entity from the bank’s branches in another country.”<sup>50</sup>

(b) The Dodd-Frank Act Contemplates Separate Designation of U.S. Branches of Foreign Banks as Swap Dealers

Consistent with the historical distinction between a foreign bank and its U.S. branches, the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), in defining the term “prudential regulator,” expressly contemplates that a “federally chartered branch . . . of a foreign bank” or a “State-chartered branch . . . of a foreign bank” could itself be a swap dealer.<sup>51</sup> In addition, the Dodd-Frank Act’s “swap dealer” definition specifically provides that a “person may be designated as a swap dealer for a single type or single class or category of . . . activities and considered not to be a swap dealer for other types, classes, or categories of . . . activities.”<sup>52</sup>

## V. Other Banking Law Provisions

(a) Only U.S. Branches Access the Federal Reserve Discount Window and Comply with Reserve Requirements

Pursuant to the statutory framework and implementing regulations governing access to the Federal Reserve’s discount window, a U.S. branch of a foreign bank is treated as if it were a member bank, separate and apart from the foreign bank of which it is a component.

In 1978, the IBA applied reserve requirements to “every Federal branch and Federal agency of a foreign bank in the same manner and to the same extent as if the Federal branch or

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non-U.S. customers to an FCM, subject to certain restrictions); CFTC Staff Letter No. 00-44, Comm. Fut. L. Rep. (CCH) ¶ 28,095 (Mar. 31, 2000) (same); *see also* CFTC Staff Letter No. 93-113, Comm. Fut. L. Rep. (CCH) ¶25,930 (Oct. 29, 1993) (granting relief from FCM or IB registration requirements to a foreign bank, notwithstanding the presence of bank branches in the United States, subject to certain restrictions); CFTC Staff Letter No. 92-19, Comm. Fut. L. Rep. (CCH) ¶25,516 (Oct. 9, 1992) (same); CFTC Staff Letter No. 89-7, Comm. Fut. L. Rep. (CCH) ¶24,479 (Jun. 22, 1989) (same); CFTC Staff Letter No. 89-5, Comm. Fut. L. Rep. (CCH) ¶24,471 (Dec. 8, 1988) (same).

<sup>50</sup> CFTC Staff Letter No. 00-44, Comm. Fut. L. Rep. (CCH) ¶ 28,095 (Mar. 31, 2000).

<sup>51</sup> Section 1a(39) of the Commodity Exchange Act (the “CEA”), as amended by the Dodd-Frank Act.

<sup>52</sup> Section 1a(49)(B) of the CEA, as amended by the Dodd-Frank Act.

Federal agency were a member bank,<sup>53</sup> subject to certain exceptions. Pursuant to authority in the IBA, the Federal Reserve applied these requirements to state branches and agencies,<sup>54</sup> and made Federal Reserve bank discount window access available “to any branch or agency of a foreign bank in the same manner and to the same extent that [the Federal Reserve bank] may exercise such powers with respect to a member bank if such branch or agency is maintaining reserves with such Reserve Bank . . . .”<sup>55</sup>

Subsequently, the Monetary Control Act of 1980 amended the Federal Reserve Act to provide that “any depository institution in which transaction accounts or nonpersonal time deposits are held shall be entitled to the same discount and borrowing privileges as member banks.”<sup>56</sup>

The Federal Reserve’s Regulation D, which implements the reserve requirement provisions of the Federal Reserve Act, provides that a foreign bank’s branch or agency located in the United States is required to comply with the reserve requirements “in the same manner and to the same extent” as if the branch or agency were a member bank.<sup>57</sup> Under the Federal Reserve Act, the U.S. branch or agency is required to maintain reserves only with respect to its own reservable deposits—not those of the non-U.S. bank. Similarly, the Federal Reserve’s Regulation A, which governs extensions of credit by a Federal Reserve bank, applies to U.S. branches and agencies of non-U.S. banks that are subject to reserve requirements under Regulation D “in the same manner and to the same extent as this part applies to depository institutions.”<sup>58</sup>

Thus, the U.S. branch is required to maintain reserves with a Federal Reserve bank with respect to its transaction accounts and nonpersonal time deposits,<sup>59</sup> but neither the U.S. branch nor the foreign bank is required to maintain reserves against deposits of the foreign bank. As a

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<sup>53</sup> 12 U.S.C. § 3102(b).

<sup>54</sup> 12 U.S.C. § 3105; *see* Reserve Requirements, Interest Rate Limitations on Deposits, and Advances of Federal Reserve Credit for U.S. Branches and Agencies of Foreign Banks, 45 Fed. Reg. 19,216 (Mar. 25, 1980) (to be codified at 12 C.F.R. pts. 201, 204, 211 and 217).

<sup>55</sup> 12 U.S.C. § 347d; *see id.* at 19,218.

<sup>56</sup> 12 U.S.C. § 461(b)(7).

<sup>57</sup> 12 C.F.R. § 204.1(c)(2).

<sup>58</sup> 12 C.F.R. § 201.1.

<sup>59</sup> 12 U.S.C. § 3105(a).

consequence, the branch—but not the foreign bank—is entitled to the same discount and borrowing privileges as a member bank.<sup>60</sup>

(b) Affiliate Transaction Restrictions Only Apply to U.S. Branches

Transactions between a U.S. branch and certain of its U.S. insurance, broker-dealer and merchant banking affiliates are subject to the restrictions of Sections 23A and 23B of the Federal Reserve Act,<sup>61</sup> even though these restrictions do not apply to transactions between the foreign bank and these same U.S. affiliates.

(c) Anti-Tying Provisions Apply Only to U.S. Branches

Anti-tying provisions of the U.S. banking laws and regulations apply to the activities of the U.S. branches and agencies of a foreign bank, but do not apply to activities of the foreign bank generally.<sup>62</sup>

(d) The Depository Institution Management Interlocks Act Applies Only to U.S. Branches

The Federal Reserve's application of the interlock restrictions in the Depository Institution Management Interlocks Act<sup>63</sup> respects the distinction between a foreign bank and its U.S. branch by applying the act's restrictions to the officers of U.S. branches, but not those of the foreign bank itself.<sup>64</sup>

(e) Federal and State Laws Require Maintenance of Assets or Capital Equivalency Deposits for a U.S. Branch of a Foreign Bank Notwithstanding the Overall Capital Adequacy of the Foreign Bank

The IBA requires that a foreign bank maintain a deposit in a member bank located in the state in which each of its Federal branches and agencies is located in an amount “not less than the greater of (1) that amount of capital (but not surplus) which would be required of a national bank being organized at this location, or (2) 5 per centum of the total liabilities of such branch or

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<sup>60</sup> *Supra*, notes 55, 56; 12 C.F.R. § 201.1.

<sup>61</sup> 12 C.F.R. § 223.61.

<sup>62</sup> 12 U.S.C. § 3106(d). *See also* 12 C.F.R. § 225.7(e).

<sup>63</sup> 12 U.S.C. § 3201, *et seq.*

<sup>64</sup> *See* 12 C.F.R. §212.1(2)(f).

agency . . .”<sup>65</sup> The underlying purpose of the IBA provision is to ensure that branches and agencies of a foreign bank maintain a minimum level of unencumbered assets in the United States that would be available in a liquidation of the branch or agency. Many states impose similar requirements on state-licensed branches of foreign banks.<sup>66</sup>

(f) Before Its Repeal, the Prohibition Against the Payment of Interest on Demand Deposits Applied Only to U.S. Branches

The prohibition against payment of interest on demand deposits was applied only to those deposits maintained at U.S. branches of foreign banks and not to any deposits “payable only at an office located outside of the United States.”<sup>67</sup> This prohibition was repealed for both U.S. banks and U.S. branches of foreign banks, effective July 21, 2011.<sup>68</sup>

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<sup>65</sup> 12 U.S.C. § 3102(g)(1), (2). The IBA provisions are implemented for Federal branches through rules of the OCC. *See* 12 C.F.R. § 28.15.

<sup>66</sup> *See, e.g.*, N.Y. BANKING LAW § 202-b (McKinney).

<sup>67</sup> *See* 12 C.F.R. Part 217 (2010) (Federal Reserve’s Regulation Q, prior to its repeal).

<sup>68</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.L. 111-203, § 627, 124 Stat. 1640 (2010).

## **VI. U.S. Law Recognizes Certain Distinctions Between U.S. Banks and Their Branches**

### **(a) U.S. Law Recognizes the Distinction Between U.S. Banks and Their Foreign Branches**

U.S. law also recognizes analogous distinctions between foreign branches of U.S. banks, and the banks of which they are components. For example, deposits payable only at foreign branches are non-reservable,<sup>69</sup> non-insured,<sup>70</sup> and in fact subordinated in right of payment to domestic deposits.<sup>71</sup> In addition, although the credit of the whole bank is normally engaged when a foreign branch contracts, the Federal Reserve Act shields the bank from liability for deposits made at a foreign branch if the branch is unable to repay the deposit on account of war, civil strife or insurrection in, or expropriation by, the foreign country in which the branch is located.<sup>72</sup>

Finally, in order to ensure foreign branches of U.S. banks are competitive in their local markets, such branches are authorized to engage a number of activities that are prohibited for U.S. banks, including offering insurance as agent or broker and underwriting and dealing in obligations of foreign governments.<sup>73</sup>

### **(b) U.S. Law Recognizes the Distinction Between Different U.S. Branches of the Same U.S. Bank**

U.S. commercial law recognizes the distinction between different U.S. branches of the same U.S. bank where the distinction is consistent with certain bank functions. For example, the Uniform Commercial Code provides that a branch or other separate office of a U.S. bank is a “separate bank” for the purpose of calculating certain timeframes with respect to negotiable instruments, bank deposits and collections, and wire transfers.<sup>74</sup>

### **(c) Separate Entity Doctrine in New York Judicial Proceedings**

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<sup>69</sup> 12 C.F.R. § 204.128.

<sup>70</sup> 12 U.S.C. § 1818(m)(2).

<sup>71</sup> *See* 12 U.S.C. § 1821(d)(11).

<sup>72</sup> 12 U.S.C. § 633. Numerous state laws take the same approach, and some even go further in articulating the legal separation between a U.S. bank’s domestic and foreign branches. *See, e.g.*, N.Y. BANKING LAW § 138(1) (McKinney).

<sup>73</sup> 12 C.F.R. § 211.4.

<sup>74</sup> U.C.C. §§ 4-107, 4A-105(a)(2).

The separate entity doctrine under New York judge-made law provides, in essence, that “each branch of a bank is a separate entity, [and is] in no way concerned with accounts maintained by depositors in other branches or at a home office.”<sup>75</sup> This doctrine has long been an important facet of New York attachment and execution law<sup>76</sup> and stands for the proposition that the “mere fact that a bank may have a branch within New York is insufficient to render accounts outside of New York subject to attachment merely by serving a New York branch.”<sup>77</sup> The purpose of the separate entity doctrine is clear—service of process on one branch should not be permitted to accomplish a restraint on accounts in other branches because of the substantial interference with banking business, and the exposure of banks doing business in multiple jurisdictions to inconsistent determinations being rendered by the courts sitting in those jurisdictions. Section 138 of the New York Banking Law represents a statutory articulation of the separate entity doctrine for New York banks.<sup>78</sup>

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In conclusion, U.S. law has long recognized in a variety of contexts that bank branches are not merely offices of the bank. Instead, they enjoy a hybrid status that results in their treatment as separate entities for numerous purposes. Although that separate treatment is sometimes explicitly provided by statute, it is frequently the result of interpreting the relevant statutory scheme and its purpose in light of the nature and regulation of the branch.

CLEARY GOTTlieb STEEN & HAMILTON LLP  
DAVIS POLK & WARDWELL LLP  
SULLIVAN & CROMWELL LLP

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<sup>75</sup> *Cronan v. Schilling*, 282 A.D. 940, 126 N.Y.S.2d 192 (1st Dep’t 1953).

<sup>76</sup> Although some courts have concluded that the viability of the separate entity doctrine was placed into doubt by the New York Court of Appeals decision in *Koehler v. Bank of Bermuda, Ltd*, 12 N.Y. 3d 533 (2009), and have declined to apply it, other courts have distinguished *Koehler* or limited it to its specific facts after concluding that the rationale for the doctrine remains sound, and have confirmed that the separate entity doctrine remains a good statement of the law in New York. See *Samsun Logix Corp. v. Bank of China*, 2011 N.Y. Misc. LEXIS 2268 (N.Y. Sup. Ct. May 12, 2011) (“the Court of Appeals in *Koehler* did not even mention the separate entity rule, thereby strongly indicating that it had not intended to overrule that doctrine”); *Parbulk II AS v. Heritage Maritime SA*, No. 651285 (N.Y. Sup. Ct. June 10, 2011).

<sup>77</sup> *Matter of National Union Fire Ins. Co. of Pittsburgh, Pa. v. Advanced Empl. Concepts*, 269 AD2d 101, 101 (1st Dept. 2000).

<sup>78</sup> N.Y. BANKING LAW § 138(1) (McKinney).